

Reconsideration of Sexual Misconduct by Clergy Counselors: The Case of *F.G. v. MacDonell*

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In the last decade, concerns about clergy counselors' liability for malpractice has focused on allegations of sexual abuse. Thus far, courts have not adjudicated a complaint of clergy malpractice. Their reasons have centered on concern for freedom of religion under the First Amendment. Therefore, there is a need to find another way to deal with the obvious reality that violating others' rights to satisfy one's own sexual appetites is not a valid expression of religious belief or practice. The authors, upon reviewing cases decided up to a few years ago, concluded that the complaint of breach of fiduciary duty provides a highly fitting way for courts to fairly assess complaints of sexual misconduct brought against clergy counselors. Now, the New Jersey Supreme Court has clearly recognized this complaint as an approach to the problem.

No matter how outrageous the alleged misconduct, courts continue to avoid involvement with cases alleging clergy malpractice. No U.S. court has, to date, proceeded with a case under this rubric. On the one hand, this seems to be expected, since any allegation of failure by a member of the clergy to meet a standard of care would have to be judged using definitions based at least in part on religious doctrine. Courts have understand-

ably held back from venturing into disputes that might involve them in religious disagreements lest they run afoul of First Amendment provisions involving religious freedom. On the other hand, no religious issue seems to be involved in acknowledging that there is something wrong with allowing a clergyman to practice psychotherapy in a way that is egregiously below any conceivable standard of care. Nevertheless, courts have insisted that patients wronged in such a context should seek redress under some theory other than that of clergy malpractice.

Background

Concern about sexual misconduct by therapists of all types has not diminished

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in recent years. If anything it has increased since our report published in late 1995.¹ In that article, we listed several of the reasons courts have given for turning such cases aside: lack of precedent (respecting and following past approaches by other courts); redundancy of the remedy (the requirement in some states that more traditional remedies be tried first); First Amendment conflict (always mentioned as noted above); and a requirement that mishandling of transference be alleged (a narrow view based on cases involving non-clergy therapists).

Plaintiffs believing they had been sexually abused have used several alternative bases, sometimes with success, to sue their clergy counselors. These include intentional infliction of emotional distress, breach of fiduciary duty, fraud, and vicarious liability. Among these charges, we saw breach of fiduciary duty as particularly appropriate. We also pointed out that in addition to use of civil suits, aggrieved parties could complain to professional organizations and licensing boards, which are avenues commonly used to complain about secular counselors. We also noted, however, that not all pastoral counselors belong to professional organizations or are licensed by a state. Finally, several jurisdictions have recently enacted criminal sanctions that apply to all counselors whether clergy or secular.

The Case

A recent New Jersey case, *F.G. v. MacDonell*,² has added significantly to the jurisprudence of tort liability for clergy counselors. The case was decided by the state's Supreme Court on July 22, 1997,

by a 5 to 2 margin, Justice Pollock writing the decision. The plaintiff, F.G., brought several charges against the Rev. MacDonell, an Episcopal pastor, starting with clergy malpractice and adding negligent infliction of emotional distress along with breach of fiduciary duty. The case was dismissed at the trial level and reinstated by the state's appellate court.³ Both decisions state that the complaint did not go into detail about the scope of the counseling or the conduct leading to the allegations. The Supreme Court mentions that the sessions lasted from April 1992 until the end of 1993 and that there was a sexual relationship that "apparently did not involve sexual intercourse" (696 A.2d at 700). The defendant was married at the time; the plaintiff was single. There was a deposition asserting seduction by the plaintiff. Few additional details are provided in the New Jersey Supreme Court decision or in that of the appeal court.

The Appellate Court The plaintiff, F.G., appealed the trial court's summary judgment in favor of defendant MacDonell. In a unanimous decision written by Judge D'Annunzio for a panel of three judges, the appeals court reinstated all three complaints against the defendant, mentioning that, according to the plaintiff, MacDonell had been sanctioned by the "Standing Commission on Clergy Ethics of the Diocese of Newark" in March 1994 (677 A.2d at 260). The court recognized that in allowing the first count alleging clergy malpractice it was going against a significant line of cases in other states. It acknowledged that previous courts had rejected claims of clergy coun-

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seling malpractice on the basis that to adjudicate them would entangle them in matters of religious belief that are protected by the First Amendment. This was because in doing so they would have to evaluate the alleged conduct using standards of counseling practice based on religious beliefs.

However, the appeals court found an additional federal decision that appeared to open significant room for an allegation of clergy counseling malpractice. It was a 1994 diversity (involving parties from different states) action, *Dausch v. Ryske*.⁴ Here, it was pointed out that a church might offer “purely secular counseling. . . to the members of its congregation” exposing its counselors to “civil adjudication of their performance” (677 A.2d at 262). This observation is consistent with our typology of pastoral counseling.⁵ For its part, the appeals court in *F.G. v. MacDonell* still declined to allow a distinction between pastoral counseling and secular psychological counseling by a pastor as “unworkable because it is difficult to apply” (677 A.2d at 263). Even so, the same court went on to point out that the record before it was sparse (as mentioned above), and it concluded that in the particular context of a sexual misconduct allegation it might be possible to establish a standard of care applicable to clergy counselors. If so, a claim of clergy malpractice could then be adjudicated without involving “dogma or ritual, or other matters of purely ecclesiastical concern” (*Id.*). In reversing the trial court’s dismissal and allowing this complaint along with the others, the appeals court also noted the need for expert opinion to es-

tablish the standard of care (677 A.2d at 262). The court added that “issues regarding inappropriate sexual behavior by clerics are matters of current public concern” (677 A.2d at 265).

The New Jersey Supreme Court Defendant MacDonell appealed, and the New Jersey Supreme Court accepted the case.

This court began its discussion by saying: “We believe that a claim for breach of fiduciary duty provides the (*sic*) more appropriate form of relief than does clergy malpractice. An action for breach of a clergyman’s fiduciary duty permits the parishioner to recover monetary damages without running the risk of entanglement with the free exercise of religion” (696 A.2d at 701).

The court went on to comment flatly: “The free exercise of religion does not permit members of the clergy to engage in inappropriate sexual conduct with parishioners who seek pastoral counseling” (*Id.*).

To back up their opening statements, the judges cited material from depositions in the case. The defendant had actually “acknowledged that a sexual relationship between a married rector and an unmarried parishioner violates the rector’s fiduciary duty to the parishioner,” and further, that such conduct is condemned by Episcopal teaching (696 A.2d at 702). Two church officials explicitly corroborated this testimony, the well-known Bishop John Spong of Newark along with the chair of the Standard Commission on Clergy Ethics of the Diocese of Newark, the Reverend Franklin Vilas.

This much said, the state Supreme

Court took note of the fact that no court in the country had yet recognized a claim of clergy malpractice and that the Appellate Division was dealing with the first case of such a claim in New Jersey. Its reasons for reversing here were all those so well rehearsed in earlier cases. Deciding on a malpractice claim requires defining the standard of care, and this would entail dealing with issues of training and skill across diverse religions with their many different beliefs, as well as measuring competence of performance according to them.

Breach of fiduciary duty was for this court an entirely different matter, and the judges developed this charge more fully than had earlier cases. Their reasoning merits attention. Said the court, "The essence of a fiduciary relationship is that one party places trust and confidence in another who is in a dominant or superior position" (696 A.2d at 703). It comes into existence when two parties agree to form a relationship placing one in a dominant position entailing an obligation to act for the other's best interest. "By accepting a parishioner for counseling, a pastor also accepts the responsibility of a fiduciary" (696 A.2d at 704). Those who seek counseling help are in a vulnerable state, the court noted, and they turn to religion for solace and to the pastors who should recognize the trust that is being placed in them. This recognition does not involve the content of religious faith or any resultant standard of care. "A violation of that trust constitutes a breach of the duty" (*Id.*). In concluding, the court went so far as to compare the vulnerable parishioner's position to that of a child (i.e., one

who is legally unable to give consent to sexual relations). (The Supreme Court also went along with the appeal court's reinstatement of the claim based on negligent infliction of emotional distress.)

The Dissent For Justices O'Hern and Garibaldi, their colleagues' comparison to a child's position went too far. They emphasized that both parties were adults consenting to enter a relationship involving a lawful degree of intimacy. The dissenters placed considerable emphasis on the role played by the defendant's religious identity, asserting that it should protect him from liability. For them, the complaint of fiduciary breach seemed to be only a roundabout way to state a clergy malpractice claim.

Comment

We are not so sure as the dissenters are about the decision having merely reworded a malpractice claim. Their central issue does point to an important concern in sexual abuse allegations against pastoral counselors, one that we have emphasized.¹ As they indicate, it may of course be true that the client gave full and competent consent despite her position of lesser power in the relationship. In fact, the defendant's side in this case asserted even more, claiming that she was the seducer. As did the New Jersey Supreme Court, we would see this precisely as a legitimate issue for trial. As such, it should not be barred from consideration by an overstretched reading of the First Amendment. The complaint of fiduciary breach provides an appropriate avenue for accomplishing adjudication of a potentially legitimate claim. We believe that it

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does so with fairness to both of the disputing parties. It provides a clear and practical way to overcome the chief difficulty posed by clergy malpractice allegations, namely that they require establishing a standard of care.

It is difficult at best to establish a standard of care across all religions because of their immense variability in training, background, doctrine, and expected styles of counseling practice; and any attempt to establish a standard of care for each religion would certainly entangle a court in evaluating its practices if not its dogmas as well. Therefore, another basis for resolving legitimate disputes involving pos-

sible sexual abuse is needed, and breach of fiduciary duty may well be the ideal choice. An explicit statement of this principle by a state Supreme Court seems a welcome contribution.

References

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