COURT FILE NO.: 98-CV-154117
DATE: 20030626

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

VICTORIA BOER

Plaintiff

- and -

BRIAN CAIRNS, STEVE BROWN, JOHN DIDUR and WATCH TOWER BIBLE AND TRACT SOCIETY OF CANADA

Defendants

REASONS FOR JUDGMENT

MOLLOY J.

Released: June 26, 2003

COURT FILE NO.: 98-CV-154117
DATE: 20030626

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
VICTORIA BOER	)	Charles P. Mark, Q.C., for the Plaintiff
	)	
Plaintiff	)	
	)	
- and -	)	
	)	
	)	
BRIAN CAIRNS, STEVE BROWN, JOHN DIDUR and WATCH TOWER BIBLE AND TRACT SOCIETY OF CANADA	)	Colin P. Stevenson and Maureen L. Whelton, for the Defendants
	)	
Defendants	)	
	)	
	)	
	)	**HEARD:** September 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 23, and 24, 2002

MOLLOY J.:

REASONS FOR JUDGMENT

[1] These reasons are organized under the following headings:

A. INTRODUCTION

[2] The plaintiff Victoria Boer seeks punitive damages and damages for negligence and breach of fiduciary duty against the Watch Tower Bible and Tract Society of Canada (the governing body of the Jehovah's Witnesses in Canada) and three elders of that church. Her claim stems from actions taken by Jehovah's Witness elders when, at the age of 19, she disclosed to them that she had been sexually molested by her father during her childhood. The plaintiff alleges that she was forced to confront her father with these allegations in the presence of two

male elders of her congregation, an experience which she found to be traumatic. She says she was then required to go through essentially the same exercise of confrontation again, this time before three male elders, as part of a church disciplinary process against her father, thereby compounding the trauma. She further alleges that Watch Tower failed to properly deal with the abuse by her father, failed to report it as required by law, and directed her not to seek medical or psychological treatment. The plaintiff testified that as a result of the defendants' wrongdoing she has suffered extreme emotional harm which was for years untreated and which will require extensive therapy in the future.

B. BACKGROUND

[3] There is no material dispute as to the general background leading up to Watch Tower's involvement in this matter. The plaintiff was born in 1970 to Mary and Gower Palmer. She has an older brother and two younger siblings. Both parents were Jehovah's Witnesses and all the children were raised in that faith, primarily as part of the congregation in Shelburne, Ontario.

[4] The plaintiff attended public school as a child but was not permitted to participate in after-school activities with children not of her faith. The family attended religious services several times a week. In addition, the plaintiff was required to spend considerable time in prayer, religious studies and pioneering work (spreading the Jehovah's Witness message to others, often by going door-to-door). She was cautioned against falling into "wordly ways". She was taught to accept a rigid hierarchy of obedience: children must obey their parents; wives must obey their husbands; members of the congregation must obey the governing elders; the elders must obey the overall governing body, Watch Tower. Independent thought was not permitted. Higher education was discouraged, particularly for girls. It was in many ways a closed and isolated society. Even though the members of the congregation lived, worked and attended school in the general community, they had little social interaction outside their faith.

[5] The plaintiff was sexually molested by her father from about the age of 11 or 12 until she was 15. The abuse was serious, although it stopped short of actual intercourse. When the plaintiff was about 15, she read a religious article about masturbation and realized for the first time the nature of what had been happening with her father and that it was wrong. She spoke to her mother about it. Mrs. Palmer told her daughter she had suspected something like this was going on but had been afraid to raise it. She counselled her daughter to be more modest in her dress and not to wear pyjamas around her father. She also confronted her husband with the plaintiff's disclosure and he promised to stop the offensive conduct. The matter was not discussed outside the family at that time. Mr. Palmer privately apologized to the plaintiff for his conduct, while at the same time telling her that she had, after all, "enjoyed it too". After that, there were no further incidents of overt abuse, but more subtle things still happened, which Mr. Palmer passed off as accidents or jokes.

[6] In 1989, when the plaintiff was 19, she left home to take a job as a live-in nanny in Toronto. She continued her adherence to the Jehovah's Witness faith, joining a Toronto congregation. In the fall of 1989, the plaintiff began to experience considerable anxiety arising from the sexual abuse she had suffered years earlier. She had flashbacks and recurring dreams

about her father. She was fearful when caring for the children in her charge and was worried that she might be accused of doing something wrong. The plaintiff confided in a friend at the Toronto Jehovah's Witness congregation about these problems. The friend, Chris, advised her that she had a responsibility to report her father's conduct to the church elders. Chris said there were two reasons for this. First, the past abuse was affecting the plaintiff and he felt she needed spiritual help to deal with it. Second, Chris pointed out that the plaintiff was aware of a sinner in the Shelburne congregation (her father) but the congregation was unaware of that sinner being in their midst. Chris said that if Armageddon came and the plaintiff had not taken steps to bring her father's sin into the open, she could be held responsible for having jeopardized the salvation of the entire Shelburne congregation. At Chris's suggestion, the plaintiff contacted Sheldon Longworth, an elder in the Toronto congregation, and reported the matter to him.

[7] The Church's response to this report is the subject matter of this lawsuit. Many of the crucial facts from this point on are in dispute.

C. THE PLAINTIFF'S POSITION

[8] The plaintiff, Vicki Boer, had several conversations with Mr. Longworth. He consulted with "head office" in Toronto to determine the appropriate steps to be taken. For one of his interviews with her, which took place in her room at the home of her employers, another male elder from Toronto was also present. Ms Boer testified that Mr. Longworth was sympathetic and kind, but that he told her she must invoke Matthew 18:15-18. This would require confronting her father in front of elders from Shelburne and giving him a chance to repent. She found this prospect terrifying and told Mr. Longworth so. However, when he insisted this was the proper course of action, she felt she had no choice but to obey the elders.

[9] Ms Boer testified she asked Mr. Longworth if she could get her mother to talk to her father about it, rather than having to do it herself, but he said this was not possible. However, she also testified that she did in fact telephone her mother and asked her to tell her father to report himself to the Shelburne elders. Her evidence on this point was somewhat confusing.

[10] Ms Boer also testified that she discussed her distress about the situation with a long-time childhood friend, Jonathan Mott-Trille. His family were members of the Shelburne Jehovah's Witness congregation. She said she was crying and hysterical as she told her friend Jonathan about having to confront and accuse her father. Jonathan told her he thought the confrontation was wrong and promised he would discuss the matter with his father Frank Mott-Trille, who was a lawyer and also an elder in the Shelburne congregation.

[11] The next day, Ms Boer met with Jonathan and Frank Mott-Trille at their home in Toronto. Frank Mott-Trille told her there was no requirement that she confront her father. He also advised her that she should report the abuse to the Children's Aid Society ("C.A.S.") and recommended that she see a psychiatrist. Frank Mott-Trille actually arranged an appointment for Ms Boer with Dr. Kaplan, a psychiatrist recommended to him by his daughter (who is herself a doctor).

[12] In the meantime, Ms Boer received a telephone call from her father stating that a meeting had been arranged for December 29, 1989 at the Palmer family home in Shelburne and that two Shelburne elders, Steve Brown and Brian Cairns, would be attending. Ms Boer testified at trial that she went to the meeting because Mr. Longworth had directed she must attend and she had no choice but to obey the elders.

[13] Ms Boer described the meeting as being very painful for her. It was conducted in the Palmers' kitchen, with the plaintiff, her parents and the two elders in attendance. The plaintiff was asked to describe in detail what her father had done to her. She said she objected to doing so but was told it was necessary. After she recounted the details, her mother stated that this had all been dealt with in the family years before and that her father had apologized. Ms Boer testified that towards the end of the meeting she told Mr. Cairns and Mr. Brown that Frank Mott-Trille had advised her to report to the Children's Aid Society and had arranged for her to meet with a psychiatrist. She said Mr. Cairns and Mr. Brown told her Frank Mott-Trille was "acting worldly" and that she should not listen to him. Further, they told her that if she went to the C.A.S. the family would be investigated, her father could lose his job and her mother would be destitute. She said that her mother was crying and telling her to listen to what the elders were saying or her father could go to jail. Finally, according to Ms Boer, Mr. Cairns and Mr. Brown indicated that Mr. Palmer had demonstrated repentance and improved spirituality by being more active in the faith and spending time "in service" (spreading the word about Jehovah's Witness to others outside the faith).

[14] Ms Boer did not contact the C.A.S. and did not attend the appointment with the psychiatrist which Frank Mott-Trille had arranged for her. She testified at trial that she knew she needed help but did not seek it out because she had been told not to by the elders.

[15] At the end of January, Ms Boer was contacted again and asked to attend a further meeting at her parents' home. Although she did not realize it at the time, the purpose of the meeting was to conduct a Judicial Committee (an investigation by the elders) in respect of Mr. Palmer's wrongdoing and to determine what, if any, sanctions were appropriate. According to Ms Boer, this meeting was also conducted in the kitchen with all the same people as the first meeting plus an additional elder, Dave Walker, who was from a congregation outside Shelburne. She was asked to repeat her story because Mr. Walker had not heard it before. She was questioned closely about the details so the elders could determine the level of sin Mr. Palmer had committed. She testified at trial that her father started to deny some of the allegations and to say that she was exaggerating. She felt she was under attack and was so distraught that she had what she described to be a panic attack in which everything appeared to be "swimming" and she "nearly passed out".

[16] After the Judicial Committee meeting, Ms Boer returned to Toronto to her live-in nanny job. However, she was having such a difficult time emotionally that she resigned. Unemployed, and without housing or any source of income, she eventually returned to live with her parents in Shelburne. At this time, there was a lot of in-fighting among the members of the congregation and between various of the elders. Ms Boer felt responsible for the trouble. Rumours leaked out about her having accused her father of sexual abuse. However, since no sanctions appeared to

have been imposed on Mr. Palmer, the plaintiff believed there was a perception in the community that she had fabricated these accusations. She felt ostracized by the community. She became bulimic and developed ulcers.

[17] In July 1991, the plaintiff decided to move to Moose Jaw, Saskatchewan. She had hoped to reconcile with a former boyfriend who lived there. However, after arriving in Moose Jaw, she discovered that he was in another relationship. In September 1991, the plaintiff met Scott Boer and by mid October, they were engaged to be married. He was aware of the psychological problems she was having and persuaded her to attend counselling. She attended five group sessions, but stopped going because she said she found it too difficult to listen to other women recounting the abuse they had suffered.

[18] Vicki and Scott Boer were married in May 1992. There was considerable emotional upheaval surrounding the wedding. Scott Boer is not a member of the Jehovah's Witness faith, which was problematic for Vicki's friends and family, particularly for Mrs. Palmer who was very devoted to her religion. Marriage outside the faith is frowned upon. Originally, the wedding was booked for the Jehovah's Witness church in Shelburne. However, Mrs. Palmer cancelled all of the arrangements without warning. There was some question as to whether the Palmers would even attend. The wedding did proceed in Shelburne, but before a rabbi and in the Legion hall. Although the plaintiff's parents attended, very few other members of the congregation did.

[19] Vicki and Scott Boer had three children soon after their marriage, the third being born in 1995. Ms Boer continued to have emotional difficulty. The couple had marital problems as a result. Scott Boer, a member of the Canadian Armed Forces, was often away from home for extended periods of time. Ms Boer, alone at home with three small children and sometimes in communities where she knew very few people, had a difficult time. She also had little or no contact with her former friends in the congregation. Scott and Vicki Boer attended counselling together for five sessions in 1995. The family then moved to Quebec City where Ms Boer had difficulty finding a therapist who spoke English. In January 2000, Scott Boer was posted to New Brunswick, where the family still lives. After an initial waiting period, Ms Boer is again seeing a psychiatrist on a regular basis.

[20] After her marriage, Ms Boer's relationship with her mother was very strained as Mrs. Palmer blamed her daughter for exposing her father's sin to the community. Ms Boer left the Jehovah's Witness faith in 1995 or 1996, which also was a source of strain between her and her mother. Mrs. Palmer began to say that the abuse had never happened. Even when she was dying of cancer, Mrs. Palmer refused to see her daughter. She died in 1998 without any reconciliation with her daughter Vicki.

[21] On August 25, 1998, Vicki Boer commenced this action. She alleges that the individual defendants Brian Cairns and Steve Brown acted negligently and in breach of a fiduciary duty owed to her in forcing her to go through the traumatic experience of recounting particulars of her father's sexual abuse in the presence of her father on two occasions. She also alleges that Messrs Cairns and Brown were concerned only for the reputation of the congregation and for her father. They attempted to "cover up" the abuse by trying to keep it inside the community, by telling her

not to get medical help for herself, and by telling her not to report it to the secular authorities. This deepened the trauma which the plaintiff had experienced and prevented her from starting a healing process until many years later. The defendant John Didur was a senior elder at the Watch Tower head office and was involved in an advisory capacity in respect of the steps taken by Sheldon Longworth and by Messrs. Cairns and Brown. The plaintiff alleges that Mr. Didur and Watch Tower instructed and supported the other Jehovah's Witness elders in their handling of this matter and are equally responsible for the damages she has sustained.

D. THE DEFENDANTS' POSITION

[22] The defendants deny having caused any harm to the plaintiff. They point out that it was the plaintiff who brought the matter to the Jehovah's Witness elders and that she was an adult when she did so. They allege that the extent of Sheldon Longworth's involvement was to find out from the plaintiff the nature of her complaint and then to tell her that it should be dealt with through the Shelburne congregation elders. They deny that Matthew 18:15-18 has any application to this situation and deny having told the plaintiff she must comply with Matthew 18.

[23] The issue before the Shelburne congregation was a spiritual one: specifically, a serious sin committed by a member of the congregation and the appropriate sanction, if any, for that sin. The defendants take the position that the manner in which the elders dealt with Mr. Palmer is a question of religious faith and is not reviewable by this court. They allege that Ms Boer was present at the two meetings to ensure that the elders had a full picture of what occurred and not just her father's version. Mr. Brown and Mr. Cairns testified they did not know ahead of time what would be discussed at the first meeting. They further testified that the second meeting was a Judicial Committee, which was required because of the serious nature of the sin involved. They stated the plaintiff was present during all parts of the first meeting, but the family members were interviewed separately for the Judicial Committee meeting. They deny the plaintiff was required in that session to retell her story in front of her father.

[24] The defendants deny telling the plaintiff not to report the matter to C.A.S. and deny telling her not to get medical help. On the contrary, they say they advised the plaintiff to get medical help and understood she would be seeing a psychiatrist recommended by Frank Mott-Trille. Further, they required Mr. Palmer to report the abuse to his family doctor and to the C.A.S. and then followed up with C.A.S. to ensure this was done. The defendants deny having covered up the abuse, although they did try to maintain confidentiality for the protection of the plaintiff and other members of her family. The defendants deny the plaintiff suffered emotional harm as a result of the two meetings in which she participated.

[25] The defendants take the position that any emotional harm sustained by the plaintiff flows from the sexual abuse by her father and other difficult circumstances in her life, such as her mother's conduct and lack of support and difficulties in her marriage. The defendants also submit that the plaintiff's delay in bringing this action is an absolute bar to her obtaining any recovery.

E. RULINGS ON EVIDENCE

[26] During the course of the trial, the plaintiff sought leave to present evidence from two witnesses about certain characteristics or practices of the Jehovah's Witness organization in situations similar to this one. I ruled such evidence to be inadmissible, with reasons to follow.

[27] The first witness, Professor James Penton, is an historian and the author of a book entitled *Apocalypse Delayed*. Mr. Mark, on behalf of the plaintiff, intended to elicit evidence from Mr. Penton with respect to his conclusions about various characteristics of Jehovah's Witnesses, the way women are treated within that faith and the functioning of Judicial Committees. Professor Penton's evidence would be based on his research and would constitute opinion. He does not have first-hand evidence. However, Mr. Mark did not deliver notice of his intention to call an expert on this topic and did not serve an expert report on the defence as required under the *Evidence Act*, R.S.O. 1990, c.E23. That alone is fatal to the plaintiff's request to call this evidence. The defence would have been caught by surprise with no opportunity to prepare, nor to call its own evidence to rebut the evidence of Mr. Penton.

[28] In any event, I am by no means satisfied that expert evidence of this nature would have been admissible in respect of these matters. It seems to me that I am in a position to determine the relevant facts to the particular matters before me without the assistance of an expert on these matters.

[29] The second witness proposed by the plaintiff is Barbara Anderson, who was a member of the Jehovah's Witnesses in New York from 1954 until her recent disfellowship (ejection from the faith). The plaintiff proposed to elicit evidence from Ms Anderson as to her knowledge of how sexual abuse of children is dealt with within that religion and of cover-ups of abuse by the Watch Tower Society. Most of Ms Anderson's proposed testimony would be hearsay. The plaintiff argued it is admissible as similar fact evidence to show that the actions of the defendants in this case were part of a design, rather than negligence.

[30] The general test for the admissibility of similar fact evidence in a civil trial is derived from *Mood Music Publishing Co. v. DeWolfe Ltd.*, [1976] Ch. 19, 1 All E.R. 763 (C.A.). In that case, Lord Denning stated, at p. 127 (Ch.):

> . . . in civil cases the courts will admit evidence of similar facts if it is logically probative, that is if it is logically relevant in determining the matter which is in issue; provided that it is not oppressive or unfair to the other side; and also that the other side has fair notice of it and is able to deal with it.

[31] The proposed evidence from Ms Anderson fails this test on every front. First, it is not logically probative of any issue before me. Whatever may have been Ms Anderson's personal experience with the Jehovah's Witness faith, and whatever information she may have gleaned about how child abuse cases were dealt with elsewhere, she has no evidence whatsoever about the Toronto or Shelburne congregations or any of the individuals in this case. Further, even her information about Watch Tower generally relates to that organization in the United States. There

is nothing about her evidence that would assist in the very specific findings of fact I am required to make about what happened in the case before me.

[32] Secondly, the defendants did not have a fair opportunity to deal with this proposed evidence as they had no notice of it until the first day of trial.

[33] Thirdly, the proposed evidence is oppressive and unfair. Even if the evidence could be seen as relevant (which it is not), it would only be so if it were true. In order to establish the truth of it, a trial within a trial would be required. There would be no effective way for the defendants to mount a defence to the matters alleged by Ms Anderson, and the admission of such evidence would therefore be unfair to them.

F. LIMITATION PERIOD AND LACHES

[34] The actions of the defendants which the plaintiff alleges to have caused her harm occurred in late 1989 and in 1990. This action was commenced in August 1998, more than eight years later. The defendants submit that the negligence claim is statute-barred because it was not commenced within the six-year limitation period, and that the plaintiff's delay in commencing the action is also a bar to the equitable claim based on breach of fiduciary duty. I reject the defendants' position on both points.

(i) Negligence Claim

[35] In *M.(K.) v. M.(H.)* (1992), 96 D.L.R. (4th) 289 (S.C.C.), the plaintiff sued her father for incest which had occurred more than 10 years earlier, basing her claim in both tort and breach of fiduciary duty. The Supreme Court of Canada applied the discoverability rule and held that the limitation period did not begin to run until the victim had a substantial awareness of the harm she had sustained and of the causative connection between the abuse and her symptoms: pages 305-306 and 314-315. Further, based on the scientific evidence at trial, the Court held that in incest cases there is a presumption that "victims only discover the necessary connection between their injuries and the wrong done to them (thus discovering their cause of action) during some form of psychotherapy": p. 314.

[36] I agree with the submission of counsel for the defendants that this presumptive rule applied by the Supreme Court in *M.(K) v. M.(H.)* does not apply here. However, the general principles applied by the Court as to the discoverability rule and its rationale are directly applicable. The underlying rationale for the discoverability rule is that a plaintiff ought not to be deprived of a cause of action before she is aware, or could reasonably have been aware, that she has one: *Central Trust v. Rafuse*, [1986] 2 S.C.R. 147; *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549. In determining the plaintiff's level of awareness, it is relevant to consider whether she could reasonably have known both that the conduct of the defendant was wrong and that there was a causal link between that wrong conduct and her psychological injury.

[37] It is clear the plaintiff knew her father's conduct was wrong by the time she had reached the age of majority. However, I conclude from the evidence at trial that she had not realized the

connection between that abuse and her own psychological state until years later when she began therapy. In particular, it was not until 1995 when Ms Boer and her husband underwent marital counselling with Susan Frykland, a social worker in Moose Jaw, that Ms Boer substantially appreciated the connection between the childhood abuse and the anxiety and behaviour she was experiencing as an adult. Even then, the potential causal connection between the conduct of the church elders and the plaintiff's emotional suffering was not apparent to the plaintiff. Although the plaintiff was unhappy about many aspects of her faith and how she had been treated by the elders, she did not connect that unhappiness to any problems she was having until after she attended a counselling session with Russell Scott in October 1997. She had gone to see Mr. Scott because she felt emotionally overwhelmed raising three small children in Quebec City while her husband was away on military duties. She told him of difficulties she was having in her relationship with her parents, which led to her relating some of the problems she experienced growing up as a Jehovah's Witness. Ms Boer also disclosed to Mr. Scott that she had been sexually abused by her father and told him about the pressure from the elders to confront her father about this in their presence. Mr. Scott told the plaintiff that this confrontation had the potential to be emotionally damaging and also suggested that she do some research of her own on the impact of being raised in a "cult environment".

[38] I find as a fact that it was only after this session with Mr. Scott and the follow-up research she undertook on her own through the Internet that Ms Boer came to any understanding that the actions of the elders in 1989 and 1990 could be a source of her psychological problems. This action was commenced in 1998, which is within one year of the plaintiff becoming aware of the possibility of a cause of action against these defendants, and therefore is not caught by the limitation period.

[39] In *M.(K.) v. M.(H)*, *supra*, the Supreme Court of Canada held that it is appropriate to consider the doctrine of fraudulent concealment in determining the applicability of a limitation period, even where fraudulent concealment has not been specifically pleaded. The doctrine applies to both common law and equitable causes of action and operates to prevent the application of a limitation period where there is conduct by the defendant that has prevented the plaintiff from being aware of the cause of action. The term "fraudulent" in this context is to be interpreted broadly and "is not confined to the traditional parameters of the common law action" for fraud: *M.(K.) v. M.(H.)* at p. 320. The Supreme Court in *M.(K.) v. M.(H.)* at p. 320 adopted the following definition of the factual basis for fraudulent concealment from 8 Hals., 4th ed., p. 413, para 919:

> It is not necessary, in order to constitute fraudulent concealment of a right of action, that there should be active concealment of the right of action after it has arisen; the fraudulent concealment may arise from the manner in which the act which gives rise to the right of action is performed... (Emphasis added)
>
> In order to constitute such a fraudulent concealment as would, in equity, take a case out of the effect of the statute of limitation, it was not enough that there should be merely a tortious act unknown to the injured party, or enjoyment of property without title, while the rightful owner was ignorant of his right; there had

to be some abuse of a confidential position, some intentional imposition, or some deliberate concealment of facts. (Emphasis added)

[40] In *M.(K.) v. M.(H.)*, the Supreme Court of Canada ruled that incest falls within the second category of fraudulent concealment. LaForest J. writing for the majority, noted at p. 320, "The fact that the abuser is a trusted family authority figure in and of itself masks the wrongfulness of the conduct in the child's eyes, thus fraudulently concealing her cause of action." Further, at p. 321, he held that incest is "an abuse of a confidential position". The Court went on to state that the underlying premise supporting the application of the doctrine of fraudulent concealment in cases such as these is that the courts will not allow a limitation period to act as an instrument of injustice.

[41] In considering whether the discoverability rule applies unfairly to the defendants in the case before me, it is relevant to take into account the doctrine of fraudulent concealment. As against the defendants before the court, this is not an incest case. However, the claim does involve an alleged abuse of a confidential position. Further, the fundamental precepts of the Jehovah's Witness faith include obedience and deference to the wisdom of the elders. A devout Jehovah's Witness in the position of the plaintiff at 19 years of age would be particularly vulnerable to the power of the elders, having been raised her entire life to defer to them. Her religious upbringing would not permit her to question the authority of the elders, much less to realize that she might have a cause of action against them. In these circumstances, it would be unjust to regard the plaintiff in 1989 and 1990 as having any appreciation of wrongdoing that could amount to negligence or breach of fiduciary duty on the part of the elders. That understanding only came to the plaintiff after she was no longer part of the community and subject to their control. Given the social isolation and dependence of the plaintiff at the time of the acts giving rise to the cause of action, which isolation and dependence were fostered by Watch Tower and its elders, it would be unjust to impose a limitation period commencing in 1990 without the mitigating effect of the discoverability rule.

[42] Accordingly, I conclude that the discoverability rule should be applied in this case. As such, the action was commenced within the six-year limitation period, that period not having started to run until October 1997. Alternatively, at the very earliest, the period started to run in 1995 when the plaintiff first realized that her emotional difficulties stemmed from earlier abuse by her father and when, arguably, she was sufficiently distanced from the Church to connect the conduct of the elders to some of her problems.

(ii) Breach of Fiduciary Duty

[43] There is no limitation period for breach of fiduciary duty, whether explicitly or by analogy: *M.(K.) v. M.(H.)*, at p. 328-333. However, since this is an equitable claim it is subject to the equitable defence of *laches*. Mere delay by a plaintiff in commencing an action is not sufficient to support a defence of *laches*. In addition, the plaintiff's delay must either: (1) constitute acquiescence in the defendants' conduct; or (2) result in circumstances that make the prosecution of the action unreasonable, as for example where the defendants have reasonably

altered their position as a result of the delay or are otherwise prejudiced in the defence of the action because of the delay.

[44] The defendants submit that the plaintiff's delay amounts to acquiescence. I disagree. A plaintiff cannot be taken to have acquiesced in wrongdoing unless she had, or reasonably should have had, knowledge of the wrongfulness of the acts and their actionability. As noted by LaForest J. in *M.(K.) v. M.(H.)* at p. 336-338, there is some overlap between the concepts of knowledge as part of acquiescence and the application of the discoverability rule in tort. However, the analysis is not identical. In the case before me, Ms Boer cannot be taken to have acquiesced in wrongdoing by the elders (which allegedly occurred in 1989 and 1990) until she reasonably should have known it was in fact wrongdoing and that she had a right of action (which occurred in 1997). In that context, it is not equitable to consider her as having acquiesced in any wrongdoing by the defendants. That branch of the *laches* doctrine does not, therefore, provide a defence to these defendants.

[45] There was no evidence of any change in position by the defendants as a result of the plaintiff's delay. The individual defendants involved with the plaintiff confirmed their actions in correspondence with the Watch Tower head office and that correspondence was preserved. Sheldon Longworth kept handwritten notes of his discussions with the plaintiff, and those also were preserved. To the extent that memories had dimmed, the documentary record was available to refresh them. It seemed to me from hearing the evidence of the defence witnesses that there was little, if any, prejudice to the defendants as a result of the plaintiff's delay in commencing the action. There was certainly not the sort of prejudice to support a conclusion that it would be inequitable for the plaintiff's action to proceed. On the contrary. The unfairness to the plaintiff in dismissing her action because of delay would be far greater than any unfairness to the defendants in having the action proceed.

G. FACTUAL FINDINGS

(i) Key Facts to be Determined

[46] There were many factual disputes in the evidence at trial. Some of them are not necessary for me to resolve in order to decide this case, particularly those relating to the internal wrangling and power struggle among the elders of the Shelburne congregation. Other disputes are central to the plaintiff's claim and crucial to her case. I consider the following disputed facts to be core issues requiring resolution:

(a) Did Sheldon Longworth instruct the plaintiff that she was required to confront her father pursuant to Matthew 18:15-18?

(b) If so, was the first meeting at the Palmer home with Mr. Cairns and Mr. Brown an application of Matthew 18:15-18?

(c) Did the defendants instruct the plaintiff not to see a psychiatrist or get medical help for herself?

(d) Did the defendants instruct the plaintiff not to report her father's abuse to the Children's Aid Society?

(e) Was the second meeting at the Palmer home an application of Matthew 18:15-18 and did it otherwise involve a confrontation between the plaintiff and her father?

(ii) Matthew 18:15-18

[47] Much was said about Matthew 18:15-18 during the course of the trial before me, but a text of those verses was never put before me. Mr. Longworth testified that applying this principle is a three-part process. If you have a problem with someone, you should first go to that person directly and attempt to resolve it. If that is not successful, you should take someone with you to be a witness. If both those steps are unsuccessful, the third step is to take the problem to the church elders. Set out below is the text of the applicable verses from the King James Version of the Bible. Although I am uncertain as to whether this version is the one used by Jehovah's Witnesses, it appears to reflect the synopsis given by Mr. Longworth.

> Mat 18:15
> Moreover if thy brother shall trespass against thee, go and tell him his fault between thee and him alone: if he shall hear thee, thou hast gained thy brother.
> Mat 18:16
> But if he will not hear [thee, then] take with thee one or two more, that in the mouth of two or three witnesses every word may be established.
> Mat 18:17
> And if he shall neglect to hear them, tell [it] unto the church: but if he neglect to hear the church, let him be unto thee as an heathen man and a publican.
> Mat 18:18
> Verily I say unto you, Whatsoever ye shall bind on earth shall be bound in heaven: and whatsoever ye shall loose on earth shall be loosed in heaven.

[48] Vicki Boer testified that Sheldon Longworth told her Matthew 18:15-18 applied to her situation and required her to confront her father about his wrongdoing. She stated she was extremely upset about this prospect and she went to discuss it with her friend Jonathan Mott-Trille. Her discussion with Jonathan Mott-Trille would certainly have been some time around the middle of December 1989, but neither she nor Jonathan Mott-Trille kept a record of the date and neither can pinpoint the date from memory. Jonathan Mott-Trille does, however, have an independent recollection of his discussion with the plaintiff. I found him to be an honest and unbiased witness who tried his best to relate the facts accurately. I have no hesitation accepting his evidence that Vicki Boer was extremely distraught and that the focus of her emotional distress at the time was that she was being told she had to invoke Matthew 18 and confront her father about his sexual abuse.

[49] Jonathan Mott-Trille further testified that he had Vicki Boer wait while he went to discuss the problem with his father, Frank Mott-Trille, on a no-names basis. He said he asked his father if it was necessary for a victim of sexual abuse to confront her abuser in front of male elders. It makes sense that Jonathan would consult his father on this point as Frank Mott-Trille was both a lawyer and an elder in the Shelburne congregation, and therefore likely to be knowledgeable about the process. Jonathan's evidence on this point is corroborated by his father

Frank Mott-Trille. Jonathan told the plaintiff that his father said there was no requirement to confront the abuser and had offered his further assistance if required.

[50] The plaintiff returned the next evening to speak directly with Frank Mott-Trille. Both she and Frank Mott-Trille testified that she advised him she was being instructed by Sheldon Longworth to apply Matthew 18. They also testified that Mr. Mott-Trille told her that this was a misapplication of the Scripture and that she was not required to confront her father. Mr. Mott-Trille advised her to report the matter to the Children's Aid Society and recommended she see a psychiatrist for counselling. Mr. Mott-Trille, with the assistance of his son and his daughter Rachel, who is a doctor, arranged an appointment for the plaintiff with a psychiatrist, Dr. Kaplan. There is no evidence as to the specific date of that appointment although Mr. Mott-Trille's evidence was that it was made on an urgent basis and would have been within a few days of his meeting with the plaintiff.

[51] Both Jonathan Mott-Trille and Frank Mott-Trille described Vicki Boer as extremely upset and possibly suicidal. Vicki Boer also said she was extremely upset and hysterical when she met with them. I trust Jonathan Mott-Trille's perception and find his recollection to be reliable. I accept that Vicki Boer was upset, hysterical and potentially suicidal when she first went to talk to her friend Jonathan. However, Jonathan described the plaintiff as having calmed down somewhat after being advised that there was no requirement in the Scripture for a confrontation in this situation. That makes sense. The plaintiff went there looking for help. She was treated sympathetically, given good advice, and told there was no need to have a confrontation with her father. An appointment was set up for her to start a process of counselling. One would expect that this combination of kindness and concrete good advice would have had the calming effect described by Jonathan. I do not find the perceptions of Frank Mott-Trille to be as reliable. His evidence was at times exaggerated. I treat it with caution as it appeared to me to be coloured somewhat by Mr. Mott-Trille's hostility towards the elders and the Jehovah's Witness organization. If Mr. Mott-Trille truly believed Ms Boer to be suicidal at the time she left his home after their second meeting, I would not have expected him to suggest to her that she go by herself to report the matter to the C.A.S. Further, when the plaintiff failed to attend for her appointment with Dr. Kaplan, I would have expected Mr. Mott-Trille to take more urgent steps to follow up if he had perceived her mental distress at the time to be as acute as he described it in his evidence at trial.

[52] I therefore conclude that Ms Boer was highly upset at the time and that the primary and immediate source of her distress was the prospect of having to confront her father under Matthew 18. She would not have simply concluded on her own that Matthew 18 applied. She must have been told that by somebody. The person she was relying upon for advice at the time was Sheldon Longworth. He is the logical source of the information.

[53] Sheldon Longworth testified at trial. While he certainly remembered the incident with Vicki Boer, he was no longer able to recall the specific details of precisely what was said in each of his discussions with her and with his advisers at the Watch Tower head office. However, the notes he kept at the time are available and are of considerable assistance. Those notes, though somewhat sketchy, were made contemporaneously and I find them to be highly reliable. Also, I

find Mr. Longworth to be an honest and impartial witness. When he could not remember a detail, he said so. When he testified as to a particular event which he did recall, I accept his evidence.

[54] Mr. Longworth's notes indicate that he first spoke with the plaintiff on December 11, 1989 when she called him for advice. He got some further information from the plaintiff, consulted with head office on December 12, and read a 1988 Watch Tower directive on how to deal with child abuse in order to inform himself. On the evening of December 12, he met with the plaintiff at his apartment and she provided him with the further particulars he requested, including the fact that there were two young children still in the home. It would appear from Mr. Longworth's notes that no advice was given to the plaintiff on this occasion, but that he promised her he would look into it and get back to her quickly.

[55] On December 13, 1989, Mr. Longworth spoke with John Didur at head office and got some advice as to how to deal with the matter, which he passed on to the plaintiff later that same evening. Mr. Longworth testified at trial that the main thrust of the advice he gave the plaintiff after December 12 was that this matter should be dealt with by the elders in Shelburne and that her father should contact them to ensure this happened. I accept his evidence on this point as being credible, supported by his notes, and consistent with how the matter proceeded thereafter.

[56] However, it is also apparent from his testimony and from his notes that he did discuss Matthew 18 with advisers from head office and that he did tell the plaintiff to apply Matthew 18. Mr. Longworth's notes on December 13 indicate that Mr. Didur told him that Vicki should "apply Matt.18 to go to her father and tell him to go to the elders and straighted (sic) out". He further noted that he told this to Vicki and suggested she call her father and "give him a week to go to the elders or Vickie will go to them" and that Vicki said she would do this.

[57] The next note Mr. Longworth made was on December 15 when he wrote that Vicki had approached him and said she was afraid of her father and that it was "too hard" for her to talk to him directly. He told her he would look into it and get back to her. His notes indicate that he then discussed this with Mr. Kutschke (another elder at head office) who advised that "she would need to apply Matt 18 and call her father". His notes of December 16 further state that later that evening he spoke to Vicki "and tried to help her see necessity of applying Matt 18 which meant going to her father". At that time Vicki said she would consider it but that maybe she would call her mother instead. His final note that day, in response to this alternate suggestion was, "So that is how I left it".

[58] Mr. Longworth testified that the plaintiff was very upset about the situation and about confronting her father under Matthew 18. He said she was crying while talking about these matters. However, he did not perceive her level of distress to be as extreme as was described by Jonathan Mott-Trille. The likely explanation for this minor discrepancy is that the plaintiff simply did not display the same degree of distress before Mr. Longworth. She was a close friend of Jonathan's and felt more at liberty to break down in front of him than she would likely do in front of Mr. Longworth, who was a virtual stranger to her.

[59] On December 17, the plaintiff called Mr. Longworth and advised him that she had called her mother as "she still felt she couldn't call her father" and that her mother would advise her father to go to the elders in Shelburne. Obviously this did occur as Mr. Palmer called Mr. Longworth the next day and said he would cooperate fully. After further consultation with John Didur, Mr. Longworth told Mr. Palmer to go to the elders of his congregation to straighten the matter out.

[60] On December 18, 1989, Mr. Longworth and Mr. Novak visited the plaintiff at the home where she was working as a nanny. Mr. Longworth's note from that day states:

> We commended her for her coming forward for help and for talking to us to what must have been a very hard thing to do. We encouraged her to speak up if she is required to talk to the elders in Shelburne and tell them the facts. (Emphasis added)

[61] Thereafter, the Toronto elders had no further involvement, having left the matter to the Shelburne elders to handle. The last note made by Mr. Longworth is headed "Dec 21/89, phone call from Vickie about 6:00 pm". It then states:

> Went to Bro. Mott-Trille as she is very close to him. Her father is saying he can't remember very much about what he done to her. Vickie said she was having a hard job handling this and felt her family father and mother was upset at her bringing this up.

Somewhat confusingly, this notation is followed immediately by a note which states, "Dec 18/89 Advised Fred [Novak] as to above 7:30 pm". Obviously, Mr. Novak could not have been advised on the 18th of something which occurred on the 21st. One of the dates is an error, but it is unclear whether they both occurred on December 18th or on the 21st.

[62] In my view, much of the confusion surrounding the Matthew 18 issue stems from the fact that it does not actually apply to a situation such as this one. I accept the evidence of John Didur that it is not now the policy of the Jehovah's Witness to require a victim of abuse to proceed through the steps envisioned in verses 15-18 of Matthew 18, nor was that the policy in 1989. He explained that Matthew 18 applies to private disputes between people, such as disputes over financial matters, and cannot be applied to a serious sin against God's laws, such as child abuse. I understand why the defence witnesses are genuinely puzzled as to how this could have come up in this situation. However, I am confident that Matthew 18 was mentioned specifically to the plaintiff and that she was told it applied. Further, I am confident that it was after receiving this advice that she spoke to the Mott-Trilles.

[63] On March 29, 1991 (more than a year after these events occurred), Frank Mott-Trille wrote a letter to the legal department of Watch Tower in New York in which he stated that the plaintiff came to his home on December 11 and 12, 1989. That cannot be correct. Mr. Longworth's notes made at the time are a more accurate and reliable source for establishing chronology. His own first discussions with the plaintiff were on December 11 and 12 and it

appears from his notes that the first time he considered the application of Matthew 18 was on December 13. It is probable that he said something to the plaintiff about Matthew 18 on that same date and that Ms Boer went to see Jonathan Mott-Trille after that. It is also probable that the plaintiff went to the Mott-Trille home on two consecutive days sometime between December 13 and December 18 or 21. On December 15, the plaintiff suggested to Mr. Longworth that she might speak with her mother rather than her father. Then, on December 17, she did in fact call her mother. The next day, December 18, Gower Palmer spoke with Mr. Longworth and was told to report the matter to the Shelburne elders. In Mr. Mott-Trille's letter of March 29, 1991, he states that about two days after he saw the plaintiff, he received a call from her father inquiring about the possibility of his acting for him on serious criminal charges that might arise. By that date, Mr. Palmer was already aware that this matter had been raised by his daughter. It follows that the call to Mr. Mott-Trille could not have been earlier than December 17.

[64] The plaintiff gave conflicting evidence about whether she was told it would be acceptable to ask her mother to get her father to contact the Shelburne elders, or whether she simply took this step against the advice and direction of Mr. Longworth. Her recollection on this point is not reliable. It would appear that something was likely going on between December 13 (when Matthew 18 was first mentioned to her) and December 17 (when she called her mother rather than her father). It seems to me that the logical conclusion is that her discussions with the Mott-Trilles happened sometime between December 13 and December 17. On December 15, Ms Boer told Sheldon Longworth it was simply "too hard" to talk to her father about this. On the 16th he encouraged her to call her father, but she said maybe she would call her mother instead. I find as a fact that Mr. Longworth did not force the issue at that point, but more or less acquiesced in the plaintiff's proposal to call her mother. I further find that the plaintiff's decision to take this course of action was likely based on the advice of Mr. Mott-Trille that Matthew 18 did not apply.

[65] Based on the evidence of the witnesses and the limited documentation available, I conclude, on a balance of probabilities, as follows:

(a) Mr. Longworth told Ms Boer on more than one occasion that Matthew 18 applied and that she should speak directly to her father about the abuse.

(b) This advice was an inaccurate application of the Scripture.

(c) Ms Boer was extremely upset at the prospect of having to confront her father. Her level of distress was accurately described by her and by Jonathan Mott-Trille. Although Mr. Longworth knew she was upset, and indeed crying much of the time, he did not perceive her distress to be as acute as that described by Mr. Mott-Trille.

(d) Ms Boer was given correct advice by Mr. Mott-Trille that Matthew 18 did not apply.

(e) Thereafter, she spoke to Mr. Longworth and told him that she might speak to her mother rather than her father. Mr. Longworth did not press the point. She then actually spoke to her mother and asked her mother to direct her father to contact the elders.

(f) Up to December 29, 1989, although there had been discussion about the requirement of invoking Matthew 18:15-18, it was not actually applied and Ms Boer did not have any direct confrontation with her father.

(iii) Instructions Not to Report to Child Welfare Authorities

[66] Before considering whether the December 29th meeting was an application of Matthew 18, I will set out my factual findings on the issues of medical treatment and reporting to the authorities as my findings on these points have an impact on whose evidence I accept as to the details of the December 29 meeting.

[67] Ms Boer testified that at the first meeting at her parents' home, which took place on December 29, 1989, Mr. Cairns and Mr. Brown warned her against reporting her father's abuse to the Children's Aid Society ("C.A.S."). She said that she had mentioned to them that Frank Mott-Trille advised her to speak to the C.A.S. and had arranged an appointment for her to meet with a psychiatrist. According to Ms Boer, the two elders specifically told her not to go to the C.A.S. because there would be an investigation and her father could lose his job, leaving her mother destitute. She was adamant that this conversation occurred with the elders and that it was not a conversation with only her parents. Ms Boer's evidence on this point is completely at odds with all of the other evidence.

[68] One of the first things Sheldon Longworth did upon hearing the plaintiff's first disclosure was to consult the 1988 Watch Tower letter setting out the policy for dealing with cases of sexual abuse of children. Likewise, Brian Cairns turned to this document immediately after the December 29 meeting to determine what should be done. The 1988 Watch Tower document was an exhibit at trial. I do not need to decide whether the directions set out therein are completely in accordance with the requirements of the relevant child protection statute in 1988 or in 1989/1990. Nothing in this case turns on that legal issue. What is clear from the document is that the official policy of the church was to report child abuse cases to child welfare officials. Further, the policy advises that elders, as ministers, have a positive duty to ensure that child abuse is reported. Although the policy suggests it is permissible to require the offender or family members to report the matter to their own physician, who would then have a duty to report, the policy also emphasizes the need for the elder to follow up to ensure that the reporting in fact occurred.

[69] Steve Brown and Brian Cairns both denied having told the plaintiff that she should not report the abuse. Both testified they told the family they would consider what needed to be done and get back to them. The plaintiff also confirmed this was how the meeting was left. Mr. Cairns and Mr. Brown also testified that they asked a lot of questions to ascertain whether the two younger children were at any risk of abuse at Mr. Palmer's hands, but were convinced there was no such danger.

[70] It is clear both Mr. Cairns and Mr. Brown were aware of the reporting requirement. However, they were also aware that the Palmer family had a previously scheduled vacation to Florida for three weeks in January, for which they were scheduled to depart shortly after the

December 29 meeting. Since they were satisfied there was no risk to the younger children, they decided to take no steps until the family returned from vacation.

[71] Mr. Cairns called Mr. Didur at Watch Tower head office shortly after the December 29 meeting. Mr. Cairns testified, and I accept, that Mr. Didur said reporting was clearly required because there were still children in the home. Mr. Didur said the ideal situation would be to get the abuser to report himself, either to a doctor or the C.A.S., but that the elders had to report if Mr. Palmer failed to do so. By this time, the Palmers were in Florida and Mr. Didur and Mr. Cairns agreed it would be permissible to delay reporting until their return.

[72] Mr. Cairns wrote a letter to Watch Tower head office on January 21, 1990. This was before the Palmers had returned from their vacation. I am satisfied this letter was written and sent at the time of the events. It is clear from the letter that Mr. Cairns was aware of the reporting requirement. He mentions having discussed with the family the possibility of Mr. Palmer going to a medical doctor to report the problem, but without giving any final direction. The response from Watch Tower, dated January 25, is also clear about the necessity of reporting.

[73] Mr. Cairns testified, and I accept, that when the Palmers returned from Florida, Mr. Cairns told Mr. Palmer he had to report himself to a medical doctor and Mr. Palmer agreed to do so. Later Mr. Cairns was advised that both Mary and Gower Palmer had gone to the doctor. On January 29, 1990, Mr. Cairns reported to the Watch Tower head office that Mr. Palmer had talked to a doctor that day but the doctor had indicated she was unsure whether there was an obligation to report to C.A.S. in this situation (presumably because the complainant was no longer a child).

[74] A few days later, Mr. Cairns and Mr. Didur spoke again by phone. Mr. Cairns testified that Mr. Didur instructed him to ensure a report was made to the Children's Aid Society since it was unclear whether the Palmers' doctor would be reporting. Mr. Cairns therefore called Mr. Palmer and told him that he should personally report himself to the C.A.S. Mr. Palmer reported back to the elders that he had taken his wife and two youngest children with him to the Children's Aid Society and reported the matter to them. Mr. Brown testified, and I accept, that he personally called the C.A.S. office immediately thereafter to confirm the report had been made. The plaintiff acknowledges Mr. Palmer did in fact report himself to the Children's Aid Society.

[75] I find that Mr. Cairns, Mr. Brown, and Mr. Didur were aware of the reporting requirement and fully intended to comply with it. I need not comment on whether they made the right decision to allow Mr. Palmer to go on vacation with his family before any report was made, nor whether it was appropriate to have the initial report come through Mr. Palmer rather than from the elders. There is no need to resolve those points to decide this case. However, it is clear there was no plan to cover up this abuse from the authorities. On the contrary, all of the elders involved were consistent in their resolve to ensure the Children's Aid Society was made aware of these allegations. Further, it was because of the elders that the C.A.S. was in fact notified. Based on this alone, it is improbable that the elders told Ms Boer on December 29, 1989 that she should not tell the authorities because her father could go to jail and her mother end up destitute.

[76] In addition to the improbability of Ms Boer's evidence on this issue, and the documents corroborative of the defendants' version, I have taken into account my findings as to the credibility of Mr. Cairns and Mr. Brown. I believe both were telling the truth, as best as they could recall it. Mr. Cairns, in particular, struck me as a thoroughly honest witness. He was careful never to overstate. He was even careful to ensure that he was testifying as to what he could actually remember, as opposed to what he had heard in court earlier in the trial and accepted to be true. I am confident he did not lie to the court. I am also confident that he could not simply be mistaken as to whether he specifically told Ms Boer that this should not be reported.

[77] It follows that I am accepting Mr. Cairns' evidence on this point, in preference to that of Ms Boer. I wish to emphasize that this does not mean I found Ms Boer to be a less than honest witness. That is absolutely not the case. I do not question her honesty and integrity. What I do question is her ability to recall accurately and specifically who said what at a meeting thirteen years ago – a meeting which, by her own account, was highly emotional and traumatic for her. I do not doubt that following the meeting, and perhaps even before and during the meeting, there was pressure on Ms Boer to put the interests of her mother and other family members ahead of addressing the abuse by her father. I do not doubt that she was asked to consider what would happen to the family if her father went to jail and her mother became destitute. Her own evidence, which is corroborated to some extent by notes of others at around that time, is that her parents were angry with her for having brought this matter up again. If there was pressure on Ms Boer to "bury" the issue and to avoid reporting to the authorities, it most likely came from her mother. Given Mrs. Palmer's devotion to her religion, it is entirely possible that she cast this as a religious duty and that over the years Vicki Boer has come to believe it emanated from the elders. However, her recollection is mistaken. I find as a fact there was no suggestion from Mr. Brown or Mr. Cairns that the matter should be "covered up" or that it should not be reported to the authorities.

[78] I do not consider it necessary to deal extensively with the evidence of Frank Mott-Trille on this point. He did not have first-hand knowledge of the communications between Watch Tower head office and the elders who were directly involved in dealing with the matter. I conclude that his outrage was more directed towards how the issue was handled from a religious point of view, whether the appropriate decision-making rules for the congregation were followed, and whether the appropriate sanctions were imposed against Gower Palmer. If his concern was truly that there was a cover-up or failure to report to child welfare authorities, he had an obvious remedy. He was the first elder of the Shelburne congregation to become aware of the abuse, as a result of the report directly to him in mid-December by Ms Boer. However, he took no steps himself to bring the matter to the attention of the authorities at that time.

(iv) Instructions Not to Seek Treatment

[79] Ms Boer testified at trial that she was specifically advised by the elders at the December 29, 1989 meeting that she should not see a psychiatrist or get medical help. She was adamant that this instruction came from the elders. She said she believed she needed counselling and the only reason she did not seek help was because she had been instructed not to.

[80] Brian Cairns testified at trial that he never instructed Ms Boer not to get medical help. On the contrary, he suggested it would be a good idea. Mr. Brown supported Mr. Cairns' evidence. He testified that Ms Boer was told it was a matter of personal choice whether she sought psychiatric help and she was never discouraged from doing so. I accept their evidence.

[81] I am convinced of the honesty of Mr. Cairns on this point. I find his evidence to be compelling, not just because I believe him to be a truthful witness, but also because he provided personal information about his own circumstances and those of his family which convince me that he would never have counselled a young woman in the plaintiff's position to avoid psychiatric help. Mr. Cairns said that at the time of the December 29 meeting, he was enormously sympathetic to Ms Boer's situation. He considered what Mr. Palmer did to be a "horrible thing" and he immediately thought about his own two teen-age daughters who were close to the plaintiff's age at the time. He also testified that his wife is a survivor of childhood abuse and he is fully aware that the harmful effects of such abuse can live on for many years. Further, he is not averse to psychiatry. He revealed he suffers from depression himself and has sought treatment from a psychiatrist on more than one occasion.

[82] Mr. Cairns' evidence is corroborated by the documents produced at trial, which were written in early 1990. In Mr. Cairns' letter of January 21, 2990, he reported to Watch Tower:

> The daughter was quite upset while trying to tell us about it. She expressed that she felt much better emotionally now that we had heard her out. The elders gave encouragement to her and suggested that in addition to getting spiritual refreshment she may want to get medical assistance if she felt it was necessary. That would be her decision and we would not push that.

[83] It is unlikely that the plaintiff failed to see a psychiatrist because of anything said by the defendant. Frank Mott-Trille had arranged an appointment for Ms Boer with Dr. Kaplan. He said this would have been within a few days of when he met with Ms Boer in mid December 1989. It makes sense that it would have been soon after that date as Mr. Mott-Trille and his son both thought Ms Boer might have been suicidal. It is unlikely they would have delayed several weeks. The meeting with the elders was on December 29, 1990. It is most likely that by then Ms Boer had already failed to attend the appointment with Dr. Kaplan, *i.e.* before the Shelburne elders were even involved. Thus, it would appear she was already reluctant to talk to a psychiatrist before she met with the elders. According to Dr. Awad, the psychiatrist called as an expert witness at trial by the plaintiff, this is not unusual. He testified that 50% of adolescents will fail to attend their first scheduled appointment and that in his experience it is not uncommon to try five times before succeeding in having the patient actually attend for counselling.

[84] In his January 29, 1990 letter, Mr. Cairns asked Watch Tower for guidance on a number of questions, including whether it was necessary for the elders to "insist" that "both parties" receive psychiatric help. Watch Tower responded that following the handling of a case both the accuser and accused might need the assistance of a physician or psychologist for mental and emotional recovery and that this should be recommended. The letter then states that the elders

can "only recommend", and that the kind and extent of professional help sought is a matter of personal decision.

[85] In the minutes of the Judicial Committee meeting dated January 31, 1990, the elders note their understanding that the plaintiff would be "going to a psychiatrist at the encouragement of Frank Mott-Trille". It was apparently the understanding of other elders that Ms Boer would be getting psychiatric care as recommended by Mr. Mott-Trille. The Children's Aid Society was under the same impression.

[86] I find that the defendants did not impede Ms Boer from getting psychological counselling, but rather that they encouraged it. She received the same encouragement from Mr. Mott-Trille. She elected, as was her right, not to act on that advice. It was years later that she finally decided to seek treatment, and initially that was for problems which she did not immediately connect to the sexual abuse. The delay in obtaining treatment is in no way attributable to the defendants.

[87] Again, I hasten to add that my finding on this issue, although completely at odds with Ms Boer's evidence at trial, does not mean I think she has been untruthful. I accept that she honestly believes she was instructed not to get counselling. However, she was under enormous stress at the time and was subjected to equally horrible pressure at home and in her religious community in the months thereafter. This has affected her ability to recall accurately the particulars of what was said at those meetings with the elders. It may well be the case that she could not face talking to another person about the abuse at that time, or even that she was persuaded that it was not an appropriate course of action for religious reasons. After the fact, she has misremembered this discomfort about seeing a doctor as having been a direction from the elders. However, I am satisfied on the evidence that she is mistaken. The elders never attempted to persuade her to avoid medical help.

(v) December 29, 1989 Meeting

[88] It was Gower Palmer who set up the December 29, 1989 meeting. He had been told by his wife, and by Sheldon Longworth, that he needed to inform the Shelburne elders of his abuse of his daughter Vicky. Mr. Palmer telephoned Steve Brown and asked him to come to his home to talk about an important family problem. Mr. Brown did not know the nature of the problem. Mr. Brown asked Mr. Cairns to come as well because he was the senior elder (presiding overseer) of the Shelburne congregation. Neither Mr. Brown not Mr. Cairns knew what the meeting was about until after they got there and heard Mr. Palmer's explanation. Ms Boer testified she received a call from her father telling her the time of the meeting and she felt she had to attend because of the previous discussions she had with Mr. Longworth.

[89] All parties agree that the meeting took place in the Palmer kitchen and that Mr. Palmer, Mrs. Palmer, Mr. Cairns, Mr. Brown and the plaintiff were all present at the same time. The parties also essentially agree on how the meeting started. They opened with a prayer, following which Mr. Palmer said he had something that needed to be told. He then revealed some of the things he had done to his daughter Vicki several years earlier when she was still a child.

[90] There is some divergence between the evidence of Vicki Boer and the evidence of Messrs Cairns and Brown as to how the meeting proceeded from there. I have already ruled that I do not accept Ms Boer's evidence that the elders told her not to seek medical assistance and not to report the abuse to the authorities. These were important points about which she was certain in her own mind. Her memory on those was inaccurate. I am therefore very reluctant to rely on her evidence as to other details of the meeting where her evidence conflicts with that of Mr. Cairns and Mr. Brown.

[91] Although Ms Boer may have perceived the meeting as a confrontation, and while I am certain that it felt that way to her, I find that it did not actually proceed that way. Mr. Palmer opened by confessing some of what he had done. I accept the elders' description of the way Mr. Palmer conducted himself, that he was openly upset, stammering, tearful, and ashamed. Like them, I was struck by the similarity of their descriptions and the evidence given by Scott Boer of how Mr. Palmer appeared on the much later occasion when he discussed it with him. I also accept the elders' description of Vicki Boer as being very upset and weeping, but nevertheless able to give a coherent account of what happened. At times she added to, or corrected, details of Mr. Palmer's account. The elders asked her questions so they could determine the extent and nature of the abuse. Ms Boer admitted under cross-examination she did not complain to Mr. Cairns and Mr. Brown that she did not want to be there and never asked or attempted to leave.

[92] It is difficult to see what Mr. Cairns and Mr. Brown could have done differently. They were sympathetic to the plaintiff. She understood they believed her story. They knew it was Ms Boer who had started the process. They played no role in causing her to be there and were unaware of any ambivalence on her part. They had no reason to believe that she felt she was under any compunction to be there, nor were they aware that this session had anything to do with Matthew 18. It was reasonable, and indeed appropriate, in the circumstances for them to ensure that the plaintiff's voice was heard and that they not rely solely on Mr. Palmer's version of the events.

[93] That said, I accept Ms Boer's evidence that this was a traumatic experience for her. She was young and vulnerable and had not yet dealt with any of the complex issues arising from being the victim of childhood sexual abuse. Further, because of the sheltered religious environment in which she had been raised, she did not feel she had any choice but to follow the process directed by the Jehovah's Witness elders whom she had spoken to in Toronto. That process was psychologically harmful to her, the extent of which I will deal with later in these reasons. Although Mr. Cairns and Mr. Brown cannot be faulted in this regard, the fact remains that Ms Boer participated in this whole process because of the direction she received from Mr. Longworth and Watch Tower, and she did suffer some injury as a result.

(vi) The January 31, 1990 Meeting

[94] It is clear that the January 31, 1990 meeting was a Judicial Committee to determine the appropriate sanctions to be imposed on Mr. Palmer as a result of his sin, the sexual assault of his daughter.

[95] After the December 29, 1989 meeting, Mr. Cairns and Mr. Brown were satisfied that nothing further need be done. They had recommended medical attention for the whole family. They did not believe the two younger children were in any danger, but were nevertheless ensuring that the appropriate authorities were notified. From a spiritual perspective, they felt Mr. Palmer was genuinely repentant and had atoned for his sins by being more active in his religion. They believed, as well, that he had not repeated this sin and was a changed person. They therefore decided to do nothing further. However, Frank Mott-Trille took the position that the matter had not been dealt with properly, that the sin was serious and required more serious sanctions, and that a full Judicial Committee of three elders was required to make a decision. He raised the matter at a January meeting of the elders. It was directly because of his intervention that the January 31, 1990 meeting with the Palmer family took place.

[96] Mr. Cairns and Mr. Brown ultimately agreed with Mr. Mott-Trille's argument that a full Judicial Committee was appropriate. They asked Mr. Mott-Trille to be the third member of the panel, but he declined on the basis that he had a conflict. He took the position that they had a conflict as well, but Watch Tower head office did not agree. Since no other local elder would agree to serve on the committee, Mr. Cairns asked Dave Walker, an elder in a nearby congregation, to participate. There was much evidence at trial as to whether the Committee was properly constituted. I do not need to decide that point in order to deal with the plaintiff's claims in this action and I therefore will not do so.

[97] Ms Boer testified that the Judicial Committee meeting proceeded in exactly the same manner as the December 29 meeting, with all of the participants in the kitchen at the same time, and with her being required to recount her story in front of her father. She said it was very confrontational, even worse than the first meeting, and that she had a panic attack during the session. However, all three elders who testified at trial said that they spoke separately to each of Gower Palmer, Mary Palmer and their daughter Vicky. Having obtained Mr. Palmer's confession, they told Vicki what he had said and asked for her comments. The elders testified that there was no confrontation between the plaintiff and her father. She corrected some of the things he said, which she felt had minimized what happened. The evidence of Mr. Cairns, which I accept, was that this format was deliberately chosen to make it easier for the plaintiff. The elders said the plaintiff was upset and crying but able to regain her composure. They realized this was difficult for her but she never objected to being there, nor to the process. After speaking separately to the three family members, the elders met again with Mr. Palmer to discuss with him the sanctions to be imposed. They then met with all three family members briefly to encourage their spiritual progression and ended the meeting with prayer.

[98] In my opinion, Ms Boer is very confused about this last meeting. I have already noted above that her memory of the details of these meetings is not wholly reliable. The evidence given by the three elders at trial is consistent with the minutes of the meeting which they prepared immediately afterwards. Ms Boer did not make any notes at the time. It is apparent that she has done her best to reconstruct the events of 1989 and 1990 many years later. I note that her earlier attempts to put a chronology together contained obvious errors and were inconsistent with much of her evidence at trial. Where her evidence conflicts with that of Mr.

Cairns as to what happened at the Judicial Committee meeting on January 31, I accept his evidence.

(vii) Conclusions on Key Facts

[99] I set out in paragraph [46] above five crucial questions of fact that needed to be resolved. I have concluded as follows:

(a) Sheldon Longworth instructed the plaintiff that she was required to confront her father pursuant to Matthew 18: 15 – 18. Initially, she was instructed to tell her father to repent his sin to the elders in Shelburne. The plaintiff did not actually do this. Instead, with the acquiescence of Mr. Longworth, she asked her mother to tell her father to report the matter to the Shelburne elders.

(b) The December 29, 1989 meeting was set up by Mr. Palmer and it was he who invited the plaintiff to attend. Mr. Cairns and Mr. Brown did not know what the meeting was about and had no part in compelling the plaintiff to attend. The process which led to the plaintiff's attendance at the December 29, 1989 meeting was put in place as a result of advice given by Sheldon Longworth and Watch Tower that Matthew 18 applied. But for this advice, Ms Boer would not have attended. The meeting was psychologically harmful to her.

(c) The defendants did not instruct the plaintiff not to get medical help. She chose not to seek professional help herself, against the advice of the elders and Mr. Mott-Trille.

(d) The defendants did not instruct the plaintiff that her father's abuse should not be reported. On the contrary, the defendants directed Mr. Palmer to report himself to the C.A.S. and then followed up directly to ensure he had done so.

(e) The January 31, 1990 meeting was a Judicial Committee called to decide the appropriate sanction to be imposed upon Mr. Palmer as a result of his sin. It was not an application of Matthew 18. There was no confrontation between the plaintiff and her father.

H. FAILURE TO REPORT and FORBIDDING MEDICAL TREATMENT

[100] The plaintiff's claim against the defendants includes two bases of liability which are not viable based on my factual findings.

[101] The plaintiff alleged the defendants advised her not to seek medical treatment from a psychiatrist. I do not need to decide any legal issues to deal with this aspect of her claim. I have found on the facts that none of the defendants gave her such advice.

[102] The plaintiff also alleged that she sustained harm as a result of the defendants' failure to report her father's abuse to the appropriate authorities as required by law. I have already noted above that it is not necessary for me to rule on the precise extent of the reporting requirement in order to decide this case. It is also unnecessary for me to decide whether, as a question of law, a delay in reporting under the relevant legislation can support a cause of action in negligence or breach of fiduciary duty. I therefore will not do so.

[103] The defendants Brian Cairns and Steve Brown first learned of the abuse on December 29, 1989. The abuse was reported to the Children's Aid Society in Orangeville (the office with authority extending to Shelburne) in February 1990. It would appear that representatives of the C.A.S. interviewed the plaintiff's younger sister (who was still a child) to ensure she had not been a victim and was in no danger. The authorities were satisfied that no further steps needed to be taken. They did not even speak to the plaintiff. Therefore, there cannot have been any damages to the plaintiff as a result of the delay in reporting between December 29, 1989 and February 5, 1990.

[104] Counsel for the plaintiff argues that the Toronto elders had a duty to report, and that if they had exercised that duty by reporting in Toronto, C.A.S. authorities would have intervened prior to the December 29, 1989 meeting and the plaintiff would have been spared the trauma of the two "confrontations" with her father. There is no factual foundation for that argument. There is no reason to believe the Toronto office of the C.A.S. would have taken any steps whatsoever since the alleged abuser lived outside the Toronto area, as did any girls vulnerable to future abuse at his hands. Ms Boa was by then an adult and outside the jurisdictional mandate of any Children's Aid Society. Even if the Toronto office had decided to intervene, there is no reason to believe they would have handled the situation any differently than the Orangeville office. In particular, there is no evidence to establish that a report to the Toronto C.A.S. would have had any impact on how the plaintiff was treated by the elders. Therefore, even if there was any liability for the delay in reporting, there is no causal link between that conduct and any harm suffered by the plaintiff.

I. BREACH OF FIDUCIARY DUTY

[105] The plaintiff claims damages for breach of fiduciary duty based on the manner in which the defendants dealt with her after she disclosed her father's abuse. Her main focus is on the "confrontation" meetings with her father, which she alleges she attended only because she was required to by the elders. She argues that forcing her to attend these meetings was harmful to her and inconsistent with the fiduciary duty of the defendants to act in her best interests. There was also considerable attention at trial to the aftermath within the Jehovah's Witness community when rumours circulated about the plaintiff's allegations of abuse. The plaintiff believes that the relatively insignificant punishment meted out to her father led others in the community to believe she had made false allegations against him. She also believes that

members of the community blamed her somehow for the internal struggles among the elders of the congregation. As a result of all of this, she felt she was shunned within the community, which was also psychologically harmful. Although it is not entirely clear to me whether this is asserted as a basis for recovery of damages for breach of fiduciary duty, for the sake of completeness, I will deal with it as if it were.

[106] In assessing a claim for breach of fiduciary duty, the typical starting point is a consideration of the nature of the relationship between the parties to determine if a fiduciary duty arises. Upon concluding the defendant stands in a fiduciary relationship, one would go on to consider the nature and extent of that duty, and only then, whether it has been breached. In the case before me, I propose to approach from the other direction. I consider first the following question: assuming there is a fiduciary duty, can the conduct of any of the defendants be properly characterized as a breach of fiduciary duty? In my view, it cannot. This conclusion is fatal to the cause of action. It is therefore unnecessary for me to decide whether there was a fiduciary responsibility between the defendants and the plaintiff, or to resolve the far more complex question of the nature and extent of such a responsibility in circumstances such as these where there may be competing issues of religious freedom. The resolution of those issues is better left to a situation where the disposition of the case requires it.

[107] The concept of fiduciary duty is inextricably linked to principles of trust, loyalty and good faith. In *Fiduciary Duties in Canada*, looseleaf (Toronto: Thomson Canada Ltd., 2000), Mark Ellis, at p. 1-1 seeking to define "fiduciary", cites the following words of Southin J.A. in *Jostens Canada Ltd. v. Gibsons Studio Ltd.* (1997), 99 B.C.A.C. 35, 162 W.A.C. 35, 42 B.C.L.R (3d) 149, [1998] 5 W.W.R. 403 (B.C.C.A.) at para. 19:

> The word itself [fiduciary] is of Latin origin – from the noun "*fiducia*" meaning "trust" which is related to the noun "*fidelitas*" from which we derive the word "fidelity" through, if not a common descent, then association with the word "*fides*" (faith) which turns up in the phrase "*bona fide*", and which is itself closely linked to the word "*fidere*" (to trust), which brings us back to "*fiducia*".

[108] Just as some element of trust must be present before a relationship can be said to be fiduciary, so too must there be some form of betrayal before there can be breach of a fiduciary duty. That does not mean that malice or bad faith must be shown in order to establish breach of fiduciary duty, nor is it necessary in every case to show a personal benefit to the fiduciary in order to find liability. However, simple negligence by a fiduciary in carrying out his or her duties will not be sufficient to constitute breach of fiduciary duty.

[109] This principle is well developed in cases involving the solicitor-and-client relationship. It has long been recognized that a solicitor owes a fiduciary duty to his or her client. However, not every act by a solicitor which causes harm to the client can be properly characterized as a breach of that fiduciary duty. In *Fasken Campbell Godfrey v. Seven-up Canada Inc.* (1997), 142 D.L.R. (4th) 456 (Ont. Gen. Div.), aff'd (2000), 182 D.L.R. (4th) 315 (Ont. C.A.), application for leave to appeal dismissed, [2000] S.C.C.A. No. 143, the trial judge found at p. 483 that a failure to warn a client about a transaction was merely negligence, not

breach of fiduciary duty. To similar effect is the Ontario Court of Appeal's decision in *Canada Trustco Mortgage Co. v. Bartlet & Richardes* (1996), 28 O.R. (3d) 768 (C.A.), in which Weiler J.A. stated at p. 774:

> Although the professional relationship of solicitor and client is of a fiduciary nature, many of the tasks undertaken by a solicitor for a client may not involve a question of trust and therefore do not attract a fiduciary obligation.

[110] In *Girardet v. Crease & Co.* (1987), 11 B.C.L.R. (2d) 361 (B.C.S.C.), Southin J. held:

> "Fiduciary" comes from the latin "fiducia" meaning "trust". Thus, the adjective, "fiduciary" means of or pertaining to a trustee or a trusteeship. That a lawyer can commit a breach of the special duty of a trustee, e.g., by stealing his client's money, by entering into a contract with the client without full disclosure, by sending a bill claiming disbursements never made and so forth is clear. But to say that simple carelessness in giving advice is such a breach is a perversion of words. The obligation of a solicitor of care and skill is the same obligation of any person who undertakes for reward to carry out a task. One would not assert of an engineer or a physician who had given bad advice and from whom common law damages were sought that he was guilty of a breach of fiduciary duty. Why should it be said of a solicitor? I make this point because an allegation of breach of fiduciary duty carries with it the stench of dishonesty – if not of deceit then of constructive fraud. (Emphasis added)

Although this excerpt is from a British Columbia trial court decision, I believe it accurately reflects the law in Ontario. I note that Southin J.'s statement of the law was specifically approved by the Supreme Court of Canada in *Lac Minerals v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, both in LaForest J.'s majority opinion at para. 147 and in Sopinka J.'s partial dissent at para. 31, as well as by the Ontario Court of Appeal in *Canada Trustco Mortgage Co. v. Bartlet, supra*, at p. 774.

[111] There have been other decisions from British Columbia courts which have applied similar principles: *e.g. W.R.B. v. Plint*, [2001] B.C.J. No. 1446 (S.C.); *J.H. v. British Columbia*, [1998] B.C.J. No. 2926 (S.C.) and *C.A. v. Critchley*, [1998] B.C.J. No. 2587 (C.A.). In *C.A. v. Critchley* the British Columbia government had contracted with the defendant Critchley to operate a wilderness group home for troubled male youths, including the plaintiffs. Critchley repeatedly physically and sexually abused the plaintiffs who had been entrusted to his care. The Court of Appeal upheld the trial judge's ruling that the government was vicariously liable for Critchley's torts. However, the Court of Appeal reversed the trial judge's finding that the government was itself in breach of its fiduciary duty to the plaintiffs. McEachern C.J.B.C., writing the lead decision, reviewed the Supreme Court of Canada jurisprudence on breach of fiduciary duty and concluded that such a finding should not be made "without personal wrongdoing beyond possible carelessness or negligence": see paras 74-84. He then held, at para 85:

> Applying this approach, I conclude that it would be a principled approach to confine recovery based upon fiduciary duties to cases of the kind where, in addition to the other requirements such as vulnerability and exercise of a discretion, the defendant personally takes advantage of a relationship of trust or confidence for his or her direct or indirect personal advantage. This excludes from the reach of fiduciary duties many cases that can be resolved upon a tort or contract analysis, has the advantage of greater certainty, and also protects honest persons doing their best in difficult circumstances from the shame and stigma of disloyalty or dishonesty. (Emphasis added)

[112] I agree with most of what Chief Justice McEachern said on this topic in the *Critchley* case, although I would stop short of requiring a direct or indirect personal advantage to the fiduciary in order to constitute breach of fiduciary duty. The vast majority of cases in which breach of fiduciary duty is established will involve some benefit to the fiduciary, just as they will typically involve a detriment to the person to whom the duty is owed. However, in my view, neither is an absolute requirement in order to establish breach of fiduciary duty. What is required is conduct by the fiduciary which is in some manner a betrayal of the trust relationship. Negligence in carrying out fiduciary obligations, while subject to redress through tort or contract remedies, ought not to be characterized as a breach of the fiduciary duty without some element of betrayal or bad faith on the part of the fiduciary. For example, suppose a trustee responsible for administering a fund for the benefit of several beneficiaries distributes the fund unequally. If the trustee does this deliberately, intending to benefit one beneficiary over the others due to favouritism towards the one or animus towards the others, that would be breach of fiduciary duty regardless of whether there was any direct or indirect benefit to the trustee. However, if the unequal distribution was due to an arithmetical error, this would merely be negligence, not breach of fiduciary duty.

[113] Applying these principles to the case before me, I find there was no breach of fiduciary duty by any of the defendants. Assuming (without deciding) the existence of a fiduciary relationship, and assuming harm to the plaintiff from attending the two meetings with her father and her treatment by members of the congregation thereafter, there was no element of betrayal or bad faith on the part of any of the defendants such as would make them liable for breach of fiduciary duty.

[114] I will deal first with the first meeting on December 29, 1989. The plaintiff's position is that she only attended this meeting because she was advised by Sheldon Longworth that she was required to do so as part of the application of Matthew 18. Although Mr. Longworth is not named as a defendant, the plaintiff argues that the defendants Watch Tower and/or John Didur are responsible for the conduct of Mr. Longworth. I have found as a fact that Mr. Longworth told the plaintiff she was required to apply Matthew 18 in this situation. I have also found that Mr. Longworth's advice in this regard would appear to be contrary to the official position of the Church, which is that Mathew 18 has no application to this type of sin. However, Mr. Longworth was sympathetic to the plaintiff and did not act out of any self-interest. He passed along to her what he honestly believed to be the action required by the Scripture and by the Jehovah's Witness faith. That was the extent of his involvement. Likewise, there is no

evidence that the people at head office advising Mr. Longworth with anything but the best of intentions. I find as a fact that there was no element of breach of trust or bad faith on their part. In my opinion, even if the advice given to Ms Boer which caused her to attend the December 29, 1989 meeting was inaccurate or negligently given, it cannot be characterized as breach of fiduciary duty.

[115] The December 29, 1989 meeting was set up by Gower Palmer. Brian Cairns and Steve Brown did not know what the December 29, 1989 meeting was about until after they arrived. They therefore have no responsibility whatsoever for the fact that the plaintiff attended. The plaintiff did not tell them she did not wish to be there, and she did not ask to leave. They were sympathetic to her during the meeting. Nothing they did or said in the course of that first meeting could be properly construed as breach of fiduciary duty.

[116] Messrs Cairns and Brown did set up the Judicial Committee for January 30, 1990, not as a matter of personal self-interest, but rather in the course of their duties as elders of the congregation in order to deal with the transgressions of a congregant. While their actions may have been hurtful to the plaintiff, it cannot be said they acted out of malice or in bad faith. They believed they were doing the right thing and they did not simply ignore the plaintiff's interests. For example, in the second meeting, although they did review the allegations of abuse with the plaintiff, they did not require her to go through that exercise with her father present. Likewise, the head office personnel advising the local elders did nothing that could be characterized as disloyalty or bad faith. Accordingly, I find no breach of fiduciary duty as a result of the January 30, 1990 meeting.

[117] Mr. Cairns and Mr. Brown were not responsible for spreading rumours about the plaintiff in the community. They maintained the confidentiality of the information they had received. To the extent there were problems among the elders, there is certainly no evidence that either Mr. Cairns or Mr. Brown considered Ms Boer to be in any way responsible for that and no evidence that they ever communicated such a view to others. There is no evidence that they shunned the plaintiff, nor that they instructed others to do so. Therefore, even if the perception of others within the congregation was as Ms Boer describes (which also is not proven), there is no basis for placing any blame for that at the feet of these defendants. Ms Boer is of the view that her father was dealt with too leniently by the Judicial Committee and that this damaged her own reputation in the community. I will not comment on whether the Judicial Committee made the right decision as to the category of sin committed, the extent of Mr. Palmer's repentance and the appropriate sanctions for his spiritual wrongdoing. Those are matters far beyond the purview of this court. However, I do find as a fact that none of the personal defendants was motivated by any ill will towards the plaintiff, nor bias in favour of her father. They acted sincerely and honestly in carrying out their tasks as elders of the congregation. There was no element of bad faith. There was no breach of fiduciary duty.

[118] In the result, therefore, the plaintiff's cause of action for breach of fiduciary duty fails.

J. NEGLIGENCE

[119] The plaintiff also sues for negligence. In order to establish a cause of action, she must show: (i) that the defendants owed her a duty of care; (ii) that the defendants breached that duty of care; (iii) that it was reasonably foreseeable she would be harmed as a result; and (iv) that she was in fact harmed.

(i) Position of the Parties

[120] The plaintiff argues that she was dependent upon the various defendants because of her upbringing as a Jehovah's Witness and that they would have known she felt she had no choice but to follow their direction. She claims that the defendants were negligent in directing her to confront her father and knew or ought to have known she would be psychologically harmed by that process. She further argues that the defendants' handling of her father's conduct within the congregation was negligent and that this caused her additional harm.

[121] The defendants rely on the constitutionally entrenched freedom of religion which, they argue, prevents any civil liability from attaching to elders who have applied their religious beliefs in accordance with their conscience. They deny the existence of any duty of care in the course of pastoral counselling. They also point to the fact that Vicki Boer was an adult when she voluntarily sought out the elders, that she was requesting a remedy in accordance with the Jehovah's Witness faith, and that she voluntarily chose to participate in the Church's process. The defendants further argue that their only responsibility was to provide spiritual guidance and that the courts ought not to intervene in matters involving theological principle and the imposition of religious sanctions by the church. Alternatively, the defendants submit that their actions did not fall below the applicable standard of care and, in any event, caused no harm.

(ii) The American Approach: No Tort of Clergy Malpractice

[122] The defendants rely on a line of cases in which American courts have refused to recognize a tort of clergy malpractice. The American case law flows from the judicial interpretation of the First Amendment to the United States Constitution, which provides, in part, "Congress shall make no law respecting an establishment of religion, or prohibit the free exercise thereof . . ." These two clauses are known as the Establishment Clause and the Free Exercise Clause. American courts have held that the Establishment Clause prohibits all forms of government action, including both statutory law and court action. Any government or court activity which would foster "an excessive entanglement" with religion runs afoul of the Establishment Clause. Thus, courts have held that "civil tort claims against clerics that require the courts to review and interpret church law, policies or practices in the determination of claims are barred by the First Amendment under the entanglement doctrine": *Franco v. The Church of Jesus Christ of the Latter-Day Saints* 21 P.3d 198 (Utah 2001) at p. 203.

[123] Cases involving allegations of negligence against clergy in carrying out their pastoral duties have uniformly been dismissed as constituting a violation of the Establishment Clause under the First Amendment. The courts have reasoned that determining the nature and extent of the standard of care to be imposed on a member of the clergy would require the courts

to rule on the level of expertise normally required of other similar members of that profession. According to the Supreme Court of Utah in *Franco, supra*, at para 23:

> This would embroil the courts in establishing the training, skill and standards applicable for members of the clergy in this state in a diversity of religions professing widely varying beliefs. This is as impossible as it is unconstitutional; to do so would foster an excessive government entanglement with religion in violation of the Establishment Clause.

[124] In *Franco*, a seven-year old girl had been sexually abused by a fourteen-year old member of her religious community. She repressed the memory, disclosing it for the first time when she was fourteen. She and her parents approached the bishop and the president of their church who advised her to forgive, forget and seek atonement. They asked for a referral to a registered mental health professional, but were referred instead to someone they later learned was unlicensed. The family then sought help from a qualified secular professional, who reported the abuse to the police. As a result, the Franco family was ostracized by the religious community. The Francos sued for clergy malpractice, gross negligence, negligent infliction of emotional distress, breach of fiduciary duty and fraud. All claims were dismissed summarily. With respect to the fiduciary duty and negligence-based claims, the Supreme Court held at p. 205 that these all related to alleged mishandling by church officials in the context of an ecclesiastical counselling relationship and hence were merely a "roundabout way of alleging clergy malpractice", which was barred by the First Amendment.

[125] In *Pritzlaff v. Archdiocese of Milwaukee*, 194 Wis.2d 302; 533 N.W. 2d 780 (1995), the Supreme Court of Wisconsin dismissed the claims of a plaintiff who had been sexually assaulted by a priest while she was a high school student. The claim against the church was based on alleged negligence in hiring, training and supervision of a priest who was a pedophile. The Supreme Court held at p. 236 that the First Amendment prevents a court from inquiring into what makes one suitable to serve as a Catholic priest since "such a determination would require interpretation of church canons and internal church policies and practices."

[126] In *Schmidt v. Bishop*, 779 F. Supp. 321 (1991) the plaintiff sued the Presbyterian Church and one of its pastors, to whom her parents had sent her for "emotional, spiritual and familial counselling" when she was twelve years old. During the course of the counselling, the pastor sexually molested her. The United States District Court for the Southern District of New York found that these facts would support an action for battery or some other intentional tort. However, the limitation period for such an action had expired. The Court dismissed the plaintiff's claims framed in negligence and breach of fiduciary duty as against the pastor and the church because of the difficulty in articulating the scope of the duty owed or the standard of care without getting into religious philosophy or ecclesiastical teachings. The Court said clergy members and churches could be held liable for negligence arising outside pastoral duties, *e.g.* driving the Sunday School van; but the Court held that providing counselling to a member of the congregation is a normal part of a pastor's religious activities and hence the First Amendment precludes liability for negligence.

[127] The defendants in the case before me rely upon the decision of the Maine Supreme Judicial Court in *Bryan R. v. Watch Tower Bible and Tract Society of New York*, (1999) M.E. 144. When the plaintiff Bryan R. was an adolescent, he was molested by an adult member of his Jehovah's Witness congregation, the defendant Baker. Some years before, Baker had molested another child in the community. At the time, he was disciplined by the elders for his misdeeds, but later was permitted to resume his activities as an ordinary member within the congregation. Bryan alleged that the church and its elders were liable to him for negligence and breach of fiduciary duty, arguing that manner in which the elders dealt with Baker's earlier transgressions, and the elders' failure to warn him about Baker, made it possible for Baker to obtain the plaintiff's trust and to have the opportunity to assault him. The plaintiff's claims against the church and the elders were dismissed. The Court held there was no duty to protect members of the congregation from the wrongdoing of others. Further, any effort to hold the church responsible "would require direct inquiry into the religious sanctions, discipline, and terms of redemption or forgiveness that were available within the church in the context of this claim, an inquiry that would require secular investigation of matters that are almost entirely ecclesiastical in nature": *Bryan R.* at para. 27-28.

[128] The only American case to which I have been referred which has recognized a cause of action in negligence against a member of the clergy is *Berry v. Watch Tower Bible and Tract Society of New York*, a decision of the New Hampshire Superior Court (Southern District), released on February 6, 2003 and brought to my attention by counsel for the plaintiff while my decision in this case was still under reserve. The plaintiff in *Berry* had been physically and sexually abused by her stepfather in the 1980s when she was between three and nine years old. The family belonged to the Jehovah's Witness church. The plaintiff's mother told the elders of their congregation on at least ten occasions that her husband was abusing her children. The elders instructed the mother to tell no one about the abuse or face potential disfellowshipping (being ejected from the faith). At the time, there was a requirement under New Hampshire state law for ministers to report suspected cases of child abuse. The plaintiff sued Watch Tower under various causes of action including a claim in negligence. The defendants moved for summary judgment, contending that their religious motivation for not reporting in accordance with statutory law placed them beyond civil reproach by virtue of the Free Exercise Clause of the First Amendment.

[129] The New Hampshire Superior Court held that the right to free exercise of religion does not operate to relieve an individual from the obligation of complying with neutral laws of general application. Therefore, the defendants could not "rely on their religious views to excuse their failure to comply with the applicable child abuse reporting statutes". Further, in dealing with the portion of the plaintiff's case founded in negligence, the Court found the elders owed a duty of care to the plaintiff, even in the absence of direct privity. Groff J. held (at p. 12):

> In this case, the plaintiff's mother sought the elders' advice and counsel regarding the sexual abuse of her children by her husband, a member of the congregation. The overwhelming risk of harm to the plaintiff from the continuing abuse by her father, and the magnitude of that potential harm to her must necessarily have been apprehended and understood by any reasonable person. This rendered the elders'

> conduct unreasonably dangerous in view of the horrific consequences to the plaintiff by not taking steps to report the abuse or properly counsel the plaintiff's mother.
>
> The prevention of sexual abuse of children is one of society's greatest duties. In this case, to impose such a duty places little burden upon the defendants. The burden requires only common sense advice to the church member and a reporting of the abuse to the authorities. Clearly, the social importance of protecting the plaintiff from her father's continued brutal sexual abuse outweighs the importance of immunizing the defendants from extended liability. The court finds that the defendants did owe a duty of care to the plaintiff, despite the absence of privity between them. Therefore, the motion for summary judgment as to the plaintiff's cause of action in negligence is DENIED. (Emphasis added)

[130] The Court in the *Berry* case referred briefly to the decision in *Bryan R.*, but distinguished it on its facts. With respect, the *Berry* decision seems to me to be at odds with the overwhelming trend in United States, which is to refuse to consider any cause of action that would involve imposing a duty of care on a clergy member engaged in any form of pastoral conduct, including counselling congregation members. I also note that the Court's decision in Berry seems to be based on a consideration of the Free Exercise Clause, whereas most of the other cases to which I have been directed turned on the Establishment Clause. Given the extreme facts in *Berry*, in particular the clear breach of the statutory reporting requirement, I do not see *Berry* as authority overriding the long-standing American case law. Accordingly, I conclude that had Ms Boer's action been brought in the United States, it would likely be subject to summary dismissal based on these cases.

(iii) The Canadian Approach: Balancing Religious Freedom Against the Rights of Others

[131] As in the United States, there is a strong tradition in Canadian law of protecting the fundamental right of all persons to freedom of religion and conscience. Religious freedom is specifically guaranteed under the *Charter of Rights and Freedoms*, and discrimination on the basis of religion is prohibited under s. 15 of the *Charter*, as well as under human rights legislation in all of the provinces and in numerous other statutes.

[132] I accept the defendant's position that protection of freedom of religion is an important factor to be considered in this case. I also accept that the courts should generally be reluctant to intervene in matters which are purely spiritual, particularly involving the discipline by the church of one of its members. Traditionally, courts have refused to allow their process to be used for the enforcement of a purely ecclesiastical decree or order, exercising civil jurisdiction only where some property or civil right is affected thereby: *Ukranian Greek Orthodox Church of Canada v. Ukranian Greek Orthodox Cathedral of St. Mary the Protectress*, [1940] S.C.R. 586; *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165.

[133] However, Canadian courts have held that freedom of religion is not absolute. Where the exercise of religious beliefs adversely affects the rights of others, the courts can and

will intervene: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141; *Young v. Young*, [1993] 4 S.C.R. 3; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315.

[134] There are obviously many similarities between the right to freedom of religion in the United States and the right to freedom of religion enshrined in the Canadian Constitution. However, the constitutional language is not identical and the same legal analysis does not necessarily follow. In particular, American case law turning on the interpretation of the Establishment Clause is not directly applicable in the Canadian context. I was not referred to, and am not aware of, any Canadian case which has considered the duty of care expected of a clergy member in circumstances similar to the one before me. However, Canadian courts have not been reluctant to find a fiduciary relationship between a minister or priest and a member of the congregation, provided the usual tests for the existence of such a relationship are met. The fact that the relationship arises in a religious setting has not been a seen as a bar to imposing a fiduciary duty of care: *Deiwick v. Frid*, [1991] O.J. No. 1803 (Gen. Div.); *W.K. v. Pornbacher*, [1997] B.C.J. No. 57 (B.C.S.C.).

[135] Similarly, the mere fact that the relationship between the plaintiff and defendant arises in a religious context is not a bar to there being a cause of action in negligence: *W. K. v. Pornbacher, supra, M.T. v. Poirier*, [1994] O.J. No. 1046 (Gen.Div.); *F.S.M. v. Clarke*, [1999] 11 W.W.R. 301 (B.C.S.C.); *W.R.B. v. Plint*, [2001] B.C.J. No. 1446 (S.C.).

[136] The Supreme Court of Canada has consistently ruled that freedom of religion cannot be used to shield conduct which harms others. In *B. (R.) v. Children's Aid Society, supra*, the Supreme Court of Canada upheld lower court rulings giving the Children's Aid Society authority to consent to blood transfusions for a young child after her parents refused such treatment as being contrary to their religious beliefs as Jehovah's Witnesses. Iacobucci and Major JJ., in a concurring opinion, wrote in that case at para. 226:

> Just as there are limits to the ambit of freedom of expression (e.g. s. 2(b) does not protect violent acts: *R. v. Zundel*, [1992] 2 S.C.R. 731, at pp. 753 and 801; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 732 and 830), so are there limits to the scope of s. 2(a), especially so when this provision is called upon to protect activity that threatens the physical or psychological well-being of others. In other words, although the freedom of belief may be broad, the freedom to act upon those beliefs is considerably narrower, and it is the latter freedom at issue in this case. The fact that "freedom" does not operate in a vacuum was underscored by Dickson J. (as he then was) in his seminal decision in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 337:
>
> > Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the

> fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

[137] Similarly, the majority judgment in *B. (R.) v. Children's Aid Society* case, delivered by LaForest J., provides at para. 107:

> However, as the Court of Appeal noted, freedom of religion is not absolute. While it is difficult to conceive of any limitations on religious beliefs, the same cannot be said of religious practices, notably when they impact on the fundamental rights and freedoms of others. The United States Supreme Court has come to a similar conclusion; see *Cantwell v. Connecticut*, 310 U.S. 296 (1940). In *R. v. Big M Drug Mart Ltd., supra*, this Court observed that freedom of religion could be subjected to "such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others" (p. 337).

[138] In *Young v. Young* and *P.(D) v. S.(C.), supra*, the Supreme Court of Canada held that a parent's religious activity can be restricted by the court when the activity is against the child's best interests, without the restriction infringing the parent's freedom of religion. As noted by McLachlin J. in *Young v. Young*, at para. 218

> It is clear that conduct which poses a risk of harm to the child would not be protected. As noted earlier, religious expression and comment of a parent which is found to violate the best interests of a child will often do so because it poses a risk of harm to the child. If so, it is clear that the guarantee of religious freedom can offer no protection.

[139] The leading cases in this area have arisen when the religious values of parents have been found to be harmful to children. However, there is no reason to restrict the principles established in these cases to cases involving children. Laws, both statutory and common law, whose purpose is to protect the vulnerable cannot be thwarted by a claim that the conduct harming the vulnerable person is permitted, or even mandated, by the perpetrator's religious convictions. In extreme situations, such a restriction on religious freedom is necessary to prevent violence against others in the name of religion. Further, I can see no principled reason to restrict the protection to intentional torts; it should have equal application to other causes of action such as negligence. My starting point, therefore, is that a tort committed by a person in the course of what he or she sincerely believes to be a religious duty is not automatically shielded from scrutiny by the courts by operation of the constitutional protection for freedom of religion. Where the rights of an individual are in conflict with the religious freedom rights of another, the courts can, and will, balance the competing rights in considering what, if any, remedy is appropriate.

[140] That is not to say that courts are entitled to disregard issues of religious freedom entirely in deciding cases of this nature. On the contrary, principles of religious freedom will be

integral to such decisions. However, the fact that a principle of religious freedom may be involved will not necessarily be a bar to a litigant's right to a remedy before the courts. The extent to which the rights of the individual will take priority over the principles of religious freedom will depend on the circumstances of each case. As is demonstrated by the cases to which I have referred above, courts will commonly favour the health and safety of children over the religious values of their parents if their religious practices are harmful to their children. The same would hold true for other vulnerable persons who are harmed as a result of the religious beliefs of others. The free will of competent adults to choose their own religious faith must be recognized. Having chosen a particular religion, or voluntarily elected to remain a member of it, a person will not be heard to complain later that he was injured in some way as a result of the application of principles of that faith. Likewise, matters of a purely internal nature such as membership or discipline within a congregation would rarely, if ever, be subject to review by the courts. In each case the court must consider the nature of the religious principle relied upon, the context in which it arises, the circumstances of the person harmed and the nature of the harm in the course of determining whether the rights of the plaintiff should be recognized notwithstanding the impact on the religious freedom of the defendant.

(iv) Analysis: The December 29, 1989 Meeting

(a) Causation

[141] I have found as a fact that the plaintiff attended the December 29, 1989 meeting because she had been told by Sheldon Longworth that she was required to confront her father pursuant to Matthew 18:15-18. I have also found that her attendance at that meeting was psychologically harmful to her. But for the advice given by Mr. Longworth, she would not have attended. Thus, there is a direct causal link between the advice given by Mr. Longworth and the harm sustained by the plaintiff.

(b) Duty of Care

[142] The defendants acknowledge in their written submissions that the test for determining whether a duty of care exists in this type of situation involves the application of the classic rule in *Donoghue v. Stevenson*, [1932] A.C. 532 (H.L.) at 580. I agree. However, the *Donohue v. Stevenson* test must also be considered within the principles discussed in *Anns v. Merton London Borough Council*, [1978] A.C. 728, [1977] All E.R. 492 (H.L.) (*"Anns"*), as accepted by the Supreme Court of Canada in *City of Kamloops v. Nielson et al.* (1984), 10 D.L.R. (4th) 641. In 2001, the Supreme Court of Canada released two decisions which refined and clarified the application of the *Anns* test: *Cooper v. Hobart* (2001), 206 D.L.R. (4th) 193 (*"Cooper"*); *Edwards v. Law Society of Upper Canada* (2001), 206 D.L.R. (4th) 211 (*"Edwards"*). The approach to be applied is summarized in *Edwards* as follows (at paras 9-10):

> At the first stage of the *Anns* test, the question is whether the circumstances disclose reasonably foreseeable harm and proximity sufficient to establish a prima facie duty of care. The focus at this stage is on factors arising from the relationship between the plaintiff and the defendant, including broad

> considerations of policy. The starting point for this analysis is to determine whether there are analogous categories of cases in which proximity has previously been recognized. If no such cases exist, the question then becomes whether a new duty of care should be recognized in the circumstances. Mere foreseeability is not enough to establish a prima facie duty of care. The plaintiff must also show proximity that the defendant was in a close and direct relationship to him or her such that it is just to impose a duty of care in the circumstances. . .
>
> If the plaintiff is successful at the first stage of *Anns* such that a prima facie duty has been established (despite the fact that the proposed duty does not fall within an already recognized category of recovery), the second stage of the *Anns* test must be addressed. That question is whether there exist residual policy considerations which justify denying liability. Residual policy considerations include, among other things, the effect of recognizing that duty of care on other legal obligations, its impact on the legal system and, in a less precise but important consideration, the effect of imposing liability on society in general.

[143] The first consideration is whether there are analogous categories of cases where a duty of care has been recognized. There have certainly been cases where a church or member of the clergy has been found liable for negligence. However, these cases have tended to arise where the church has been connected in some way to physical or sexual abuse suffered by the plaintiff, *e.g.* failing to take action when child abuse has been reported, failing to properly supervise or discipline staff, or failing to have safeguards in place to prevent opportunities for child abuse: *F.S.M. v. Clarke, supra*; *W.K. v. Pornbacher, supra*; *W.R.B. v. Plint, supra*; *M. T. v. Poirier*, [1994] O.J. No. 1046 (Gen.Div.). I was not referred to and am not aware of any case in which a member of the clergy functioning in a counselling capacity has been found to owe a duty of care in negligence. However, there is one case in which a minister providing counselling to a husband and wife was found to owe a fiduciary duty to them (which he breached by having a sexual affair with the wife): *Deiwick v. Frid, supra*. There are also numerous examples of a duty of care being applied to other types of counsellors, such as psychologists or social workers. In my view, these situations in which a duty of care has been found are sufficiently similar to be considered analogous to the case before me, such that a duty of care can be said to arise here without going any further in the *Anns* analysis. However, since there are no cases directly on point, and in the event I have erred on this aspect of the test, it is appropriate to consider all aspects of the *Anns* test before coming to a final conclusion on whether there is a duty of care in this case.

[144] The second part of the first stage of the *Anns* test involves a consideration of proximity and foreseeability in order to determine whether a new duty of care should be recognized. In *Cooper*, the Supreme Court of Canada noted (at para 31) that "proximity" is a term used to characterize the type of relationship in which a duty of care may arise and that these relationships should be identified through the use of categories. The category of relationship in this case would be that of a minister providing counselling and advice to a member of his congregation who has come to him for help.

[145] In *Cooper*, the Supreme Court quoted with favour the words of Lord Atkin, who observed in *Donohue v. Stevenson* that proximity extends "to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act". Further, Lord Atkins held a duty is owed to "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts and omissions which are called into question": *Cooper* at para 32. The Supreme Court of Canada said in *Cooper* that courts should look to factors such as "expectations, reliance, representations and the property or other interests involved" in evaluating the closeness of the relationship between the plaintiff and the defendant and in determining whether it is "just and fair" to impose a duty of care on the defendant: *Cooper* at para 34.

[146] There is obviously a close and direct relationship between a member of the clergy and a parishioner who goes to him for advice. In that situation the clergyman would know that the person seeking his advice would be directly affected by the advice he provides. In providing that advice, he would clearly have his parishioner in his contemplation as a person who would be affected by the advice he gives. Counselling and providing advice to parishioners is part of the normal duties of a member of the clergy. Further, clergymen are typically regarded by members of their congregation as having a special status or position of authority. The relationship is one of trust. The parishioner would, to the knowledge of the clergyman, be likely to rely on him. It would be reasonable for the parishioner to expect that the clergy member would exercise a reasonable degree of care in dispensing advice. Because of the nature of this relationship, turning to one's minister for advice is fundamentally different from looking for advice from friends or family. Given the direct relationship, it is easily foreseeable that harm may befall the parishioner if the member of the clergy is negligent in dealing with the matter before him. In my view, this situation is precisely the kind of close and direct relationship in which courts have recognized it would be just and fair to impose a duty of care on the person providing the advice. Thus, the first stage of the *Anns* test is met.

[147] The defendants submit that the role of the elders in the case before me is closely akin to the pastoral counselling referred to in *F.S.M. v. Clarke*, [1999] 11 W.W.R. 301 (B.C.S.C.) and suggest, therefore, that no duty of care ought to arise. In *F.S.M. v. Clarke*, the trial judge, Dillon J., imposed an onerous burden of care on defendants who were various emanations of the Anglican Church. The plaintiff had been sent to a residential school for native children when he was a child and had been repeatedly sexually assaulted by Clarke, his dormitory supervisor, while there. The school was operated by the Anglican Church, and was described at para. 7 as "a religious institution run with military precision" and, at para. 171, as a "pervasive, purposeful Anglican environment controlled by an Anglican administrator who was also a clergyman". In this context, at para. 173, Dillon J. imposed a duty on the Anglican Church to "ensure a proper moral environment and to care for known moral harm" that might befall the plaintiff. The Anglican Church was held liable for failing to properly supervise its employee Clarke, thereby creating an environment in which Clarke could abuse the plaintiff. Dillon J. also found at para 182 that the Anglican Church further breached its duty in "failing to investigate properly and report Clarke's sexual abuse after it became directly known to them and in failing to provide any counselling or care to F.S.M. after the disclosure." Dillon J.

acknowledged at para. 173 that the "potential breadth of this duty might be unreasonably overwhelming", but considered this appropriate when viewed "solely within the facts of this case involving physical sexual abuse [sic]". The reason for such a broad duty of care was the closed nature of the society in which it arose. Dillon J. stated at para 172:

> This is not a situation of simple pastoral counselling as occurs within a parish. F.S.M. was purposefully placed in an institutional Anglican environment without access to outside influence in order to further his religious education. There is not the distance here seen in regular contact between parishioner and clergyman where the parishioner returns to home and the influence of others. Here, the Anglicans undertook a role to influence F.S.M.'s life fundamentally, with the expectation of his blind obedience enforced by discipline. The Anglicans knew that an emotional dependence would arise in the children at the school through the intimacy and the pervasiveness of the relationship that was fostered between the children and the adults directly responsible for their care.

[148] I do not see *F.S.M. v. Clarke* as authority for the proposition that in a counselling relationship between a clergyman and congregant there can be no duty of care. On the contrary, the case confirms that whether a duty of care arises will depend on whether the test defined in *Donoghue v. Stevenson* has been met. In distinguishing a situation of pastoral counselling from a highly regimented residential school, the Court in *F.S.M. v. Clarke* was dealing with the extent of the duty of care to be imposed, not whether there was any duty of care at all. I agree with Dillon J. in that case that the degree of control and domination exerted by the defendants over the plaintiff is a factor to be taken into account in determining the breadth of the duty of care to which the defendants will be held. However, the existence of such a degree of control is not a prerequisite to the existence of a duty of care.

[149] Having recognized a *prima facie* duty of care in this relationship, the second stage of the *Anns* test requires the court to consider whether there are residual policy considerations, apart from the relationship itself, which justify denying the existence of a duty of care. Such considerations include, but are not limited to, whether recognizing the duty would affect other legal obligations or the legal system generally and whether recognizing a duty of care "would raise the spectre of liability to an indeterminate class of people": *Cooper* at para 37-39.

[150] The defendants argue that societal interest in the protection of freedom of religion is contrary to the imposition of a duty of care in this situation. They further point to the difficulty of imposing a duty of care where, as here, the religious person has a conflict of interest as they are providing spiritual help to Mr. Palmer, Vicki Boer and to the congregation at large.

[151] The fact that a duty of care, or differing duties, may be owed to more than one person at the same time is not, in my view, grounds for denying the existence of any duty of care at all. The competing duties on a defendant may be factored into the standard of care to be imposed, or may be taken into account in determining whether there has been any breach of the duty of care. However, I do not see this as a compelling policy reason for denying any duty of care.

[152] As I have already stated (at paragraphs 131 to 140 above), protection of religious freedom does not mandate the denial of any cause of action in negligence against a church or member of the clergy. Principles of religious freedom may be taken into account in determining, on a case by case basis, what standard of care should be imposed, or whether any remedy is available. However, religious beliefs should not be an absolute defence to conduct that is harmful to others. The implications of denying any cause of action arising from negligent advice given by a church official could be enormous. It would provide complete immunity for potentially serious wrongdoing for which there might be no other remedy.

[153] Imposing a duty of care in the circumstances before me would not open the floodgates of liability to an indeterminate class of people, any more than imposing a duty of care in a doctor/patient or solicitor/client relationship would. This is a specific and direct relationship between the clergy and a member of the congregation seeking advice.

[154] Nor do I see any impediment to recognizing a duty of care because of problems within the legal system itself. I recognize the difficulty noted by the American courts in defining a standard of care in cases involving negligence by church officials. However, I do not see that as a reason for denying the existence of a duty of care altogether. Courts are called upon to determine standards of care in many complex situations, *e.g.* the standard of care for a neurosurgeon in a teaching hospital in a large urban center, or for a family medicine practitioner in a remote area. The trial judge who makes such a decision is not meddling in medicine or imposing the court's will on medical matters. Rather, the parties call evidence from experts on the standard of care and the judge decides the appropriate standard based on the weight of the evidence. Although coming to such a conclusion in a religious case is not without its difficulties, I do not see it as a significant departure from other cases routinely before the courts.

[155] Neither do I consider it beyond the ability of the court to determine whether a particular teaching or principle is truly a tenet of a particular religion. Courts and tribunals are often called upon to make similar determinations in discrimination cases, labour cases and wrongful dismissal actions where a particular course of conduct or hiring decision is said to be required by the religion of the employer or employee.

[156] I therefore conclude there is no general policy reason to negate the *prima facie* duty of care arising in a situation where a member of the clergy is providing advice and counseling to a member of his congregation. The *Anns* test is met. The next step is to determine whether that duty of care arose in the case before me.

[157] In the Jehovah's Witness faith, there is an even closer and more dependent relationship between members of the congregation and the clergy than is the case in most religions. For members of the Jehovah's Witnesses, religion is a pervasive and dominant influence in everyday life. Social contact with others outside the faith is discouraged and adherence to the instructions of the elders is required. Although the relationship between Ms Boer and the elders of her congregation did not involve quite the same degree of control and dependency as described by the Court in *F.S.M. v. Clarke*, neither was it a mere counselling relationship between minister and parishioner where the parishioner returns home to the

influence of family and others. Many of the aspects of dependency noted by Dillon J. in *F.S.M. v. Clarke* were also present here: *e.g.* a closed society isolated from outside influence, the pervasive nature of the religious influence, and the requirement of blind obedience. It was within this context that the relationship between the plaintiff and the defendants arose. Vicki Boer went to Sheldon Longworth because she was troubled and needed advice. She barely knew him. She consulted him solely in his capacity as an elder of her faith. She had been raised in her faith to put her complete trust in the elders. Obedience was required. To the knowledge of the elders and Watch Tower, she relied entirely upon the advice she was given and felt she had no option but to comply. Mr. Longworth was fully aware of her vulnerable emotional state. He was also aware that she dreaded the confrontation with her father which he counselled her was required. In this situation, there was a close and direct relationship between the elders and the plaintiff in which there was every expectation that she would rely upon and follow the advice she was given. Further, given her emotional state, it was readily foreseeable that the course of action recommended would likely cause further emotional harm to the plaintiff, the very type of harm which did occur. In these circumstances, I find that a duty of care did arise as between the elders and the plaintiff.

(c) Religious Freedom of the Defendants and the Plaintiff's Free Choice

[158] The defendants submit that the plaintiff was an adult in December 1989 when she voluntarily came to the elders seeking their intervention. She wanted the elders to be aware of her father's sin and wanted them to deal with it within the principles of the Jehovah's Witness faith. They argue that since she came to the Church seeking a religious solution, she cannot fault the Church elders for having dealt with the matter as required by their faith. They point out she was not compelled to attend the December 29th meeting; rather, she freely chose to attend.

[159] There are two fundamental difficulties with the defendants' analysis. First, the matter was not dealt with as required by their religion. The evidence at trial was clear that Matthew 18 has no application and that there is no requirement of the Jehovah's Witness faith that the victim of sexual abuse must confront her abuser and give him an opportunity to repent. Second, in all of the circumstances, I do not see the plaintiff's attendance at that meeting as an exercise of free will on her part. I will deal with both points in more detail.

[160] First of all, there is considerable merit to the argument that if a competent adult does not agree with her religion's position on a given topic, she has two choices: (i) she can choose to follow the church's teaching because she wishes above all to remain a member of the faith; or (ii) she can leave the religion. Having freely chosen to stay in the religion and accept its principles, she cannot later complain that she has suffered harm as a result of her own decision. But can a person be said to be responsible for her own harm, having freely chosen to follow her faith, when in fact the harm she sustained was not required by that faith? An example is illustrative. Suppose a member of the Jehovah's Witness faith is considering surgery and asks an elder if Jehovah's Witnesses are permitted to have blood transfusions. She is told, accurately, that this is not permitted within the Jehovah's Witness faith. Having considered the matter, she decides not to have a transfusion and sustains harm as a result. She has exercised free choice, deciding to follow the teachings of her religion rather than the advice of her medical doctor.

Next, suppose that a member of the Anglican Church faced with the same surgery asks her minister if Anglicans are permitted to have blood transfusions. In fact there is nothing in the Anglican faith to prevent blood transfusions. However, the minister gives his parishioner the wrong information and tells her blood transfusions are forbidden for Anglicans. Rather than give up her religion, and trusting the advice of her minister, she elects not to have the transfusion and is harmed. Can the second woman be said to have exercised free choice in the same manner as the first? I think not. The source of the second woman's harm is not her choice to follow the teachings of her religion, but rather her reliance on the incorrect advice of her minister.

[161] The plaintiff in the case before me is in the position of the second woman in my example. Vicki Boer believed that she was required to apply Matthew 18 in this situation. She was told this by Mr. Longworth to whom she had turned for help and advice. It is not fully clear whether Mr. Longworth misunderstood the advice he received from head office, or whether the advice given by head office was precisely what Mr. Longworth conveyed to the plaintiff. What is clear is that the advice he gave to the plaintiff was wrong. It was, therefore, the incorrect advice given to the plaintiff that caused her to attend that meeting, not her free choice to follow a principle of her religion. The harm she sustained flowed from her reliance on the incorrect advice provided by Watch Tower, through Mr. Longworth. It was not caused by any actual requirement of her religion. Ironically, in an action focused so extensively on principles of religious freedom, on the actual facts of the case there was no issue of religious freedom involved. It was all a mistake.

[162] The second difficulty I have with the defendants' position is that it is valid only if the plaintiff's decision to attend the December 29, 1989 meeting was truly an exercise of free will. The plaintiff says she was "forced" to attend the meeting by the elders, whereas the defendants say she "chose" to attend. In my view, this situation is directly analogous to one in which the defence of consent is asserted.

[163] In December 1989, Vicki Boer was a mentally competent adult person, legally capable of making her own decisions. In the absence of factors traditionally seen as vitiating consent (such as force, threat of force, or fraud), she is presumed to have attended the December 29th meeting as an exercise of autonomy and free will. However, the analysis of whether there has been genuine consent on her part does not end there. To determine whether the consent is genuine, one must also consider the power relationship between the parties, and in particular whether one party had the power to dominate and influence" the other: *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 at pp. 246-261.

[164] In *Norberg v. Wynrib* the defendant was the plaintiff's doctor. Dr. Wynrib was aware his patient was addicted to drugs. He offered to continue prescribing those drugs for her in exchange for sexual favours. At first she refused. However, after her other sources for obtaining the drugs dried up, she returned to Dr. Wynrib and agreed to his proposition. Years later, she sued Dr. Wynrib, asserting (among other things) the tort of battery and breach of fiduciary duty. Dr. Wynrib argued that Ms Norberg had consented to the sexual activity. At the Supreme Court of Canada, a panel of six judges all ruled in favour of Ms Norberg, but for differing reasons. Two of the six judges (McLachlin and L'Heureux-Dubé JJ.) decided the case based on breach of

fiduciary duty without reference to the issue of the defence of consent or the tort of battery. Of the remaining four judges, three (LaForest, Gonthier and Cory, JJ.) held that Dr. Wynrib's conduct constituted battery, rejecting the defence of consent in the circumstances. The sixth judge, Sopinka J. found in Ms Norberg's favour based on breach of contract. Sopinka J. considered the battery claim, but was of the view that the defence of consent had been established on the facts. Thus, three of the four judges dealing with the issue found there was no consent.

[165] LaForest J. delivered the judgment of the three judges whose decision was based on the tort of battery. He first noted, at p. 247, that the presumption of individual will and autonomy is "untenable in certain circumstances". In particular, "a position of relative weakness" can interfere with free choice. He therefore concluded that, "Our notion of consent must . . . be modified to appreciate the power relationship between the parties." Having considered the parallels between this approach to consent and the concept of unconscionability in contract law, LaForest stated, at p. 250:

> It may be argued that an unconscionable transaction does not, in fact, vitiate consent: the weaker party retains the power to give real consent but the law nevertheless provides relief based on social policy. . . In the same way, in certain situations, principles of public policy will negate the legal effectiveness of consent in the context of sexual assault. In particular, in certain circumstances, consent will be considered legally ineffective if it can be shown that there was such a disparity in the relative positions of the parties that the weaker party was not in a position to choose freely. (Emphasis added)

[166] LaForest J. went on to consider the impact of "special relationships", concluding that relationships where one party has power and authority over another are more likely to attract scrutiny in determining whether consent by the weaker party is genuine. He concluded that consent to a sexual relationship in such circumstances is "inherently suspect", referring to an article by Professor Phyllis Coleman as follows, at p. 255:

> An ability to "dominate and influence" is not restricted to the student-teacher relationship. Professor Coleman outlines a number of situations which she calls "power dependency" relationships: see Coleman, "Sex in Power Dependency Relationships: Taking Unfair Advantage of the 'Fair' Sex" (1988), 53 *Alb. L. Rev.* 95. Included in these relationships are parent-child, psychotherapist-patient, physician-patient, clergy-penitent, professor-student, attorney-client, and employer-employee. (Emphasis added)

[167] In applying these principles to the situation between Ms Norberg and Dr. Wynrib, the three majority judges (on this issue) held that she had not freely consented to the sexual activity. In coming to that conclusion, at p. 257 LaForest J. noted the "marked inequality in the respective power of the parties", the fact that Ms Norberg was "a young woman with limited education", the fact that her "need for drugs placed her in a vulnerable position" and the fact that this vulnerability was known to and exploited by Dr. Wynrib.

[168] Sopinka J. disagreed with the conclusion reached by his three fellow judges and would have held, on the facts, that Ms Norberg had consented to the sexual activity involved. He agreed that in determining the existence of factors tending to negate consent, it is necessary to "take a contextually sensitive approach". This, he stated, should be done on a case-by-case basis rather than establishing categories of relationships in which consent to sexual conduct would rarely be accepted as genuine. However, he stated at p. 304, "Certain relationships, especially those in which there is a significant imbalance in power or those involving a high degree of trust and confidence may require the trier of fact to be particularly careful in assessing the reality of consent."

[169] Before turning to the application of these principles to the case before me, it is relevant to consider the observations of the trial judge in *F.S.M. v. Clarke*, *supra*, in particular the excerpt I have quoted at paragraph [149] above. Dillon J. was dealing at that point with the breadth of the duty of care to be imposed. However, the point made has equal application to a consideration of the relationship between the parties in the course of deciding whether there has been an exercise of free will. Dillon J. noted the difference between a situation of "simple pastoral counselling as occurs within a parish" and a totally closed society in which the religious influence is "pervasive" and "blind obedience" expected of the members. Those are useful distinctions to bear in mind in considering the situation of Vicki Boer and the elders of her faith.

[170] In my opinion, the power dependency relationship between Vicki Boer and the elders of the Jehovah's Witness faith in 1989 was such that she cannot be said to have exercised free will in respect of directions given by the elders. Although she was legally of the age of majority (having turned nineteen in November 1989), Vicki Boer was a naïve and unsophisticated young woman who had led a sheltered life to that point. Furthermore, it was a life dominated by the influence of the Jehovah's Witness faith. She had been forbidden to develop relationships with anyone outside the faith and had been trained to obey the elders without question. Up until a few months before, she had lived at home with her family, in a rigidly religious household and within a small community in which everything in her life centered on her religion. Refusal to follow the direction of the elders was not an option if she wished to stay within her religion; and abandoning her religion would also constitute an abandonment of her family, friends and community, at a time in her life when she was emotionally dependent and fragile. Disobeying the elders was literally inconceivable to the plaintiff at the time.

[171] As I have noted above, the relationship between Ms Boer and the Jehovah's Witness elders was not as dependent as was the case with the children in the residential school in *F.S.M. v. Clarke*, *supra*. However, it was far closer to that sort of closed society than would be the case in the usual situation of a parishioner having regular contact with a clergyman but returning to home and the influence of others at other times. That is because of the pervasive nature of the Jehovah's Witness religion's presence in the everyday lives of its adherents, the specific religious requirement of obedience, and the direction to avoid worldly ways and social interaction outside the faith.

[172] The plaintiff's dependence and powerlessness developed as a direct result of the teachings of the defendant Watch Tower. She was brought up in that faith to accept the word of the elders unquestioningly. Independent thought was not permitted. She was taught not to trust anyone outside the faith and she followed that direction. Thus, when her employers noticed her distress in December 1989 and asked if they could help, she rebuffed their efforts, insisting that only somebody within her religion could help her. The elders were, therefore, not only aware of her dependence and vulnerability, they were responsible for it.

[173] In my view, there is a direct parallel between the relationship between the doctor and patient in *Norberg v. Wynrib*, *supra*, and the relationship between the elders of the Jehovah's Witness and Ms Boer. Certainly the conduct of Dr. Wynrib was more reprehensible than anything done by the defendants here, and the element of exploitation of the relationship for personal advantage by Dr. Wynrib is missing in this case. On the other hand, the degree of control that the Jehovah's Witness elders were able to exert over Ms Boer was, if anything, more ingrained and pervasive than was the case for Dr. Wynrib. In both cases, the powerful party was aware of the dependency and involved in its continuation: the Jehovah's Witnesses as part of their religious belief system and Dr. Wynrib because he took no steps to cure his patient's addiction.

[174] The defendants called evidence on this point from Dr. Daniel Silver, a psychiatrist who examined the plaintiff at the request of defence counsel. He testified that the plaintiff at the age of nineteen was not submissive or passive. Rather, he described her as strong-willed and rebellious. From my earlier conclusions about the plaintiff's relationship to the Jehovah's Witnesses, it follows that I do not accept the evidence of Dr. Silver on this point. Dr. Silver's opinion was based on what he thought to be the plaintiff's behaviour at the time. However, the instances of rebellious behaviour he noted were all incidents that occurred after February 1990, after the time when she had begun to feel abandoned and mistreated by her own religion. He was also under the incorrect impression that the tensions between Ms Boer and the church had been going on for some time before December 1989. Nobody who knew Ms Boer in December 1989 described her as rebellious. Those who knew her, including some of the defendants, described her as committed to her religion and as a quiet, somewhat shy young woman. Dr. Silver's opinion that the plaintiff was not "forced" to participate in the two meetings, but rather chose to do so, is based on a mistaken apprehension of the facts and therefore I do not find it to be persuasive.

[175] Accordingly, I conclude that holding the defendants to a duty of care in this situation does not interfere with their religious freedom. Further, by attending the meeting on December 29, 1989, the plaintiff was not truly exercising a free choice to follow her religion and is not therefore prevented from asserting this cause of action.

(d) Standard of Care and Breach

[176] There was no evidence of the particular standard of care applicable to elders of the Jehovah's Witness faith in this community at the relevant time. I agree with the defendants' submission that the standard of care applicable to psychiatrists, psychologists, or social workers

is not the appropriate standard against which to measure the conduct of the elders. In the absence of specific evidence as to the standard, it is appropriate to apply the general standard of care for negligence, that of a reasonable person in like circumstances. The elders in this situation had no particular expertise dealing with victims of childhood sexual abuse. They cannot be expected to be familiar with the literature on how to handle disclosure of abuse by vulnerable victims. However, as a matter of the general knowledge any person in the community would be expected to have in 1989, the defendants must have known that being a victim of sexual abuse is traumatic and that for any such victim to confront her abuser about such conduct in front of others would also likely be emotionally difficult. It was reasonably foreseeable that such a confrontation could be emotionally harmful to the plaintiff.

[177] The particular elders involved in counselling Ms Boer also had specific information about her emotional circumstances. They knew she was already beginning to have emotional problems arising from her father's abuse and they knew, because she specifically told them, that she was terrified about having to confront her father in the manner they directed. Fixed with that knowledge, and aware of their own lack of expertise, it was incumbent upon the elders to make inquiries of a professional as to how the potential harm to the plaintiff could be minimized, if not avoided entirely. In my opinion, failure to take this very basic precaution was a breach of the standard of care. Further, the elders in Toronto could at least have warned the elders in Shelburne of the nature of the situation and the vulnerability of Ms Boer, so that an attempt could be made to minimize the risk of harm to the plaintiff. Instead, they took no steps whatsoever to speak with their Shelburne counterparts, with the result that Messrs. Cairns and Brown walked into the meeting "blind", unaware of what would be discussed and unaware of the plaintiff's emotional difficulty. Again, in my view, this falls below the appropriate standard of care. Had the Shelburne elders been aware of the situation, it is likely they would have heard from the plaintiff in the absence of her father, just as they had done for the January 31, 1990 meeting. Further, given that the advice with respect to Matthew 18 was incorrect, there is a good chance this could have been avoided altogether if there had been better communication between the two groups of elders.

[178] Accordingly, I find that the plaintiff was obliged to go through the difficult and traumatic experience of confronting her father about his past sexual abuse in front of her father and two elders of her community. Although the plaintiff knew this confrontation would be harmful to her, she felt she had no choice but to comply. Further, because of her religious upbringing and the requirements of her religion, she was powerless and dependent upon the elders. She cannot be regarded as having chosen of her own free will to attend the meeting. She attended the meeting due to the incorrect advice given to her by the elders in Toronto as to the requirements of her faith. Further, although the Toronto elders were aware this experience would likely be traumatic for her, they failed to take reasonable steps to avoid that harm, such as obtaining competent expert advice or, at the very least, advising the elders in Shelburne of the situation they would be facing. Had they taken these reasonable steps, the harm to the plaintiff arising from the December 29, 1989 meeting would likely have been averted. I therefore find that the requisite elements for a cause of action in negligence are established. The next question is which, if any, of the defendants are liable for damages arising from the negligence that caused the plaintiff to attend the December 29, 1989 meeting.

(e) The Individual Defendants

[179] The defendants Steve Brown and Brian Cairns were completely unaware of the subject matter of the December 29, 2989 meeting prior to actually hearing it from Mr. Palmer and the plaintiff. They heard from the family members present, made some inquiries to satisfy themselves that the younger children were not in danger, and told the Palmers they would get back to them about what needed to be done. Neither Mr. Brown nor Mr. Cairns was responsible for the structure of the meeting. They had no knowledge that Matthew 18 was being applied. The plaintiff did not tell them that she did not want to be there and she did not ask, nor attempt, to leave. Under these circumstances, neither Mr. Brown nor Mr. Cairns is responsible for any harm suffered by the plaintiff as a result of the meeting. I have already determined that there is no liability arising from any of their conduct subsequent to the December 29, 1989 meeting.

[180] John Didur is a personal defendant. He testified at trial that Matthew 18:15-18 has no application to this type of situation and that he would never have told this to Sheldon Longworth. Mr. Longworth's notes of one of his conversations with Mr. Didur indicate that Mr. Didur told him that Matthew 18 applied. It is also apparent from his notes that Mr. Longworth spoke to other advisers at head office and that at least one other elder told him Matthew 18 applied. Mr. Longworth's specific memory of which elders provided which advice is not reliable, as he candidly acknowledged in his testimony. It is possible Mr. Didur gave such advice without fully appreciating the background circumstances. It is also possible Mr. Longworth was confused about the advice he received from Mr. Didur, or that he inaccurately recorded the discussion as having been with Mr. Didur when it was in fact with someone else. I found Mr. Didur to be a convincing witness. I am not able to say on a balance of probabilities that he was the one who told Mr. Longworth to apply Matthew 18:15-18. Therefore, he is not personally liable in damages to the plaintiff in respect of the December 29, 1989 meeting.

(f) The Defendant Watch Tower Bible and Tract Society of Canada

[181] Sheldon Longworth is not named as a personal defendant. However, Ms Boer contacted Mr. Longworth in his capacity as an elder of the church. Mr. Longworth consulted throughout with more senior advisers at the Jehovah's Witness head office and passed on their advice to the plaintiff. He acted at all times as an agent of the defendant Watch Tower. The defendant Watch Tower does not seek to distance itself from the conduct of Longworth and the other elders who provided advice to Ms Boer in Toronto, or to disclaim any responsibility for their actions. Although the statement of claim could be clearer on this point, I believe that on a fair reading of that pleading and subsequently delivered particulars, there is an allegation that Watch Tower is responsible for the harm suffered by the plaintiff as a result of the direction given to her to apply Matthew 18:15-18. Accordingly, I find the defendant Watch Tower Bible and Tract Society of Canada liable to the plaintiff for the harm she sustained as a result of attending the December 29, 1989 meeting.

(v) Analysis: The January 31, 1990 Judicial Committee Meeting

[182] The January 31, 1990 Judicial Committee meeting was called to consider the appropriate sanctions, if any, to be imposed upon Mr. Palmer for his transgressions. The decision as to whether a Committee was appropriate is not something this court should interfere with. This is akin to a quasi-judicial function. No duty of care would be owed to Ms Boer in connection with the decision itself. However, the manner in which the meeting was conducted could potentially give rise to a duty of care since Ms Boer was directly involved and there was a reasonable expectation on the part of the three committee members that she would find the meeting emotionally difficult. However, in my view, the three committee members acted reasonably in the manner in which they conducted the Judicial Committee meeting. They were careful to ensure the plaintiff felt she was being listened to and believed, and they met separately with the plaintiff to hear her story so as to spare her the difficulty of going over the details in front of her father. I find no breach of any duty of care by the defendants in connection with the Judicial Committee meeting and, hence no liability against any of the defendants arising from it.

(vi) Analysis: The Church's Handling of Mr. Palmer's Abuse and Events After January 1990

[183] Having heard the particulars of Mr. Palmer's conduct and considered the applicable Scriptures, the three elders who constituted the Judicial Committee that had been struck to consider the matter made a decision as to what they thought was an appropriate sanction. In coming to that decision they considered and applied what they believed to be the principles of their faith. There is no evidence that any of the defendants communicated the circumstances of the situation inappropriately to others. They took no steps directly against the plaintiff and were not responsible directly or indirectly for gossip in the community or for any actual or perceived shunning of the plaintiff by members of the congregation. The discipline by a church of one of its own members is an area upon which courts are very reluctant to intrude. That is particularly so when, as here, the plaintiff was not the one being disciplined and alleges only indirect harm. In my opinion, neither the elders nor the church owed a duty of care to the plaintiff in these circumstances. The nature of the discipline to be imposed on Mr. Palmer was purely a matter between the church officials and Mr. Palmer. The plaintiff had no privity and was owed no duty. Further, there was no reasonable expectation that she would be harmed by any sanction imposed on Mr. Palmer. Even if there was a duty owed, there was no breach by any of the defendants that could be said to cause damage to Ms Boer. Therefore, there is no liability on any defendant for anything that happened after the January 31, 1990 Judicial Committee meeting.

K. DAMAGES

[184] It follows from the above that the only harm suffered by the plaintiff for which any defendant is in law responsible is the harm arising from her participation in the December 29, 1989 meeting. The only defendant liable in damages for that harm is Watch Tower Bible and Tract Society of Canada. The final question to be determined is the quantum of the plaintiff's damages.

[185] The plaintiff relies upon the evidence of Dr. George Awad, a psychiatrist. He is not a treating psychiatrist, but examined the plaintiff at the request of her counsel for the purposes of this litigation. Dr. Awad testified Ms Boer suffers from a generalized anxiety disorder, which is long term and will require many years of psychotherapy to treat. He noted she has many of the symptoms of survivors of childhood sexual abuse and agreed many of her symptoms stem directly from the trauma of being sexually assaulted by her father. However, Dr. Awad also placed great emphasis on the manner in which the Jehovah's Witness elders handled the situation once the abuse was reported to them. He described them as being "insensitive" from the outset and said that the way the Church handled the matter was a factor preventing her recovery from the initial trauma of her father's abuse. Further, he specifically referred to the requirement of her confronting her father in front of the elders and other forced repetitions of her story, and said this exacerbated the original trauma, with effects even more severe than the sexual abuse itself.

[186] The plaintiff also filed reports from several health care professionals whom she has seen for treatment for brief periods over the intervening years. These included a one page letter from a counselor, Russell Scott, who saw Ms Boer for a 1 ½ hour counselling session in October 1997. In the letter, Mr. Scott confirmed his advice to Ms Boer that some of her difficulties "may be related to the fact she was raised in a cult environment". Mr. Scott further stated that the strategy of requiring Ms Boer to confront her father in front of the elders caused far-reaching emotional damage and was "re-traumatizing". Dr. Hélène Daigle, a psychologist who saw the plaintiff for treatment in January 1998, described her as suffering from symptoms of "excessive anxiety, lack of trust in others and herself and confusion". She stated that Ms Boer would have benefited from getting professional help when she revealed the abuse and this "could have spared her years of excessive guilt, fear, [and] confusion."

[187] The diagnosis of the plaintiff's current psychological difficulties by the defence's expert, Dr. Silver, is remarkably similar in many respects to the opinions of the experts relied upon by the plaintiff. He agreed that she suffers from anxiety and many symptoms of post-traumatic stress. He was further of the view that she struggles with a personality disorder which includes attempts to avoid "real or imagined abandonment, difficult interpersonal relationships, feelings of emptiness and impulsivity". Where Dr. Silver differed significantly with Dr. Awad is in respect of the cause of the plaintiff's psychological difficulties. He accepted that it was emotionally difficult for the plaintiff to go through the December 29, 1989 meeting and confront her father about his abuse. However, in his opinion, the sexual abuse by her father when the plaintiff was at a most vulnerable adolescent age was the most important causal event leading to her later emotional difficulties. Dr. Silver also referred to other sources of the plaintiff's anxiety such as failed romantic relationships, her difficulties with her mother, difficulties arising from her split with her religion, and loneliness as a young wife and mother with her husband away for extended periods of time. Dr. Silver agreed that the process of confronting her father would likely have caused the plaintiff grief and anxiety and would have "re-evoked" the trauma of the original abuse. However, he also testified that the plaintiff was very strong-willed and that if she found the experience of repeating her story to be truly traumatic, she could not have been "dragged" to the meeting. He testified that she unconsciously needed to repeat the original abusive trauma suffered as a result of her father's abuse by repeating her story over and over. Dr.

Silver disagreed strongly with Dr. Awad's opinion that the trauma of the December 29, 1989 confrontation meeting was worse than the original sexual abuse. Dr. Silver testified that the impact of the confrontation was negligible or insignificant when compared to the horrendous trauma of the original sexual abuse. He said it was like comparing a malignant tumour to a benign boil.

[188] Dr. Silver testified that the plaintiff appeared to feel a great deal of rage towards her father, which he found to be understandable. However, she also demonstrated a desire to preserve her own good image of her parents. Dr. Silver believes the plaintiff has displaced her rage against her father by directing it against the Church; that she has a need to split things into good and bad, with her parents perceived as good and the Church as bad.

[189] As I have already noted above (at paragraph 176), I do not accept Dr. Silver's opinion with respect to the plaintiff being strong-willed and rebellious in 1989. His conclusion in that regard is based on a misapprehension of some of the evidence. To the extent his conclusions as to the minimal traumatic impact of the December 29, 1989 meeting are influenced by his belief that the plaintiff attended that meeting willingly, his opinion must be looked at critically and carefully. However, I found the balance of Dr. Silver's evidence to be even-handed and thoughtful.

[190] Dr. Awad's evidence must also be considered carefully because it is premised on the accuracy of the plaintiff's evidence as to how the events of December 1989 and January 1990 transpired. As I have stated above, many of the plaintiff's beliefs as to the way in which she was treated by the elders are inaccurate. Dr. Awad, understandably, accepted the accuracy of the plaintiff's recollection for the purpose of reaching his opinion. The inaccuracy of the factual underpinning for his opinion seriously undermines its weight. Further, I found Dr. Awad to be almost adversarial in his support for the plaintiff's cause during the course of his testimony. In his written report delivered in August 1999, Dr. Awad described the elders as being hostile, unfeeling and judgmental. His report recognizes the trauma of the original abuse and its likelihood of longtime sequelae. He describes the confrontation meeting and the forced re-telling of the plaintiff's story as re-traumatizing and says it "made the situation worse" (page 11) and that "the way this case was handled, increased the anguish and suffering that Mrs. Boer experienced" (page 12).

[191] At trial, Dr. Awad went considerably further. In examination in chief, Dr. Awad stated that Ms Boer's current anxiety stems from earlier trauma, in part because of the sexual abuse, but "mostly" because of the way it was handled by the elders. On cross-examination, Dr. Awad stated at one point that it was a "toss-up" as to which was more traumatic, the original sexual abuse or the way it was handled by the elders, but that if he had to choose, he would say the Church's handling of the matter was worse than the original trauma. Later he said that although the plaintiff was upset by the sexual abuse, he was not sure she was psychiatrically disturbed by it. According to him, it was the re-traumatization by the elders that did the real damage.

[192] As I have already noted, there are difficulties with the evidence of both experts who testified. However, I found the evidence of Dr. Silver to be more balanced and impartial than that of Dr. Awad. I accept Dr. Silver's opinion that Dr. Awad failed to give sufficient weight to the obvious trauma caused by the sexual abuse. Ms Boer had already started to experience disturbing symptoms stemming from her father's abuse before the elders were even involved. Many of her symptoms in later life were clearly related to the original abuse; for example, concerns about bathing her children and hearing her husband's breathing during the night and having flashbacks to her father's abuse. The long-term traumatic effects of sexual abuse are well documented and well-known. While I do not doubt that the experience of having to recount the details of the abuse in front of her father was traumatic, it stretches credulity to suggest that the long-term effects of such a confrontation are worse than the original abuse.

[193] I accept the evidence of Dr. Silver that by far the most significant factor contributing to the plaintiff's current difficulties is the sexual abuse by her father. I also accept his opinion that the plaintiff's focus on the Church as the source of her problems is likely based on her need to displace her rage against her parents. It is important to note the role of the plaintiff's mother in all of this. The plaintiff was certainly betrayed by her father. However, her mother was suspicious that her husband was abusing the plaintiff, but said nothing. When the plaintiff went to her about it, she did intervene, but the matter was hushed up and Mrs. Palmer told her daughter not to tempt her father by dressing provocatively or wearing pyjamas in his presence. Mrs. Palmer was angry with the plaintiff for bringing the matter up again in 1989 as she felt it was over and done with. Later, when the plaintiff left the Church there was further ill-will between mother and daughter, and, as the plaintiff poignantly stated in her evidence, "My mother died hating me." Mrs. Palmer chose her allegiance to her faith over her daughter. It is clear from all of the evidence that this betrayal by her mother has also been a factor contributing to the plaintiff's emotional difficulties.

[194] That said, I believe Dr. Silver minimized the impact of the confrontation meeting. I accept the evidence of Dr. Awad that this would have been re-traumatizing. I do not see it as being as inconsequential as Dr. Silver described. I believe the confrontation meeting was extraordinarily difficult at the time, and likely made matters worse for the plaintiff for a period of time after that. However, with or without the December 29, 1989 meeting, I believe the plaintiff would have been in the same psychologically damaged state now. There were many factors compounding the plaintiff's inability to recover fully from the sexual abuse. Those factors included the lack of support from her family, particularly her mother, and the very sheltered, judgmental environment in which she had been raised. It is not easy for any person simply to break away from a religious group that has been such a pervasive influence in all aspects of one's life. For a person with the vulnerabilities of the plaintiff, and already damaged by the sexual abuse, that struggle was even more difficult. I recognize that, to an extent, the difficulties the plaintiff now experiences are related to her upbringing within the Jehovah's Witness faith and the effects of leaving that faith. However, those are not actionable sources of harm. The only cause of action against the Church is in respect of its negligence in causing the plaintiff's attendance at the December 29, 1989 meeting. In my opinion, that one session, while traumatic, played only a minor role in creating the situation in which the plaintiff now finds herself.

[195] At the time of the incident giving rise to this cause of action, the plaintiff had already suffered the initial harm from the sexual abuse, and was already suffering from its sequelae. Her current emotional difficulties stemming from the sexual abuse would have occurred in any event, as would most of the other difficulties arising from leaving the Church. In my opinion, this case falls within what has been described as the "crumbling skull": *Athey v. Leonati*, [1996] 3 S.C.R. 458; *W.R.B. v. Plint* (2001), 93 B.C.L.R. (3d) 228 (B.C.S.C.); *S.F.P. v. MacDonald* (1999), 234 A.R. 273 (Q.B.); *Whitfield v. Calhoun* (1999), 242 A.R. 201 (Q.B.).

[196] Therefore, Watch Tower is not liable in damages for the whole of the plaintiff's current psychological problems. Further, the plaintiff would have required psychological treatment for the other sources of her difficulties in any event, and I do not see the sequelae of the December 29, 1989 meeting as requiring additional or more prolonged treatment than would otherwise have been the case. There was, however, psychological harm to the plaintiff as a result of the December 29, 1989 meeting. She was in a very vulnerable state at the time, as she had just begun to deal with the effects of her father's abuse. I accept the evidence of the various experts, including Dr. Awad, that this confrontation made things worse for the plaintiff. I am not able to say, in hindsight, how long those effects would have been felt. Putting a dollar figure on psychological harm is always a nearly impossible task, and one which is inherently arbitrary. I am mindful of the range of damages typically awarded to victims of severe childhood incest and physical assault where the long-term psychological harm is significantly more disabling than in the plaintiff's situation. Damages in those most horrific cases range from $75,000.00 to $150,000.00. Taking all of those factors into account, I assess general damages suffered by the plaintiff in this case at $5,000.00.

[197] There is no foundation on the facts to support an award for punitive damages. Most of the allegations against the defendants have not been established on the facts. The defendants who interacted with the plaintiff did not bear ill will toward her. They accepted the veracity of her account, were sympathetic to her situation, and meant her no harm. The claim for punitive damages is dismissed.

L. JUDGMENT AND COSTS

[198] In the result, there will be judgment in favour of the plaintiff in the amount of $5,000.00 as against the defendant Watch Tower Bible and Tract Society of Canada, plus interest thereon at the Courts of Justice Act rate from August 28, 1998. The action is dismissed as against the other defendants. If the parties cannot agree on costs, I can be spoken to.

MOLLOY J.

Released: June 26, 2003