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A Strange Distinction: Charitable Immunity and Clergy Sexual Abuse in Picher v. Roman Catholic Bishop of Portland

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I. INTRODUCTION

In 2009, the Maine Supreme Judicial Court, sitting as the Law Court, decided *Picher v. Roman Catholic Bishop of Portland*,[1] a case that presented an issue of first impression in Maine: whether the doctrine of charitable immunity[2] protected charitable organizations from liability for intentional torts.[3] The court ultimately held that charitable immunity was not a defense to intentional torts, but that it did bar negligence claims based on the sexual abuse of a minor.[4]

In *Picher*, a majority of the Law Court partly vacated the trial court's grant of summary judgment for the Roman Catholic Bishop of Portland (Bishop)[5] and held that the doctrine of charitable immunity did not protect the Bishop from liability for the alleged intentional tort of fraudulent concealment.[6] The majority stated three reasons for its decision: (1) charitable immunity is a discredited doctrine; (2) the Legislature did not intend to extend the reach of the doctrine to intentional torts with the enactment of title 14, section 158 of the Maine Revised Statutes in 1965;[7] and (3) there is an absence of any convincing public policy reasons for expanding the scope of the doctrine to cover intentional torts.[8] The dissent argued that section 158 did afford protection from liability for intentional torts and that the majority had "invad[ed] the province of the Legislature" by not maintaining that protection.[9] Moreover, the dissent cautioned that as a result of the court's decision, charitable institutions would now be compelled to use their funds to defend lawsuits anytime a plaintiff pled an intentional tort in a cause of action.[10]

Although the majority reached the proper conclusion in not extending charitable immunity to cover intentional torts, the court should also have found that the doctrine did not absolve the Bishop from potential liability for negligent

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1. 2009 ME 67, 974 A.2d 286.

2. Charitable immunity in Maine is a common law doctrine that protects charitable institutions from tort liability. *See* Thompson v. Mercy Hosp., 483 A.2d 706, 707-09 (Me. 1984).

3. *Picher*, 2009 ME 67, ¶ 10, 974 A.2d at 290.

4. *Id.* ¶ 1, 974 A.2d at 288.

5. *Id.*

6. *Id.* ¶ 10, 974 A.2d at 290.

7. The statute states in relevant part: "A charitable organization shall be considered to have waived its immunity from liability for negligence or any other tort during the period a policy of insurance is effective covering the liability of the charitable organization for negligence or any other tort." ME. REV. STAT. ANN. tit. 14, § 158 (2003).

8. *Picher*, 2009 ME 67, ¶ 29, 974 A.2d at 295.

9. *Id.* ¶¶ 42-43, 974 A.2d at 299 (Alexander, J., dissenting).

10. *Id.* at ¶ 41.

supervision, given the public policy rationale underlying that tort in Maine. This Note will detail the history of charitable immunity in Maine and will examine how other jurisdictions have dealt with the immunity. This Note will analyze the *Picher* decision, with particular emphasis placed on the policy rationales in both the majority and dissenting opinions. Moreover, this Note will argue that the compelling public interest in protecting individuals of limited capacity from the sexual depredations of persons with power and authority over them is the underlying rationale for not allowing a charitable organization to escape liability by pleading the defense of immunity from tort. Finally, this Note will conclude that, based on that compelling public interest, the majority was correct in not expanding the scope of charitable immunity to intentional torts, but that the Law Court should have also carved out an exception to the charitable immunity defense for the tort of negligent supervision.

II. THE CHARITABLE IMMUNITY DOCTRINE

A. The History of Charitable Immunity in Maine

Charitable immunity originated in England in the mid-nineteenth century,[11] premised on the notion that charitable donations were held in trust by charitable institutions to be used exclusively for philanthropic purposes, and therefore, should not be diverted to satisfy tort claims.[12] However, this theory was subsequently overruled and abandoned in England just two decades later.[13] Despite the failure of the doctrine to take root in England, charitable immunity was adopted in the United States in *McDonald v. Massachusetts General Hospital*[14] and continued to spread until it was recognized in some form by almost every jurisdiction in the United States.[15]

The Law Court, in 1910, established the doctrine of charitable immunity in Maine with its decision in *Jensen v. Maine Eye & Ear Infirmary*.[16] In that case, the administrator of Mary Jensen's estate claimed that the infirmary's employees were negligent in not properly monitoring Jensen, who had been suffering from typhoid fever at the facility, when she fell to her death from an open window.[17] The court held that Jensen's claim was barred as a matter of law and proclaimed:

> No principle of law seems to be better established both upon reason and authority than that which declares that a purely charitable institution, supported by funds furnished by private and public charity, cannot be made liable in damages for the negligent acts of its servants. Were it not so, it is not difficult to discern that private gift and public aid would not long be contributed to feed the hungry maw of litigation, and charitable institutions of all kinds would ultimately cease or

11. *See* RESTATEMENT (SECOND) OF TORTS § 895E cmt. b. (1979) (explaining the history of charitable immunity).

12. *Id.*

13. *Id.*

14. 120 Mass. 432 (Mass. 1876).

15. *See* RESTATEMENT (SECOND) OF TORTS § 895E cmt. b. (1979)

16. 107 Me. 408, 78 A. 898 (1910).

17. *Id.*

become greatly impaired in their usefulness.[18]

Charitable immunity remained unchallenged in Maine until the 1960s when it received increased attention from the courts and the Legislature. In the 1963 case of *Mendall v. Pleasant Mountain Ski Development, Inc.*,[19] the Law Court was urged to overrule *Jensen*.[20] The court declined to do so and noted that the *Jensen* decision rested upon two principles: "(1) that funds donated for charitable purposes are held in trust to be used exclusively for those purposes, and (2) that to permit the invasion of these funds to satisfy tort claims would destroy the sources of charitable support upon which the enterprise depends."[21] Moreover, the court maintained that if charitable immunity were to be abolished in Maine, "such a far reaching change in policy should be initiated in the Legislature."[22] Two years later, the Legislature enacted 14 M.R.S.A. section 158, which waived a charity's immunity for "negligence or any other tort" when a policy of insurance was effective covering the organization's liability.[23] In 1967, the Law Court interpreted the significance of that provision for the first time in *Rhoda v. Aroostook General Hospital*.[24] The court asserted in that case that the language of section 158 was "tacit recognition that the immunity of charitable institutions from liability for corporate negligence as well as for the negligence of subordinate employees shall remain where no insurance coverage is provided."[25] However, that reading of the statute was used to support the court's holding that there was no sound reason for distinguishing between the negligence of a charity's everyday servants, and that of its corporate officers in selecting and supervising those servants, when determining whether charitable immunity was applicable.[26]

Following these decisions in the 1960s and leading up to *Picher*, the focus shifted in charitable immunity cases from arguments against the doctrine itself to litigation concerning whether organizations were entitled to the defense. For example, in *Thompson v. Mercy Hospital*,[27] the Law Court reasoned that because gifts and donations to Mercy Hospital comprised a negligible percentage of its annual revenues, the policies underlying the doctrine were not implicated and charitable immunity was therefore not available as a defense.[28] Additionally, the court explained that "[t]he doctrine of charitable immunity is a creation of our common law. Except for one significant restriction imposed by statute, its

18. *Id.* at 410-11, 78 A. at 898. It would seem that this declaration by the court was drawing on the fact that charitable immunity had been adopted in a growing number of US jurisdictions at that point in time and was ignorant of, or indifferent to, the reality that the doctrine had originally been tried and abandoned in England nearly half a century earlier.

19. 159 Me. 285, 191 A.2d 633 (1963).

20. *Id.* at 290, 191 A.2d at 636.

21. *Id.*

22. *Id.*

23. *See* ME. REV. STAT. ANN. tit. 14 § 158 (2003).

24. 226 A.2d 530 (Me. 1967).

25. *Id.* at 533.

26. *Id.* at 531.

27. 483 A.2d 706 (Me. 1984).

28. *Id.* at 707-08. *See also* Child v. Cent. Me. Med. Ctr., 575 A.2d 318 (Me. 1990) (holding that the nonprofit status of the organization did not entitle it to charitable immunity because less than two percent of its funds were derived from private contributions).

applicability in Maine is controlled entirely by the precedents of this Court."[29] On the other hand, the Law Court found in the 2002 case of *Coulombe v. Salvation Army*[30] that the profits the Salvation Army had acquired by investing a portion of its charitable funds were the equivalent of "income from 'public [or] private charity,'"[31] and because it received more than half its funding from charitable sources, it was thus entitled to the defense of charitable immunity.[32] Despite the fact that legal arguments in Maine had gravitated away from challenging the doctrine itself during this time period, almost every other state had contemporaneously rejected charitable immunity as a defense to liability.

B. Charitable Immunity in Other Jurisdictions

The vast majority of jurisdictions in the United States no longer recognize charitable immunity as a defense to tort claims.[33] The erosion of the doctrine began in 1942 with the decision of the United States Court of Appeals for the District of Columbia in *President & Directors of Georgetown College v. Hughes*.[34] In that case, a nurse who worked at the Georgetown Hospital brought a claim for negligence and contributory negligence against the defendant organization after she was injured by a swinging door that had been "violently" pushed open by a student nurse who also worked at the hospital.[35] The court began its analysis by noting that "[f]or negligent or tortious conduct liability is the rule. Immunity is the exception."[36] It went on to illustrate that under the charitable immunity doctrine, an individual who continuously pursues charitable work is not protected by the doctrine, but if he were to form that same charitable enterprise into an organization, he would be able to avoid liability for the organization's carelessness.[37] The court found this to be a "strange distinction"[38] and one that "reverses the general trend of responsibility in a risk-sharing and distributing age."[39] Ultimately, the court condemned the immunity as "out of step with the general trend of legislative and judicial policy in distributing losses incurred by individuals through the operation of an enterprise among all who benefit by it rather than in leaving them wholly to be borne by those who sustain them."[40] In reaching its conclusion, the court noted that the widespread availability of insurance at manageable premiums should assuage those who feared that abandoning the doctrine would deter charitable donations and eventually lead to the systematic demise of charitable organizations.[41] After this decision by the court of appeals, a number of other

29. *Thompson*, 483 A.2d at 707 (internal citations omitted).
30. 2002 ME 25, 790 A.2d 593.
31. *Id.* ¶ 11, 790 A.2d at 596.
32. *Id.*
33. *See* RESTATEMENT (SECOND) OF TORTS § 895E (1979).
34. 130 F.2d 810 (D.C. Cir. 1942).
35. *Id.* at 811.
36. *Id.* at 812.
37. *Id.* at 814.
38. *Id.*
39. *Id.*
40. *Georgetown*, 130 F.2d at 827.
41. *Id.* at 823-24.

jurisdictions began to follow the *Georgetown* court's reasoning in what became a widespread abolition of the doctrine.[42] Currently, thirty-six American jurisdictions no longer recognize charitable immunity.[43]

The doctrine has survived in some states through legislative enactments that have preserved the immunity by limiting the amount of damages that can be recovered from a charitable organization. For example, after the New Jersey Supreme Court dissolved charitable immunity in *Collopy v. Newark Eye & Ear Infirmary*,[44] that state's legislature revived the doctrine.[45] The Massachusetts Legislature imposed a similar restriction, limiting recovery to $20,000 for liability stemming from charitable activities, but placed no restrictions on damages that resulted from a charitable organization's commercial endeavors.[46]

A small number of American courts have made noticeable modifications to the doctrine such as limiting the immunity to the protection of charitable trusts and refusing to extend the scope of the immunity to protect against liability for intentional torts. In 1952, the Supreme Court of Colorado, in *St. Luke's Hospital Ass'n v. Long*,[47] explained that the law in that state concerning charitable immunity was that the "exemption and protection afforded to a charitable institution is not immunity from suit . . . but that the protection actually given is to the trust funds themselves."[48] Similarly, Tennessee's highest court held in *O'Quin v. Baptist Memorial Hospital*[49] that a charitable hospital could not completely avoid liability for the negligence of its servants because the immunity only extended to the protection of the charitable trust.[50]

The issue of charitable immunity protection from intentional tort liability was addressed in 1973 by the Supreme Court of South Carolina in *Jeffcoat v. Caine*.[51] In that case, a plaintiff brought a claim of false imprisonment against a charitable hospital.[52] That court reversed the lower court's grant of summary judgment for the hospital on the basis of charitable immunity and reasoned that none of its past decisions had contemplated expanding the protection of the doctrine beyond mere negligence.[53] The court emphasized that "we know of no public policy . . . which would require the exemption of the charity from liability for an intentional tort."[54] Likewise, in 2006 the Supreme Court of New Jersey held that the statutory enactment granting immunity to charities in that state reached no further than protection from claims of ordinary negligence and did not extend to cover

42. RESTATEMENT (SECOND) OF TORTS § 895E cmt. b. (1979).

43. *See* RESTATEMENT (SECOND) OF TORTS app. § 895E, court citations (1982, 1991, 2008).

44. 141 A.2d 276 (N.J. 1958) (holding that the rationale for the doctrine is flawed and outdated and that judges need not be held back by stare decisis in addressing the needs and responsibilities of modern society in the realm of tort law).

45. *See* N.J. STAT. ANN. § 2A:53A-7 (West 2000 & 2009-2010).

46. *See* MASS. GEN. LAWS ANN. ch. 231, § 85K (West 2000).

47. 240 P.2d 917 (Colo. 1952).

48. *Id.* at 920 (citations omitted).

49. 201 S.W.2d 694 (Tenn. 1947).

50. *Id.* at 696.

51. 198 S.E.2d 258 (S.C. 1973).

52. *Id.* at 259.

53. *Id.* at 259-60.

54. *Id.* at 260.

intentional torts.[55]

III. THE *PICHER* DECISION

In *Picher*, the Law Court was tasked with determining to what extent the Bishop, as a corporation sole,[56] could be held liable for civil claims surrounding the alleged sexual abuse of a young boy by his priest.[57] William Picher attended St. Mary's Church and St. Mary's School in Augusta during the 1980s where he participated in a number of extracurricular activities.[58] It was alleged that from 1986, when Picher was twelve years old, to June 1988, Picher was sexually abused by Raymond Melville, a priest at St. Mary's who had been assigned there by the Bishop.[59] In February 2007, Picher filed a complaint against Melville and the Bishop, including claims against the Bishop for negligent supervision, breach of fiduciary duty, and canonical agency.[60] Melville defaulted, and in January 2008, after a hearing on damages, a judgment of more than $4 million was entered against the former priest.[61] Subsequently, the Bishop filed a motion for summary judgment based on the affirmative defense of charitable immunity.[62] While the motion for summary judgment was pending, the trial court granted Picher's motion to amend his complaint to include an intentional tort claim against the Bishop for the alleged fraudulent concealment of information regarding Melville's prior sexual improprieties.[63] Ultimately, the trial court granted the Bishop's motion for summary judgment, holding that charitable immunity covered both intentional and negligence based torts.[64]

On appeal, Picher argued that, based on the facts asserted in his claim, the Law Court should not recognize charitable immunity as a defense to torts related to the sexual abuse of a minor. Picher first noted that the doctrine leaves the injured party without a remedy and essentially forces the "innocent victim to bear the burden of his injuries to protect the perceived benefit to society" derived from the work of charitable institutions.[65] Moreover, Picher maintained that this injustice was most apparent in the context of intentional torts.[66] With respect to the negligent supervision claim, Picher noted that the court's decision in *Fortin v. Roman Catholic Bishop of Portland*[67] had officially recognized the tort under factual

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55. Hardwicke v. Am. Boychoir Sch., 902 A.2d 900, 917 (N.J. 2006).

56. The Bishop and his successors in that office are in essence the embodiment of the Roman Catholic Bishop of Portland as a corporate entity and as such are subject to all the laws of the State of Maine. *See Picher*, 2009 ME 67, ¶ 4 n.2, 871 A.2d at 289.

57. *Id.* ¶¶ 1-2, 974 A.2d at 288.

58. Brief of Appellant William Picher at 1-2, Picher v. Roman Catholic Bishop of Portland, 2009 ME 67, 974 A.2d 286 (No. KEN-08-81) [hereinafter "Brief of Appellant"].

59. *Id.*

60. *Id.* at 2-3.

61. *Id.* at 3 n.1.

62. *See Picher*, 2009 ME 67, ¶ 1, 974 A.2d at 288.

63. Brief of Appellant, *supra* note 58, at 4. Picher maintained that the Bishop had knowledge that Melville sexually abused a young boy while in seminary in Baltimore, Maryland. *Id.* at 8.

64. *Picher*, 2009 ME 67, ¶ 6, 974 A.2d at 289.

65. Brief of Appellant, *supra* note 58, at 24.

66. *Id.*

67. 2005 ME 57, 871 A.2d 1208.

circumstances substantially similar to this,[68] and he asserted that charitable immunity should not be a defense to acts of negligence that resulted in the sexual abuse of a minor.[69]

Conversely, the Bishop argued that the doctrine of charitable immunity in Maine had been firmly established nearly a century ago and had been reaffirmed as recently as 2002.[70] Thus, the Bishop asserted that if the court reversed the judgment of the trial court, it would be overruling a long line of its own precedent and would be ignoring the Legislature's purported adoption of charitable immunity in section 158.[71] Moreover, the Bishop maintained that the essence of charitable immunity was the protection of charitable funds from civil judgments, and, as such, the doctrine was not specific to any particular form of conduct, but rather was driven by a party's status as a charitable institution.[72] Finally, the Bishop contended that even if the court abrogated charitable immunity to permit intentional tort claims, the Bishop, as a corporation sole, could not be held vicariously liable for the alleged intentional tort of fraudulent concealment because such actions are considered to be outside the scope of employment.[73]

A majority of the Law Court upheld charitable immunity as a defense to the negligent supervision claim against the Bishop, but declined to extend the doctrine to cover the intentional tort claim of fraudulent concealment.[74] Justice Silver, writing for the majority, stated three reasons for not expanding the doctrine to cover intentional torts: (1) the doctrine was discredited in almost all other jurisdictions; (2) section 158 did not expand the scope of the doctrine to cover intentional torts; and (3) prior decisions by the court had maintained the doctrine, but refused to expand it.[75] The majority declined, however, to determine whether the Bishop could be held vicariously liable for the intentional tort. Instead, the opinion only went so far as to establish that vicarious liability for the claim of fraudulent concealment was separate and distinct from vicarious liability for Melville's alleged sexual abuse.[76] However, because the Bishop did not make any argument concerning vicarious liability before the trial court, the issue was not preserved for appeal and the majority therefore did not render a decision on the issue.[77]

On the issue of negligent supervision, the majority declined to make an exception to the charitable immunity protection. Justice Silver explained that the policy rationale behind the doctrine was the protection of charitable funds and that

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68. Brief of Appellant, *supra* note 58, at 25.

69. *Picher*, 2009 ME 67, ¶ 9, 974 A.2d at 290.

70. Brief of Appellee at 10, Picher v. Roman Catholic Bishop of Portland, 2009 ME 67, 974 A.2d 286 (No. KEN-08-81) [hereinafter "Brief of Appellee"]. *See Jensen*, 107 Me. at 410-11, 78 A. at 899 (establishing the doctrine of charitable immunity in Maine); *Coulombe*, 2002 ME 25, ¶¶ 10-11, 790 A.2d at 595-96 (upholding summary judgment for the Salvation Army on the defense of charitable immunity because it was a charitable organization).

71. Brief of Appellee, *supra* note 70, at 16-17.

72. *Id.* at 35-36.

73. *Id.* at 37.

74. *Picher*, 2009 ME 67, ¶ 1, 974 A.2d at 288.

75. *Id.* ¶ 10, 974 A.2d at 290.

76. *Id.* ¶ 31, 974 A.2d at 296.

77. *Id.*

"[a]lthough the rationale itself may be challenged as outdated . . . we would need persuasive grounds to hold that charitable funds should be protected against certain types of negligence claims but not others."[78] As a result, the majority's opinion affirmed the Bishop's status as a charitable institution and also determined that the Bishop had not waived immunity through the purchase of insurance.[79]

Chief Justice Saufley, in a concurring opinion joined by Justice Levy, agreed that charitable immunity did not extend to intentional torts and focused on the legislative intent behind section 158 in reaching her conclusion.[80] She asserted that the Legislature, with the enactment of section 158, did "not purport to define or expand the charitable immunity doctrine."[81] Furthermore, she reasoned that "[i]f the Legislature had, in fact, engaged in weighing the risks posed by *intentional torts*, including the potential sexual assault of children, against the possibility of destructive litigation costs . . . . one would have expected much more robust debate and much clearer language."[82]

In stark contrast to the majority and concurring opinions, Justice Alexander, in a dissent joined by Justice Clifford, found that section 158 did protect charities from intentional tort claims.[83] The dissent argued that the phrase "negligence or any other tort" within the statute was not ambiguous and should be given its plain meaning: "protection from suit for torts in addition to negligence, including intentional torts."[84] Moreover, Justice Alexander maintained that the doctrine of charitable immunity served an important function in allowing for the "continued existence of many community-based charitable organizations including local granges, arts organizations, fraternal groups, youth programs, churches, and some schools and health care providers."[85] He warned that, as a result of the court's opinion, any one of those organizations would now be forced to expend their charitable funds to defend lawsuits through trial any time a plaintiff included an intentional tort claim in their cause of action, effectively ending charitable immunity in Maine.[86]

IV. ANALYSIS

A. Negligent Supervision in Maine

Negligent supervision was first officially recognized as a cause of action in Maine four years before the *Picher* decision, in *Fortin v. Roman Catholic Bishop of Portland*.[87] Prior to *Fortin*, the status of Maine's negligent supervision law in both

78. *Id.* ¶ 9, 974 A.2d at 290.

79. *Id.* ¶¶ 33-39, 974 A.2d at 296-98. The court reasoned that because the insurance policy (as interpreted by the court) did not cover acts related to sexual misconduct, the Bishop had no insurance coverage for claims being asserted by Picher. *Id.* ¶¶ 36-39, 974 A.2d at 297-98.

80. *Id.* ¶ 58, 975 A.2d at 302 (Saufley, C.J., concurring).

81. *Id.* ¶ 60.

82. *Id.*

83. *See id.* ¶ 42, 974 A.2d at 299 (Alexander, J., dissenting).

84. *Id.* ¶ 55, 974 A.2d at 301.

85. *Id.* ¶ 46, 974 A.2d at 299-300.

86. *Id.* ¶ 41, 974 A.2d at 299.

87. 2005 ME 57, 871 A.2d 1208.

secular and religious contexts had been clouded in uncertainty,[88] and the Law Court notably had declined to recognize the tort in ecclesiastical settings on several prior occasions.[89] However, these decisions were made before revelations concerning widespread sexual abuse and institutional cover-up within the Catholic Church received national attention in 2002.[90] Interestingly, the factual circumstances in *Fortin* were almost identical to those presented in *Picher*.[91] In *Fortin*, the Law Court allowed a claim of negligent supervision to proceed against the Bishop[92] and emphasized that "societal interests are at their zenith" when a situation involves the protection of a child from sexual abuse. [93] Moreover, the court explained that the context of the relationship in which the alleged abuse took place provided further justification for the imposition of a high civil duty.[94] Justice Levy observed that "[a] child who is both a student and an altar boy is subject to the supervision, control, and authority of the Diocese on a daily basis"[95] and that Fortin had alleged the existence of a "special relationship that ineluctably involved the actual placement of trust, as well as a substantial disparity in power and influence between him and the Diocese" that "[b]y its very nature . . . renders a child vulnerable to the possibility of abuse at the hands of a miscreant employee."[96] The court further explained that the Bishop's duty to protect did not exist simply by virtue of Fortin's status as a student and altar boy, but also required the assertion that the Bishop "knew or should have known of the risk of harm posed by the priest who abused Fortin."[97] The court observed that this duty was "closely connected to an independent statutory duty[:] As the administrator of a school, the [Bishop] has been obligated since 1975 to report to civil authorities information that a child has

88. *See id.* ¶¶ 18-20, 871 A.2d at 1215-16 (discussing the uncertainty surrounding the status of negligent supervision in Maine prior to the *Fortin* decision); Sonia J. Buck, Note, *Church Liability for Clergy Sexual Abuse: Have Time and Events Overthrown* Swanson v. Roman Catholic Bishop of Portland*?*, 57 ME. L. REV. 259 (2005) (arguing that the status of negligent supervision in Maine was uncertain and that it needed to be clarified in light of the church abuse scandal).

89. *See* Napieralski v. Unity Church of Greater Portland, 2002 ME 108, ¶ 1, 802 A.2d 391, 391-92 (affirming dismissal of the case on factual grounds without deciding the negligent supervision question); Bryan R. v. Watchtower Bible & Tract Society of N.Y., Inc., 1999 ME 144, ¶ 22, 738 A.2d 839, 847 (avoiding the negligent supervision issue by finding that the tortfeasor was neither an agent or employee of the church defendant); *Swanson*, 1997 ME 63, ¶ 13, 692 A.2d 441, 445 (acknowledging that it was unclear whether or not negligent supervision was a recognized cause of action in Maine, but assumed that even if it was, the claim would be barred by First Amendment issues under the factual circumstances).

90. *See* Martin Kasindorf et al., *Boston Church Scandal Starts Chain Reaction*, USA TODAY, Dec. 19, 2002, at A13 (explaining that the media coverage of the Boston clergy abuse scandal in 2002 sparked a nationwide reaction).

91. William Picher and Michael Fortin, as minors, both attended St. Mary's Church and St. Mary's school in Augusta, where they were allegedly sexually abused by their priest, Raymond Melville, who had been assigned to the church and the school. Brief of Appellant, *supra* note 58, at 1; Brief of Appellant Michael Fortin at 1, Fortin v. Roman Catholic Bishop of Portland, 2005 ME 57, 871 A.2d 1208 (No. KEN-04-072) [hereinafter "Brief of Appellant Fortin"].

92. *Fortin*, 2005 ME 57, ¶ 76, 871 A.2d at 1232.

93. *Id.* ¶ 67, 871 A.2d at 1230.

94. *Id.* ¶ 34, 871 A.2d at 1220.

95. *Id.*

96. *Id.* ¶ 37, 871 A.2d at 1222.

97. *Id.* at ¶ 38.

been or is likely to be abused."[98]

Ultimately, the Law Court held that if a plaintiff alleged the existence of a special relationship,[99] an action could be maintained against a defendant for negligent supervision in accordance with section 317 of the *Second Restatement of Torts*.[100] The policy rationale at the heart of the *Fortin* decision was the protection of children from sexual abuse. This was most clearly demonstrated in the court's recognition that "[t]he profundity of the individual and social harm resulting from the sexual abuse of children and society's interest in responding to the same requires little discussion."[101] Although the issue of charitable immunity was not raised in *Fortin*, this unconditional principal articulated by the court should have militated against the majority's holding in *Picher* that charitable immunity barred all negligence based claims, even those relating to the sexual abuse of a minor.

B. Exception to Charitable Immunity for Negligent Supervision

Given the compelling public interest advanced in *Fortin* of protecting children from sexual abuse at the hands of trusted members of the clergy, an exception to the charitable immunity doctrine should be recognized under Maine law for negligent supervision. It is perplexing that the *Picher* Court dismissed Picher's negligent supervision claim under factual circumstances almost identical to those presented in *Fortin* by stating that there were no "persuasive grounds to hold that charitable funds should be protected against certain types of negligence claims but not others."[102] The nature of a negligent supervision claim, as crafted by the *Fortin* opinion, distinguishes that tort from everyday accident-based negligence claims in

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98. *Fortin*, 2005 ME 57, ¶ 63, 871 A.2d at 1229 (citing ME. REV. STAT. ANN. tit. 22, § 4011-A(1)(A)(13) (2004 & Supp. 2009-2010)).

99. *See* Dragomir v. Spring Harbor Hosp., 2009 ME 51, ¶¶ 17-19, 971 A.2d 310, 315-16 (discussing the nature of a special relationship as it pertains to a claim of negligent supervision and explaining that "those fiduciary relationships in which there exists a great disparity of position and influence between the parties would qualify as a special relation" (citation and quotation marks omitted)). *See also* RESTATEMENT (SECOND) OF TORTS § 315 (1965) (explaining that there is generally no duty to control a third party from causing physical harm to another absent a special relationship that creates a duty to protect the other person).

100. Section 317 describes an employer's duty to control his or her employee in a negligent supervision cause of action:

> A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if
>
> (a) the servant
>
> (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
>
> (ii) is using a chattel of the master, and
>
> (b) the master
>
> (i) knows or has reason to know that he has the ability to control his servant, and
>
> (ii) knows or should know of the necessity and opportunity for exercising such control.

Napieralski v. Unity Church of Greater Portland, 2002 ME 108, ¶ 7, 802 A.2d 391, 393 (quoting RESTATEMENT (SECOND) OF TORTS § 317 (1965)).

101. *Fortin*, 2005 ME 57, ¶ 67, 871 A.2d at 1230.

102. *Picher*, 2009 ME 67, ¶ 9, 974 A.2d at 290.

that it involves a betrayal of trust placed in a superior party by a vulnerable party[103] rather than a breach of a duty to act with reasonable care in order to avoid injuring a stranger. This consideration becomes even more important in clergy sexual abuse cases because "the Church places priests in a position of ultimate trust and authority over parishioners. In particular, children, with their absolute faith and trust, are strongly conditioned to obey priests."[104]

The *Picher* Court has, in effect, placed the policy of protecting charitable funds, and the benefits that the public recoups from them, above the right of a sexual abuse victim to seek compensation from an entity that breached its duty to protect that individual from the potential harm posed by a pedophilic priest. This result cannot be reconciled with the majority's pronouncement in *Fortin* that "societal interests are at their zenith" when a situation involves the protection of a child from sexual abuse. [105] Forcing a child who has been sexually abused to bear the full burden of that injury in the hopes that society as a whole will continue to receive the benefits from charitable institutions is fundamentally unjust and, as the court of appeals noted in *Georgetown*, is "out of step with the general trend of legislative and judicial policy in distributing losses incurred by individuals through the operation of an enterprise among all who benefit by it rather than in leaving them wholly to be borne by those who sustain them."[106]

Other jurisdictions have made similar exceptions to the charitable immunity doctrine through judicial opinion and by legislative enactment. For example, the Supreme Court of Virginia in *J. v. Victory Tabernacle Baptist Church*[107] allowed a plaintiff to recover against a church that negligently hired an employee who had been previously convicted of aggravated sexual assault[108] by holding that "the independent tort of negligent hiring operates as an exception to the charitable immunity of religious institutions."[109] Likewise, the New Jersey Legislature amended its charitable immunity statute in 2006 to make it clear that charitable immunity does "not apply to a claim in any civil action that the negligent hiring, supervision or retention of an employee, agent or servant resulted in a sexual offense being committed" against a minor who was a beneficiary of the charitable organization.[110]

C. Why the Bishop's Liability Should Not Be Limited to Intentional Torts

Limiting a charitable entity's liability to intentional torts poses numerous challenges to a sexual abuse victim's ability to recover damages, especially in an ecclesiastical setting. For example, as the majority noted in *Picher*, in order for the

103. *See Fortin*, 2005 ME 57, ¶ 37, 871 A.2d at 1222.

104. Kelly W.G. Clark, Kristian Spencer Roggendorf & Peter B. Janci, *Of Compelling Interest: The Intersection of Religious Freedom and Civil Liability in the Portland Priest Sex Abuse Cases*, 85 OR. L. REV. 481, 511 (2006) (a detailed discussion and demonstration of the challenging issues that arise in the litigation of clergy sexual abuse cases).

105. *Fortin*, 2005 ME 57, ¶ 67, 871 A.2d at 1230.

106. President & Dirs. of Georgetown Coll. v. Hughes, 130 F.2d 810, 827 (D.C. Cir. 1942).

107. 372 S.E.2d 391 (Va. 1988).

108. *Id.* at 394.

109. *Id.*

110. *See* N.J. STAT. ANN. § 2A:53A-7.4 (West 2000 & Supp. 2009-2010).

plaintiff to succeed on an intentional tort claim of fraudulent concealment, he would need to establish, in part, that the Bishop failed to disclose a material fact with the subjective "*intention* of inducing another to act or to refrain from acting in reliance on the non-disclosure."[111] Establishing actual subjective intent on the part of the Bishop to mislead the victim is much more difficult than establishing the objective standard imposed by the tort of negligent supervision, which requires a showing that the Bishop "knew *or should have known* of the risk of harm posed by the priest who abused [the victim]."[112] Thus, as a result of the *Picher* decision, if Child A is sexually abused by the agent of a for-profit corporation and Child B is sexually abused by the agent of a charitable organization, Child B will need to prove more than Child A to recover for the same injury. This substantial increase in the burden of proof necessary to recover from a charitable organization is unwarranted given the policy arguments outlined above. Moreover, a showing of subjective intent to mislead a sexual abuse victim may be even harder to prove in the context of clergy sexual abuse because the supervising bishop in many cases may not believe, personally, that a priest who has abused children in the past is likely to abuse children in the future.[113] Further complicating such a situation is the possibility that a supervising bishop may hold a "sincere religious belief that God could and would change" the abusive priest.[114]

V. CONCLUSION

The Law Court, in *Picher*, refused to extend the scope of charitable immunity to cover intentional torts, but declined to abrogate the doctrine for claims of negligent supervision. In doing so, the court was attempting to provide the sexual abuse victim in the case with a means by which to recover from the Bishop while at the same time remaining deferential to past precedent and the Legislature. However, as a result of the court's reluctance to provide an exception to charitable immunity for the tort of negligent supervision, sexual abuse victims who seek to recover against the Bishop, or other charitable organizations, face a much higher burden than those seeking recovery against for-profit entities in that they will be limited to pleading and proving an intentional tort claim. As the dissent noted in *Picher*, intentional tort claims, such as fraudulent concealment, are "easily pled, but difficult to prove."[115]

The Law Court has declared that "societal interests are at their zenith" when a situation involves protecting a child from sexual abuse. [116] The *Picher* Court ignored that declaration in declining to create an exception to the charitable

111. *Picher*, 2009 ME 67, ¶ 30, 974 A.2d at 295 (emphasis added). The court explained that
> [t]he elements of fraudulent concealment are: (1) a failure to disclose; (2) a material fact; (3) where a legal or equitable duty to disclose exists; (4) with the intention of inducing another to act or refrain from acting in reliance on the non-disclosure; and (5) which is in fact relied upon to the aggrieved party's detriment.

Id. (citations omitted).

112. *Fortin*, 2005 ME 57, ¶ 38, 871 A.2d at 1222 (emphasis added).

113. *See* Clark, Roggendorf & Janci, *supra* note 104, at 495.

114. *Id.*

115. *Picher*, 2009 ME 67, ¶ 56, 974 A.2d at 301 (Alexander, J., dissenting).

116. *Fortin*, 2005 ME 57, ¶ 67, 871 A.2d at 1230.

immunity doctrine for negligent supervision under the facts presented in that case. The Law Court should have made such an exception and reemphasized that the doctrine of charitable immunity is a creation of its own jurisprudence[117] and that other than "one significant restriction imposed by statute, its applicability in Maine is controlled entirely by the precedents of [the Law] Court."[118] With regards to that restriction, it is also important to note that section 158 was enacted forty years before the court recognized negligent supervision as a cause of action and decades before revelations about the clergy sexual abuse scandal came to light. Its application to present day cases must reflect these realities. Perhaps above all else, the court should have been mindful that religious "institutions teaching divine justice, the dignity of man and his obligations to his fellowmen . . . would not claim on the basis of their teachings that they ought to be exempt from repairing the injury done by themselves or their agents to another."[119]

117. *Thompson*, 483 A.2d at 707 (Me. 1984).

118. *Id.* (citations omitted).

119. Widell v. Holy Trinity Catholic Church, 121 N.W.2d 249, 254 (Wis. 1963) (a decision that abolished charitable immunity for religious institutions in Wisconsin).