

Liability Issues

DARREN B. MOORE
Attorney at Law
Bourland, Wall & Wenzel, P.C.
301 Commerce Street
Suite 1500
Fort Worth, Texas 76102
817.877.1088
dmoore@bwwlaw.com

Copyright ©2001
All Rights Reserved

May 11, 2001
Texas Wesleyan School of Law

Avoiding Legal Landmines:
How Religious Professionals Can Recognize
and Avoid Hidden Legal Liabilities

DARREN B. MOORE

DARREN B. MOORE, born in Lubbock, Texas, on December 11, 1973, is an associate of the law firm of Bourland, Wall & Wenzel, P.C. in Fort Worth, Texas. ***Mr. Moore's law practice is directed to litigation, religious entity law, family law, and creditor's rights law.*** Mr. Moore received his B.A., cum laude, from Texas A&M University and his J.D. degree magna cum laude from Baylor University School of Law where he served as Editor in Chief of the *Baylor Law Review*. Mr. Moore speaks regularly to churches and church leaders on avoiding legal liability.

I. INTRODUCTION	4
II. LIABILITY FOR RELIGIOUS PROFESSIONALS	4
A. NEGLIGENCE CLAIMS	4
1. <i>Defined</i>	4
2. <i>Direct</i>	4
3. <i>Vicarious</i>	4
4. <i>Examples</i>	5
5. <i>Good Faith</i>	5
6. <i>Distinction from Intentional Acts</i>	5
B. DEFAMATION	5
1. <i>Defined</i>	5
2. <i>Truth is a Defense-Burden of Proof</i>	6
C. INVASION OF PRIVACY – PUBLIC DISCLOSURE OF PRIVATE FACTS	6
1. <i>Truth is no Defense</i>	6
2. <i>Consent is Defense</i>	6
D. NEGLIGENT COUNSELING (CLERGY MALPRACTICE)	6
1. <i>State Regulation – Licensing</i>	7
2. <i>Counseling vs. Ministering</i>	7
3. <i>Confidentiality of Communications and Records</i>	7
E. CHILD ABUSE/NEGLECT	7
1. <i>Defined - Section 261.001 Et Seq., Texas Family Code</i>	7
2. <i>Duty To Report</i>	8
3. <i>Immunity</i>	8
4. <i>Clergy Privilege</i>	8
5. <i>Criminal/Civil Liability For Failure To Report</i>	9
6. <i>Child Abuse Prevention Policy</i>	9
III. LIABILITY FOR RELIGIOUS ORGANIZATIONS	9
A. NEGLIGENCE - VICARIOUS LIABILITY	9
B. NEGLIGENCE - DIRECT	10
1. <i>Negligent Hiring/Appointment</i>	10
2. <i>Negligent Retaining</i>	11
3. <i>Hazardous Activities</i>	11
4. <i>Inadequate or Negligent Supervision</i>	12
5. <i>Waiver of Liability</i>	12
C. PREMISES LIABILITY	12
1. <i>Concealed Dangerous Conditions</i>	13
2. <i>Attractive Nuisances</i>	13
3. <i>Inspections</i>	13
a. <i>Duty to Inspect</i>	13
b. <i>Time Period to Inspect</i>	13
c. <i>Liability for What a Reasonable Inspection Would Discover</i>	14
4. <i>Use of Facilities by Outside Groups</i>	14
5. <i>Security Issues</i>	14
IV. IMMUNITIES IN PERSONAL INJURY AND PROPERTY DAMAGE CLAIMS	15
A. NO COMMON LAW CHARITABLE IMMUNITY	15
B. SECTION 84.001 ET SEQ., TEXAS CIVIL PRACTICE & REMEDIES CODE	15
1. <i>Definition of a Charitable Organization</i>	15
2. <i>Volunteer Immunity</i>	16
3. <i>Employee and Organization Immunity</i>	17
4. <i>Exceptions</i>	17
5. <i>Open Questions</i>	17
6. <i>Types of Insurance</i>	18

LIABILITY ISSUES¹

I. INTRODUCTION

Liability is simply the quality or state of being legally obligated or responsible such that a wronged party can look to the liable party's assets for satisfaction. Each person is exposed to liability each day, from driving a car to keeping his or her premises in a safe condition for guests. Religious organizations are no different. Through the operation of churches, synagogues, mosques, or schools, religious organizations expose themselves to liability. The point of this paper is not to identify every area where an organization is exposed to liability nor to frighten religious organizations or religious professionals into withdrawing from society. Rather, this paper will seek to highlight those theories of liability most often employed against religious organizations and religious professionals, offer guidance in limiting exposure to those areas of liability, and explain the role that statutory immunity and insurance play in limiting liability.

II. LIABILITY FOR RELIGIOUS PROFESSIONALS

A. NEGLIGENCE CLAIMS

1. Defined

A tort, or the commission of tortious conduct, involves the violation of a duty imposed under the law on the actor which causes injury to another. In their most common form, duties imposed under the law are those which require each person to act as a reasonably prudent person with regard to the safety and rights of others surrounding the actor. Torts involve both intentional conduct of the actor as well as conduct which is described as negligent. Negligent conduct does not require the actor to have an intent to injure, but is action that is done with less care than a reasonably prudent person would use in the same activity. In other words, an activity done without the proper degree of care is considered negligent.

2. Direct

Direct liability involves the liability that the actor personally has for his own conduct to the plaintiff.

3. Vicarious

Vicarious liability involves the liability that another person or entity has for the actions of the actor under the law (i.e., indirect legal liability). Vicarious liability will be more fully discussed in Section III.

¹ Portions of this paper have been reprinted from *Keeping Your Church Out of Court: Legal Issues Affecting Pastors, Staff and the Local Church, 2nd Edition*, Copyright 1997 by Bourland, Wall & Wenzel, a Professional Corporation.

4. *Examples*

Example one: If the church holds a youth fellowship where a sports activity is involved, and the youth minister for the church bumps into a youth, causing the youth to fall and injure himself, the youth minister would be liable if it was determined his negligence (i.e. failure to act as a reasonably prudent person would act under the same or similar circumstances) caused the injury.

Example two: If a church member is driving his vehicle to the local hardware store to get supplies for a project at the church and causes a wreck, the member would be liable if it was determined his negligence (i.e. failure to act as a reasonably prudent person would act under the same or similar circumstances) caused the injury.

5. *Good Faith*

Good faith is not a defense to a negligent tort. Negligence is the failure to act as a reasonably prudent person would act in the same or similar circumstances that proximately causes damages to a third party. Thus, negligence involves a degree of carelessness, but it is irrelevant that the actor did not intend the result. The actor can have good intent (lack of intent to bring about the result) and still be negligent if he or she fails to act as a reasonably prudent person would act in the same or similar circumstances.

6. *Distinction from Intentional Acts*

Intentional torts require that the actor intended the conduct which is the basis of the tort (e.g., intentional offensive contact or intentional infliction of emotional distress). Thus, actors committing intentional torts intend a “bad” result. Good faith (i.e., lack of intent) would therefore be a defense to claims of intentional tort. An example of an intentional tort is a physical assault by one person on another.

B. DEFAMATION

1. *Defined*

Libel and slander are forms of tortious conduct called defamation. Defamation consists of false statement about the plaintiff “published” to a third party which damages the reputation of the plaintiff, under circumstances that the defendant is at fault in making the defamatory statement. If the act of “publishing” the false statement involves a recorded statement, such as in written or video form, then the defamation constitutes libel, whereas if it is spoken without a record being made, then it is slander. To be at fault with respect to the defamatory statement, the defendant must act with malice (with knowledge that the statement was false or with reckless disregard as to its truth or falsity) if the subject of the statement is a public official or public figure, and must be negligent in ascertaining the truth or falsity if the subject of the statement is any other person.

2. *Truth is a Defense-Burden of Proof*

Truth is an absolute defense to defamation. In other words the statement must be false in order for one to be liable for a defamatory statement. However, the defendant has the burden to prove that the statement is true. This is sometimes difficult.

C. INVASION OF PRIVACY – PUBLIC DISCLOSURE OF PRIVATE FACTS

Invasion of privacy by the publication or public disclosure of private information about a person which a reasonable person of ordinary sensibilities would object to having made public is actionable.

1. *Truth is no Defense*

Even if the statements are true, this is not a defense to a claim for invasion of privacy caused by disclosing private facts. For example, if during ministerial counseling the pastor learned information about a member of the church which would constitute child abuse, even though the pastor has a duty to disclose the child abuse to the appropriate government authority (discussed in Section II. E.) and would have absolute immunity for having done so, the pastor would not have the right to publish this information to others due to the clergy privilege which attached to the communication. (The clergy privilege will be more fully discussed in another presentation.) Thus, the fact that such private facts are true would not be a defense to invasion of privacy if those facts are disclosed to the public.

2. *Consent is Defense*

If the plaintiff consented to the publication of the information, it would be a defense to invasion of privacy. Thus, if the pastor was told something by a church member during ministerial counseling, and the member consented to the pastor announcing the fact to the congregation as a whole, or to some other church group, the member's consent would prevent the publication from being an invasion of privacy. This may be the case in a church discipline proceeding. If the church has, as a part of its doctrine and governance, guidelines for disciplining members, then members arguably consent to disclosure in a church discipline proceeding by joining the church and accepting its governance and policies. Of course the First Amendment also protects the right of the religious organization to discipline members according to church doctrine and governance. However, organizations should be aware that the First Amendment also protects the right of an individual to remove himself as a member. Therefore, under either defensive theory, any discipline should take place only while the individual remains a member of the organization.

D. NEGLIGENT COUNSELING (CLERGY MALPRACTICE)

Negligent counseling refers to claims brought by individuals who have received counseling or ministering, often in private sessions, with the ministerial staff of the

organization. Claims usually involve assertions that the ministerial staff improperly advised or counseled such individuals. Claims could also involve the assertion of lack of training or experience of the staff member in handling a particular problem of someone being counseled.

1. *State Regulation – Licensing*

Texas requires professional counselors to be licensed, unless the counseling activity involves a religious practitioner performing counseling consistent with the law of the state, their training, and any code of ethics of their profession, and if they do not hold themselves out as being “licensees”.

2. *Counseling vs. Ministering*

Religious organizations should use care in recognizing the limitations of their unlicensed staff with regard to expertise in particular areas in counseling and not attempt to deal with personal or family problems that are beyond the scope of the training or experience of the staff. From a liability standpoint, the organization should encourage “ministering” and should refer individuals to licensed experts for “counseling”. However, it should be noted that a counseling relationship does not have to be purely secular for the court to review the conduct. Even in religious settings, where the “counseling” actions violate social duties, courts will review the conduct. Another presentation will address this issue with respect to sexual exploitation in counseling, the most common example of a court reviewing the counseling relationship.

3. *Confidentiality of Communications and Records*

Communications made to the organization’s ministerial staff as well as to licensed counselors who perform counseling on behalf of the organization are confidential if they were not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

E. CHILD ABUSE/NEGLECT

1. *Defined - Section 261.001 Et Seq., Texas Family Code*

Child abuse is defined to include acts or omissions which cause or permit: (i) mental or emotional injury to a child, (ii) physical injury or a threat of physical injury to a child, (iii) the failure to make reasonable efforts to prevent action by another person that results in physical injury to a child, or (iv) sexual contact or the failure to make reasonable efforts to prevent sexual contact with or in the presence of a child.

Neglect includes: (i) leaving a child in a situation where the child would be exposed to a substantial risk of harm, (ii) requiring a child to use judgment or take actions beyond the child’s level of maturity, physical condition or mental abilities, (iii) the failure to

obtain medical care for a child, or (iv) the failure to provide a child with food, clothing, or shelter necessary to sustain the life or health of the child.

2. *Duty To Report*

Any person who learns of or has cause to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect by any person shall report that belief to a local or state law enforcement agency or the Texas Department of Protective and Regulatory Services (state hotline: 1-800-252-5400). An oral report must be made immediately upon learning of the abuse or neglect or the likelihood of abuse or neglect, and a written report shall be made within five days to the same agency or department on the form available at that agency for making such a report. The reports shall be nonaccusatory, which means the identity of the victim of the abuse or neglect must be identified, but the reporter is not required to speculate as to the person who committed the abuse or neglect. It should be emphasized that the duty to report is very broad because it includes any time a person learns of (has knowledge) or has cause to believe (a reasonable suspicion) that: (i) abuse or neglect has been committed, or (ii) abuse or neglect is likely to be committed in the future.

3. *Immunity*

Any person reporting or assisting in the investigation of a report of child abuse or neglect is immune from liability, civil or criminal, that might otherwise be incurred or imposed. Immunity extends to participation in any judicial proceeding resulting from the report. This means that a person who reports child abuse and is later sued by any of the parties, including the parents of the child or the accused perpetrator of the crime, can defend himself on the basis that his actions are absolutely protected by this immunity statute and the reporter should not be liable for damages related to the reporting. This does not mean, however, that the reporter cannot be sued and be required to defend himself against the suit even though the defense is ultimately successful.

4. *Clergy Privilege*

The Texas Rules of Civil and Criminal Evidence provide that communications between the clergy and any individual consulting with him or her for the purpose of seeking spiritual advice in the clergy's professional capacity is considered privileged, and the person making the communication has a privilege to refuse to disclose and prevent the clergy member from disclosing the confidential communication. Because the privilege belongs to the communicant, the minister violates the communicant's rights if he discloses an otherwise privileged communication.

However, there is an express exception which provides that the privilege disappears in the event the clergy member learns of child abuse or neglect, and the clergy is required to report the information to authorities under the child abuse reporting statute. Because of this exception to the clergy privilege, it is recommended that when any clergy member is engaged in communications with an individual for the purpose of the

individual seeking spiritual advice, the clergy member should advise the individual (preferably in writing) that suspicion of child abuse and/or neglect are non-privileged matters that must be reported to the authorities by law. Any time an individual during a counseling session discloses an instance of abuse, the clergy's warning should be renewed verbally, so that the communicant has no expectation of privacy with respect to the matter, and will be less likely to sue the church or the clergy member for allowing the communicant to make statements to the clergy member which the clergy member then is required by law to report to authorities.

5. *Criminal/Civil Liability For Failure To Report*

A person failing to report child abuse or neglect commits a Class B Misdemeanor. In addition, the person who is the victim of child abuse or neglect and his or her family may bring a civil claim against the religious organization and its agent if the agent of the organization learns about an instance of child abuse or neglect and fails to report same as required by law. The potential civil liability in this instance is so great that it could easily bankrupt an organization if a matter that should have been reported by law goes unreported.

6. *Child Abuse Prevention Policy*

A Child Abuse Prevention Policy should be in place in each organization that regularly deals with children.

III. LIABILITY FOR RELIGIOUS ORGANIZATIONS

There are many activities engaged in by religious organizations that involve the requirement of a degree of care to those participating. For example, a religious organization must provide a reasonably safe facility to its guests, it must maintain its vehicles in a reasonably safe manner so as not to cause injury, and it must supervise its activities in a reasonable manner so as not to allow harm or injury to fall upon the participants.

A. NEGLIGENCE - VICARIOUS LIABILITY

An organization such as a church cannot engage in any activity without the participation of its agents or employees. Therefore, the church acts through them. If a volunteer is acting on behalf of the church and within the scope of the volunteer's authority with regard to a particular activity, and through the volunteer's negligence, causes injury or property damage to another, the volunteer would have direct liability to the third party. However, the church would be responsible to the third party vicariously because the law considers it legally responsible for the activity of its agents or employees when they act within the scope of their authority.

In Section I, two examples of negligence were given: the youth minister who injured a youth in a basketball game and the church member that caused an accident

while driving a motor vehicle. In both examples, if the tortfeasor (the youth minister and the church member) were negligent, the church would have vicarious liability because each person was acting within the course and scope of his duties for the church.

In these examples, if the actor is found to have direct liability because of his own negligence, and if the church has indirect or vicarious liability because its agent was acting within the scope of his duties when the negligent act was committed, then both the actor and the church are jointly and severally liable to the plaintiff for damages proximately caused by the actor's negligence. This means that the church could be forced to pay all of the damages to the plaintiff if the actor was financially unable to do so.

Because the organization's vicarious liability results when an agent or employee, including any volunteer, commits tortious action while acting within the scope of his or her authority, it usually can be stated that when the agent or employee acts outside the scope of his or her authority, the vicarious liability of the organization does not extend to that activity. For example, where an organization's volunteer is carrying out an activity of the organization and through good faith but negligent conduct liability results, the organization will usually have vicarious liability when it can be said the volunteer was acting within the scope of his or her authority. On the other hand, if the volunteer commits an intentional tort, such as sexual misconduct, it can be argued that the volunteer is not in good faith in his or her conduct and the conduct has gone outside his or her scope of authority given by the organization. For example, if a child is injured in a church nursery because the adult worker negligently failed to supervise the children playing, the church could be vicariously liable. On the other hand, if the child had been injured by the intentional abuse of the adult worker, the church would not have vicarious liability. Generally, intentional torts will not be within the course and scope of the actor's duties (i.e., religious organizations do not employ persons to harm third parties).

B. NEGLIGENCE - DIRECT

Even though a religious organization will most often not be vicariously liable for the intentional torts of its agents, another source of liability exists. This second source of liability involves the organization's direct liability in the negligent hiring of an individual which the organization knew or reasonably should have known was prone to commit such acts. Thus, where the organization's vicarious or indirect liability ends, its own negligence can continue its liability if it has not performed due diligence in its hiring and supervising practices of its agents and employees.

1. Negligent Hiring/Appointment

Negligent hiring can apply not only to employees, but also to any agent of the organization, even a volunteer (often referred to as negligent selection). The organization is charged with the duty under law of using volunteers, agents and employees that will act in a reasonably prudent manner. If the organization is aware or if it should be aware of facts that point to the propensity of its volunteer, agent or employee to commit such torts,

especially involving intentional torts, then the organization has been negligent in appointing these actors to carry out the activities of the organization.

Because the organization cannot predict with certainty which persons in fact will commit acts that cause injury or damage to others, an objective of preventing such occurrences in every case would be unrealistic. Thus, the objective of the organization in this area must be to undertake such steps to demonstrate that it has exercised due diligence with respect to the hiring and/or appointment of its employees and volunteers. Ultimately, if the organization is sued because of an action of one of its employees or volunteers which was outside the scope of that individual's authority on behalf of the organization, the organization must show that it acted in a reasonably prudent manner with respect to the decision making process of hiring or appointing the individual as its agent.

2. *Negligent Retaining*

If the organization has acted prudently in the decision making process of hiring or appointing an individual as its employee or agent, the organization has a continuing responsibility with respect to its agent. If the organization gains information that would show that it would not be reasonably prudent for the organization to continue to have that individual act as the organization's employee or agent, the organization has the responsibility to dismiss the individual. If the organization continues to retain an employee or agent after the organization learns that the individual is not someone the organization should have acting on its behalf, the organization would be negligent for allowing the individual to continue in that position. If the individual commits a tortious act consistent with the negative information the organization has learned, the organization could be liable for having retained or left that individual in a position in which the individual could commit the act. For example, if an organization performs a diligent investigation of an individual who has asked to be a volunteer in the nursery of the organization, and has found no indication that the person would be unfit for that position, the church has acted properly in appointing that person as its agent for that purpose. However, if the church later learns that the person had a history of child molestation incidents, which were uncovered during the initial background check, the church would be negligent for allowing the individual to continue to work in the nursery, and the church would likely be legally responsible to the victims of any child molestation committed by that individual while working in the nursery.

3. *Hazardous Activities*

Religious organizations often have groups that engage in fellowship activities that involve some type of recreation. Because some forms of recreation are extremely dangerous, care should be taken to limit and carefully supervise those activities (e.g a church rodeo, a church tackle football game, etc.) Other activities that are not considered unreasonably hazardous under ordinary circumstances could become hazardous if there is inadequate supervision or uncommon circumstances (e.g a church snow skiing trip that involves traveling icy or extra hazardous roadways due to a storm).

4. *Inadequate or Negligent Supervision*

Any activity can become more risky without the proper supervision. This can happen in the church nursery, the church baptistry, or on the church volleyball court or softball field. The organization can be liable for injuries occurring during activities when it is shown the injuries could have been avoided with adequate supervision.

5. *Waiver of Liability*

Often schools, youth associations, and other entities use written forms containing waivers of liability to discourage claims resulting from injuries. The age of the participant of the activity is significant in determining the effectiveness of such forms. Forms signed voluntarily by competent adults expressly acknowledging risks in the activity can be useful. For such a form to be effective, the parties' intent that the organization be released for its own future negligence must be expressed in unambiguous terms within the four corners of the release and the releasing language must be conspicuous (e.g. contrasting type or all caps). Such forms do not, however, operate in the same manner with minors for the reason that minors are not legally competent to contract, and parents of minors cannot contract away causes of action their children may have based on the negligence of another. Nevertheless, there may be some benefit to these forms in discouraging claims and in making the participants aware of certain risks involved in the activity. Religious organizations can (and should) have a child's parents or legal guardians sign forms consenting to the child's participation in the activity, certifying that the child is able to participate, and listing emergency contact numbers and health conditions of the child. Ultimately, it should be remembered that adequate supervision is the most important and most effective way to avoid liability in hazardous activities.

C. PREMISES LIABILITY

While the general rule is that one must exercise reasonable care with respect to his activities to prevent unreasonable risk to others, different rules apply with respect to the ownership or lease of property. The fact that one owns or leases a premises does not fall within the category of an "activity". Therefore, the risk of injury to third parties related to those parties' use of the premises is dealt with under a separate analysis.

A premises liability cause of action is comprised of four elements: (1) the owner/lessee had knowledge of some condition on the premises; (2) the condition posed an unreasonable risk of harm; (3) the owner/lessee did not exercise reasonable care to reduce or eliminate the risk; and (4) such failure caused injury to a third party.

Different legal duties are imposed on the owner/lessee depending on the category of persons to which the third party belongs. An "invitee" is a person on the premises at the express or implied invitation of the owner/lessee. Persons entering onto places generally held open to the public are typically invitees. "Licensees" are persons on the

premises of the owner/lessee with the permission of the owner/lessee but without an invitation. Finally, “trespassers” are persons on the premises without right, lawful authority, invitation, or permission.

Because churches and other religious organizations are held open to the public, persons entering onto the premises (during the appropriate times) are typically classified as invitees. As such, the religious organizations owe those persons the duty to exercise reasonable care in maintaining the premises in a safe condition, conducting inspections of the premises to uncover dangerous conditions, and warning the third parties of the dangerous conditions that cannot be remedied. The remainder of this section will deal with a landowner/lessee’s duty to invitees.

1. *Concealed Dangerous Conditions*

An owner or lessee of property has a duty to warn his invited guests (“invitees”) of conditions of the property that are concealed or not obvious to the invitees, and that cause the invitees to be exposed to the dangerous condition. An example would be knowledge of the presence of friable asbestos in a building.

2. *Attractive Nuisances*

When the landowner/lessee is aware that children will be on the premises who are of such an age that they will not appreciate a danger, even if the danger is open and obvious, the owner/lessee has a duty to protect against that risk. For example, if the organization builds a swimming pool, the organization should know that the pool attracts children of a young age who may not be able to swim, and therefore should properly safeguard against that risk by building a childproof fence around the pool.

3. *Inspections*

As discussed previously, a landowner only owes a duty to inspect the premises to discover dangerous conditions to its invitees. However, because almost all religious organizations regularly open their premises to invitees, the issue of inspections will be treated accordingly.

a. Duty to Inspect

The landowner/lessee has a duty to conduct reasonable inspections to discover dangerous conditions on the property to render them safe.

b. Time Period to Inspect

There is no absolute or arbitrary time frame for a landowner/lessee to inspect its property. The test is one of reasonableness; when would it have been reasonable for the landowner/lessee to have inspected the property and discovered the dangerous condition

if the landowner/lessee had been acting as a reasonably prudent person under the same or similar circumstances.

For example, if during a storm a tree causes damage to an electrical outlet, thereby rendering electrical wires exposed, the landowner/lessee would not normally be liable to someone who is injured prior to the time the landowner/lessee should have discovered the dangerous condition and rendered the condition safe.

c. Liability for What a Reasonable Inspection Would Discover

A landowner/lessee must anticipate the invitees who will enter the property, and perform reasonable inspections to render the property safe for those invitees. If a reasonable inspection would not uncover a dangerous condition, the landowner/lessee would not be liable under the doctrine of premises liability. On the other hand, if a reasonable inspection would have uncovered a condition, the landowner/lessee has a responsibility to discover and render that condition safe as soon as reasonably possible after the time a reasonable inspection should have been performed. For example, if a church is aware that children play on its playground equipment each Sunday morning, the playground should be inspected each week before children are allowed on the equipment. If a reasonable inspection would have detected any unsafe playground equipment, the equipment should be rendered safe before children are allowed to play on it further.

4. *Use of Facilities by Outside Groups*

A religious organization can be held liable for injuries that occur on its premises even if the injuries occur during times the premises are being used by outside groups. The determinative factor in such situations is the degree of control the organization maintains over its premises during the outside group's use. As is the general rule, with control comes accountability. For example, a church that allows another group to use its fellowship hall could be found to have retained control over the premises by setting up the tables, cleaning the floors, and providing a custodian. Such control might be significant if an individual at the function is injured by a fall caused by a dirty floor. This does not mean an organization should give up all control in order to limit its exposure to liability, but rather, that the organization should act with reasonable care in controlling its premises even when those premises are being used by outside groups.

5. *Security Issues*

With the unfortunate rise of school and church violence in our society, many religious organizations fear the potential liability associated with the criminal acts of third parties. In fact, religious organizations such as churches could be liable for the criminal acts of third parties only in limited situations. Generally, a landowner/lessee does not have a duty to protect third parties from the criminal conduct of third parties. However, such a duty does arise when the harm is so great that it is both unreasonable and foreseeable. The foreseeable harm must be the general danger (rather than the exact sequence of events) to the particular plaintiff or one similarly situated. In order to

determine the foreseeability of the general danger, courts look at five factors: (1) whether any criminal conduct previously occurred on or near the premises; (2) the recency of the previous criminal conduct; (3) the frequency of the previous criminal conduct; (4) what publicity was given to the previous criminal conduct (to test whether the landowner knew or should have known about the previous conduct); and (5) the similarity between the previous conduct and the criminal act in question.

IV. IMMUNITIES IN PERSONAL INJURY AND PROPERTY DAMAGE CLAIMS

A. NO COMMON LAW CHARITABLE IMMUNITY

Historically, Texas charities had enjoyed a doctrine in Texas law which held that charities were immune from liability for the negligent acts of their servants, for which those charities otherwise would have vicarious liability without the immunity. For example, if a church's agent acted negligently within the scope of the agent's responsibilities, under the doctrine of charitable immunity the church would not have been vicariously liable for the acts of the agent.

However, in 1971, the Texas Supreme Court abrogated the doctrine of charitable immunity for any action occurring after March 9, 1966. Therefore, since that date charitable organizations could be held vicariously liable for the acts of their agents.

B. SECTION 84.001 ET SEQ., TEXAS CIVIL PRACTICE & REMEDIES CODE

1. Definition of a Charitable Organization

In response to the growing increase in liability against entities carrying out charitable purposes, the Texas legislature passed the Charitable Immunity and Liability Act of 1987 (the "Act"). A stated purpose of the statute is to remedy the unwillingness of volunteers to serve in organizations due to their perception of the risk of personal liability related to those services.

The Act covers: (a) an organization exempt from federal income taxation as a §501(c)(3) nonprofit corporation, organized and operated exclusively for charitable or religious purposes, and (b) any bona fide religious or charitable organization organized and operated exclusively for the promotion of social welfare, if the organization (i) is operated exclusively for its charitable or religious purposes, (ii) does not engage in activities that in themselves are not in furtherance of said purposes, (iii) does not directly or indirectly participate or intervene in any political campaign on behalf of or in opposition to any candidate for public office, (iv) dedicates its assets to achieving the stated purposes of the organization, (v) does not allow any part of its assets on dissolution of the organization to inure to the benefit of any group, shareholder, or individual, and (vi) normally receives more than one-third of its support in any year from private or public gifts, grants, contributions, or membership fees.

It appears much easier to qualify as a charitable organization under the Act if an organization complies with the first definition, rather than unincorporated which requires that it comply with the second definition.

Once it has been determined that an entity falls within the definition of a charitable organization under the Act, the volunteers and employees of the organization, as well as the organization itself, enjoy the immunities described below. However, the constitutionality of the Act has not been tested in Texas courts. Consequently, charitable organizations as well as their employees and volunteers are still well advised to confirm that adequate liability insurance coverage exists with respect to their activities.

2. *Volunteer Immunity*

A volunteer is a person rendering services for or on behalf of a charitable organization who does not receive compensation in excess of reimbursement for expenses incurred. The Act distinguishes between a person serving in the capacity of a director, officer, or trustee and someone serving as a direct service volunteer.

A volunteer of a charitable organization who is serving as an officer, director, or trustee is immune from civil liability for any act or omission resulting in death, damage or injury if the volunteer was acting in the course and scope of his duties or functions as an officer, director, or trustee within the organization.

A volunteer who is serving as a direct service volunteer is immune from civil liability for any act or omission resulting in death, damage, or injury if he was acting in good faith and in the course and scope of his duties or functions within the organization. Thus, a direct service volunteer has an additional requirement of good faith in order to receive immunity under the Act. Good faith means the honest, conscientious pursuit of activities and purposes that the organization is organized and operated to provide.

All volunteers, without regard to the type of service they are providing to the charitable organization, are liable for death, damage, or injury to a person or his property proximately caused by an act or omission arising from the operation or use of any motor driven equipment, including an airplane, to the extent of insurance coverage required by Texas law or, if greater, any existing insurance coverage applicable to the act or omission. Thus, as long as a volunteer who is an officer, director, or trustee is within the course and scope of his duties and a volunteer who is a direct service volunteer within the course and scope of his duties and is in good faith, then he is not liable other than to the extent of liability insurance he is required to have under Texas law or that he actually has in place. This is intended to make available any liability insurance coverage for the injured individual, without subjecting the volunteer to out-of-pocket exposure himself.

3. *Employee and Organization Immunity*

An employee is any person, including an officer or director, who is in the paid service of a charitable organization, but does not include an independent contractor. For employees of non-hospital charitable organizations, and for a non-hospital charitable organization itself, the Act provides limited immunity only if the charitable organization has liability insurance coverage in effect for the act or omission of the organization and its employees and volunteers in the amount of at least \$500,000.00 for each person and \$1,000,000.00 for each single occurrence for death or bodily injury and \$100,000.00 for each single occurrence for injury to or destruction of property, provided under a contract of insurance or other plan of insurance authorized by statute. The employee and the non-hospital charitable organization enjoy immunity for any liability in excess of those amounts. For the limited immunity to apply, the employee of a non-hospital charitable organization must be in the course and scope of the person's employment at the time of the act or omission resulting in death, damage or injury.

The purpose of this limited immunity is to allow liability to remain to the extent of the amount of liability insurance coverage the legislature has decided would be prudent for the charitable organization to have in place to cover itself and its employees and volunteers, without causing the charitable organization or the employee to pay any out-of-pocket amounts with respect to such liability.

4. *Exceptions*

The Act does not apply to any act or omission that is intentional, willfully or wantonly negligent, or done with conscious indifference or reckless disregard for the safety of others (more extreme than ordinary negligence). The Act also does not limit or modify the duties or liabilities of the leaders of an organization to the organization itself or to its members and shareholders.

5. *Open Questions*

As has been previously mentioned, the Act has never been tested in a reported court opinion. Accordingly, several open questions surround the application of the Act. The Act dictates that the necessary coverage "shall apply to the acts or omissions of the organization and its employees and volunteers and be in the amount of at least \$500,000.00 for each person and \$1,000,000.00 for each single occurrence for death or bodily injury and \$100,000.00 for each single occurrence for injury to or destruction of property." It is unclear (although likely) whether the organization must have insurance in the applicable amounts to cover the act or omission complained of or simply have a general liability policy in the applicable amounts. For example, a general liability policy has many exclusions such as a sexual misconduct exclusion. Therefore, if a church were sued based on the sexual misconduct of a minister, the church might have the applicable amounts in a general liability policy but yet not be covered due to the exclusion. It would seem that the church would not be able to take advantage of the cap limits in such a

situation. However, more troubling is the situation where a church is sued for its own negligence (e.g. negligent hiring) when a minister commits sexual misconduct in a counseling session. There is currently a split across the nation whether such a claim against the church is “interdependent” on the intentional act of the minister and therefore not an “occurrence” under the policy. In that event, the church might believe it has the applicable amounts of insurance to cover its own negligence only to discover that due to an interpretation of the insurance contract, it has no coverage and potentially no cap to its liability. Finally, it is unclear whether all religious organizations can attain coverage in the applicable amounts for each type of act or omission. For example, smaller churches with fewer employees may find it difficult to contract for employment practices liability insurance in the amounts dictated by the Act. Churches and other religious organizations must be aware of these questions when purchasing insurance in seeking to protect their assets and comply with the Act.

6. *Types of Insurance*

Religious organizations should discuss different types of insurance with an insurance professional, but following is a non-exhaustive list of types of liability insurance applicable to religious organizations:

- a.) General liability insurance;
- b.) Automobile liability insurance;
- c.) Hired and non-owned insurance;
- d.) Sexual misconduct insurance;
- e.) Counseling acts insurance;
- f.) Directors and officers insurance;
- g.) Employment practices liability insurance; and
- h.) Special events insurance.