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When the Hair Must Be Split: The Importance of Distinguishing between Omissions and Commissions in Sexual Abuse Cases

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NOTE

WHEN THE HAIR MUST BE SPLIT: THE IMPORTANCE OF DISTINGUISHING BETWEEN OMISSIONS AND COMMISSIONS IN SEXUAL ABUSE CASES

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ABSTRACT

Under normal circumstances, a man who threatens witnesses of a crime to keep silent about its occurrence is as guilty as the principal who committed the crime in the first place. However, according to the Supreme Court of New Hampshire, church elders who actively and deliberately threaten a mother into concealing the sexual abuse of her own five-year-old girl have not committed an active tort, but instead omitted to act, for which they cannot be liable. By failing to distinguish the active threat from the passive failure to report abuse, the New Hampshire Supreme Court gave Jehovah's Witnesses elders tacit permission to engage in cover-ups with impunity, allowing them to be secure in the knowledge that the victims of their deceptions and manipulations would never have any chance to hold them accountable for the wrongs thus inflicted.

Traditionally, courts are reluctant to impose liability for acts of omission. That reluctance is woven into the fabric of American law, and it is one that should be both affirmed and respected. However, where courts uphold the portrayal of affirmative acts of negligence as passive failures to act, they deny victims of sexual abuse the opportunity to recover damages from those who assisted the abuser in hiding his crimes. This occurred in New Hampshire because the court, hesitant to impose liability for inaction, did not even begin to consider whether the alleged incident contained inaction or action. This dismal result could have been avoided without making a change in existing law, and liability can in the future be imposed without expanding liability for acts of omission, as long as courts are able and willing to carefully and deliberately draw a line between an affirmative act and an act of omission.

This Note will examine and explain the policies behind the limited liability framework traditionally applied to acts of omission. It will then examine how that framework was misapplied by the New Hampshire Supreme Court in a suit alleging the willful concealment of sexual abuse and will argue that the

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Court should have analyzed the case under a standard negligence framework. It will then explain how that framework would have provided justice for the victims without violating the policies behind limited liability for acts of omission.

I. INTRODUCTION

There are some crimes that by their very nature give rise to a feeling of confusion, horror, and consternation in the hearts of humans. The sexual assault of a five-year-old girl by her father is one such crime. When first we hear of an instance where that crime has been committed, we can hardly comprehend how any sort of man would even conceive of the act. Afterwards, it is impossible to communicate in any language the entirety of the horror that we feel for the sake of this unfortunate child and the burden she must bear for the rest of her life. For those who practice law in hopes of preventing (or at the very least mitigating) the very tragedy which has unfolded, there is a deep feeling of consternation at the inadequacy of the civil justice system.

The heinous character of the crime, the sympathetic nature of the victim, and the helplessness of her plight cries out for justice in a system that at times appears ill-equipped to provide an adequate remedy. Far too often, well-meaning attorneys and sympathetic judges find their hands seemingly tied behind their backs by longstanding principles of civil liability and due process. One potential arena in this fight is centered around whether individuals have a duty to report abuse that they know or suspect is taking place.

The abuser's most powerful enemy is the Samaritan who exposes him; but his most powerful ally is the common man who passes by in apathy. As one court wrote, "[C]hild abuse is more often than not committed in secret upon silent and powerless victims. It takes no leap of logic to conclude that the secretive commission of child abuse is likely to continue absent intervention by appropriate authorities to whom the abuse has been reported."[1] Conversely, there is little question that at least some instances of abuse might have been prevented if someone had simply informed the appropriate authorities. This, in turn, has led some victims to sue persons who knew about the abuse but refused to intervene.[2]

The biggest hurdle these victims face is the general principle that individuals are not subject to a general duty to act or intervene to prevent criminal acts (or other harm) against another person.[3] Of course, there are

1. J.A.W. v. Roberts, 627 N.E.2d 802, 812 (Ind. Ct. App. 1994).
2. *See, e.g.*, Mayeux v. Charlet, 203 So. 3d 1030 (La. 2016).
3. RESTATEMENT (SECOND) OF TORTS § 314 (AM. LAW INST. 1965).

several exceptions to this where affirmative duties are acknowledged.[4] One of the most prominent characteristics of situations producing duties to act is some sort of relationship or interaction between the alleged non-actor and either the plaintiff or a third-party perpetrator.[5]

As courts around the nation grapple with this question of whether to establish civil liability under the common law for failing to report sexual abuse, the answers and rationales have varied. Those jurisdictions which have upheld a common law cause of action tend to rely upon the existence of some special relationship between the defendant and either the victim or the abuser.[6] This indicates that courts are unwilling to create an entirely new cause of action and instead seek to fit failure to report abuse under the existing nonfeasance framework. Where such a special relationship does not exist, unfortunately, the common law tends to provide no remedy.

The reasonable solution for such a problem, of course, is for the legislatures to remedy through statute what the courts through judicial opinions cannot. Acting through the proxy of the legislature, the people may impose statutory civil liability where the courts, acting solely under the authority of the common law, lack the power to develop new causes of action. Recognizing this, some legislatures have acted. Many states have passed mandatory reporting statutes requiring certain professions or other categories of persons to report suspected or confirmed child abuse.[7] Unfortunately, the legislature cannot—or, on occasion, will not—act on every possible eventuality. Moreover, when victims fall into statutory gaps which leave them just out of reach of civil remedies, courts struggle to provide justice in an imperfect system through existing common law remedies. For instance, where a statute does not provide for a civil cause of action in the

4. *See id*. at § 314 cmt. a (summarizing exceptions to the general rule).

5. *See, e.g.*, *id*. at § 314A (duty of affirmative action when a special relationship exists between the defendant and the injured party); *id*. at § 314B (duty of affirmative action toward an endangered or injured employee); *id*. at §§ 316–320 (duty of affirmative action when defendant has control of a third person); *id*. at §§ 321–322 (duty of affirmative action when previous or current action creates an unreasonable risk of harm or actual harm to another person); *id*. at §§ 323–324, 324A (duty of affirmative action upon the voluntary undertaking of a duty).

6. *Cf*. Doe v. Liberatore, 478 F. Supp. 2d 742 (M.D. Pa. 2007) (duty to report exists where a fiduciary relationship was established between the plaintiff and the defendant); Marquay v. Eno, 662 A.2d 272 (N.H. 1995) (duty to report existed because the student/teacher relationship created an affirmative duty to report); Bradley v. Ray, 904 S.W.2d 302 (Mo. Ct. App. 1995) (therapist's special relationship with the patient created a duty to report where the therapist knew that the patient was sexually assaulting the patient's daughter).

7. *See* CHILDREN'S BUREAU, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT (2019).

event of violation, there is a substantial risk that victims will be left without a remedy against the people who ignored their plight.

In 1967, the State of New Hampshire criminalized failure to report, but did not explicitly create a corresponding private right of action.[8] When a victim asked the New Hampshire Supreme Court to rule otherwise in *Marquay v. Eno*, the Supreme Court indicated that the omission was deliberate, and no statutory cause of action would exist unless and until the legislature indicated an intent to create one.[9] In *Berry v. Watchtower Bible & Tract Society of New York., Inc.*,[10] however, the court encountered a much more nuanced set of circumstances. In *Berry*, a Jehovah's Witness told multiple elders in her congregation that her husband was sexually assaulting her two daughters.[11] Rather than report the abuse, the elders kept silent and pressured the mother to keep silent as well.[12]

Years later, when the two girls sued the elders for negligence, breach of fiduciary duty, and willful concealment of abuse, the trial court used a combination of negligence law, cleric-penitent privilege, and the Establishment Clause of the First Amendment to justify dismissing all claims.[13] A majority on the New Hampshire Supreme Court affirmed the trial court's ruling, but on other grounds, specifically ruling that the elders had breached no duty to the plaintiffs.[14] The majority decision's holdings on statutory negligence and fiduciary duty are not in dispute. However, the majority used only a partial standard in its common law negligence analysis, which resulted in an incomplete analysis and an erroneous conclusion.

II. BACKGROUND

Child victims of sexual abuse in New Hampshire suffer the same legal hurdles that exist in other jurisdictions when attempting to obtain a remedy from those who fail to report ongoing abuse. The nonfeasance framework in New Hampshire is adopted from the Restatement (Second) of Torts.[15] In the words of the New Hampshire Supreme Court, "The duty to do no wrong is a legal duty. The duty to protect against wrong is . . . a moral obligation only,

8. N.H. REV. STAT. ANN. § 169-C:29 (2019).
9. *Marquay v. Eno*, 662 A.2d at 277–78.
10. Berry v. Watchtower Bible & Tract Soc'y of New York, Inc., 879 A.2d 1124 (N.H. 2005).
11. *Id.* at 1125.
12. *Id.* at 1127.
13. *Id.* at 1126.
14. *Id.* at 1128.
15. Walls v. Oxford Mgmt. Co., 633 A.2d 103, 104–05 (N.H. 1993).

not recognized or enforced by law."[16] Thus, there were large groups of people who had no duty to report abuse to the proper authorities. This, in turn, meant that there was little incentive to report said abuse.

The New Hampshire legislature attempted to remedy this issue in 1979 by enacting a mandatory reporting statute that applied to numerous professions in the State.[17] The statute made failure to report punishable as a misdemeanor in an attempt to create the previously missing incentive.[18] Unfortunately for victims of sexual abuse, the legislature did not indicate a desire to create civil liability under the statute.[19] As a result, even if an individual violated the statute by failing to report abuse and was criminally convicted of the violation, the victims could not receive a civil remedy for their injuries.

This interpretation of the reporting statute was confirmed when students from the Mascoma Valley Region School District argued sixteen years later that the statute implied a private right of action for statutory negligence.[20] The New Hampshire Supreme Court rejected the students' argument, citing a lack of evidence that the legislature intended to create such a cause of action.[21] Although the Court did rule that the students' suit could go forward, it did so based on common law claims of negligent supervision and negligent hiring by school officials, rather than via any claim for failure to report.[22] Thus, the lack of a remedy still persisted where no special relationship existed.

When the court in *Berry v. Watchtower Bible & Tract Soc'y of New York, Inc.* faced the question of whether a common law claim for failure to report abuse could be raised, the court addressed a question of first impression in New Hampshire.[23] For the first time, the New Hampshire Supreme Court was faced with plaintiffs who asserted a blanket common law claim for failure to report (among other claims). Rather than following the strategy of *Marquay* in relying solely upon an established common law claim, the plaintiffs in *Berry* proffered a nonfeasance claim attempting to establish an affirmative duty to report the abuse.[24]

16. Dustin v. Curtis, 67 A. 220, 221 (N. H. 1907) (quoting Buch v. Amory Mfg. Co., 44 A. 809, 811 (N. H. 1897)).

17. N.H. REV. STAT. ANN. § 169-C:29 (2019).

18. Marquay v. Eno, 662 A.2d 272, 276 (N.H. 1995).

19. *See* § 169-C:29.

20. *Marquay*, 662 A.2d at 275–76.

21. *Id.* at 278.

22. *Id.* at 278–81.

23. *See* Berry v. Watchtower Bible & Tract Soc'y of New York, Inc., 879 A.2d 1124, 1125–26 (N.H. 2005).

24. *Id.*

Berry was a case that cried for a new cause of action, if such a case ever existed. The plaintiffs were sisters; their father had started sexually abusing them in a most sickening manner before either daughter was even six years old.[25] His marriage was predictably decaying, and the two spouses went to the elders of their local Jehovah's Witnesses Congregation ("Congregation") for marital counseling.[26] Over the course of this counseling, the plaintiffs' mother alerted the elders "on ten to twelve separate occasions" that her husband was sexually abusing her daughters on a regular basis.[27]

Instead of reporting the abuse as required under section 169-C:29, the elders covered it up. Even worse, they also pressured the plaintiffs' mother to maintain the coverup, telling her to "be silent . . . and be a better wife."[28] The abuse halted in 1989, when the plaintiffs were eleven and six years old.[29] Over a decade later, the two sisters sued both their father and the Congregation.[30] While the trial court dismissed the suit against the plaintiffs' father under the statute of limitations, it allowed the suit against the other defendants to move forward.[31] Thereafter, their father was not a party to the appeal.[32]

The plaintiffs sought to revisit the claim of a private right of action under section 169-C:29, despite the court having thoroughly laid that claim to rest ten years before in *Marquay*.[33] They also raised a claim for breach of fiduciary duty.[34] Most significantly, however, they asked the trial court to recognize a new common law cause of action for failure to report sexual abuse.[35] Pursuant to *Marquay*, the trial court dismissed the claim relying on a private right of action in section 169-C:29, but let the common law claim proceed.[36] Later, though, the trial court dismissed all charges on the grounds of both penitent-cleric confidentiality and the Establishment Clause.[37]

The majority opinion in *Berry* briefly disposed of both the private right of action and fiduciary duty claims, and devoted most of its opinion to discussing whether the plaintiffs had a common law cause of action for failure

25. *Id.* at 1133 (Dalianis, J., dissenting).
26. *Id.* at 1127 (majority opinion).
27. *Id.*
28. *Berry*, 879 A.2d at 1133 (Dalianis, J., dissenting).
29. *Id.*
30. *Id.* at 1125–26 (majority opinion).
31. Berry v. Bible, No. 01-C-0318, 2003 WL 25739775, at *3 (N.H. Super. Feb. 06, 2003).
32. *Berry*, 879 A.2d at 1125.
33. *Id.* at 1126.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*

to report the sexual abuse.[38] The court devoted the majority of its analysis to a nonfeasance analysis considering whether the defendants had an "affirmative duty to aid [the plaintiffs]," and concluded that they did not fall within any exception that would have incurred such a duty.[39] The court additionally declined to extend liability, and therefore denied all claims raised by the plaintiffs.

Justice Dalianis dissented, arguing that the court erred in conducting only a partial analysis.[40] She argued that the sheer foreseeability that the defendants' actions would encourage and enable continuing abuse in itself formed a special relationship, and that the defendants thus may have been liable.[41] She further argued that the facts of *Berry* were unique and would not create a risk of overextending liability.[42] After addressing a number of other issues raised by the trial court (including the First Amendment issues), she concluded that the plaintiffs' suit should have been allowed to proceed.[43] Because *Berry* was decided by the New Hampshire Supreme Court on non-constitutional grounds, it was not appealed and remains binding authority within the State of New Hampshire.

This Note begins by presenting the policies and rationale behind a limited nonfeasance framework (such as the New Hampshire Supreme Court applied in *Berry*). It then shows that the majority opinion erred in attempting to avoid those pitfalls by analyzing the facts solely under a nonfeasance framework. This Note further argues that while the dissent correctly recognized that the majority's conclusion was incorrect and its analysis was incomplete, it also neglected to consider the possibility that the defendants had committed a misfeasance by acting in a manner that required and lacked due care.

This Note elaborates on and applies the distinction between nonfeasance and misfeasance and argues that the defendants' actions in this case were actions of misfeasance. This misfeasance should have subjected them to liability for their active attempt to prevent the plaintiffs from receiving assistance from other sources. This, in turn, opened them up to liability for their decision to not report the abuse.

This Note further demonstrates that if the court had applied a standard misfeasance framework to the facts in *Berry*, the plaintiffs would have received a just remedy for the wrong inflicted upon them by the defendants.

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38. *Berry*, 879 A.2d at 1128–31.
39. *Id.*
40. *Id.* at 1131–32 (Dalianis, J., dissenting).
41. *Id.* at 1133.
42. *Id.* at 1134.
43. *Id.* at 1134–37 (addressing issues involving the religious privilege, the Establishment Clause, and the statute of limitations).

Finally, it will argue that applying this rule to similar cases would provide more complete remedies for victims of abuse while avoiding both policy and constitutional pitfalls that creating a new tort of nonfeasance might incur.

III. *BERRY V. WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.*

A. *The Facts*

Berry was a heart-breaking case where longstanding judicial principles seemed to pervert justice rather than promote it. The plaintiffs in *Berry* had both been physically and sexually abused by their father between 1983 and 1989.[44] During that time, both parents had been dealing with marital issues and attended counseling at their local Jehovah's Witnesses congregation.[45] Separately from the counseling, the plaintiffs' mother, Mrs. Poisson, told the elders between ten and twelve times that her husband had physically and sexually assaulted her daughters.[46] The elders responded to Mrs. Poisson's cry for help by dismissing her concerns and condemning her behavior as a wife.[47] They also allegedly "admonished [her] not to speak to secular authorities upon the pains of disfellowship."[48]

The plaintiffs filed suit against the defendant Society and Congregation on four counts. They alleged common law negligence, statutory negligence under section 169-C:29, breach of fiduciary duty, and willful concealment of abuse.[49] The trial court granted summary judgment for the defendants on the statutory negligence and fiduciary duty claims.[50] It later dismissed the remaining claims (of common law negligence and willful concealment of abuse), asserting that the plaintiffs' claims, "whether sounding in common law negligence or deceit, [were] 'clerical malpractice,'" and that continuing to hear the case would violate the Establishment Clause.[51] The plaintiffs appealed to the New Hampshire Supreme Court.

B. *The Majority: Nonfeasance, Therefore No Liability*

In a 2-1 decision, the court affirmed the dismissal of all counts, but used different reasoning than the trial court.[52] As a result, the majority did not see fit to reach the Establishment Clause issue. Instead, the court held that (1)

44. *Berry*, 879 A.2d at 1133 (Dalianis, J., dissenting).
45. *Id.* at 1127 (majority opinion).
46. *Id.*
47. *Id.* at 1133 (Dalianis, J., dissenting).
48. *Id.* at 1129 (majority opinion).
49. *Berry*, 879 A.2d at 1125–26.
50. *Id.* at 1126.
51. *Id.*
52. *Id.* at 1131.

section 169-C:29 did not create a private right of action, (2) the defendants had no common law duty towards the plaintiffs, and (3) no fiduciary duty existed to be breached.[53]

1. Holdings and Disposition of Claims

The majority opinion first addressed the statutory negligence claim, and summarily brushed it aside based upon its earlier decision in *Marquay*.[54] Then, it considered the common law and fiduciary duty claims. The court held that no fiduciary relationship existed between the plaintiffs and the defendants, and, therefore, that no fiduciary duty had been breached.[55] The court also held that the defendants did not have a common law affirmative duty to act.[56] As a result, the majority saw no need to reach a holding on the constitutional issue involved in the case, and relied upon other rationales in affirming the trial court's dismissal of all claims.[57]

2. Statutory Negligence and Fiduciary Duty Rationales

The New Hampshire Supreme Court had already determined that section 169-C:29 did not create a private right of action in *Marquay v. Eno* ten years before, and saw no reason to revisit the issue.[58] In that case, high school students filed suit against the school for failing to report chronic abuse of students by a school employee, and one of the claims raised was for statutory negligence under section 169-C:29.[59]

Although the court allowed other claims to proceed in that case, it dismissed the claim for statutory negligence.[60] Under New Hampshire law, the *Marquay* court wrote, a criminal statute only created a private right of action if there was some indication that the legislature intended to do so.[61] The court noted that section 169-C:29 was not accompanied by any such indications, and therefore held that the statute did not create a private right of action.[62] The *Berry* court declined to overrule *Marquay* and held that the plaintiffs could not claim statutory negligence as a cause of action.[63]

53. *Id.*
54. *Id.* at 1128.
55. *Berry*, 879 A.2d at 1131.
56. *Id.* at 1130.
57. *Id.* at 1131.
58. Marquay v. Eno, 662 A.2d 272 (N.H. 1995).
59. *Id.* at 275–76.
60. *Id.* at 278.
61. *Id.* at 276–78.
62. *Id.* at 278.
63. Berry v. Watchtower Bible & Tract Soc'y of New York, Inc., 879 A.2d at 1124, 1128 (N.H. 2005).

The *Berry* court also brushed aside the plaintiffs' fiduciary duty claim, holding that a fiduciary duty only existed where "influence has been acquired and abused or confidence has been reposed and betrayed."[64] The court noted that nothing of the sort had occurred between the plaintiffs themselves and the defendants, as any relationships that existed involved the elders and the children's parents (rather than the children themselves).[65] Thus, the court affirmed the trial court's decision to dismiss the plaintiffs' breach of fiduciary duty claim.[66]

3. Common Law Negligence Rationale

The majority spent most of its analysis addressing the plaintiffs' common law claim. Calling failure to report an allegation of nonfeasance, the court ruled that a duty to act to prevent foreseeable harm generally does not exist.[67] The court also listed three exceptions under which a duty to prevent criminal behavior could arise: (1) where a special relationship existed between the parties; (2) where special circumstances existed including situations where the defendant's acts create an "especial temptation and opportunity" for the criminal misconduct; or (3) where the defendant voluntarily assumed a duty to act.[68]

The plaintiffs only raised the first two exceptions as issues, so the court declined to analyze whether the defendants had voluntarily assumed a duty to report sexual abuse.[69] The court found that the plaintiffs presented no evidence of a relationship with the defendants beyond a generic membership in the Congregation.[70] Unfortunately for the plaintiffs, "membership and adherence to church doctrine by the plaintiffs' parents [does not create] a special relationship."[71] Next, the court rejected the plaintiffs' argument that the defendants created a special opportunity for sexual abuse by failing to report it.[72] The court held that the exception could not be met by "mere failure . . . to report . . . [or] improper advice concerning an appropriate response to . . . criminal activity."[73] Rather, the court held that some actual act must have taken place, and found that "[t]here is no allegation that the

64. *Id.* at 1131.
65. *Id.*
66. *Id.*
67. *Id.* at 1128.
68. *Berry*, 879 A.2d at 1128.
69. *Id.* at 1129.
70. *Id.*
71. *Id.*
72. *Id.*at 1129–30.
73. *Id.* at 1130.

elders created any opportunity for Berry to abuse his daughters."[74] The court held that neither of the exceptions were met, and that therefore the defendants had no common law duty that could be breached.[75] As a result, the trial court's ruling was affirmed.[76]

C. *The Dissent: Foreseeability, Therefore Liability*

Justice Dalianis wrote a second opinion which concurred in part and dissented in part.[77] While she agreed with the majority that there was no fiduciary relationship or statutory duty, she disagreed with the conclusion that the defendants had no common law duty.[78] As a result, she also found it necessary to address the First Amendment grounds for the trial court. In doing so, she argued that the First Amendment did not bar a claim for failure to report under the circumstances.[79]

1. Common Law Negligence

She started by laying out a fourth exception under which a duty to act could be created—overriding foreseeability.[80] She argued that the sheer foreseeability of the sexual abuse, when combined with the faulty advice given to Mrs. Poisson, created a special opportunity for the abuse to take place, thus creating a duty to act.[81] Justice Dalianis also inferred that the abusive husband was present when Mrs. Poisson was ordered to stay silent and argued that this only increased the severity of the defendants' conduct.[82] If true, she argued, then the defendants were creating a condition where the abuser was secure in the knowledge that he could continue to act with impunity.[83]

2. First Amendment Analysis

Justice Dalianis also addressed the trial court's decision to dismiss the claims on First Amendment grounds. The trial court construed the plaintiffs' assertions as a claim for negligent counseling and invoked *Lemon v. Kurtzman* to state that investigating that claim would "excessively entangle[]" the government with religion in violation of the Establishment

74. *Berry,* 879 A.2d at 1130.
75. *Id.* at 1131.
76. *Id.*
77. *Id.* (Dalianis, J., dissenting).
78. *Id.*
79. *Id.* at 1135–36.
80. *Berry*, 879 A.2d at 1132.
81. *Id.* at 1133.
82. *Id.* at 1133–34.
83. *Id.*

Clause.[84] Dalianis argued that this analysis was flawed and proposed her own analysis under both the Establishment and Free Exercise Clauses.[85]

Addressing the Free Exercise Clause, Justice Dalianis applied the United States Supreme Court's "neutral law of general applicability" standard.[86] However, she noted, before a government statute may be subjected to any form of scrutiny, the person claiming violation of the Free Exercise Clause must first demonstrate that the government's conduct would burden a specific religious doctrine or practice.[87] Observing that the defendants had not identified any such doctrine or practice that would be burdened by a finding of liability, Justice Dalianis claimed that the Free Exercise Clause was therefore not violated.[88]

Turning then to the Establishment Clause, Justice Dalianis argued that the trial court misapplied the *Lemon* standard.[89] The defendants had argued (and successfully persuaded the trial court) that any trial for liability would violate the excessive entanglements prong of *Lemon* because "any inquiry into the counsel given to [the plaintiff's mother] . . . would require the trial court to evaluate religious doctrine and the quality and substance of religious counseling."[90] They further argued that this would be "a claim for 'clergy malpractice,' a cause of action which has not been recognized by any court."[91]

Justice Dalianis disagreed.[92] She argued that the entanglements doctrine looked at the *effect* of the government action rather than the *process* of it, and the effect in question was simply whether the government was advancing or inhibiting religion.[93] Additionally, she argued that construing the claim as "clergy malpractice" was erroneous because "malpractice relies upon adherence to profession standards. [But t]here is no need to rely upon any 'professional' clerical standard here to discover the Wilton Congregation's duty in this case."[94] She then implied that the Congregation's actions went

84. *Id.* at 1134, 1136 (citing Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971)).

85. *Id.* at 1135–36.

86. Emp't Div. v. Smith, 494 U.S. 872 (1990). In *Smith*, the Supreme Court held that a "neutral law of general applicability" is subject to strict scrutiny under the Free Exercise Clause only when it also burdens other constitutional protections. *Id.* at 879–81. This standard was superseded federally by statute in 1993 by the Religious Freedom Restoration Act, but it remains binding upon state governments. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

87. Berry v. Watchtower Bible & Tract Soc'y of New York, Inc., 879 A.2d 1124, 1135 (N.H. 2005).

88. *Id.*

89. *Id.* at 1136.

90. *Id.*

91. *Id.*

92. *Id.* at 1134, 1136.

93. *Berry*, 879 A.2d at 1134, 1136.

94. *Id.* at 1136.

beyond mere failure to adhere to a profession standard, arguing that "just as the State may prevent a church from offering human sacrifices, it may protect its children against injuries caused by pedophiles by authorizing civil damages against a church that knowingly . . . creates a situation in which such injuries are likely to occur."[95] This is in line with the findings of courts in other states.[96]

IV. ANALYSIS: REACHING THE RIGHT RESULT FOR THE RIGHT REASON

Negligence as a cause of action contains four elements: a duty to conform to a standard of conduct, a breach of that duty, actual loss or harm, and a showing that the breach was the actual and legal cause of the harm.[97] The particular focus of *Berry* was the element of duty.

When considering the question of duty in the context of *Berry* and Section 169-C:29, it is important to distinguish between statutory negligence and negligence per se, because New Hampshire recognizes both.[98] The key is to recognize that a "duty" analysis consists of two parts—the *creation* or *recognition* of a duty, and the *definition* of that duty. The recognition of a duty's existence is a question of law.[99] If no duty has been previously recognized under a specified fact pattern, then one must be created, or no negligence suit can be maintained.[100] A duty can be created in two ways. The first is by statute, which gives rise to an action of statutory negligence.[101] In New Hampshire, this can only occur if the intent to create a private right of action by statute was either expressed or implied by the legislature.[102] The second method is through the existence of a common law duty as established through case precedent.[103] This gives rise to a standard negligence action.

Once the existence of a duty has been established, the inquiry then moves to the definition of that duty. Defining a duty means determining the standard of conduct to which the defendant must conform under a specified set of circumstances.[104] This standard can be a matter of either fact or law depending on the method used to define it. Once again, there are two ways for a duty to be defined—by statute or by case precedent. If the standard of

95. *Id.* (citing Malicki v. Doe, 814 So. 2d 347, 360 (Fla. 2002)).

96. Morrison v. Diocese of Altoona-Johnstown, 68 Pa. D. & C.4th 473 (Pa. Com. Pl. 2004); State v. Motherwell, 788 P.2d 1066 (Wash. 1990).

97. Kendrick v. East Delavan Baptist Church, 886 F. Supp. 1465, 1472 (E.D. Wis. 1995).

98. Marquay v. Eno, 662 A.2d 272, 277 (N.H. 1995).

99. Walls v. Oxford Mgmt. Co., 633 A.2d 103, 104 (N.H. 1993).

100. *Marquay*, 662 A.2d at 277.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Kendrick*, 886 F. Supp. at 1472.

conduct is established through a statute, then the duty is defined as a matter of law and termed negligence per se.[105] On the other hand, case precedent defines duty as a question of "ordinary care" by a reasonable person, which makes the specific standard of conduct a matter of fact.[106]

In *Berry*, the majority correctly dismissed the plaintiffs' statutory negligence claim under *Marquay*.[107] As a result, the question addressed here is whether a duty was created under case precedent and common law. While the majority was correct in finding that the defendants did not commit a nonfeasance, both the majority and dissenting judges failed to recognize that the defendants might have been liable for committing a misfeasance. Thus, the defendants may have been subject to a duty of general care. If that was the case, then the duty would have been either defined by Section 169-C:29 as negligence per se or sent to the jury as a question of fact. In either case, summary judgment should *not* have been granted for the defendants.

A. *The Limited Nonfeasance Framework*

The New Hampshire rule of negligence in cases such as *Berry* (alleging a duty to report abuse) must recognize the tension between two opposite but fundamental principles which underly the rules of negligence. The first is that "all persons . . . have a general duty to take reasonable care to not subject other persons to an unreasonable risk of harm."[108] This is the principle from which all common law duties spring. Every other principle of negligence serves only to clarify or limit this first rule. The second principle is that courts will generally not force individuals to take affirmative action to prevent harm to other persons.[109] This, in turn, will often lead courts to conclude that an individual does not generally have a duty to act, even if inaction would result in harm.[110]

The tension between these two principles has arguably given rise to much of the modern negligence law. Even today, courts still often distinguish between torts of commission (sometimes called *misfeasance* claims) and torts

105. *Marquay*, 662 A.2d at 277 (quoting Bob Godfrey Pontiac, Inc. v. Roloff, 630 P.2d 840, 845 (Or. 1981)).

106. *Kendrick*, 886 F. Supp. at 1474 (quoting Wisconsin Civil Pattern Jury Instruction 1005).

107. Berry v. Watchtower Bible & Tract Soc'y of New York, Inc., 879 A.2d 1124, 1128 (N.H. 2005).

108. Walls v. Oxford Mgmt. Co., 633 A.2d 103, 104 (N.H. 1993).

109. Victor E. Schwartz & Leah Lorber, *Defining the Duty of Religious Institutions to Protect Others: Surgical Instruments, Not Machetes, Are Required*, 74 U. CIN. L. REV. 11, 18 (2005).

110. Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 WASH. U. L. Q. 1, 13 (1993).

of omission (frequently called *nonfeasance* claims).[111] A misfeasance claim asserts that the defendant acted in a negligent manner, while a nonfeasance claim argues that the defendant did not act, and the inaction itself was negligent.[112]

It is apparent after even a causal glance that the nonfeasance framework carries at least one substantial distinction from the misfeasance framework. Specifically, the misfeasance rule *creates* the duty, while the nonfeasance rule *abolishes* it. The misfeasance framework assumes that, by default, *all* persons possess the duty in question; exceptions tend to exempt certain persons from liability. On the other hand, the nonfeasance framework proclaims that *no* person possesses the duty in question; the exceptions tend to subject persons to a duty which they would otherwise not possess.

1. The Creation of an Affirmative Duty to Act

As a matter of practically applying these two opposing frameworks, courts have developed two different ways of articulating when a duty has been created. Under the first method, an individual incurs a duty by acting; a violation of this duty is classified as a misfeasance.[113] In other words, a person who acts is subject to the duty to do so in a reasonable manner. On the other hand, the nonfeasance framework is an inherently limited one. While a duty under the misfeasance framework is the rule, under the nonfeasance framework it is the exception. Courts articulate this by stating that an affirmative duty to act exists only when the conditions of an exception have been met.[114]

Thus, a defendant is subject to an affirmative duty to act if circumstances meet one of three criteria. These three criteria are (1) the existence of a "special relationship" between the parties, (2) the creation of an "especial temptation or opportunity for criminal misconduct" by the defendant's inaction, and (3) the voluntary assumption of a duty by the defendant.[115] All three have a common thread "of interaction or dependency" between the parties.[116]

111. RESTATEMENT (SECOND) OF TORTS § 314 cmt. c.

112. *E.g.*, J.A.W. v. Roberts, 627 N.E.2d 802, 809 (Ind. Ct. App. 1994) (Nonfeasance is "the complete omission or failure to perform," while misfeasance is "negligent conduct or active misconduct").

113. *Id.*

114. Berry v. Watchtower Bible & Tract Soc'y of New York, Inc., 879 A.2d 1124, 1128 (N.H. 2005).

115. Remsburg v. Docusearch, Inc., 816 A.2d 1001, 1007 (N.H. 2003).

116. *J.A.W.*, 627 N.E.2d at 809.

2. Policy Reasons for a Limited Nonfeasance Framework

The limited nonfeasance framework oftentimes appears heartless, and courts have been frequently criticized for it. Even the Restatement (Second) of Torts subtly critiques the rule:

> The result of the rule has been a series of older decisions to the effect that one human being, seeing a fellow man in dire peril . . . may sit on the dock, smoke his cigar, and watch the other drown. Such decisions have been condemned by legal writers as revolting in any moral sense, but thus far they remain the law.[117]

The Restatement (Second) of Torts attributes this rule to history, arguing that it came about primarily because "courts were far too much occupied with the more flagrant forms of misbehavior to be greatly concerned with one who merely did nothing."[118] Other authors—while still critical of the rule—have been at least slightly more generous, acknowledging that courts have raised other arguments beyond mere history to justify the limits placed on nonfeasance liability.[119] Courts will defend limits on nonfeasance by asserting the importance of individual autonomy, the negative consequences of legislating morality, and the importance of foreseeability.

The importance of individual autonomy is perhaps the most widespread rationale given for the limited nonfeasance framework.[120] This doctrine may carry special weight in American legal thought for two reasons. The first reason is that American culture attaches a generally high value to personal liberty and independence. The second reason, however, is America's history with slavery. Some legal scholars have pointed out that Americans have more of an aversion to the imposition of involuntary servitude than citizens of

117. RESTATEMENT (SECOND) OF TORTS § 314 cmt. c.

118. *Id.*

119. Schwartz & Lorber, *supra* note 109 at 18–19 ("courts hold that it is not the place of the courts to decide this moral issue [of affirmative duty]; it is better left to a person's own conscience."); Yeager, *supra* note 110 at 1 n.1; John G. Culhane, *Duty Per Se: Reading Child Abuse Statutes to Create a Common Law Duty in Favor of Victims*, 19 WIDENER L. REV. 73, 77 (2013) (A Delaware court held that "liability . . . should be decided by the legislature, because that body . . . should make decisions involving social policy.").

120. Yeager, *supra* note 110 at 1 n.1. New Hampshire has even gone so far as to describe the nonfeasance framework as including a balancing test between the plaintiff's interest in avoiding harm and the individual's interest in avoiding forced liability for inaction—an interest that could only come about via an interest in autonomy from state control. Marquay v. Eno, 662 A.2d 272, 279 (N.H. 1995) (citing Libbey v. Hampton Water Works Co., 389 A.2d 434, 435 (N.H. 1978)).

other countries; it seems quite likely that if they are correct, this would stem from a feeling of guilt over the involuntary servitude regime (i.e., slavery) that was tolerated for so long by so many.[121]

Whatever the source of that aversion is, it has caused Americans to consider their right to autonomy generally more important than any sort of communal obligation.[122] This does not, of course, necessitate an inference that Americans have no sense of community. Rather, it implies only that Americans are left to decide communal obligations themselves as individuals, instead of allowing an outside force (i.e., the collective government) to decide in their stead.[123]

This is most likely related to the second reason for a limited nonfeasance framework. Courts and activists assert that imposing a duty to act would be legislating morality, and they frequently recoil from the prospect.[124] Given that the United States was founded in part upon the ideals of freedom of conscience, this is not surprising. Morality is dictated by the conscience, and so, it comes as no surprise that courts see the legal imposition of moral duties as a legal imposition upon the conscience itself.

The third reason for a limited nonfeasance framework—particularly in situations involving criminal conduct such as sexual abuse—may be the close ties between duty and foreseeability. Courts will generally refuse to impose a duty to prevent unforeseeable conduct.[125] Courts also usually presume that criminal conduct is generally not foreseeable.[126] As a result, where the commission of a crime is the alleged consequence of a defendant's inaction, the limited nonfeasance doctrine could provide a convenient method for the court to determine whether the defendant is liable, foreseeability notwithstanding.

B. Berry*'s Application of the Limited Nonfeasance Framework*

In applying the general rule of duty to the facts of a specific case, the first step is to determine if the defendant is accused of *acting* (also called "misfeasance") or *not acting* (also called "nonfeasance").[127] If the defendant is accused of misfeasance, then he is subject to a general duty to act in accordance with a standard of conduct, whether that standard be defined by

121. Yeager, *supra* note 110 at 2.

122. *Id.*

123. *Id.* at 13–14.

124. Schwartz & Lorber, *supra* note 109 at 19.

125. Remsburg v. Docusearch, Inc., 816 A.2d 1001, 1006 (N.H. 2003)..

126. *Id.*

127. J.A.W. v. Roberts, 627 N.E.2d 802, 815 (Ind. Ct. App. 1994) (Sullivan, J., dissenting).

statute (negligence per se) or by the common law (ordinary care).[128] If, on the other hand, the defendant is accused of nonfeasance, then he may only be charged with a duty if one of the three conditions are met.[129] In *Berry*, both the majority and the dissent skipped over this step of the analysis, and instead assumed that the entire case was subject solely to the nonfeasance framework. This was perhaps the gravest error committed by both the majority and dissent in *Berry* because it distorted the reasoning of both decisions at a fundamental level. The majority was correct in conducting the nonfeasance analysis of the case, but it failed to reach a correct disposition of the case by failing to see the misfeasance issue. The dissent, on the other hand, reached the correct disposition of the common law claim; however, because the dissenting Justice also failed to spot the misfeasance issue, her rationale was weak and unpersuasive.

1. The Majority Decision: The Wrong Result for the Wrong Reason

The majority was correct in recognizing that an affirmative duty to act is limited to those circumstances where either (1) a special relationship existed between the parties, (2) the defendants' actions created some "special temptation or opportunity for criminal misconduct," or (3) the defendant voluntarily assumed the affirmative duty to act.[130] Voluntary assumption was not raised by the plaintiffs in *Berry*, so it will not be addressed here.[131]

A special relationship would exist only if the defendants "[were] required by law to take or . . . voluntarily [took] custody of [the plaintiffs] under circumstances such as to deprive [them of] normal opportunities for protection."[132] That did not happen in this case, as the plaintiffs' only connection with the defendants was membership in their congregation.[133] The majority's refusal to recognize a special relationship between clergy and the general congregation is in line with precedent from other states.[134]

Even in the absence of a special relationship between the parties, a duty to act may be created when a defendant's actions create a special opportunity

128. Marquay v. Eno, 662 A.2d 272, 277 (N.H. 1995).

129. *Remsburg*, 816 A.2d at 1007.

130. *Id.*

131. Berry v. Watchtower Bible & Tract Soc'y of New York, Inc., 879 A.2d 1124, 1129 (N.H. 2005).

132. *Marquay*, 662 A.2d at 279.

133. *Berry*¸ 879 A.2d at 1129.

134. *See* Doe v. Liberatore, 478 F. Supp. 2d 742 (M.D. Pa. 2007); *see also* Fortin v. Roman Catholic Bishop of Portland, 871 A.2d 1208 (Me. 2005).

for criminal misconduct. "A party who realizes or should realize that his conduct has created a condition which involves an unreasonable risk of harm to another has a duty to exercise reasonable care to prevent the risk from taking effect."[135] This conduct may include other negligent conduct by the alleged tortfeasor.[136]

If the inquiry is limited solely to the nonfeasance claim, as the majority's opinion was, then this criterion remains unfulfilled. Silence is not speech, and failure to act is not itself an action. Thus, the majority was correct in reasoning that mere failure to report cannot create an opportunity for criminal misconduct.[137] However, the majority then claimed that such special circumstances were only created where the defendant had "exercised control [over the circumstances]."[138] The majority implied that if the defendants in *Berry* had "created a condition or enhanced a foreseeable risk of criminal conduct which they could independently and affirmativ[ly] control," then they might be exposed to liability.[139] The majority also stated, "[The elders] did not create the risk of harm to the children nor control its cessation or continuation."[140] It is important to recognize that control of the situation was placed in the hands of the elders the moment they were informed of the abuse; the abuser was at their mercy to expose or protect.[141] Unfortunately, the majority did not believe that premise to be true, and therefore they concluded that the elders did not create a special circumstance or risk of harm.[142]

The majority's analysis was flawed for two reasons. First, the court rooted its decision in the rule that no general duty exists to protect a person from the criminal acts of a third party.[143] This rule, in turn, sprouts straight out of the nonfeasance framework. However, although the nonfeasance rule is sometimes treated as a standalone basis for liability, it is important to remember that the nonfeasance rule is not actually a source of duty—it is a *limitation* of it. By rooting their analysis solely within a doctrine limiting liability, the majority risked losing sight of what establishes duty in the first place. Unfortunately, this is precisely what happened when the majority

135. Walls v. Oxford Mgmt. Co., 633 A.2d 103, 106 (N.H. 1993).

136. *Id.*

137. *Berry*, 879 A.2d at 1130.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 1125–26.

142. *Id.* at 1130–31.

143. *Berry*, 879 A.2d at 1128.

overlooked the defendants' decision to threaten Mrs. Poisson into keeping her husband's sexual abuse a secret.[144]

This mistake thus assisted in causing the second error that the majority committed—it failed to distinguish misfeasance from nonfeasance. Negligent failure to report alleges nonfeasance. Willful concealment, on the other hand, alleges a misfeasance. Misfeasance is an action, which means it automatically creates a duty to act according to a standard of conduct. No special relationship is required to find a common law duty on that count.

It is also worth noting that the majority never explicitly considered the plaintiffs' claim for deceit or willful concealment of abuse. The trial court sustained this claim against a summary judgment motion but then dismissed it for violation of the Establishment Clause and penitent-clerical privilege under the New Hampshire Rules of Evidence.[145] The majority acknowledged the filing of the claim and the circumstances surrounding it (namely, the pressure exerted by the elders upon Mrs. Poisson to keep silent).[146] Further, this claim was kept alive through an appeal of the First Amendment question raised by the plaintiffs.[147] However, aside from a brief mention of the claim in the procedural history, any analysis of it is entirely absent from the majority opinion in *Berry*.[148] The omission is very abnormal, especially considering that the majority declined to engage in the First Amendment analysis because the trial court's decision on all counts was affirmed, "albeit for different reasons."[149]

This was another serious misstep by the *Berry* majority. Rule 505 and the First Amendment were the only grounds given by the trial court for dismissing the claim for deceit, and the plaintiffs raised that issue at the appellate level.[150] Because the claim of deceit was never addressed by the majority, Rule 505 and the First Amendment were *still* the only grounds for barring the claim, and the majority never ruled on that question presented for appeal. Failing to consider that question was an error because it weighs heavily on the question of misfeasance.[151]

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144. *Id*. at 1129.

145. *Id*. at 1126; N.H. R. EVID. 505.

146. Berry v. Watchtower Bible & Tract Soc'y of N.Y, Inc., No. 01-C-0318, 2003 WL 25739777 (N.H. Super. Nov. 04, 2003).

147. *Berry*, 879 A.2d at 1125–26.

148. *Id*. at 1126.

149. *Id*. at 1131.

150. *Berry*, 2003 WL 25739777.

151. *See infra* Section IV.C.1.

2. The Dissent: The Right Result, But Still for the Wrong Reason

Justice Dalianis's opinion was largely correct in its conclusions and preferred disposition of the case. However, the reasoning that she relied on in reaching those conclusions did contain several flaws, including her reliance upon precedent of a dubious nature. This most likely had a significant impact on the majority's rejection of her ultimate position.

Justice Dalianis rested the majority of her position on the doctrine of *overriding foreseeability*, which she cited as a fourth exception to the generally limited nonfeasance framework.[152] The overriding foreseeability exception holds, in essence, that a landlord may be liable for foreseeable criminal acts, even if there was no physical or security defect which satisfies the hazardous circumstances exception.[153] According to Justice Dalianis, the overriding foreseeability exception was folded into the hazardous circumstances exception in *Remsburg v. Docusearch*.[154]

The only problem is that the case Justice Dalianis uses to provide the overriding foreseeability exception—*Walls v. Oxford Management Co.*—"reject[ed] liability based solely . . . on a doctrine of overriding foreseeability."[155] The doctrine is further complicated because the court arguably relied upon that "rejected" doctrine seven years later in *Iannelli v. Burger King Corp*.[156] However, that case is an outlier; Justice Dalianis herself admits that "the status of the overriding foreseeability exception in our case law is not clear."[157]

There is no question that *Walls* had explicitly rejected liability based solely on overriding foreseeability.[158] There is also little question, upon reading *Iannelli*, that liability, in that case, was based solely upon the foreseeability of harm.[159] Justice Dalianis took this contradiction in the court's precedent to mean that a lack of conduct could still create a hazardous circumstance if the harm was sufficiently foreseeable.[160] However, this would mean outright ignoring *Walls*, which was a step that the majority was not willing to take.

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152. *Berry*, 879 A.2d at 1131–32 (Dalianis, J., dissenting).

153. Walls v. Oxford Mgmt. Co., 633 A.2d 103, 106 (N.H. 1993).

154. *Berry,* 879 A.2d at 1132.

155. *Walls*, 633 A.2d at 107.

156. Iannelli v. Burger King Corp., 761 A.2d 417, 420 (N.H. 2000). *See Berry*, 879 A.2d at 1132.

157. *Berry,* 879 A.2d at 1132.

158. *Walls*, 633 A.2d at 107.

159. *Iannelli*, 761 A.2d at 420–21.

160. *Berry*, 879 A.2d at 1133.

This skepticism was attached to her overall conclusion and caused the majority to distinguish *Iannelli* by arguing that the key factor in *Ianelli* was whether the defendant(s) "exercised control . . . [or] created a condition or enhanced a foreseeable risk of criminal conduct which they could independently and affirmatively control."[161] Although Justice Dalianis sought to rebut this by accusing the majority of making a "retrospective statement of the law," the damage was done.[162] The disagreement over the "overriding foreseeability" doctrine should have been irrelevant because the plaintiffs also accused the defendants of *actually* unjustly exerting control to conceal the abuse. Instead, the presupposition that the nonfeasance framework was the only applicable theory limited the discussion.[163]

This fixation on nonfeasance by Justice Dalianis was even more ironic, given that Justice Dalianis still argued that the defendants acted by advising Mrs. Poisson.[164] While Justice Dalianis identified the defendants' alleged concealment as a significant event, she misunderstood its significance by failing to recognize it as potential misfeasance.[165] Instead, she alluded to the "active[] facilitate[ion of] the continuing abuse" as "giving bad advice."[166] This was a gross understatement, and completely ignored the plaintiffs' claim for willful concealment of abuse.[167]

Justice Dalianis's Establishment Clause analysis also bears a need for examination. The defendants argued that liability would violate the famous *Lemon* test by excessively entangling the courts with the affairs of their congregation.[168] Justice Dalianis disagreed.[169] She argued that the excessive entanglements doctrine was merely one part of the inquiry into whether the

161. *Id.* at 1130 (majority opinion).

162. *Id.* at 1133 (Dalianis, J., dissenting).

163. *Id.* at 1130 (majority opinion).

164. *Id.* at 1133 (Dalianis, J., dissenting).

165. *Id.* at 1133–34 (Dalianis, J., dissenting).

166. *Berry*, 879 A.2d at 1133–34.

167. The majority also referred to the elders' conduct as "failure to dispense proper advice." *Id.* at 1130 (majority opinion). The exercise in vocabulary that phrases misfeasance as an omission of a response is a frequent result of clever lawyers using rhetorical trickery to obfuscate the difference between commission and omission. *See* Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV. 879 (1986) ("The clever law student is even able to turn commissions into omissions by arguing, for example, that negligent driving is nothing more than the failure to brake.").

168. *Berry,* 879 A.2d at 1136 (Dalianis, J., dissenting).

169. *Id.*

government action advanced or inhibited religion.[170] In other words, she argued that as long as imposing a duty would not advance or inhibit religion, the entanglement was not excessive.

Justice Dalianis's casual dismissing of what the Supreme Court has described as a separate element is concerning. Although the Supreme Court did state that entanglement is significant because it has bearing on the effect of a statute, nowhere did the Court say that it should merge with one of the previous two elements.[171] The Court's statement regarding the purpose of the entanglement analysis explained why the element was important, not how to resolve whether the element was present.[172] The accuracy of Justice Dalianis's conclusion is beyond the scope of this Note. Nevertheless, it should be noted that, regardless of whether her conclusion was correct, her reasoning was not sound.

On the other hand, Justice Dalianis's discussion of the trial court's claim that the plaintiffs were alleging "clerical malpractice" (which, the trial court argued, meant that it should be dismissed) consisted of some solid reasoning.[173] Unfortunately, a flaw in her underlying perspective of the case undermined her argument once more. She noted that malpractice inherently requires measurement against a professional standard and that malpractice does not exist where the standard is ordinary negligence.[174] While this is true, it still misses the point of the plaintiffs' allegations, and thus reaches only half the issue. Their claim for willful concealment alleges not only that the elders were negligent, but also that they acted intending to inflict a certain harm (a lack of intervention by others who arguably had a duty to intervene).[175] An allegation of intentional deceit is hardly an allegation of malpractice because it is a standard that applies far beyond any particular profession. To recognize this, though, would first require Justice Dalianis to have addressed the claim of deceit in the first place. This was something that she failed to do; as a result, her argument was neither as forceful nor as persuasive as it could have been.

170. *Id.*

171. Agostini v. Felton, 521 U.S. 203, 232–33 (1997).

172. *Id.* It is notable that the Court, immediately after saying that entanglement should be treated as assisting in the effects analysis, then proceeded to analyze entanglement as its own element rather than relying upon the conclusion of the effects analysis. *Id.*

173. *Berry*, 879 A.2d at 1136.

174. *Id.*

175. *Id.* at 1129–30 (majority opinion).

C. *Analyzing* Berry*'s Rationale Under a Misfeasance Framework*

The *Berry* majority held that because the plaintiffs' allegations rested solely on the defendants' failure to report the abuse, they were only alleging nonfeasance.[176] The majority also held that the plaintiffs failed to meet an exception to the limited nonfeasance rule and that the defendants, therefore, owed no duty of affirmative action to the plaintiffs.[177] Relying on those holdings, the majority affirmed the dismissal of all claims by the plaintiffs.[178]

However, the majority could only reach that result by ignoring the defendants' willful concealment of the abuse suffered by the plaintiffs. The plaintiffs had a claim for misfeasance against the defendants because of that willful action. Additionally, that misfeasance opened the door to hold the defendants liable for nonfeasance as well.

1. Implying a General Duty of Care in *Berry*

The plaintiffs' count of misfeasance will be addressed first—that is, the count of "willful concealment" (or, as the trial court termed it, "deceit").[179] The basic principle of misfeasance is that when a person acts, they acquire a duty to act with reasonable care.[180] Thus, when a plaintiff alleges that a person has acted without reasonable care, they have a common law action for negligence. In such a misfeasance case, the question of whether the defendant's action was reasonable or not is typically a question of fact left up to the jury to decide.[181] Therefore, if the defendants in *Berry* did act—i.e., if misfeasance was alleged—then the court should have left the matter to the jury. The fact that the trial court only dismissed the claim for willful concealment of abuse after the defendants raised an Establishment Clause challenge supports this conclusion.[182]

The result differs because the analysis acknowledges that in alleging that the defendants engaged in willful concealment by pressuring Mrs. Poisson from contacting the authorities, the plaintiffs alleged that the defendants acted.[183] The moment the defendants did so, they created a duty for themselves to, at the very least, take reasonable care to not subject another person to an unreasonable risk of harm by their actions.

176. *Id.* at 1130.

177. *Id.* at 1130–31.

178. *Id.* at 1131.

179. *Berry*, 879 A.2d at 1126.

180. Walls v. Oxford Mgmt. Co., 633 A.2d 103, 104 (N.H. 1993).

181. *Id.*

182. *Berry*, 879 A.2d at 1126 (majority opinion).

183. *Id.* at 1133 (Dalianis, J., dissenting).

Whether or not their advice to conceal the abuse was reasonable is not a question of law, but is a question of fact. The standard applied by the jury, in that case, would be either negligence per se (under Section 169-C:29) or ordinary care. Under either standard, the defendants arguably acted unreasonably, and they breached their duty by threatening Mrs. Poisson with eternal damnation if she asked the authorities to rescue her daughters from her husband.[184]

Neither the majority nor the dissent recognized that this was the proper standard to apply. The resulting confusion set the stage for an erroneous analysis of the common law negligence count.

2. Reapplying a Nonfeasance Analysis in Light of Misfeasance

The majority concluded that the defendants did not have a duty to report because they did not fall under any of the three exceptions to the limited nonfeasance framework.[185] According to the majority, they did not have a special relationship with the plaintiffs; they did not by their conduct create a hazardous circumstance or special opportunity for criminal activity; and they did not voluntarily assume a duty to report abuse.[186] Justice Dalianis disagreed, but only because she believed that even inaction could create a hazardous circumstance if the risk of harm was sufficiently foreseeable.[187]

This reasoning—both in its conclusions and its limits—could only be sustained by assuming that the defendants never acted. However, the defendants *did* act by threatening the plaintiffs' mother into silence.[188] Such an action constitutes conduct, which rebuts the majority's main premise; it also eliminates the need for the suspect "overriding foreseeability" doctrine used by Justice Dalianis.

Instead, the defendants committed a tort of misfeasance. This tort of misfeasance created a circumstance in which a previously committed crime could reoccur—repeatedly. This circumstance fits quite neatly within the hazardous circumstances exception to the limited nonfeasance framework. Essentially, by actively working to cut-off the plaintiffs from any avenue of assistance, the defendants incurred upon themselves a duty to provide the assistance they were attempting to prevent. This establishes a common law duty by the defendants to report the abuse to the authorities. Whether that duty was defined by Section 169-C:29 or by the common law standard of

184. *Id.* at 1129 (majority opinion).

185. *Id.* at 1128–31.

186. *Id.*

187. *Id.* at 1133 (Dalianis, J., dissenting).

188. *Berry*, 879 A.2d at 1129 (majority opinion).

ordinary care—i.e., whether the duty was common law negligence or negligence per se—would be a question for the court to decide, but the duty did exist. As a result, dismissal of the plaintiffs' claims for want of a common law duty was improper.

From one perspective, this does not impose a new cause of action at common law for failure to report abuse—instead, it analyzes the facts in *Berry* under the standard negligence framework. If a court insisted on dubbing it a new cause of action, however, it would be strictly limited to imposing a duty to report abuse upon religious organizations—or, really, any other person—who had taken active steps to prevent other people with knowledge of the abuse from reporting it to the proper authorities.

D. *Policy Implications of Applying a Misfeasance Framework to* Berry

Analyzing the *Berry* situation under a standard negligence framework ensures that the doctrine will not get carried away. It also ensures that this doctrine is not a "loophole" to be used by unscrupulous attorneys to achieve damage rewards that would otherwise be barred by the limited nonfeasance framework. More importantly, however, it also leaves the policy goals of the limited nonfeasance doctrine intact.

Three specific policy goals prominently underlie the limited nonfeasance doctrine. [189] Courts do not wish to override individual autonomy and make all persons, everywhere, subject to government controls on their behavior.[190] A closely related (but not identical) policy is the reluctance of courts to impose or legislate morality from the bench.[191] Finally, courts are very reluctant to punish people for the consequences of their acts that could not be foreseen.[192] The *Berry* analysis proposed here does not violate any of these rationales.

First, it does not override individual autonomy. The only reason that an individual would be subjected to an affirmative requirement to act is to prevent harm inflicted by his own actions. This is a duty which society already imposes; it is also one that courts have not been averse to enforcing. This paradigm recognizes that an individual's autonomy will be overridden by the courts *only* after that defendant has overridden the autonomy of the victim or a victim's would-be helper. This limitation on a failure to report litigation already exists within the existing misfeasance/nonfeasance framework, but is often overlooked.

189. *See supra* at IV.A.2.

190. *See supra* at IV.A.2.

191. *See supra* at IV.A.2.

192. *See supra* at IV.A.2.

Second, this analysis means that courts will not be legislating morality. Rather, they will be providing remedies where there was an actual infliction of injury. Where a potential defendant merely fails to report ongoing abuse, he is technically not inflicting the injury himself. Instead, he is merely standing by as someone else inflicts the injury. Although such a scenario is morally abhorrent, the courts will not intervene. Where they *will* intervene, however, is where the defendant acts to encourage or protect the individual inflicting the harm. Where that happens, the defendant is now actively helping to inflict the injuries. This is no longer a matter of mere morality, but a question of whether the law will provide a remedy for the very thing it exists to prevent. Providing a remedy under such circumstances is not legislating morality. Therefore, the proposed analysis does not violate this policy, either.

The third policy is one of not punishing people for the unforeseeable criminal acts of others. As before, analyzing failure to report cases to determine if misfeasance took place does not impede or violate this policy. If anything, it helps to enforce it by tying a duty to report abuse to actions meant to prevent others from reporting it. Such actions act as a proxy, attesting to the state of mind, which knows that the abuse has happened and is likely to happen again. Additionally, it subjects a duty to the "creation of a risk of harm" element of the limited nonfeasance framework, which itself inherently includes the element of foreseeability.

Tying failure-to-report cases to acts of misfeasance in the common law is certainly no substitute for legislative action. However, it allows courts to pursue their policy goals while also providing justice for victims who would otherwise be left without a remedy. It would require careful analysis on the part of both attorneys and judges. However, although the American legal system might perhaps be justified in recoiling from vagueness or uncertainties, it should not shrink from solutions simply because they require attention to detail. In the hands of conscientious litigators and jurists, this proposed analysis provides a balanced approach and it ensures that courts can provide justice without compromising the principles undergirding the rules of the common law.

V. CONCLUSION

The majority opinion in *Berry* feared that penalizing "mere failure . . . to report . . . [or] improper advice" would unreasonably extend liability.[193] But tortious misfeasance is not "mere" anything, and conceding that the defendants' misfeasance here created a special opportunity for sexual abuse would not have unreasonably extended liability to any circumstance it had

193. *Berry*, 879 A.2d at 1130.

not already reached. The majority erred because it did not recognize this fact, and the plaintiffs once again suffered the consequences of another's refusal to intervene on their behalf.

Further research on *Berry* and the questions it raises is encouraged. In particular, the First Amendment analysis used by both the trial court and Justice Dalianis's dissenting opinion requires more analysis. The attempted (and successful) use of *Lemon* as a shield against misfeasance liability by the defendants in *Berry* was disconcerting, and other courts have found that the Establishment Clause does not prevent courts from holding churches liable for failure to report abuse.[194] Although that topic is outside the scope of this Note, an analysis synthesizing the reasoning of those courts would be a timely addition to this developing area of tort law.

194. *See, e.g.*, Morrison v. Diocese of Altoona-Johnstown, 68 Pa. D. & C.4th 473 (Pa. Com. Pl. 2004); State v. Motherwell, 788 P.2d 1066 (Wash. 1990).