Chicken LIttle at the Reference Desk: The Myth of Librarian Liability

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Chicken Little at the Reference Desk:  
The Myth of Librarian Liability*  

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Mr. Healey explores a popular theme in library literature: the fear that librarians can incur liability for activities conducted at the reference desk. He concludes that librarian liability is a myth, finding no reported court decisions or any established legal theory to support the concept.

I. Introduction

One of the definitions given for “myth” in Webster’s Third New International Dictionary is “a belief given uncritical acceptance by the members of a group, esp[ecially] in support of existing or traditional practices.”¹ A common theme in modern library literature is the danger of legal liability, often referred to as librarian malpractice, for activities that take place at the reference desk. Over and over again the specter is raised of the possibility of a librarian or library being sued for giving out incorrect or incomplete information, or for other acts of reference misfeasance or malfeasance. Many of the writers of these articles have theories of how such liability could come about, and most begin with the assumption that the rising tide of litigation currently loose in the land will eventually flood libraries as well. But this wealth of literature fails to mention any specific or actual cases of librarian liability. In short, the inevitability of librarian liability seems to be a belief given uncritical acceptance by the library profession.

Why, if there are no actual instances of librarians being found liable, is there so much concern about it in the professional literature? Is this concern justified, or is it based on untested assumptions and faulty reasoning? To put it allegorically, are these just the cries of Chicken Little, or is there some reason to believe that the sky might actually be falling?

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** Reference/Instructional Services Librarian, Warren E. Burger Library, William Mitchell College of Law, St. Paul, Minnesota. I am indebted to Dr. James Rice of the University of Iowa School of Library and Information Science for his guidance, supervision, and advice in the writing of this article.
This article will attempt to answer these questions. After explaining the scope of the article and defining some key terms, some of the relevant library and legal literature on the topic will be examined. A search for case law involving librarian liability will be described, followed by an analysis of relevant legal theory. Finally, conclusions will be presented based on this analysis, which show that librarian liability is indeed a myth.

II. Scope and Definitions

This article looks at the issue of liability arising from interactions at the reference desk, activities that are peculiar to librarianship. It does not address litigation or claims arising from other library activities or functions. Rather, the issue is whether reference librarians are likely to incur legal liability while performing reference services.

The scope of this paper is also restricted to the activities performed at a general reference desk, such as might be found in a public or academic library. It does not address the issues peculiar to information brokers, special libraries, or libraries in which the librarian can be expected to be a subject expert, such as a law library.

The term “librarian” and “library” are used interchangeably unless a distinction is necessary, in which case the distinction will be made clear. In addition to convenience, this reflects the likelihood that libraries and librarians would be co-defendants in any suit based on reference activities.

The terms “claim,” “suit,” “litigation,” and “case” will also be used somewhat interchangeably. Technically a claim is a cause of action, a suit is a claim filed as a lawsuit, and litigation is the activity of trying a suit in court. “Case” is a general term for a legal conflict and any resulting appellate decision.

III. The Literature

Articles that warn of the dangers of potential liability for reference librarians are quite common in the library literature. While none of these claims to be

2. These could include such things as book challenges or circulation record disputers, or legal claims based on other forms of liability such as premises liability (i.e. slips and falls), access complaints arising under the Americans with Disabilities Act, or other contractual or employment conflicts.
4. Id., at 1286.
5. Id., at 841.
based on actual experiences, many create a hypothetical situation with dire warnings that the scenario could easily become a reality. What is lacking is either legal precedent or solid legal theory to back up such predictions.

A. History

Active discussion of the issue of liability seems to have begun about twenty years ago. In 1976 American Libraries published a fictional account of a suit against a library for providing a book with outdated information. The article, a mock news story written by Allan Angoff, tells of a claim against a library for providing a patron with a book that had inadequate information on building a patio. The patio subsequently collapsed, and the patron was said to be pursuing legal action against the library. There is no conclusion or advice, and the story is apparently intended as a morality tale about the potential legal pitfalls of reference service. The item was printed as if it were a straight news story except for a note from the editors at the bottom of the story explaining that the item was not true.

Angoff’s fake news item may have become the basis for other apocryphal stories. Another later article cites an unidentified news report of a 1970s Connecticut situation in which “[a] library was sued because it provided a book containing inaccurate information on a construction project that resulted in injury to the plaintiff.” This article goes on to say that the suit was later dropped. Because the source of the news article is not cited, it is impossible to determine whether this was a genuine conflict or a misinterpretation of Mr. Angoff’s fable. If this is a separate, actual incident, it is the only one reflected in the literature.

B. Reasons for Liability

The literature offers various reasons for potential liability by reference librarians. Dunn says that patrons know that they have the right to sue because of actions taken on the basis of inaccurate information provided by librarians. The rise of “consumerism” is also cited, under the reasoning that patrons are

9. The Angoff mock news story was set in New Jersey.
10. Steele, supra note 6, at 127.
11. Such a case did not turn up in the research conducted for this paper, but if the case was dismissed before trial it is not likely to have been published in any reporter.
12. Dunn, supra note 6, at 18.
more conscious of value and of being cheated or wronged.\textsuperscript{13} William Nasri states affirmatively that because patrons accept what a reference librarian tells them as fact, the patron will sue if the information leads to harm.\textsuperscript{14}

As for why the flood of litigation has not yet hit, some authors have suggested insufficient anger at inaccurate information,\textsuperscript{15} although this explanation would appear to directly contradict the theory, put forth by the same authors, that such suits would be based on consumerism. Nasri says librarians have not been sued for malpractice because they are not seen as lucrative targets, or in his terms “not collectible.”\textsuperscript{16} Interestingly, he cites teachers as an example of professionals whom he claims are now getting sued,\textsuperscript{17} but doesn’t see any problem with collectibility in their case, although as a group teachers are not significantly better paid than librarians.\textsuperscript{18} Generally, collectibility is not an issue when there is the potential for an institutional codefendant, and it strains credibility that this factor is significantly suppressing the number of suits against librarians.

\textbf{C. Standards for Liability}

The standards applied in the literature in order to find liability are also diverse. Dunn raises the possibility of libraries being held to a strict liability standard of negligence because they have “a contractual sort of agreement in which the patron, in seeking information, is tacitly agreeing to accept as available for him to choose to use, the information provided by the library/librarian.”\textsuperscript{19} Dunn goes on to say that the library “by inference ‘says’ that the information is accurate.”\textsuperscript{20}

By very loosely defining the term “profession” and then by globally attaching the concept of malpractice to any professional activity that is in error, Nasri comes to the conclusion that a malpractice suit against librarians is a real possibility.\textsuperscript{21} Unfortunately, he presents no legal theory to back up this chain of assumptions. Nasri’s main contention in support of potential liability is a syllogism: Professionals can be sued for malpractice, librarians are profession-

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13. Nasri, \textit{supra} note 6, at 4; Dunn, \textit{supra} note 6, at 19.
14. Nasri, \textit{supra} note 6, at 3. Nasri also sees the possibility of personal liability for library directors and trustees under the legal doctrine of \textit{respondeat superior}. He fails to understand that this doctrine, which can make an employer liable for the misdeeds of an employee, applies at the institutional level. A director or trustee would not be personally liable unless they were personally involved in the incident that was the subject of the claim.
15. Dunn, \textit{supra} note 6, at 20; Nasri, \textit{supra} note 6, at 4.
17. \textit{Id.} Nasri’s conclusions about teachers being sued are also in error, but a comparison between the liability risks of teachers and librarians is instructive. \textit{See infra} text accompanying notes 66–72.
19. Dunn, \textit{supra} note 6, at 20 n.4.
20. \textit{Id.}, at 20.
\end{flushleft}
als, therefore librarians can be sued for malpractice. Nasri also claims that the "person who provides the information is liable for the harm caused by it."\textsuperscript{22} This is an extremely broad and powerful assertion, and one for which he again cites no legal authority.

\textbf{D. Responses to the Literature}

Not all of the literature is without legal foundation. John Gray has written an excellent response to the Nasri article. He points out that the relationship between reference librarians and patrons is not contractual.\textsuperscript{23} He goes on to say that for a reference librarian to be found liable, a patron would have to show that it was reasonable to rely on the librarian as an expert in the particular subject area on which information was sought.\textsuperscript{24}

The only exception to this, in Gray's view, is when bodily injury results, but he says that the reliance by the patron on the information would have to be reasonable under the circumstances, the librarian would have to have understood that this reliance was taking place, and the librarian would have to be shown to have ignored reasonable care in ascertaining the accuracy of the information.\textsuperscript{25}

Martha Dragich has taken both Angoff and Nasri to task on the issue of liability.\textsuperscript{26} She points out correctly that, in the Angoff situation, the patron's claim is against the creator of the work (i.e., the author and publisher) and not the library. If the standard Angoff posits were to exist, librarians would need to be able to verify every fact in their collections—an obvious impossibility. In one of the only applicable cases on the subject of the provision of faulty information (dealing with a claim of libel against a video rental store based on information in a rented tape), the California Court of Appeals said that "one who merely plays a secondary role in disseminating information published by another, as in the case of libraries" cannot be held liable unless it knew or had reason to know the information was false.\textsuperscript{27} Dragich also points out that malpractice involves the breach of a professional duty which causes actual harm to a client. This is not the same, as Nasri would have it, as guaranteeing a satisfactory result in every transaction.

\textbf{IV. Case Search}

Because so much of the literature addresses the possibility of being sued for reference activities, one would assume that such suits are common. As a result,

\begin{itemize}
\item \textsuperscript{22} Id.
\item \textsuperscript{23} Gray, supra note 6, at 74.
\item \textsuperscript{24} Id.
\item \textsuperscript{25} Id. at 77.
\item \textsuperscript{26} Dragich, supra note 6.
\item \textsuperscript{27} Osmond v. EWAP, Inc., 200 Cal. Rptr. 674, 680 (Cal. Ct. App. 1984).
\end{itemize}
a first logical step in exploring the nature of reference librarian liability is to search for cases in which librarians have been sued for activities at the reference desk. This is important for a number of reasons. First, it indicates to some extent whether such suits are actually being brought. Second, and more importantly, it shows how the law is being applied in such cases. In other words, published cases indicate whether the courts are finding librarians liable and under what theories of law. Such cases would be important and informative whether or not they resulted in actual liability for the library involved.

Other authors have done searches, to a greater or lesser extent, to see if legal cases exist in which libraries or librarians have been sued for professional activities at the reference desk. None of those authors have reported finding such a case. In addition, except for the reference by Steele, none of the writers discussing the possibility of liability seems to be drawing on actual cases or anecdotal evidence of such claims.

In order to determine whether any cases exist, research was conducted employing both the WESTLAW and LEXIS computer-assisted legal research systems. Both LEXIS and WESTLAW cover all reported state and federal cases. Searches that varied in their intent to be specific or broad were run on both systems. The full text of all cases in each database was searched. Search precision was elusive given the type of search terms used, and every search turned up at least some cases, although none proved relevant to this topic.

Searches were done using search terms which combined variants of “library” and “librarian,” “information,” “liability” and “liable,” “law,” “injury,” “negligence,” “tort,” and “malpractice.” All searches utilized the Boolean search logic available with each system. In addition to online sources, two legal encyclopedias and an established treatise on tort law were also consulted.

The results of all these searches were the same. No reported cases were found in which a librarian has been held liable for activities at the reference desk. This result coincides with the findings of other writers on the topic.

There is one caveat to the results of this search. The LEXIS and WESTLAW databases contain only reported, or published, cases. The problem with the
reporter system is that a lack of reported cases does not necessarily mean that such suits have not been filed, or even litigated and won by one of the parties. There are a number of possible reasons for a potentially significant claim or suit not being reported. The reporter system does not include suits that were appealed but not designated by the court for publication, suits that were litigated but not appealed, suits that were filed but settled prior to litigation, and claims that were settled before a suit was filed.

While this creates the theoretical potential for extant claims in which librarians were found liable or admitted liability but were not reported, in reality this is unlikely. Lawyers have an affirmative duty to protect the interests of their clients. In a case of the type envisioned here, where there is no established case law and where there are significant public policy issues at stake, to capitulate to the demands of a plaintiff whose claim is based on untested legal theory would be irresponsible. Precisely because of the interests at stake, it is unlikely that any library represented by competent counsel would settle a claim of reference librarian negligence or malpractice; it would almost certainly proceed to trial unless the claim were dropped. Once tried, any outcome adverse to the library would almost certainly be appealed and any appellate decision reported. Thus, we can be relatively certain that if any librarian had been found liable, or even if such issues had been tried and appealed, the case would be reported.

In addition, and as a practical matter, it is likely that any actual suit against a library would have been reported heavily in library news organs and written about in library journals. No such actual news accounts were found in the literature.

V. Legal Analysis

The combination of dire predictions about impending liability, the complete lack of cases, and the welter of theories of liability presented in the literature creates a clear need for an analysis of reference librarian liability in terms of existing legal theory.

All of the writers about reference librarian liability envision a legal action in which one private party is pursuing another alleging harm. They are not

34. Some federal district court cases and some trial court decisions in certain states are reported. This is the exception rather than the rule, but to the extent it happens, it strengthens the reliability of the search.

35. American Libraries, the official monthly magazine of the American Library Association, devotes a significant portion of each issue to news from and about libraries across the nation, down to the level of book challenges and controversial firings. This is also generally true for Library Journal and other library news organs. It is only logical that any full blown claim against a librarian for malpractice or negligence would have been reported in such a forum.
talking about violations of statute law or regulations.\textsuperscript{36} Thus, all of the sources of liability discussed in the literature arise under common law.\textsuperscript{37} The literature has mentioned theories of librarian liability arising under contract law and various forms of tort law including strict liability, negligence, and malpractice. In addition, confidentiality, the charging of fees, and the unauthorized practice of law or medicine are mentioned. Each of these areas will be examined in turn.

\section*{A. Contract Law}

Contract law applies to specific, intentional agreements between two parties.\textsuperscript{38} A contract requires an offer and acceptance of the terms of agreement,\textsuperscript{39} an exchange of value,\textsuperscript{40} competency on the part of all parties, and legality of terms.\textsuperscript{41} Contracts may be informal in some ways, but they must be intentional and involve a "meeting of the minds."\textsuperscript{42} These elements are not present in normal reference desk interactions.\textsuperscript{43} Contract law would not apply in normal reference interactions because of the lack of intention by both parties to form a contract, and because of the lack of offer, acceptance, and consideration.\textsuperscript{44}

\section*{B. Tort Law}

A tort is a civil wrong, other than a breach of contract, for which the court will provide a remedy in the form of an action for damages.\textsuperscript{45} Tort law provides three theories under which actions by the defendant can lead to liability to the plaintiff. These three theories of recovery are intentional misconduct, strict liability, and negligence.\textsuperscript{46}

\subsection*{1. Intentional Misconduct}

Intentional misconduct is the deliberate, intentional infliction of harm on another and is almost always actionable.\textsuperscript{47} An example of intentional miscon-
duct in the library context would be a reference librarian who intentionally gives false or misleading information while intending to create harm. One assumes that this scenario would be rare. In any event, the gravamen of the complaint is the intentional nature of the act. Because our concern here is with actions by librarians, which are done in good faith as a part of professional duties, the concept of intentional tort is not relevant to this analysis.

2. Strict Liability

Strict liability reflects the public policy that some activities are inherently dangerous and can only be controlled by holding those who engage in them strictly liable for damages which result from their actions.\textsuperscript{48} Strict liability is intended for situations "where the defendant's activity is unusual and abnormal in the community, and where the danger which it threatens to others is unduly great."\textsuperscript{49} Examples of such activities include products liability and the handling of ultrahazardous materials.\textsuperscript{50} The actions of librarians at the reference desk are not unusual, abnormal, or unduly dangerous and do not fit the mold of strict liability situations.

3. Negligence

Negligence is a tort claim based on the negligent activities of some party which result in harm to another.\textsuperscript{51} In the legal literature, theories of negligence liability for information providers have not been widely addressed, and the major tort treatises do not address the topic at all.\textsuperscript{52}

Four things need to be proved in a successful negligence claim: (1) the presence of a duty of care recognized by law, (2) a failure to meet the duty of care, (3) a reasonable or close causal connection between the violation of the duty and the resulting harm (referred to as "proximate cause"), and (4) actual loss or harm to the interests of another.\textsuperscript{53} In order to succeed, a plaintiff must prove all four elements separately.\textsuperscript{54} In other words, a successful claim would need to show that there was a duty of care, that the defendant failed to meet the duty, that this failure was the proximate cause of the plaintiff's harm, and that the plaintiff did indeed suffer harm of a type that would be compensated by the court.\textsuperscript{55} If any one or more of the elements are not satisfied the claim will fail.\textsuperscript{56}

\textsuperscript{48} Keeton et al., supra note 46, § 75 at 537.
\textsuperscript{49} Prosser, supra note 32, at 494.
\textsuperscript{50} See Keeton et al., supra note 46, § 78 at 545–59.
\textsuperscript{51} Id. § 30 at 164–65.
\textsuperscript{53} Keeton et al., supra note 46, § 30 at 164–65.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
In order to make the concept of negligence clear, the concepts of "duty of care" and "proximate cause" should be examined separately. Duty is defined as a relationship which imposes a legal obligation on one person for the benefit of another.\textsuperscript{57} In negligence cases, duty of care is a legally recognized obligation to conform to a particular standard of conduct toward another.\textsuperscript{58} Generally, the first two elements of negligence, duty of care and the failure of that duty, taken together constitute actual negligence. In other words, negligence results from the presence of a duty and the failure to conform to that duty.

It is important to understand, however, that an occurrence of negligence does not automatically lead to liability. As Dean Prosser put it "it may be said that the defendant was negligent, but is not liable because he was under no duty to the plaintiff not to be."\textsuperscript{59} As a result, negligence in and of itself is not actionable at law.\textsuperscript{60} Rather, negligence must be combined with the additional elements of proximate cause and harm to the plaintiff in order for negligence to result in liability.

Proximate cause is the concept that there is some reasonable connection between the failure of the defendant to conform to a duty of care and the harm suffered by the plaintiff.\textsuperscript{61} The reasonableness of this connection is of paramount importance.\textsuperscript{62} In the case of using information which leads to harm, an essential aspect of proximate cause would be the reasonableness of relying on the supplied information. That the creator of an information source might be liable for faulty information is fairly clear.\textsuperscript{63} However, when the claim is against the disseminator of the information, the issue is less clear. By making a claim against a librarian, the plaintiff is not just saying that the information was somehow inadequate, but also that the librarian knew or should have known this was the case and supplied it anyway, and further that it was reasonable to rely on the librarian without any further analysis or judgment on the patron's part.

The reasonableness of such reliance reflects the presence or absence of a duty of care. If there is a duty of care for librarians at the reference desk, it becomes reasonable for patrons to rely on the information supplied without any further analysis or judgment, and the act of supplying inaccurate or inappropriate information can be seen as a reasonable cause of the plaintiff's harm. If, on the other hand, there is no such duty, and the librarian is not making

\textsuperscript{57} Id. \S 53 at 356.
\textsuperscript{58} Id.
\textsuperscript{59} PROSSER, supra note 32, at 143.
\textsuperscript{60} Id. at 142.
\textsuperscript{61} KEETON ET AL., supra note 46, \S 41 at 263.
\textsuperscript{62} Id. at 264.
\textsuperscript{63} Indeed, producers of faulty information might even find themselves being held to a strict liability standard in the event of harm, under the theory that information, in this context, is a product. See Brocklesby v. United States, 767 F.2d. 1288 (9th Cir. 1985); Blodwen Tarter, Information Liability: New Interpretations for the Electronic Age, 11 COMPUTER/L. J. 495 (1992).
guarantees about the information supplied, then it is not reasonable for patrons to look to the librarian as the proximate cause of their harm. This, it would seem, is precisely where the legitimate controversy about this issue rests, as well as most of the apparent misunderstanding of this area of law in the library literature.

Most of the literature that discusses this issue focuses on what activities constitute negligence on the part of librarians. As we have seen, this is only part of the issue. The real question in litigation would not be whether the librarian was negligent in his or her activities, but whether those activities had a reasonable causal connection to the plaintiff's harm. Such a causal connection would require a duty of care.

4. Malpractice

Much of the literature uses the term malpractice when referring to librarian negligence and liability. Malpractice is a form of negligence which is usually applied to professionals in relation to their professional duties. In malpractice, the duty of care which is owed reflects the standards of competence and due care of the profession involved. Malpractice is not limited to certain professions, but it is interesting to note that many of the professions for which malpractice is an active issue have in common the fact that the professional in question does not just assist the client, but actually assumes responsibility for an important aspect of that person's life. This assumption of responsibility, for example by treating an illness, dealing with a legal problem, or taking care of financial affairs, would logically tend to create a duty of care because of the potential for identifiable harm to the client at the hands of the professional.

With malpractice, as with other forms of negligence, liability results not just from negligence, in the form of the failure of a professional duty, but also from a reasonable causal connection between that failure and the plaintiff's harm. Many interactions with a professional have an unsatisfactory or even harmful outcome. But losses at the hands of a professional (whether involving money, legal interests, or even a life) do not, in and of themselves, indicate malpractice. Rather, liability for malpractice requires that the harm be reasonably caused by professional activities that fail to uphold the profession's duty of care.

Attempts to discuss librarian malpractice are further complicated by the question of whether librarianship is even a profession in this sense. The answer is not at all clear. The concept of profession is not absolutely necessary for

66. Id.
67. Id. at 1–6.
malpractice, but is useful because it can lead to a definition of standards for the activity in question. However, the concept of a profession is also not easy to define.\(^68\)

If we assume, at least for the sake of discussion, that librarianship is a profession, it still does not resolve what the standards are against which a duty of care for librarians can be measured, or even if such standards lead to any duty of care at all. Professional standards are more easily discernible when a profession is licensed, or when lawsuits have provided a body of case law that defines professional duty of care. Because librarianship is not licensed and has no case law, there are no formal standards of this type.\(^69\)

**C. Other Liability Issues**

Apart from contract and tort law, there are a number of other issues that are mentioned in the literature as creating the potential for liability.

1. **Confidentiality**

The concept of confidentiality is an important part of the ethics of librarianship.\(^70\) Confidentiality can be protected by law, and encompasses the concepts of confidentiality, or preserving the secrets of another, and privilege, or the right not to be compelled to disclose those secrets while under oath.\(^71\) The extent of a privilege is determined by state statute, and generally (but not always), those professions that are required to maintain confidentiality are also granted some sort of legal privilege concerning the confidential information.\(^72\)

Confidentiality requirements and legal privilege can arise from statutory or common law, and are common for such professions as medicine, law, and psychology. In the case of libraries, apart from circulation records, there are no laws protecting confidentiality.\(^73\) Any obligation to protect exchanges at the reference desk derives from ethics, not law.\(^74\) There is also no legal privilege

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\(^68\) Gray posits seven characteristics of a profession: (1) a body of specialized knowledge, (2) a formal educational process, (3) standards of admission, (4) a code of ethics, (5) licensure or special designation, (6) a public interest in the work performed and, (7) recognition by the group of a social obligation. Gray, *supra* note 6, at 71 n.1.

\(^69\) Tarter, *supra* note 63, at 491. Anne Mintz has argued that this lack of standards puts librarians at a greater risk for litigation, but it is hard to see how this could be so. In fact, it can be argued that a lack of identifiable standards lowers the risk of litigation because standards raise the expectations of patrons. Mintz, *supra* note 6, at 20.

\(^70\) RASD, *Guidelines for Medical, Legal, and Business Responses at General Reference Desks*, § 2.3.


\(^72\) Karon, *supra* note 71.


\(^74\) *Id.*
to communications between librarian and patron, and no legal sanction for violation of confidentiality. This distinction is important, not just because it forecloses a potential basis for a cause of action, but because it also lowers the expectations of patrons in their dealings at the reference desk.

2. Fees

Liability for a profession can clearly be created or raised by charging a direct fee for the service rendered. When a fee is charged for a service, liability can be created based on the inherent possibility of economic loss to the plaintiff as a direct result of the transaction. Charging a fee also creates a presumption that a contractual agreement was made. The few court cases which address liability in the area of information provision (although not specifically libraries) have required a contractual or fiduciary relationship, such as that between an information broker and a client, or that some sort of special relationship exists.

3. Medicine and Law

Medicine and law tend to get special mention in relation to reference work and liability. Because these subjects deal with intimate personal interests, and because practicing professionals in these fields do face malpractice litigation, some librarians fear that their risk of being sued is also higher when providing information on these subjects. The two fields are quite different and are dealt with separately.

**Medicine.** As with general reference work, medical librarians have not been sued for malpractice, even when working in a specialized medical library. Still, the assumption in the literature that liability is just around the corner is just as strong here as in other areas of librarianship. Mention is made of the possibility of vicarious liability (being sued along with the doctor for harm to the patient), liability in providing drug information, and the possibility of engaging in the unauthorized practice of medicine. From a legal

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76. Mintz, supra note 6, at 20; Tarter, supra note 63, at 492.
77. Huet, supra note 52, at 105. In light of this, the concept of being paid directly for the service may be one of the crucial differences between librarians and information brokers in their potential for incurring liability. Tarter, supra note 63, at 492.
80. Hafner, supra note 78, at 306.
82. Paris, supra note 79, at 774.
point of view, however, there does not appear to be any unique factor that makes a general reference librarian more liable when dealing with medical questions than with any other topic. As long as the librarian does not hold herself or himself as an expert on medicine and does not guarantee the appropriateness or accuracy of any information provided, there should be no reasonable causal connection between the librarian's activities and any harm suffered by the patron.

Law. Law librarianship presents a far more complicated situation. For one thing, more than in any other field, the literature of law is the law. In addition, the argument has been made that almost any reference interaction involving legal materials is, in some sense, practicing law. The type of library in which the information transaction takes place is also important with this issue. In a law library, reference librarians are legitimately seen as subject specialists and indeed are often lawyers as well as librarians. For such individuals, an entirely different set of considerations and standards is at work, and the potential for liability is probably greater. Even so, there are still no cases reported of law librarians being sued for negligence or malpractice. It is clear though, that because the practice of law is often the giving of advice, and the literature of law is the law, even general reference librarians should approach the issue with some caution.

Does this mean reference librarians have a duty of care when dealing with legal reference questions? Not necessarily. The issue is whether a patron can reasonably assume that a reference librarian has the expertise and intent to give legal advice. What it does mean is that reference librarians working at a general reference desk should be careful not to engage in activities which could be seen as giving legal advice. This is partly in order to avoid being seen as engaging in the unauthorized practice of law, and partly to avoid raising the expectations of the patron that a duty of care exists. In this regard some sort of verbal disclaimer when dispensing legal information might be advisable. With legal materials the point remains that as long as librarians do not claim to be legal experts it should not be seen as reasonable for a patron to have relied on them for legal advice.

83. I am indebted to Dr. Carl Orgren of the University of Iowa School of Library and Information Science for expressing this concept so succinctly.
85. Garner, supra note 7, at 34; Leone, supra note 6, at 44.
86. Garner, supra note 7, at 57; Leone, supra note 6, at 45. The results of the research conducted for this paper would have included actions against law librarians if any were published.
87. Mills, supra note 6, at 179.
88. See Brown, supra note 84, at 41.
D. Comparing Teachers and Librarians

As mentioned above, Nasri supported the concept of librarian liability by pointing to teachers as an example of a profession that was facing a new threat of malpractice litigation. The comparison between teachers and librarians is instructive and worth examining briefly. It would appear that malpractice claims against teachers would be more likely to be successful than those against librarians. This is true for a number of reasons. The teaching profession provides two important elements of a profession that are lacking in librarianship. First, teachers are licensed, which presumably creates fairly concrete standards against which negligent activity can be measured. Second, there have been actual attempts to sue teachers for malpractice, and case law has been published. Other less formal factors would also point to a greater likelihood for a successful malpractice claim against a teacher. One can assume that a teacher-student relationship is closer than that of a librarian with a patron and that it comes with more expectations of a measurable and identifiable outcome. In addition, a failure to perform the duties of an educator can be assumed to inflict a concrete type of harm on a student. Thus, in light of our examination of tort theory, it would appear logical that teachers might have a verifiable duty of care, the violation of which could be found to be the proximate cause of harm to a student. All of this would indicate that teachers are more vulnerable than librarians to a negligence or malpractice claim.

The late 1970s saw predictions in the literature of a flood of lawsuits against teachers, just as in the literature of librarianship. Although some suits were filed, the flood never materialized, and, as of September 1995, no successful educational malpractice cases had been published. This is in spite of the fact that some of the literature was not only predicting malpractice claims against teachers, but clamoring for it.

In spite of the closer relationship between teachers and students and the potential for identifiable harm, the idea of educational malpractice has had absolutely no success in the courts. Several courts have concluded that a duty of care for educators does not exist, while others have refused to allow the tort as a matter of public policy. Interestingly, at least one court notes that,

89. See supra text accompanying notes 17-18.
90. See Julie O’Hara, The Fate of Educational Malpractice, 14 EDUC. L. REP 887 (1986).
91. A search of LEXIS and WESTLAW in October 1995 found a total of fifty-seven cases based on a claim of educational malpractice. In none of those cases was such a claim allowed. See also Laurie S. Jamison, Educational Malpractice: A Lesson in Professional Accountability, 32 B.C. L. REV. 899 (1991); John G. Culhane, Reinvigorating Educational Malpractice Claims: A Representational Focus, 67 WASH. L. REV. 349; Ryland F. Mahathey, Note, Tort Law: Can an Educator be Liable for a Student's Failure? The Tort of Educational Malpractice, 34 WASHBURN L.J. 147 (1994).
92. E.g., Culhane, supra note 91.
93. Jamison, supra note 91, at 901.
while education is a collaborative effort, the ultimate responsibility for success remains with the student. This collaborative effort is similar to the type of interaction that takes place at the reference desk, with the qualification that the reference interaction is both brief and informal. To the extent that the comparison is accurate, the uniform refusal of courts across America to refuse to recognize a tort of educational malpractice makes the idea of librarian malpractice as a viable tort claim that much more unlikely.

VI. Results of the Legal Analysis

Where does all this analysis leave the librarian answering questions at a general reference desk? We have seen that such legal concepts as contract law, strict liability, and confidentiality do not apply to reference interactions. The only apparent potential source of librarian liability would have to be an action based on negligence (which may or may not be called "malpractice") and that alleges that the librarian breached a duty of care toward a patron, which reasonably caused harm. The first question is whether librarians rendering reference services have a duty of care to their patrons. If not, negligence is not possible and liability is precluded. If they do, the nature of this duty of care must be established, including how it is affected by professional standards. Even with a duty of care, the most important question is whether the violation of that duty is ever reasonably causally connected to any harm suffered by a patron. Negligence, or malpractice, without proximate cause precludes liability.

An initial problem with defining a duty of care for librarians is the lack of professional standards from which such a duty would be derived. This is not necessarily because librarians have been derelict in developing such standards, but because that particular type of standard is irrelevant to what librarians do. In the absence of such standards, we must then look to the nature of the relationship between reference librarians and their patrons to determine if a duty of care exists. An important factor militating against the existence of a duty of care is that while reference librarians undertake to connect patrons with information, they do not normally assume responsibility for the underlying information need. Librarians can thus be seen as "information intermediaries" who search for and identify information for users, assist patrons in using information, and acquire and report information. This intermediary position

96. Gray, supra note 6, at 73.
is something quite different from taking full responsibility for a patron’s problem. 97

There is nothing, either in the literature or in legal theory, that points to a duty of care between librarians and their patrons. The nature of the relationship is simply not such that any action by a librarian, whether somehow negligent or not, could be reasonably related to any harm suffered by a patron.

In addition to the arguments against the presence of a duty of care for reference librarians, it may be helpful to look at some of the ramifications for librarianship if a duty of care were to exist. The scenarios in the literature seem to envision two sources of liability: the provision of misleading or inaccurate information, and a failure to match the information provided to the patron’s intended use. If a duty of care between librarian and patron existed, the idea of determining the patron’s “information need,” as opposed to the information request, would take on a certain urgency. 98 In order to avoid liability, librarians would have to be absolutely sure they understand the entirety of a specific information need and its ramifications. At some point the librarian’s duty to assure the appropriateness of the information, along with the obligation to avoid violation of the duty of care, would exceed the right of the patron to access to the information. If this point were reached, the librarian might have the right, or even the duty, to take steps to assure that the information was used properly or not at all. Librarians would have to use professional judgment to withhold information, restrict its use, or assist the patron in the use of the information if they wished to avoid liability.

The imposition of a duty of care concerning the information provided and the attendant actual risk of liability would quickly create a situation in which librarians actively interfered with the flow of information. They would do this in order to avoid violating their duty of care toward their patrons and to protect themselves from liability. 99 If reference librarians could be held liable if a book did not describe properly how to build a patio, they would respond by not giving the patron access to the book. This result works directly against the public policy that information should flow freely in our society. The free provision of library services points to the high value society places on the

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97. The issue of selecting materials is beyond the scope of this article, but there is no reason to think that the standards laid out here do not apply. Selecting materials for a collection is not intended to serve as an absolute guarantee of the accuracy of the information the collection contains, and it is not represented as such. Because of this, it is not reasonable to rely on the presence of a particular item in a library’s collection as a guarantee of the item’s accuracy, appropriateness, or correctness. Without an expert’s knowledge of a particular subject, to require a librarian to be able to verify every fact in a work is simply not reasonable.


99. Indeed, this could be taking place even now in some libraries, based on the assumption that liability is a real threat.
exchange of information. Readily or easily holding librarians liable for the accuracy or completeness of the information provided would work directly against this interest.

We can only conclude that librarians do not, and should not, have a duty of care toward patrons. Patrons use information received at the reference desk at their own risk and with the full freedom to do with it as they please. This is as it should be. Without a duty of care on the part of reference librarians to guarantee accuracy and appropriateness of the information provided, the issue of a reasonable causal connection between the conduct and the injury becomes moot. Indeed, it is this lack of a duty of care which makes a claim of proximate cause unreasonable. Unless librarians holds themselves out as experts on the particular topic at hand, it is hard to see how they assume responsibility for anything other than trying to connect patrons with the information they seek. While other writers have derived a greater duty than this, they are perhaps confusing being an expert at finding information with being an expert on the information found.

VII. Conclusion

Librarian liability for actions at the reference desk does appear to be a myth. That is, it appears to be a belief given uncritical acceptance by members of the library profession. There is no case law to give it credence, and as far as can be determined, no librarian has ever been successfully sued for reference activities.

As many of the authors freely admit, the threat of liability that they raise is the result of playing with legal theory. For better or worse, legal theory is an elastic and pliable toy. In addition, theorizing about the possibility of liability where none is actually present is harmless in the sense that, if followed, the warnings will cause librarians to be more cautious than necessary rather than less. Still, this approach also has its costs, and the best approach is one of moderation.

A claim against a reference librarian would have to be an action in tort claiming that negligence on the librarian’s part was the proximate cause of the plaintiff’s harm. To be successful such a claim would have to show that the librarian had a specific duty of care toward the patron, that the librarian failed to conform his or her conduct to the duty, that the patron suffered harm, and that the librarian’s negligence was the reasonable, proximate cause of that harm.

The practical reality is that librarians are information intermediaries who neither guarantee the information they supply nor hold themselves out as subject experts. Even if they were to do either of these things, the question would still be whether it is reasonable for a patron to rely on the librarian for
an expert opinion on subjects in which the librarian is not formally educated, trained, or licensed.\textsuperscript{100} Librarians do not assume responsibility for a patron’s information need. They simply attempt to connect the patron with the information they seek.

In such a litigious society as our own, some fear of liability is normal and even healthy. However, some of the elaborate measures recommended in the literature to prevent liability are probably excessive.\textsuperscript{101} In avoiding liability, reference librarians should maintain the position of an information intermediary whose expertise is in finding information for patrons, not in being an expert about the information itself. If necessary, reference interactions should be conducted in such a way that the patron is made to understand that the librarian is not assuming responsibility for the patron’s information need.

There are some in the literature who are calling for reference librarians to become more involved with their patrons, even to the extent of setting up client relationships.\textsuperscript{102} From the point of view of avoiding liability, this is probably a bad idea. There is also a wealth of literature on the phenomena of the reference interview, again with most authors recommending further involvement in assessing and meeting a patron’s information needs.\textsuperscript{103} This is probably also unwise from a liability standpoint. Interestingly, other research has found that only a small percentage of reference interactions actually qualify as a reference interview.\textsuperscript{104} This is probably just as well.

The bottom line is that librarians do not have a legal duty of care when acting as information intermediaries. This reality serves to promote the interchange of information within our society and guarantee the viability of a vibrant system of accessible academic and free public libraries. It also explains the complete lack of case law and, apparently, litigation in this area. Whether or not one approves of it from the point of view of ideal librarianship, the quick, anonymous reference interaction is efficient, effective and, at least in terms of potential liability, relatively safe. Chicken Little is wrong: The sky is not falling, and librarians should continue to do their jobs with confidence that there is little chance of incurring liability for simply connecting patrons with the information they seek.

\textsuperscript{100} Gray, \textit{supra} note 6, at 82 n.17.
\textsuperscript{101} \textit{See}, e.g., Brown, \textit{supra} note 84, at 41.
\textsuperscript{102} \textit{E.g.}, Joan Durrance, \textit{The Generic Librarian: Anonymity Versus Accountability}, 22 RQ 278 (1983).
\textsuperscript{103} \textit{E.g.}, Ethel Auster, \textit{User Satisfaction with the Online Negotiation Interview: Contemporary Concern in Traditional Perspective}, 23 RQ 47 (1983).