# Tithing to the Vortex:
# The Secrecy of Financial Records in the Church of Jesus Christ of Latter Day Saints and the Case of D.I. v. Corp. of the Bishops of the Church of Jesus Christ of Latter Day Saints

**By: Lynda L. Hinkle ***

"You must continue to bear in mind that the temporal and spiritual are blended. They are not separate. One cannot be carried on without the other, so long as we are here in mortality."
– President Joseph F. Smith, 1877.[1]

In July 2007, the Oregon Supreme Court ruled against The Church of Jesus Christ of Latter Day Saints (LDS) in their attempt to withhold financial information from a plaintiff in a sexual molestation case through which the church is implicated via the doctrine of vicarious liability.

The case of *D.I. v Corp. of Bishops of the Church of Jesus Christ of Latter Day Saints* (*D.I.*) involved a man who purports to have been molested by a home teacher assigned to his family by the church.[2]

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JOSEPH F. SMITH, GOSPEL DOCTRINE: SELECTIONS FROM THE SERMONS AND WRITINGS OF JOSEPH F. SMITH 208 (Deseret News Press) (1939).

[2] Home Teachers are assigned to families in a ward, which is a subsection of the local church, to go and provide ministry and teach themed lessons. They are volunteers, not paid employees, though they have been "set apart" as priesthood members.
LDS.ORG, HOME TEACHING
http://www.lds.org/ldsorg/v/index.jsp?vgnextoid=bbd508f54922d010VgnVCM1000004d82620aRCRD&locale=0&sourceId=f0862f2324d98010VgnVCM1000004d82620a____,
(last visited September 28, 2008).

The Plaintiff, now an adult, sought civil remedy against the church using the legal concept of respondeat superior, a form of vicarious liability through which an employer is responsible for the actions of its employee when those actions are committed in the course of their employment.

Before the case could go to trial on the merits, the Plaintiff and his attorney, Kelly Clark, sought to have the finances of the LDS church revealed in discovery in order to assist a potential jury in determining what size award would be suitable should they find for the Plaintiff. The LDS Church sought to block this discovery through an injunction, which the Oregon Supreme Court denied, in a terse, one page document that provided no legal reasoning.

The LDS church has long believed that it has a religious right to secret their financial records which they value as an expression of their religion. This is a right, or privilege, that they have protected by settling any case that might lead to an investigation of their financial records.[3]

In fact, since 1959, the church has not released any financial information to the public.[4] This note will first investigate how *D.I.* has raised and informed the question. Then, it will investigate why the LDS church argues it should retain secrecy over its financial records and how the Plaintiff successfully undermined that argument to the court in Oregon. Finally, it will explore common religious

[3] Attorney Timothy Kosnoff, an attorney in Seattle, Washington, calls the financial information "the secret of secrets," a secret which he sought to uncover in 2001 on behalf of another Oregon man who says he was sexually abused by an LDS Sunday School teacher. The case was settled for $3 million. Associated Press, *UPDATE: Ore. Court Rules Against LDS Church's Bid to Keep Finances Secret,* UTAH COUNTY'S DAILY HERALD, July 12, 2007, at A1.

[4] In 1959, when the church last offered a financial accounting to the public, it reported expenses of $72.8 million. JOHN HEINERMAN AND ANSON SHUPE, THE MORMON CORPORATE EMPIRE 81 (Beacon Press) (1985). D. Michael Quinn argues that the church stopped releasing its financial records to sidestep criticism over deficit spending. He writes: "By the end of 1959 the church spent more than $8 million more than its income that year. This was extraordinary in view of the fact that the church had surplus income of $7 million after 1958's expenditures. To conceal the massive increase of building expenditures in the last half of 1959 which created the deficit, the church stopped releasing even abbreviated financial reports." D. MICHAEL QUINN, THE MORMON HIERARCHY: EXTENSIONS OF POWER 219 (Signature Books) (1997).

practice, federal law and case law and how a challenge presented to the United States Supreme Court on this matter might be decided.

## An Examination of *D.I. v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints*

Attorney Kelly Clark of Portland, Oregon considers himself something of an expert on church sex abuse cases.[5]

The case of *D.I.* may have given Clark a victory in pursuing the LDS church in sex abuse cases in the future, as well as in this present case: the Oregon Supreme Court refused to challenge a trial court order demanding the church reveal its finances in order to prepare for the potential vicarious liability finding against it under the doctrine of respondeat superior.

Despite this seeming victory, Clark contends that the fight is not won since the Oregon Supreme Court did not give its reasoning in denying the LDS Church's injunctive motion, and that whatever their unspoken reasoning is in this matter may not apply to future cases.[6] Clark currently has multiple other cases of sexual abuse against the Mormon church in Oregon courts which he hopes to use to test the Oregon Supreme Court's true intentions in denying the stay.[7]

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[5] Kelly Clark's website, http://www.mormonabuse.com, not only advertises his practice but offer resources about church related sex abuse. His website claims about Clark that,
His successes include the landmark cases of *Fearing v Bucher and Archdiocese of Portland,* 977 P. 2d 1163 (Oregon Supreme Court, 1999) and *Lourim v Swenson and Boy Scouts,* 977 P.2d 1157 (Oregon Supreme Court, 1999), which, taken together, both strengthened the statute of limitations for child sexual abuse survivors and at the same time held "institutions of trust" liable for abuse arising from the relationships sponsored by those institutions. He as also won victories against the LDS Mormon Church, including numerous trial court wins on questions of statutes of limitations, agency and punitive damages–and in the summer of 2007, won an important victory when the Oregon Supreme Court refused to overturn a trial court order requiring the Mormon Church to disclose its financial strength and records as part of a punitive damages case against the Church. *DI v Johnson and the Church of Jesus Christ of Latter Day Saints*, (Oregon Supreme Court, mandamus proceeding, July, 2007). He also claims to have handled over 150 cases of childhood sexual abuse. KELLY CLARK, MORMON SEX ABUSE ATTORNEY, http://mormonabuse.com/ (last visited September 25, 2008).

[6] Telephone Interview with Kelly Clark, Plaintiff's Attorney (January 29, 2008).

[7] *Id.*

The *D.I.* case began with a home teacher, defendant Ken Johnson, allegedly sexually abusing a boy, aged 13-15 when the abuse took place, in Beaverton, Oregon. The alleged sexual abuse took place as often as twice a week for two years between 1987 and 1989. According to the Plaintiff, nicknamed D.I. for anonymity, Johnson was acting as an agent of the LDS church through its home teaching program, thereby making the church vicariously liable for the damages that Johnson caused under the doctrine of respondeat superior.[8] The LDS church denies that Johnson was acting as its agent, instead stating that he visited the home as a family friend.[9] The Plaintiff is suing for $45 million in damages.[10] Plaintiff also petitioned the court that the LDS church's finances be revealed to

[8] The Amended Complaint filed by the Plaintiff argues that, "While working in the second ward of the Beaverton Stake, and for the purpose of furthering his assigned duties as a Home Teacher, Johnson identified Plaintiff's family as with adolescent or teenage boys; befriended the Plaintiff, Plaintiff's brother, and their family; gained the family's trust and confidence as an educational and spiritual guide, and as a valued and trustworthy mentor to Plaintiff; gained the permission, acquiescence and support of Plaintiff's family to spend substantial periods of time alone with the Plaintiff; and sought and gained the instruction of Plaintiff's parents to Plaintiff that he was to have respect for authority and to comply with Johnson's instruction and requests…The above course of conduct described….is hereinafter collectively referred to as 'Grooming'….Johnson, while acting within the course and scope of his employment and agency using the authority and position of trust as a Home Teacher for the Defendants – through the Grooming process—induced and directed Plaintiff to engage in various sexual acts with him….Johnson used the Grooming process to accomplish his acts of sexual molestation. Johnson's Grooming was (1) committed in direct connection and for the purpose of fulfilling Johnson's employment and agency with the Defendants (2) committed within the time and space limits of his agency as Home Teacher (3) done initially and at least in part from the desire to serve the interests of Defendants; (4) done directly in the performance of his duties as a Home Teacher (5) was generally actions of a kind and nature which Johnson was required to perform as a Home Teacher; and (6) was done at the direction of, and pursuant to, the power vested in him by the Defendants."THIRD AMENDED COMPLAINT *at* 2-4, D.I. v Corporation of Bishops of the Church of Jesus Christ of Latter Day Saints, No. 0603-03429 (2007). The Complaint further claims that years later Plaintiff sought the counsel of the church when he realized he had been damaged, and they offered him counseling and advised him that the statute of limitations for pursuing the matter had past, a false representation that Plaintiff claims was a knowing one. *Id.* at 4-5.

[9] In fact, the Home Teachers generally only visit once a month, not the twice a week that Ken Johnson was allegedly visiting and abusing D.I. LDS.ORG, *supra* note 2.

[10] In addition to $45 million in punitive damages, the Plaintiff is seeking an additional $12.7 million in economic and non-economic damages as stated in their Complaint. *See* THIRD AMENDED COMPLAINT note 8 at 8.

assist the development of their case and their pursuit of punitive damages.[11] The Plaintiff's response to LDS Defendant's motion for a protective order argued:

Because the purpose of holding a principal liable for punitive damages for the act of its agent is to deter the principal, the proper measure of damages must reflect the principal's worth[12] Likewise, the purpose of punishing a wrongdoer through an award of punitive damages justifies an award based on a principal's financial status because, under a respondeat superior theory, the acts of an agent are deemed to be the acts of the principal, making the LDS Defendants the wrongdoers in this case. Because any punitive damages awarded against the LDS Defendants should reflect their worth, discovery of the financial condition of these defendants is relevant and appropriate.[13]

Because the LDS church funnels all of their money into a common pool maintained out of Salt Lake City, Utah, financial disclosure would not merely disclose the finances of the Oregon church, but of the entire LDS church.[14]

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[11] Kelly Clark, plaintiff's attorney, said to the press that "A jury needs to know the entire financial context to now whether a punitive award is too much or sufficient or not enough." Ashbel S. Green, *Church Can't Hide It's Worth*, THE OREGONIAN, July 12, 2007, available online at http://www.oregonlive.com/news/oregonian/index.ssf?/base/news/1184210740215720.xml&coll=7&thispage=1 (last visited on January 20, 2008).

[12] *See Stroud v. Denny's Restaurant Inc*., 271 Or. 430, 435 (1972) (discussing deterrence). Cited in the PLAINTIFF 'S RESPONSE TO THE LDS DEFENDANT'S MOTION FOR A PROTECTIVE ORDER, D.I. v Corporation of Bishops of the Church of Jesus Christ of Latter Day Saints, No. 0603-03429 (2007).The rule of Stroud is that "if the servant has committed a tort within the scope of his employment so as to render the corporation liable for compensatory damages, and if the servant's act is such as to render him liable for punitive damages, then the corporation is likewise liable for punitive damages."`*Stroud* at 435. The court reasoned that this is the only way to adhere to the principle of punitive damages, which is to provide a deterrent to the behavior leading to the damage.

[13] The Plaintiff's Response to the LDS Defendant's Motion for a Protective Order bases their argument on two cases on point: *Laidlaw Transit, Inc. v. Crouse*, 53 P.3d 1093 (S.Ct. Alaska 2002) (affirming an award of punitive damages under the doctrine of respondeat superior and held that the court was correct in admitting evidence of the principal's financial status) and *Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn*, 184 Ariz. 120 (1995) (upholding a punitive damages award against a law firm that was vicariously liable under the doctrine of respondeat superior where the award was considered reasonable against the factual background of the law firm's financial statements).

[14] According to Dan Busby, vice president of the Evangelical Council for Financial Accountability, this is an unusual system of accounting among churches. Busby says, "I'm not aware of any group or denomination that would funnel all money into the central repository. That would be totally unheard of in Protestantism….Most denominations require that local churches

Concerned about this possibility, the Church sought and failed to get injunctive relief against the court order to reveal their finances in discovery. This may seem an insignificant issue when facing a multi-million dollar lawsuit, but the priority of the Church was evidenced in their quick settlement of the matter rather than the releasing of that financial information.

Since 1959, the Church of Jesus Christ of Latter Day Saints have kept their financial information secret. This includes the number of employees the church retains. [15] It includes their income from tithing. [16] It even includes their real estate and corporate holdings and other sources of potential income.[17] The church

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pay a percentage of per capita amount to headquarters, but usually only 10 or 15 percent used to fund headquarters operations. The Catholic church, for instance, is financed at each dioceses, even though political and spiritual power is centered at the Vatican." Peggy Fletcher Stack, *Church Shuns Talk of Assets*, The Salt Lake Tribune (July 13, 2007), downloaded from the archival database of http://www.sltrib.com/, September 20, 2007.

[15] The state of Utah allegedly once requested an accounting of the LDS church's employees for the purposes of putting together a prospectus for the bond market, but when church officials refused to release any data, the state noted on their prospectus that "the church was 'believed to be' one of the largest employers in the state of Utah. Robert Gottleib and Peter Wiley, America's Saints: The Rise of Mormon Power at 103 (Harvest Books) (1986).

[16] To be a member in good standing, members are required to give 10% of their gross income annually in tithing. Tithing is the primary income of the church. As early as 1983, the church had computerized the tithing records to easily move records with their members from one ward or stake to another. Robert Gottleib and Peter Wiley, America's Saints: The Rise of Mormon Power at 97 (Harvest Books) (1986). Critics of the church often refer to mandatory tithing as a central point of their contentions against it. The tithing is mandatory in that one cannot get a "temple recommend" if not up to date on tithing (and also demonstrating other values central to Mormon belief, such as general morality and the keeping of the Word of Wisdom, which discourages the use of alcohol, tobacco and coffee and tea) , and that recommend is necessary in order to complete many of the rituals that LDS church members believe permit them to enter the highest of three degrees of heaven. *See* Bill McKeever, *Tithing by Coercion*, available online at http://www.mrm.org/topics/miscellaneous/tithing-coercion.

[17] Attempts to estimate the church's net worth are occasionally made, such as this one by a prominent author on Mormon issues, "Their enterprises range from a $16 billion insurance company to perhaps $6 billion in stocks and bonds, if not more. There's a $174 million chain of radio stations (seventh largest in the country). The church's more than 150 farms and ranches, including America's largest cattle ranch, make it one of the largest landowners in the nation. The farms and ranches encompass somewhere in the neighborhood of one million acres, roughly equal to the size of the state of Delaware."Richard Ostling, *Mormon America: The Power and the Promise* at 118 (HarperOne) (1999). Although Gordon B. Hinckley, President of the LDS church from March 1995 until his death in January 2008, was once quoted by the Wall Street Journal as saying "The business involvement which we have is a very, very minor part of our activity," one mid-1970's study estimated the Church's business earnings at $500 million annually, along with another half billion from tithing and other member gifts. David Briscoe and Bill Beecham, *Mormon Church Controls Extensive National Business Interests*, Idaho Falls Post Register at A-

maintains that they since they are a non-taxable religious organization, they have the right to withhold this information from the prying eyes of the public. The Oregon Supreme Court recently disagreed in the *D.I.* case, but did not cite its reasoning, only producing a terse, one page order denying the Church's motion for a protective order on July 9, 2007.[18] In response, LDS attorney Stephen F. English made a statement that may have been laying the groundwork for a potential United States Supreme Court challenge to the order, saying "The church respects the rule of law, but has profound constitutional concerns based on its constitutional right to protect the free expression of its religion."[19]

Oregon courts gave the LDS church an out, ordering the case into mediation, which delayed the need for them to produce financial documents as they attempted to negotiate a settlement.

Quickly after this decision, the LDS church did settle the case in mediation with a sealed agreement.[20] The settlement eliminates the need for the Church to reveal its financial records, at least for now, and also demonstrates the Church's commitment to retaining the secrecy of those records. It seems more than possible, however, that now that the Pandora box of the Oregon Supreme Court's

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11 (September 21, 1975).Although it is virtually impossible to guess the net worth of the church without insider information, Heinerman and Shupe made an attempt in 1983, and estimated that the church's worth was $8 billion. *See supra* note 4. Richard Ostling reports that Heinerman and Shupe admit that this was a very conservative estimate and that they may have been "easily" 30 percent low. OSTLING *at* 117.

[18] The order states: "Upon consideration by the court, Relators' motion for leave to file a reply to the adverse party's response is granted. Relators' motion to strike portions of the adverse party's response is granted. The petition for a peremptory writ of mandamus is denied. The stay of the Circuit Court order of June 28, 2007 is lifted." ORDER DENYING PETITION FOR PEREMPTORY WRIT OF MANDAMUS, LIFTING STAY, GRANTING MOTION TO FILE REPLY AND GRANTING MOTION TO STRIKE. Oregon Supreme Court No. S055003 (July 2, 2007).

[19] Quoted in Peggy Fletcher Stack, *Church Shuns Talk of Assets*, THE SALT LAKE TRIBUNE (July 13, 2007), np, downloaded from the archival database of http://www.sltrib.com/, September 20, 2007. The article further opines "LDS spokesman Scott Trotter declined to say what the church will do next, but it may not have to do much. The decision was reached on narrow pretrial grounds, which means the trial court could ultimately side with the church's position."

[20] Kelly Clark, attorney for the Plaintiff, stated that the terms of the settlement will remain secret. Telephone Interview with Kelly Clark, Plaintiff's Attorney (January 26, 2008). Despite the flurry of media about the Oregon Supreme Court decision, none of the main papers have even picked up that a settlement was reached, let alone were they able to deduce any terms.

denial of a protective order is open, other cases may arise that will further press and challenge the Church to reveal their financial holdings.

## The Arguments For and Against Compelling Financial Disclosure in *D.I.*

Prior to the Oregon Supreme Court decision, however, the LDS Defendant made arguments against the motion to compel financial disclosure. The Defendant argued that case law did not entitle the discovery of net worth prior to the determination of vicarious liability and that it is the agent, not the principal's net worth that is discoverable.[21]

Further, the LDS Defendant argued that the Church's financial status is irrelevant in this case because it is not a traditional vicarious liability case and that even if it were, only the direct wrongdoer's financial assets are discoverable. [22] The public policy interest in the assignment of punitive damages, the LDS Defendants further argued, is to deter wrongdoing, and there is no deterrence of wrongdoing when a party was unaware of any wrongdoing.[23] Finally, the motion poses a hypothetical:

Indeed, if punitive damages against the actual wrongdoer were based on net worth of a vicariously liable employer or other principal, punitive damage awards would be absurdly large and probably unconstitutional. A Wal-Mart employee, for example, might commit a tort that subjects Wal-Mart to vicarious punitive damages. If the jury took Wal-Mart's net worth into account, a minimum wage employee with no assets could be found liable for tens of millions of dollars in

[21] See *supra* note 11 for the Plaintiff's response to this argument.

[22] The motion cites *Shetka v. Kueppers, Kueppers, Von Feldt and Salmen*, 454 N.W.2d 916, 918-919 (Minn 1990) in which individual partners in a law firm were sued based on vicarious liability in a legal malpractice claim. The court found that "it does not follow that the financial condition of the individual nonparticipating partners is relevant to the jury's computation of the punitive damage award….[F]or the purpose of determining the amount of a punitive damage award, the financial condition of a nonparticipating, non-culpable vicariously liable party is irrelevant and not discoverable."

[23] Here the motion cites *Franz v. Brennan*, 440 N.W. 2d 562, 565 (Wis. 1989) in which the parents of a minor involved in a car accident were not required to produce evidence of their financial status as they did not act "negligently, or with malice, willfulness or wantonness in allowing their son to drive" and discovery of their financial status would not serve public policy interests.

punitive damages. The effect of this, of course, would not be to deter and punish the wrongdoer—that would sufficiently be done by a much lower award of punitive damages that is in proportion to the direct wrongdoer's net worth. Instead, the effect would be to arbitrarily transfer wealth from a large, corporate defendant to an individual plaintiff, which is prohibited by the Due Process Clause of the U.S. Constitution.[24]

Further, the LDS Defendants argue that they "have been unable to locate any case in Oregon or anywhere else allowing punitive damages or net worth discovery based on such a vicarious liability theory" and that "every case on point holds that only the net worth of the direct wrongdoer is relevant to a punitive damages claim."[25]

In other words, they argue that only the net worth of the main defendant is relevant. The Plaintiff responded to this claim by stating that "To call these assertions 'disingenuous' may be too polite."[26] Plaintiff argued that Johnson was an employee of the LDS Church in his role as home teacher when he committed the alleged abuse, and therefore the Church was vulnerable to discovery probes of their financial assets under the doctrine of respondeat superior.[27]

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[24] Defendant's Motion for Protective Order and Supporting Memorandum of Law*, D.I. v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints,* No. 0603-03429 (May 29, 2007). The motion requested a protective order "prohibiting discovery of the financial statements, financial reports, budgets, balance sheets, year-end statements, audits and any other financial documents of the LDS Church or any of its affiliated entities" because "the requested discovery is not relevant; reasonably calculated to lead to the discovery of relevant and admissible evidence; harassing; and oppressive." *Id.* at 2.

[25] *Id.* at 6.

[26] Plaintiff's Response to LDS Defendant's Motion for Protective Order, *D.I. v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints,* No. 0603-03429 (June 11, 2007), 2.

[27] Plaintiff cites *Laidlaw Transit , Inc. v. Crouse* 53 P.3d 1093 (S. Ct. Alaska 2002) which affirmed an award of punitive damages assessed against a corporate principal under the doctrine of respondeat superior and further supported the trial court's decision to admit evidence of the principal's financial status. Referring to their decision to admit that evidence, the Court in *Laidlaw* opined that "Because the law treats the employer and employee alike as wrongdoers, it is proper for the jury to consider what amount of punitive damages will suffice to punish and motivate the vicariously liable employer." *Laidlaw* at 1102.

The Plaintiff also address the LDS Defendants concerns about due process by stating that no due process issues were raised in this matter. The Plaintiff relied on the case of *Hyatt Regency Phoenix Hotel Co. v Winston & Strawn,*[28] a 1995 Arizona case that found that a partnership could be held vicariously liable for one partner's actions and that due process is not violated when a vicariously liable party is assessed damages in a jury trial because there is post-trial judicial review. The Plaintiffs fail to note, and the Defendants did not argue, that the case is highly distinguishable from *D.I.* as in it there is a clear, legal partnership between the vicariously liable firm and the partner, a partnership that is governed by law. [29] In D.*I.*, the home teacher that allegedly committed the sexual abuse was a volunteer of the Church, not necessarily susceptible to the same legal status as an employee. Although technically priesthood, Johnson was not priesthood in the sense that he was a legal employee of the church as might be, for example, in the Catholic Church. The LDS Church admits all "worthy males" to the priesthood after they reach the age of 12.[30] Most priesthood members are asked to accept responsibility for home teaching certain families in their ward. They are not given a salary or benefits of any sort for this home teaching, but are expected to take it on as a duty of their calling as priesthood members.

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[28] *Hyatt Regency Phoenix Hotel Co. v Winston & Strawn,* 184 Ariz. 120 (Ariz. App. 1995).

[29] *Id.* Hyatt Regency sued a law partnership for legal malpractice. The court quoted the Uniform Partnership Act in evidencing the vicarious liability of the partnership for the act of one of its partners.

[30] From the LDS website, "All male members of the Church who are worthy and prepared may receive the priesthood to help lead the Church and serve Heavenly Father's children. A man with the priesthood might serve by leading congregations of the Church, performing the ordinances of the Church (such as baptism), and blessing those who are sick. God expects those who hold this sacred priesthood authority to follow the example of Jesus Christ and serve with love, gentleness, and kindness." Church of Jesus Christ of Latter Day Saints, *The Restoration of Truth: The Restoration of the Priesthood*, available at http://www.mormon.org/mormonorg/eng/basic-beliefs/the-restoration-of-truth/the-restoration-of-the-priesthood. (Last visited September 27, 2008). Priesthood is divided into two types, the Aaronic and the Melchizedek priesthood. The Church believes that these were the original types of priesthood handed down from the earliest church on earth, back in the days of Adam and Eve, and that this priesthood was restored in 1829. Young males are given the Aaronic priesthood and serve as helpers who can perform baptisms and serve Communion. Adult males are given a laying on of hands which confers the Melchizedek priesthood, with offices of elder, high priest, partriarch, Seventy, Apostle, and there is one President and Prophet of the church, currently Thomas Monson. Home teaching is a responsibility assigned to teachers and priests in the Aaronic priesthood and all Melchizedek priesthood members. Home teachers are supposed to visit the assigned families in their ward once a month to teach and strengthen them. http://www.lds.org/ Gospel Library. (Last visited September 25, 2008).

The church provides instruction to home teachers through the production of a church magazine, Ensign, with inspirational stories that home teachers can go over with the families to which they are assigned, and by having Sunday School and other educational programs for home teachers. However, the relationship between home teachers and the Church is clearly significantly different than partners in a firm have to that partnership. They are not paid or contractual employees, and there isn't the same law governing their involvements.
The court in *D.I.* denied the protective order requested the LDS church to protect their financial secrecy in a pretrial motion. Had this order been challenged, the above argument would likely have surfaced and the court would have had to consider whether this unique relationship falls under the governance of the doctrine of respondeat superior.

This issue has been litigated in another religious context. Specifically, the string of sex abuse cases leveled at Catholic priests and their impact on the Catholic church has raised the issue of what relationship priesthood members have to a church and what liability churches have in the misdeeds of their spiritual representatives.

In Oregon, the same jurisdiction as *D.I.,* the Oregon Supreme Court found in *Fearing v. Bucher* that the Catholic Church was subject to a vicarious strict liability for priest's sexual abuse of children.[31]

The Court distinguished the case from *G.L. v. Kaiser Foundation Hospitals*, in which it upheld the dismissal of a claim of vicarious liability against a hospital when an unconscious patient was allegedly sexually assaulted by a respiratory

[31] *Fearing v. Bucher*, 977 P.2d 1163 (Oregon Supreme Court 1999) concerned an allegation of sexual abuse against a priest from 20 years earlier by a parishioner, a minor at the time. The Supreme Court held that "the allegations were sufficient to state a claim of vicarious liability against archdiocese based on application of doctrine of respondeat superior" and also extended the statute of limitations to allow the claim.

therapist, because they determined that the therapist was not acting in furtherance of the hospital's interests at the time. [32]

The Court argued that :

> This is not a case like *G.L.* in which the only nexus alleged between the employment and the assault was that the employment brought the tortfeasor and the victim together in time and place, and therefore gave the tortfeasor the 'opportunity' to commit the assaults.[33] Instead, the Court said in *Fearing* that the Defendant had 'us[ed] and manipulated his fiduciary position, respect and authority as youth pastor and priest' to befriend plaintiff and his family, gain their trust, spend large periods of time alone with the plaintiff, physically touch the plaintiff, and ultimately to gain the opportunity to commit the sexual assaults upon him.[34]

The precedent in *Fearing* could have cut either way had *D.I.* gone all the way to trial. Like *G.L.*, it could be argued that the LDS Church did little more than provide the opportunity for Johnson to be in contact with the Plaintiff at the time of the alleged abuse. However, because Johnson was a member of the priesthood and had a certain fiduciary position, the courts could also look to *Fearing* as a means through which they can assign vicarious liability to the LDS Church for the abuse.

One of the LDS Church's claims in *D.I.* was that Johnson was, in fact, not acting in furtherance of their interests. It is arguable that if home teaching is to take

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[32] *G.L. v. Kaiser Foundation Hospitals*, 306 Ore. 54 (1988).

[33] *Id*. at 61. Further, the Court used the case of *Chesterman v. Barmon*, 305 Or. 439, 442 (1988) which laid out the elements that prove that an employee's conduct is in furtherance of the interest of the employer: "(1) the conduct must have occurred substantially within the time and space limits authorized by the employment. (2) the employee must have been motivated, at least partially, by a purpose to serve the employer; and (3) the act must have been of a kind that the employee was hired to perform." *Id.*

[34] *Fearing v. Bucher*, 328 Or. 367 at 377.

place once a month in the custom of the church, Johnson's weekly (or more) visits to the Plaintiff were out of the ordinary and no longer furthering the interests of the church. Further, home teaching is customarily done in a group with the entire family. Johnson's access to an individual boy in private was unusual for the home teaching situation, particularly since home teachers are generally assigned in pairs and Johnson was making these visits alone. The unique structure of the LDS church's priesthood and programs will have to be considered should this issue re-emerge in the courts.

## Financial Secrecy for Churches in Common Practice

The LDS Church is not the only church that keeps its finances secret. In fact, the federal government has no requirement that churches publicly disclose their records.

The Internal Revenue Service typically does not get involved in Church finances unless there is some evidence that the church is using the pulpit as a political platform or in some other way abusing their status as churches to commit fraud.[35] One example of a church organization that has kept its financial records secret is the Benny Hinn Ministries, a popular televangelist known for his "miracle crusades" and his program "This is Your Day". Hinn has been investigated periodically by media and government since the 1990's, but has kept a tight lock on his financial records right up until the fall of 2007, when he gave a verbal statement of the worth of his ministries (with no documenting evidence) so as to try to calm the negative press.[36]

[35] *Branch Ministries v. Rossotti,* 40 F. Supp. 15 (D.D.C. 1999). The court held that the IRS had the right to revoke exemption status if the church participates in political activity. In this case, the church, Branch Ministries, took out a two page ad in USA Today and the Washington Post urging citizens to vote for a particular candidate and requesting "tax deductable donations" to cover the cost of the ad. The Internal Revenue Code removes exemption from churches who engage in any involvement in "any political campaign on behalf of (or in opposition to) any candidate for public office." 26 U.S.C. § 501(a), (c)(3) (1994). Although an extreme example, the IRS has since gone after a number of churches and church organizations on this issue. *See generally* Jennifer M. Smith*, Morse Code, Da Vinci Code, Tax Code and…Churches: An Historical and Constitutional Analysis of Why Section 501(C) (3) Does Not Apply to Churches.* 23 JLPOL 41 (Winter 2007).

[36] A 2005 report from Ministry Watch, a watchdog organization for evangelical ministries, stated that "the reported exorbitant spending of the Hinn family reveals that Benny Hinn Ministries has far more money than it needs to carry out its ministry." Ministry Watch website

Churches and ministries that fail to reveal financial records are not necessarily always on the fringe. The Catholic Church kept its finances and employment records a secret as a matter of canon law until sex abuse cases and requests for discovery eventually forced the revealing of much sensitive data.[37] Some of that data was financial, and was used to determine the capability of the Church as a party to a suit to pay civil damages.[38]

Although many churches reveal their financial data as a matter of course, it is clearly not unusual for a church to choose not to do so. As a private entity without the typical IRS regulations corralling their actions, churches have traditionally been free to make the decision to reveal and secure what they wish.[39]

## The Law and Church Financial Secrecy

In the absence of legislation requiring churches to reveal their financial information publicly, churches cling to what law exists that supports their privacy.

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http://ministrywatch.com/mw2.1/F_SumRpt.asp?EIN=591245704 (Last visited on January 17, 2007). Hinn's revelation of his financial information took place on an episode of Dateline NBC. In order to avoid accusations of financial impropriety, many churches join the Evangelical Counsel for Financial Accountability (http://www.ecfa.org/ ) which maintains a list of best practices and standards for church financial reporting. Benny Hinn Ministries is not a member.

[37] Under the REVISED CODE OF CANON LAW OF 1983, each diocese is required to keep secret archives whose purpose is to retain the privacy of assorted individuals in matters of marriages and annulments, de-frockings, etc. In order to demonstrate vicarious liability, plaintiffs in sex abuse cases sought to open these secret files. For example, in the case of *Hutchinson v. Luddy* Civ Div No 445 (Somerset Co Pa 1988) the plaintiff was successful in getting the court to order opening of the secret files. *See generally* Nicholas P Cafardi, *Discovering the Secret Archives: Evidentiary Privilege of Church Records*, 10 JLREL 95 (1993/94) for a discussion of the use of secret archives of the Catholic Church in discovery.

[38] The LDS Church pools all money into a central pot in Utah, their headquarters. The Catholic Church has independent financial accounting at each diocese level, therefore releasing data on a particular diocese does not reveal financial data from other diocese or the Vatican itself. *See generally* Thomas J. Reese, ARCHBISHOP: INSIDE THE POWER STRUCTURE OF THE AMERICAN CATHOLIC CHURCH (Harper & Row) (1989) for a thorough examination of how the church is structured, including a chapter on financial administration.

[39] For a discussion of churches and their tax status, see Wendy Gerzog Shaller, *Churches and their Enviable Tax Status*, 51 U. Pitt L. Rev. 345 (1990).

Coming first to mind is the First Amendment, which protects the free exercise of religion.[40]

The First Amendment does not protect those who are committing tortuous or illegal acts. Therefore, if churches are to be made vicariously liable for sexual abuse acts, the First Amendment does not protect them from criminal or civil redress because it has nothing to do with the actual free exercise of religion, but instead with the torutous or illegal act. One Florida court made this argument in *Malicki v. Doe*, a 2002 action against a church and archdiocese for negligent hiring and supervision in connection with alleged sexual assaults on parishioners by a priest while the parishioners were working at the church.

Here, the Supreme Court of Florida held that the Free Exercise and Establishment clauses of the First Amendment did not bar the parishioners claim, since the claim was based on the neutral application of tort law, the imposition of the tort liability had a secular purpose, and the primary effect of imposing the tort liability based on the allegations neither advanced nor inhibited religion.[41]

The *Malicki* court looked to the United States Supreme Court for guidance and stated that they felt the Court was split on the issue of how far religious autonomy principles can be expanded to stop third party tort claims that interrogate a religious institution's acts or omissions.

Although the Court decided that religious autonomy was not impaired by allowing claims of negligent hiring and supervision, the dissent argued,

> While I recognize that the First Amendment does not shield a religious institution against all vicarious liability arising from the tortuous actions of its employees, I dissent because allowing a tort claim for negligent

[40] Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof..." U.S. Const. Amend I.
[41] *Malicki v. Doe*, 814 So. 2d 347 (Fla. 2002).

> hiring and supervision against the hierarchy of a religious institution would necessarily require a secular court to impermissibly interpret the religious institution's law, policies, and practices. Such intrusion into the internal affairs of the church-or any other religious institution-would amount to excessive entanglement of religion by the state and, therefore, such a claim is barred by the First Amendment. In reaching its conclusion, the majority generally undervalues the First Amendment concerns at stake and specifically overlooks the undeniable, and constitutionally violative, result that secular standards of care and duties will be unilaterally imposed upon the ecclesiastical hierarchy."[42]

It is, therefore, by no means without argument that the standards of negligent hiring and supervision that are applied to non-religious work environments are applied to churches.

In the case of the LDS Church, where all male members are admitted to priesthood, the application of such a standard to protect against all tortuous acts by priesthood members in the pursuit of their callings could potentially require a renegotiation of the entire priesthood structure and system, which is a system rooted in religious belief and custom.

In *D.I.*, negligent hiring or supervision was not the issue, but rather the closely related vicarious liability via respondeat superior. Nevertheless, if the First Amendment concerns regarding negligent hiring and supervision give pause, so should concerns of holding the LDS Church responsible for the tortuous actions of a lay and only loosely supervised and trained priesthood. Unlike the Catholic Church, that puts its priesthood through rigorous training, hires them, selects them for appointments in various locations, financially supports and closely supervises them, the LDS Church merely investigates their worthiness from a series of outwardly visible benchmarks such as adherence to tithing practices. It then confers priesthood not as a career or principal vocation, but as a spiritual calling.

[42] *Id.* at 367.

It assigns them some families to look after in pairs and asks them to provide spiritual counsel, and then it sends them on their way.

If we apply the principles that *Malicki* was decided upon, it becomes clear that although the claims in *D.I.* may be based on the neutral application of tort law and the imposition of that liability had a secular purpose, these allegations of vicarious liability against the LDS Church do have the effect of inhibiting religious expression by significantly deterring the church from continuing to follow its established practices, based on spiritual belief, of conferring priesthood easily upon its male members, for fear of legal suit should any member commit a tortuous act while stating or implying that they are acting within their fiduciary duty as priesthood members.

Although aimed at the issue of religious involvement in public schools, the Supreme Court created a clear test for application of laws in relation to the Freedom of Religion Clause in the First Amendment.

In *Lemon v. Kurtzman* the United State Supreme Court argued that in order to pass muster under the First Amendment, a governmental action must have (1) a primarily secular purpose (2) a primarily secular effect and (3) avoid "excessive entanglement" with religion. [43] Should there be a challenge before the Supreme Court regarding the revealing of LDS finances, it is possible that their attorney could raise a Lemon test challenge. A government order to reveal LDS finances, could fail under the second prong, "primarily secular effect", because the LDS church can argue that the revealing of their financial and employment records would compromise its religious structure.

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[43] *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Although the Lemon test is considered by some scholars to be somewhat out of vogue, it was applied by the United States Supreme Court as recently as 2000 in *Santa Fe Independent School District v. Doe,* 520 U.S. 290 (2000). *See generally* Herbert M. Kritzer and Mark J. Richards, *Jurisprudential Regimes and Supreme Court Decisionmaking: The Lemon Regime and the Establishment Clause Cases*, 37 Law & Soc'y Rev 827 (December 2003).

Another test that rears its head in free exercise claims is the *Sherbert* test, which requires strict scrutiny to be used in deciding if a governmental action violates the free exercise clause.[44] The *Sherbert* test requires courts to determine if (1) the claim is based on sincere belief (2) the governmental action is a substantial burden on the ability to act on the belief. If they rule affirmatively on these two prongs, the government must then prove it had a compelling state interest and went about pursuing that interest in the least restrictive way if they want to successfully maintain the action. *Sherbert* was overruled by subsequent court cases, but resurfaced in the Religious Freedom Restoration Act of 1993 (RFRA).[45] RFRA was overturned in part by the Supreme Court in *City of Bourne v. Flores.*[46] However, most recently in 2006 the Supreme Court affirmed the application of RFRA to federal acts only in *Gonzalez v. O Centro Esperita Beneficente Uniao Do Vegetal.*[47] The Sherbert test or RFRA test are both applied to legislative or governmental actions. The courts, in ordering the release of financial records under tort law might also be affected, but in *D.I.* we are dealing with a state court and state law, not federal, and so this test is not governing. However, the zeitgeist of the test may be used by a court in determining the proper result of an LDS constitutional challenge to a court ordered financial audit. If so, there will be investigation into the sincerity of the connection between LDS financial secrecy

[44] The Sherbert test is from *Sherbert v. Verner*, 374 U.S. 398 (1963), in which a Seventh Day Adventist successfully precluded the state from denying her unemployment compensation because she refused to work on her Sabbath day.

[45] RFRA frames the *Sherbert* test in this way: a) IN GENERAL. -- Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).(b) EXCEPTION. -- Government may burden a person's exercise of religion only if it demonstrates that application of the burden to the person -- (1) furthers a compelling governmental interest; and(2) is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C 2000 bb sec 3. (1993).

[46] *City of Bourne v. Flores*, 521 U.S. 507 (1997) (finding that when a Catholic archbishop brought suit under RFRA against local zoning officials when they refused to allow him to build onto a church, that the RFRA was an unconstitutional use of Congress's enforcement powers). *See also* Gregory S. Walston, *Reexamining the Implications of Expanding Constitutional Liberty: How the Supreme Court Misconstrued the Religious Freedom Restoration Act in City of Boerne v. Flores*, 21 T. Jefferson L. Rev. 23 (1999). Walston argues that separation of powers was infringed upon by the *Bourne* decision.

[47] In this case, involving the regulation of a sacramental tea used for religious purposes but that contained psychotropic substances, the Court quoted RFRA as the appropriate controlling legislation on the issue and used its interpretation of the *Sherbert* test to decide the case in favor of the church. This legislation applies only to federal governmental action, not states. *Gonzalez v. O Centro Esperita Beneficente Uniao Do Vegetal*, 546 .S. 418 (2006).

and their religious belief, followed by a determination of the substantial restriction of their belief by the court ordered financial revelation. If they successfully navigated those two prongs, the LDS church would still face the government's attempt to prove that it has a compelling state interest and that they are going about this interest in the least restrictive manner possible.

The LDS church's commitment to financial secrecy seems clear. Perhaps the best argument for the religious aspect of this secrecy is that their income is from tithing, which is more than just a practical means of maintaining their programs, but also a sacred part of their worship and a benchmark for successful development in the individual's religious walk. Revealing their financial bottom line, as it were, would, to them, sully the sacred nature of their accounting, changing the sacrifice of a people to their God to a cold calculation of worth meant to be exploited for others financial gain. It may prove difficult to demonstrate this belief due to the lack of official documents that specifically express the sacredness of their belief despite nearly 50 years of retaining the policy of financial secrecy. Nevertheless, if they are successful they then must also show how revealing the finances would substantially hinder the practice of their religion. This may also prove difficult for the same reasons enumerated above.

However, if they are successful, this will be balanced against a very strong and compelling state interest: that of compensating victims of sexual abuse. In spite of this, a strong argument that the LDS church had in their favor in this particular case was that the order to release financial data was given prior to any verdict, therefore the state interest had not yet been proven. The government's case is weak in their second prong, because while most churches or organizations typically do their accounting in small pockets that can be revealed independent of the greater whole, the LDS church maintains all of their financial records in a single database, and it may prove difficult for the court to show that in ordering

the release of their financial documents that there is a "least restrictive" method of doing so.

Whether the Court uses the *Lemon* test, the *Sherbert* test, or some other test created specifically for this matter, it is apparent that should this matter come before the Court the unique circumstances of the accounting system and beliefs of the Church of Jesus Christ of Latter Day Saints will make for a fascinating and complex opinion that may change the shape of free exercise jurisprudence.

## Conclusion

*D.I. v. Corporation of Bishops of the Church of Jesus Christ of Latter Day Saints* is a finished matter. The courts will not have to directly wrangle with the Oregon Supreme Court's decision to require the Church to reveal its financial records in this case. However, this unresolved issue is sure to rise again.

Plaintiff's Attorney, Kelly Clark, is involved in another suit filed in February 2008 in which a Portland, Oregon man is suing a Mormon youth leader and Boy Scout Troop leader in Idaho that he says abused him between 1967 and 1970[48]. He is one of seven plaintiffs who are suing the Boy Scouts and the Church of Jesus Christ of Latter Day Saints for not doing enough to stop that man on his rampage of alleged sexual assaults when he was acting as a Boy Scout Troop leader called by the LDS Church to serve in that capacity.

Kelly Clark admits that there is no guarantee that in these or other future cases he will be as fortunate to get a ruling that the LDS Church must reveal their finances. However, the LDS Church must doubtlessly be considering that there is no

[48] Oregon and Idaho law have a liberal statue of limitations law regarding sexual abuse cases. Another case in South Dakota is currently appealing to the United States Supreme Court to discover if a similar liberal statute of limitations in South Dakota extends to persons or corporations attached under the doctrine of vicarious liability. Carson Walker, *Sex Abuse Suit Against Mormon Church Awaits Supreme Court Ruling*, SALT LAKE CITY TRIBUNE, (February, 5, 2008) Last visited February 28, 2008. The outcome of this case could impact the ability of the new case to attach the LDS church, depending on the timing of the hearings.

guarantee that in these or other future cases that Kelly Clark or some other attorney won't be that fortunate.

The Church of Jesus Christ of Latter Day Saints and its attorneys must take seriously the warning in the case of *D.I.*; that the time may be coming soon when they may have to prepare a constitutional challenge in order to retain their financial secrecy and that victory is not assured. They must take steps now to evaluate their central financial recording system, and/or to release clear and unambiguous doctrinal information related to the belief aspects of their financial secrecy or they must prepare to eventually tell their secrets to a curious and critical world.