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# "But He Told Me It Was Safe!": The Expanding Tort of Negligent Misrepresentation.

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Program for Judicial Awareness

**“BUT HE TOLD ME IT WAS SAFE!”:  
THE EXPANDING TORT OF NEGLIGENT  
MISREPRESENTATION**

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## ABSTRACT

*When more information is available, everyone benefits. Rather than having to rediscover basic wisdom at each crossroad, people can learn from one another's actions, inactions, failures and successes. However, the availability of shared information is deeply threatened by laws and judicial doctrines that favor blind reliance on advice and then encourage suits against faulty information providers, if, in following the advice, the listener is harmed. One such law is the doctrine of negligent misrepresentation leading to physical harm as codified in the Restatement (Second) of Torts Section 311. Because it is largely written in broad language, it has been applied with a variety of inconsistent and unjust results over the past hundred years.*

*Section 311 imposes duty on those who represent information to use reasonable care and compels liability when a negligent misrepresentation, reasonably or justifiably relied upon, results in the physical harm of another. Courts have generally required this duty for expert information providers and those who might benefit financially from the actions of the listener. But because the language of Section 311 does not require those limitations, in some areas, particularly in employment reference law, courts have imposed Section 311 duties upon unqualified or unreliable information sources, encouraging irresponsible actions on the part of information receivers, thus harming employees, employers and consumers alike.*

*If the trend continues, it may not be long before Section 311 will have an analogous stifling effect on information exchange outside the employment reference arena. This article addresses the ambiguities and inconsistencies in the application of Section 311 and recommends that courts adopt Section 311 only with proper guiding limitations articulated in their decisions. Such guidelines would help ensure that the competing interests of free information exchange, deterrence of negligent misrepresentation, and compensation of injured victims are adequately balanced.*

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## I. INTRODUCTION

Vince, a laundry truck driver, approaches a railroad crossing in the early morning hours. He stops and looks both ways down the tracks but does not see or hear any trains approaching. Observing that the crossing gates are raised, and hearing a voice from the railroad tower say “go ahead,” Vince begins to cross the four sets of tracks at the crossing. Passing over three in safety, he is struck and seriously injured while passing over the fourth track by an express train going 50 miles per hour.<sup>1</sup> Because of the unique positioning of the station and the road, he could not have seen the train approaching, but the station manager, Danny, could have. Danny negligently raised the gates to indicate to drivers that passage was safe, and further negligently indicated verbally that it was safe to pass with the words “go ahead.”

The above example is one scenario envisioned by the drafters of Section 311 of the Restatement (Second) of Torts regarding misrepresentations threatening physical harm.<sup>2</sup> Here, by failing to lower the gates and by calling “go ahead,” Danny, a representative of the railroad company, erred by negligent affirmative statement and action thus failing to exercise reasonable care. A “negligent misrepresentation” occurred because “false information” was provided to

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<sup>1</sup> See *Johnson v. Director General of Railroads*, 123 A. 484 (Pa. 1924) (jury rendered \$10,000 verdict for plaintiff, later reduced to \$6,000 and affirmed on appeal); see also RESTATEMENT (SECOND) OF TORTS: MISREPRESENTATIONS THREATENING PHYSICAL HARM § 311 cmt. b, illus. 1 (1965).

<sup>2</sup> See *id.*

Vince that was “negligently give[n],” that caused Vince to take action “in reasonable reliance upon” that information, and that action—crossing the tracks—caused his injuries.<sup>3</sup>

Vince was reasonable in relying upon the railroad to provide him information about the safety of crossing. But why? Negligent misrepresentation as codified in Section 311 fails to state *who* is qualified to give such legally binding information or whether there ought to be any distinction between omitted information and asserted information. What if the crossing had the following warning: “Enter at Your Own Risk: Crossing Not Monitored”? And, what if instead of a railroad employee, a local pedestrian was standing near the tracks and gestured to Vince that it was safe to pass? Would that person be liable for his injuries?<sup>4</sup> What if that person (who told Vince it was safe to pass) were a uniformed police officer? What if it were the town drunk? What if it were a person in another car who presumably had a better view of the tracks?<sup>5</sup>

This article addresses these ambiguities and attempts to resolve them by recommending that Courts adopt Section 311 only with proper guiding limitations to ensure that the interests of

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<sup>3</sup> See RESTATEMENT (SECOND) OF TORTS: MISREPRESENTATIONS THREATENING PHYSICAL HARM § 311: Negligent Misrepresentation Involving Risk Of Physical Harm: (1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results (a) to the other, or (b) to such third persons as the actor should expect to be put in peril by the action taken. (2) Such negligence may consist of failure to exercise reasonable care (a) in ascertaining the accuracy of the information, or (b) in the manner in which it is communicated.

<sup>4</sup> See *id.* at illus. 4-5. (“4. A buys a tombstone from B, a dealer in tombstones. A is in doubt as to how to transport it. C, a casual bystander, volunteers the information that the tombstone weighs only 50 pounds, and that A can easily and safely pick it up and carry it to his car. Relying on C’s statement, A attempts to do so. In fact the tombstone weighs 150 pounds, and A suffers a hernia as the result of his efforts. C is not liable to A.; 5. The same facts as in Illustration 4, except that the statement is made by B. B is subject to liability to A.”)

<sup>5</sup> *Id.* at illus. 6-7. (“6. A large trailer truck of the A Company is being driven on a winding highway. B is following it in his automobile, and seeking to pass it, but has not done so because his view is obstructed. At a particular point the driver of the truck signals to B to pass it, thereby representing to B that the highway ahead is clear. In reliance upon the signal B attempts to pass the truck and is injured by a collision with an approaching car. A Company is subject to liability to B.; 7. The same facts as in Illustration 6, except that the driver calls verbal assurance to B that he can safely pass. The same result.”)

free information exchange are balanced against the interests of compensating injured victims and deterring people from making negligently false statements.

## II. HISTORY OF NEGLIGENT MISREPRESENTATION AND THE RESTATEMENTS

Negligent misrepresentation developed out of American common law during the late 1800s and early 1900s, diverging from British common law which had no such tort.<sup>6</sup> As the American common law of negligent language developed, victims of both economic and physical harm were able to sue for compensation in limited circumstances. Compensation was possible where negligent language or conduct induced the reliance of the injured party but only if the negligent party was financially interested or claimed expertise in the information he provided.<sup>7</sup> The Torts Restatements, general collections of the American common law of torts, have codified two types of negligent misrepresentation in the Restatement (Second) of Torts: Section 311<sup>8</sup> applies to negligent speech resulting in physical harm, while Section 552<sup>9</sup> provides a similar

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<sup>6</sup> See *Int'l Products Co. v. Erie R.R. Co.*, 155 N.E. 662, 663 (N.Y. 1927) (quoting Pollock on Torts 565 (12th Ed.) (“In England the rule is fixed. ‘Generally speaking, there is no such thing as liability for negligence in word as distinguished from act.’”); see also *Fish v. Kelly*, 17 C. B. (N. S.) 194 (1864).

<sup>7</sup> See generally RESTATEMENT (SECOND) OF TORTS §§ 311 and 552.

<sup>8</sup> RESTATEMENT (SECOND) OF TORTS: MISREPRESENTATIONS THREATENING PHYSICAL HARM § 311, *supra* note 3.

<sup>9</sup> RESTATEMENT (SECOND) OF TORTS: NEGLIGENT MISREPRESENTATION § 552: Information Negligently Supplied For The Guidance Of Others (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information. (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction. (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

cause of action for economic harm.<sup>10</sup> But, while Section 552 requires a commercial relationship between the parties in an interaction, Section 311 does not.<sup>11</sup> Section 311 instead imposes a duty to convey accurate information when a reasonable person in the information provider's position could foresee a potential for physical harm based upon conveying that information, regardless of the information providers' interests or relationship to the recipient of the communication.<sup>12</sup>

**A. Common law: Historically the Negligent Misrepresentation Tort was more limited than the standard set forth in the Restatement (Second) of Torts Section 311**

Diverging from British law,<sup>13</sup> negligent misrepresentation was born out of American principles of jurisprudence that to summarily deny relief when a “negligently spoken or written word” causes harm represents a “refusal to enforce what conscience, fair dealing, and the usages of business require.”<sup>14</sup> By the end of the 1800s and early 1900s, many American states had adopted rules requiring the exercise of due care for certain information exchanges.<sup>15</sup> As early as 1888, the Massachusetts Supreme Court held that merely negligent rather than intentionally

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See Johnson, *supra* note 1, 123 A. at 494; see also Derry v. Peek, L.R. 14 App. Cas. 337 (1889), reporting that “no cause of action is maintainable for a mere statement, although untrue, and although acted upon to the damage of the person to whom the statement is made, unless the statement be false to the knowledge of the person making it” (quoting Dickson v. Reuter's Telegraph Co., Limited, L. R. [1877] 3 Com. Pl. 1); see also 9 Law Quarterly Review 292 decisively explaining that England had “settled that there is no general duty to use any care whatever in making statements in the way of business or otherwise, on which other persons are likely to act.” For contrary dicta, see Burrowes v. Lock, 10 Ves. 470 (1805), Slim v. Croucher, 1 De Gex, F. & J. 518 (1860), and Brownlie v. Campbell, L. R. 5 App. Cas. 925, 935 (1880).

<sup>14</sup> Int'l Products, *supra* note 6, 155 N.E. at 663 (“the tendency of American courts has been towards a more liberal conclusion” than that of England).

<sup>15</sup> See, e.g., Tennessee, New Hampshire, New York, Massachusetts, Pennsylvania, Iowa and Illinois among others: Dickle v. Abstract Co., 14 S. W. 896, (Tenn. 1890); Edwards v. Lamb, 45 A. 480, 481 (N.H. 1899); Carpenter v. Blake, 75 N. Y. 12, 25 (1878); Andreotalla v. Gaeta, 156 N.E. 731 (Mass. 1927); Joshua L. Bailey & Co. v. Western Union Telegraph Co., 76 A. 736, (Pa. 1910); Peck v. Hutchinson, 55 N. W. 511 (Iowa, 1893); McNevins v. Lowe, 40 Ill. 209 (Ill. 1866).

fraudulent language could result in civil liability.<sup>16</sup> Where a representation is “not merely a matter of opinion, estimate, or judgment, but is susceptible of actual knowledge,” the Massachusetts Court held that “actual intent to deceive” is unnecessary to prove fraud: the “fraud consists in stating that the party knows the thing to exist when he does not know it to exist” in which case “he must ordinarily be deemed to know that it does not.”<sup>17</sup> The court continued, saying that “the mere belief of its existence, will not warrant or excuse a statement of actual knowledge” where none exists.<sup>18</sup>

By 1890, the Tennessee Supreme Court held that where a business held “itself out to the public as competent and skillful, it must be so or . . . answer[] for the loss it brings about.”<sup>19</sup> In 1899, the New Hampshire Supreme Court found that where a physician “knew of [his patient’s] danger, and negligently advised her as to it, and she was injured by following his advice,” that in so advising her, even gratuitously, “he assumed the obligation to use due care in so doing.”<sup>20</sup> Further, the New Hampshire Supreme Court explained in dicta that a contractual obligation was irrelevant where a duty to use care when representing arose.<sup>21</sup>

Early negligent misrepresentation cases involved both physical and economic harm. Cases concerning telegraph companies, title companies, banks, accountants, realtors, etc., tended toward economic harms whereas cases revolving around mechanics, railroads, physicians,

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<sup>16</sup> *Chatham Furnace Co. v. Moffatt*, 18 N.E. 168, 169 (Mass. 1888).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Dickle*, *supra* note 15, 14 S. W. 896 (Tenn. 1890) (requiring the exercise of due care in a title company’s search if the search is intended to induce action in reliance on it).

<sup>20</sup> *Edwards*, *supra* note 15, 45 A. 480, 481 (N.H. 1899) (“The gratuitous character of the services rendered to the plaintiff would not excuse the defendant’s failure to exercise such care as the circumstances demanded”) (referencing *Carpenter v. Blake*, 75 N. Y. 12, 25 (1878)); *see also* *Peck v. Hutchinson*, 55 N. W. 511 (Iowa. 1893); *McNevin v. Lowe*, 40 Ill. 209 (Ill. 1866).

<sup>21</sup> *Id.* at 481 (the “liability would be the same” either way).

dentists, doctors, and other medical care professionals tended to involve physical harm.<sup>22</sup>

Further, railroad related cases occupy much of the early negligent misrepresentation jurisprudence involving recovery for physical harm, suggesting that the frequency of train-car wrecks contributed to the separate action for physical harm.<sup>23</sup> By 1927, Massachusetts recognized recovery where negligent misrepresentations led to physical harm, not just economic harm.<sup>24</sup> The Supreme Court of Massachusetts explained in *Andreotalla v. Gaeta* that the representations of a pharmacist were “not gratuitous” because, as they were part of the sale negotiations, “proof of actual knowledge by him that the representations were false, and that he

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<sup>22</sup> For examples of economic harms, *see* *Bailey & Co.*, *supra* note 15, 76 A. 736 (Pa. 1910) (telegraph company liable for inaccurate transcription of telegram); *Dickle*, *supra* note 15, 14 S. W. 896 (Tenn. 1890) (title company liable for damages if its search was negligent and was intended to induce reliance); *Giddings v. Baker*, 16 S.W. 33, 34 (Tex. 1891) (banker liable for economic losses to client for misrepresenting that “there was no question of the ability of the bank to meet all liabilities” when the client, relying upon this assurance, continued business until the bank failed owing him nearly \$10,000); *Bunge Corp. v. Eide*, 372 F. Supp. 1058, (D.C.N.D. 1974) (Plaintiff grain merchandiser sued his lende’s accountant for negligent preparation of a financial statement which induced Plaintiff to loan money resulting in Plaintiff’s monetary loss). For examples of physical harms, *see* *Johnson*, *supra* note 1, 123 A. at 494 (Pa. 1924) (raised safety gates and watchman’s representation that plaintiff should go ahead constituted implied invitation to proceed); *Cunningham Hardware Co. v. Louisville & N. R. Co.*, 96 So. 358, 209 Ala. 327, 362 (Ala. 1923) (“where a flagman, stationed at a crossing, invites a person to proceed across a railroad track, the latter is under no duty to stop, look, and listen before obeying such invitation or signal to cross.”); *Continental Cas. Co. v. Empire Cas. Co.*, 713 P.2d 384, 393 (Colo. App., 1985) (liability for a deformed baby held proper against a physician who’s negligent failure to discover and inform parents about imminent danger to the baby constituted a breach of duty to the parents who relied reasonably on the physician); *Bailey v. Huggins Diagnostic & Rehab.*, 952 P.2d 768, 772 (Colo.App.1997) (dentist owed no duty to plaintiff who, in reliance on his book and T.V. interview, replaced her amalgams with an inferior substance because the court found it was not reasonably foreseeable that physical harm would come to readers or viewers of the defendant’s book and show).

<sup>23</sup> For examples of the many train crossing and other railroad cases *see* *Fehnrich v. Michigan Cent. R. Co.*, 49 N.W. 890 (Mich. 1891); *Gulf, C. & S.F. Ry. Co. v. Shieder*, 30 S.W. 902 (Tex. 1895); *O’Brien v. American Bridge Co. of New Jersey*, 125 N.W. 1012, 1015 (Minn. 1910); *Philadelphia & Reading R. Co. v. Le Barr*, 265 F. 129 (3 Cir.1920); *Johnson*, *supra* note 1, 123 A. at 494; *Bradbury v. Central Vermont Ry.*, 12 N.E.2d 732 (Mass. 1938); *Kovacs v. Chesapeake and Ohio Ry. Co.*, 351 N.W.2d 581 (Mich. App. 1984).

<sup>24</sup> *Andreotalla v. Gaeta*, *supra* note 15, 156 N.E. 731 (Mass. 1927).

intended to deceive the plaintiff was unnecessary.”<sup>25</sup> And, in *Johnson v. Director General of Railroads*, the Pennsylvania Supreme Court held that while a railroad crosser is “bound to use reasonable precaution for his safety in passing over the tracks,” the railroad-employed “watchman” had the duty to know crossing conditions and arrival times, and his “position in the tower afforded him a better opportunity for observation than was offered the traveler on the highway.”<sup>26</sup> Thus, the court concluded that the traveler “had the right to assume no immediate danger existed and accept the invitation to cross, impliedly extended by raising the gates, and expressly extended by the watchman.”<sup>27</sup>

By 1927, in *Int’l Products Co. v. Erie Railroad Co.*, the New York Court of Appeals also addressed the “vexed question of liability for negligent language.”<sup>28</sup> It concluded, after a substantial summary of English and American misrepresentation common law, that “[i]n some cases a negligent statement may be the basis for a recovery of damages.”<sup>29</sup> In all of the examples referenced by the *International Products* Court, the misrepresentations were made by professional business people in the course of their business or people holding themselves out as experts in a field.<sup>30</sup> Similarly, the Pennsylvania Supreme Court summarized their prior negligent

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<sup>25</sup> *Id.* at 732. Importantly, the Court noted the statements were not opinion or judgment because they were “based on his expert knowledge of drugs.”

<sup>26</sup> *Johnson*, *supra* note 1, 123 A. at 494.

<sup>27</sup> *Id.* at 494-495; *see also* *McGuigan v. Penna. R. Co.*, 73 A. 958, 959 ( Pa. 1909) (there were sufficient “ground[s] for the inference of negligence” where a railroad watchman “signal[ed] for a street car to cross, when there was not ample time for it to do so.”); *Gerg v. Pennsylvania Railroad Company*, 98 A. 960, 961 (Pa. 1916) (relying upon *McGuigan*, holding “[t]he duty of the watchman required him to know the situation as to safety at the crossing, and parties desiring to cross the track might assume and act on such knowledge.”).

<sup>28</sup> *Int’l Products*, *supra* note 6, 155 N.E. at 663.

<sup>29</sup> *Id.*

<sup>30</sup> *See, e.g.*, *Dickle*, *supra* note 15, 14 S. W. 896; *Edwards*, *supra* note 15, 45 A. 480, 481; *Harriott v. Plimpton*, 44 N. E. 992 (Mass. 1896) (physician diagnosis); *Laudie v. Western Union Tel. Co.*, 35 S. E. 810, (N.C. 1900) (telegraph company falsely confirming delivery of a telegram); *Bailey & Co.*, *supra* note 15, 76 A. 736 (Pa. 1910) (telegraph company liable for

misrepresentation jurisprudence saying that by 1938 it was well established that “when it is one’s business and function to supply information he is liable, if, knowing that action will be influenced, he supplies it negligently.”<sup>31</sup>

The development of California’s common law negligent misrepresentation is also instructive: before the 1950s, the tort of negligent misrepresentation did not exist in California, the only applicable actions being negligence and fraud. In 1958, the California Supreme Court first began to expand tort duties when it held that a negligence action for damages could go forward despite a lack of privity between plaintiff and defendant based upon the presence of certain policy factors.<sup>32</sup> Despite a lack of any relationship between plaintiff and defendant, the court held the defendant owed a duty to exercise due care to protect the plaintiff from injury when the defendant improperly drafted the plaintiff’s brother’s will and thereby prevented the plaintiff from inheriting the full bequest.<sup>33</sup> A few years later in *Merrill v. Buck*, the California Supreme Court held that individuals owed a duty of care to warn potential victims of concealed dangers in physical premises where it is reasonably foreseeable that injury will result without

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inaccurate transcription of telegram); *Ernen v. Crofellow*, 172 N.E. 73 (Mass. 1930) (dentist/patient relationship); *Cowen v. Sunderland*, 14 N.E. 117 (Mass. 1887)(lessor/lessee relationship); *Jacobs Pharmacy Co. v. Gipson*, 159 S.E.2d 171 (Ga. App. 1967) (pharmacist/patient relationship). Cf. *Shirley Cloak & Dress Co. v. Arnold*, 90 S.E.2d 622, 626 (Ga. App. 1955) (holding truck driver’s company liable where neither the driver nor the company was shown to be in the business of demonstrating safe passage nor experts in determining when automobiles might safely pass, simply because once the driver undertook to signal for the motorist to pass “a duty devolved upon him to exercise ordinary care to see that way was clear ahead for motorist's automobile to pass safely.”).

<sup>31</sup> *Renn v. Provident Trust Co. of Philadelphia*, 196 A. 8, 9 (Pa. 1938).

<sup>32</sup> *Biakanja v. Irving*, 320 P.2d 16, 19 (Cal. 1958) (factors considered were “the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, and the policy of preventing future harm.”)

<sup>33</sup> *Id.*

such warning.<sup>34</sup> The court held the defendants liable for the plaintiff's injuries because they had "affirmatively undertaken to show [a] house to plaintiff in the regular course of their business with the purpose of earning a commission if [plaintiff] decided to rent it."<sup>35</sup> In so doing, the court adopted the precursor to today's negligent misrepresentation.<sup>36</sup> But it wasn't until 1969 that a California Court of Appeal officially adopted the standard set forth in Section 311.<sup>37</sup>

### **B. The Second Restatement Standard Expanded The First Restatement's Elements to Focus on Compensating the Victim Rather Than Detering Misrepresentations**

The Restatement (First) of Torts was published in 1934 by the American Law Institute. Restatements, distillations of common law, aim to codify trends indicated by the black letter common law and occasionally recommend changes in that law.<sup>38</sup> From 1934 until 1965, when the Restatement (Second) of Torts was published, the restatement's section on negligent language causing physical harm was considerably narrower than it is today.<sup>39</sup> Originally, the

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<sup>34</sup> *Merrill v. Buck*, 375 P.2d 304, 310(1962).

<sup>35</sup> *Id.*

<sup>36</sup> *See also Connor v. Great Western Sav. & Loan Ass'n*, 447 P.2d 609, 617 (1968) (Explaining that a "duty to exercise ordinary care not to injure another . . . may arise out of a voluntarily assumed relationship if public policy dictates the existence of such a duty.").

<sup>37</sup> *Hanberry v. Hearst Corp.*, 276 Cal. App. 2d 680, 685, 81 Cal. Rptr. 519, 523 (Cal. App. 1969). Although the Court of Appeal adopted the second restatement's section 311 standard, it did so relying explicitly on *Biakanja*, *Merrill*, and *Conner*, and therefore the actual holding in the case was curbed by the limitations set forth on those three precursors. Thus, the holding itself was far more narrow than was possible under the broad Section 311 standard: loosely applying the conditions set forth by in *Biakanja*, the court relied on the fact that the defendant "voluntarily involved itself in[] the marketing process" by "in effect loan[ing] its reputation to promote and induce the sale of a given product." *Id.* at 684, 81 cal. Rptr. at 522. Finally, the court emphasized the voluntary business relationship "where public policy imposes . . . the duty to use ordinary care in the issuance of [the defendant's] certification of quality."

<sup>38</sup> *See Harvard Law School Library Website—Restatements*, [http://www.law.harvard.edu/library/services/research/guides/united\\_states/basics/restatements.php](http://www.law.harvard.edu/library/services/research/guides/united_states/basics/restatements.php).

<sup>39</sup> Although the American Law Institute, responsible for publishing the Restatements, has completed a final draft of the RESTATEMENT (THIRD) TORTS: LIABILITY FOR PHYSICAL HARM, it has not been published because additional chapters on emotional harm and landowner liability are being added. *See* American Law Institute's website, [http://www.ali.org/index.cfm?fuseaction=publications.ppage&node\\_id=53](http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=53). Consequently, in

Restatement reflected a rule much more like the one this paper advocates: only those who, as part of their “business or profession” negligently gave information “upon which the bodily security of others depend[ed]” were “subject to liability for [the] bodily harm caused” by actions taken “in reliance upon [that] information.”<sup>40</sup> But, unhappy with the narrow scope of this rule, in the Restatement (Second) of Torts, the authors decided “to include information negligently given, which is not given in the actor’s business or professional capacity” and to include “purely gratuitous information.”<sup>41</sup>

Consequently, in its final form, Restatement (Second) of Torts § 311 (1965) requires that “one who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information where such harm results to the other or” to another foreseeable person when the negligence is a “failure to exercise reasonable care” in the manner of communicating or “in ascertaining the accuracy of the information.”<sup>42</sup> Not only does gratuitously given information qualify, but the scope of Section 311 extends to include anyone who is acting “in furtherance of his own interests, undertakes to give information to another, and knows or should realize that the safety of the person or others may depend upon the accuracy of the information” whether or not this person is in the business of providing such information.<sup>43</sup> Finally, the standard in Section 311 requires that after having “correctly ascertained the facts on which his information is to be based,” and exercising “reasonable competence in judging the effect of such facts,” the information provider “must also

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years to come, the third Restatement may influence judicial decisions, but it has not begun to have the widespread affect of the Restatement (Second) edition.

<sup>40</sup> RESTATEMENT (FIRST) OF TORTS: NEGLIGENT MISREPRESENTATION INVOLVING RISK OF BODILY HARM § 311.

<sup>41</sup> RESTATEMENT (SECOND) OF TORTS § 311, *supra* note 3, Reporter’s Notes.

<sup>42</sup> RESTATEMENT (SECOND) OF TORTS § 311, *supra* note 3.

<sup>43</sup> *Id.* at cmt. b.

exercise reasonable care to bring to the understanding of the recipient of the information the knowledge which he has so acquired.”<sup>44</sup>

The Restatement (Second) of Torts also addresses negligent misrepresentation that does not result in physical harm.<sup>45</sup> It requires that when “in the course of [one’s] business, profession or employment,” or other interested business transaction, a person “supplies false information for the guidance of others” without the use of “reasonable care... in obtaining or communicating the information,” he or she will be “subject to liability for pecuniary loss” if there is a loss caused by the other person’s “justifiable reliance upon the information.”<sup>46</sup> This article will argue that courts would better serve the interests of justice by articulating negligent misrepresentation holdings following the narrower approach of Section 552 rather than Section 311.

### **III. BALANCING THE SOCIETAL NEED FOR INFORMATION AGAINST THE VALUE OF LEGAL RESPONSIBILITY FOR NEGLIGENT BEHAVIOR.**

A rule modeled on Section 311 creates a disincentive to share information regarding risk of physical harm, because sharing inaccurate information, even when believed true, might lead to a lawsuit. According to Judge Benjamin Cardozo, rules like Section 311, which can have such broad applications, threaten freedom and justice because “a thoughtless slip or blunder,” or a “failure to detect” the wrongs of others, “may expose [parties] to a liability in an indeterminate amount for an indeterminate time to an indeterminate class.”<sup>47</sup> Judge Cardozo goes so far as to

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<sup>44</sup> *Id.* at cmt. e.

<sup>45</sup> RESTATEMENT (SECOND) OF TORTS § 552, *supra* note 9.

<sup>46</sup> *Id.*

<sup>47</sup> *Ultramares Corp. v. Touche*, 174 N.E. 441, 444 (N.Y. 1931) (holding that public accountants owe clients a duty to certify that the balance sheet matched the books with proper care which was not satisfied by a “pretense of knowledge when the is none”); *See also Ore-Ida Foods, Inc. v. Indian Head Cattle Co.*, 627 P. 2d 469, 473 (Or. 1981) (quoting *Ultramares*).

suggest that even the “implication of a duty” that exposes individuals to such broad consequences, “enkindle[s] doubt” as to whether or not the duty should exist in the first place.<sup>48</sup>

Courts must strike a balance between the value of shared information (particularly regarding physical safety) and the value of holding people accountable for negligently inaccurate speech about such risks. Section 311, however, does not strike this balance. The assault on information exchange caused by unbounded negligent misrepresentation actions results in greater risks to those who might be physically harmed because knowledge holders are reluctant to share important information about dangerous employees,<sup>49</sup> hazardous medical conditions,<sup>50</sup> and other risky circumstances for fear of tort liability.<sup>51</sup> Further when it is known that injured victims may sue merely mistaken individuals who were not communicating directly to an injured party, there will be more reluctance to share potentially valuable information for fear of legal liability.

The current trend is for courts to impose Section 311 liability without properly accounting for these unintended and negative consequences. Consequently, courts are imposing liability on persons who provide false information or omit material information if someone is harmed by proximate result of that information, even though the information provider did not communicate to or for the benefit of the injured person. Worse, there is no natural limit to the current trend: law in general is about line-drawing;<sup>52</sup> but with Section 311, there is no line drawn.

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<sup>48</sup> *Id.*

<sup>49</sup> *See infra* Section III. A. *Section 311 Has Had the Most Detrimental Results in Employment Reference Cases.*

<sup>50</sup> *See infra* Section III. B. *Medical and Health Related Misrepresentation.*

<sup>51</sup> *See infra* Section III. A. 4. *Unnecessary, Unintended Consequences of Section 311 Jurisprudence.*

<sup>52</sup> *See, e.g.,* Santa Rosa Junior College v. Workers’ Comp. Appeals Bd., 708 P.2d 673, 677 (Cal. 1985) (“judicial line-drawing [is] frequently required when construing and applying vague or open-ended statutory provisions.”); Serena Crouch, *California Fallen Firefighters Assistance Tax Clarification Act Of 2006*, 39 McGeorge L. Rev. 649, 653 (2008) (“laws require line drawing and are in place to prevent fraud”) (referencing Jack Siegel, *A Worthy Cause Does Not*

If the legal system fails to account for these unintended consequences, it is possible that by following precedent, judges may further expand this doctrine, eventually reaching professors for writing student recommendations or book publishers for endorsing poorly researched books.<sup>53</sup>

Section 311 liability has already been adopted by many state and federal courts in the context of employment references, with deleterious consequences for both employers and employees.

### **A. Employment References Cases.**

Within the employment reference arena, Section 311 has been used broadly, seemingly disregarding the universal benefits of liability-free exchanges, deterrence of negligent speech, and placing legal limits to encourage reasonable reliance on information. The following four subsections address various unsatisfactory choices faced by today's employers as they balance the various potential liabilities faced for sharing information.

#### **1. Hampered Information Exchange, Silent Employers, and the “Right” to “Fail on the Job”**

In the employment references arena Section 311 liability has been applied across many states. Information exchange has been stifled to everyone's detriment. According to Walter K. Olson, despite living in the “information age,” when it comes to hiring practices, very little is

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*Justify Stupid Legislation: Fallen Firefighters Assistance Tax Clarification Act of 2006*, Jan. 2, 2007, [http://www.charitygovernance.com/charity\\_governance/2007/01/dateline\\_januar.html](http://www.charitygovernance.com/charity_governance/2007/01/dateline_januar.html) (on file with the McGeorge Law Review)).

<sup>53</sup> To date, book publishers have not been reached by § 311 misrepresentation, primarily because of the First Amendment freedom of speech. *See, e.g.*, *Winter v. G.P. Putnam's Sons*, 938 F. 2d 1033, 1037 (9th Cir. 1991). In that case a book publisher distributed a mushroom encyclopedia which claimed that readers would be able to identify and classify mushrooms “at a glance.” The encyclopedia erroneously switched the pictures of the Death Cap mushroom and a safe mushroom. Relying on this the plaintiff ate the Death Cap mushroom and required a liver transplant incurring significant medical expenses. The court dismissed the action however, holding that publisher had “not duty to investigate the accuracy of the books it publishes” and that were they “tempted to create this duty, the gentle tug of the first amendment and the values embodied therein would remind [them] of the social costs” inherent in such a decision.

known about prospective employees.<sup>54</sup> This policy of ignorant hiring, Olson explains, comes from the mistaken philosophy that “workers deserve the right ‘to fail *on the job*.’”<sup>55</sup> Employers are in the unenviable position of being “trapped between a defamation lawsuit and a misrepresentation claim.”<sup>56</sup> To avoid defamation liability, employers limit their disclosure of negative information to other prospective employers.<sup>57</sup> Fearful of being sued, many employers have a simple “no-comment” policy when asked for employment references.<sup>58</sup> As Justice Shepard of the Indiana Supreme Court explained, “[o]nly those employers dull-witted enough to issue free-wheeling assessments without calling their lawyers would supply any but the most rudimentary information.”<sup>59</sup>

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<sup>54</sup> WALTER K. OLSON, *THE EXCUSE FACTORY: HOW EMPLOYMENT LAW IS PARALYZING THE AMERICAN WORKPLACE*, 28 (1997). Olson argues that the law should recognize that people talk and that “grapevines are inevitable and largely a good thing” because in knowing more about new hires, employers can more appropriately place them to everyone’s benefit. *Id.* at 29-30.

<sup>55</sup> *Id.* at 29-30 (quoting BERNARD R. GIFFORD, ed., *TEST POLICY AND THE POLITICS OF OPPORTUNITY ALLOCATION: THE WORKPLACE AND THE LAW* (National Commission on Testing and Public Policy, (1989) p 17; see also Mark Kelman, *Concepts of Discrimination in General Ability Job Testing*, 104 Harv. L. Rev. 1157, 1204-1205 (1991) (it is “privately rational for employers and socially cost minimizing” to use less stringent hiring criteria and simply discharge the incompetent hires.)

<sup>56</sup> John Ashby, *Employment References: Should Employers Have an Affirmative Duty to Report Employee Misconduct to Inquiring Prospective Employers?*, 46 Ariz. L. Rev. 117, 128 (2004); for examples of potential defamation suits where failure to disclose information might result in negligent misrepresentation see *Duffy v. Leading Edge Prods., Inc.*, 44 F.3d 308, 310 (5th Cir. 1995) (former employee sued employer for allegedly making false and defamatory accusations that the employee engaged in sexual harassment while employed by employer); *Woodard v. University of Utah*, 776 So. 2d 528, 530 (La. App. 3 Cir., 2000) (former resident sued medical school for unfavorable reference letter), discussed *infra*, see notes 81-84 and accompanying text.

<sup>57</sup> Ashby, 46 Ariz. L. Rev. at 128; see also *Louviere v. Louviere*, 839 So.2d 57, 64 (La. App. 1 Cir., 2002) (“if a former employer gives negative information about an employee to a prospective employer, this can result in exposure to a defamation claim.”).

<sup>58</sup> *Id.* at 119 (quoting Marci Alboher Nusbaum, *When a Reference Is a Tool for Snooping*, New York Times, Oct 19, 2003, at C12 (“Many companies adopt a ‘name rank and serial number’ policy, merely confirming facts like dates of employment and positions held”)); Olson, *supra* note 54, at 20.

<sup>59</sup> *Passmore v. Multi-Management Services, Inc.*, 810 N. E. 2d 1022, 1028 (Ind. 2004) (declining to apply section 311 to employment references); see also *Kadlec Medical Center v. Lakeview*

The threat of defamation keeps employers silent because employers may also face liability if they fail to disclose the violent tendencies of former employees.<sup>60</sup> According to one scholar, this “two-sided dilemma” resembles “an unenviable choice between two vicious monsters.”<sup>61</sup> The risk of a defamation suit is particularly harsh because even if the employer “believes the reference is truthful, it does not stop a frustrated former employee from threatening a lawsuit and forcing the employer to spend time and money on legal advice.”<sup>62</sup> Further, though many such suits do not end in large trial awards, “the point of this kind of legal weaponry is to serve as a threat rather than to have to be carried through—and the threat works very well.”<sup>63</sup> Conversely, a former employer who sends a positive reference but fails to disclose “violent or harmful incidents in the employee’s past,” may face negligent misrepresentation liability if the former employee harms someone in the course of the new job.<sup>64</sup> The current state of defamation

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Anesthesia Associates, 527 F. 3d 412 (5th Cir. 2008) (“And although the defendants might have had an ethical obligation to disclose their knowledge of Dr. Berry’s drug problems, they were also rightly concerned about a possible defamation claim if they communicated negative information about Dr. Berry.”).

<sup>60</sup> *Randi W. v. Muroc Joint Unified School District*, 929 P.2d 582, 584 (Cal. 1997) (a failure to inform a future employer of the employee’s full record including allegations of sexual misconduct was actionable against the former employer when a child was molested); *Davis v. Board of County Com’rs of Dona Ana County*, 987 P. 2d 1172, 1180 (N.M., 1999) (sexual harassment allegations about a former employee were “far more than mere gossip or innuendo,” and consequently must be included in any recommendation of the former employee); *Gutzan v. Altair Airlines, Inc.*, 766 F. 2d 135, 141 (3d Cir. 1985)(holding an employment agency had breached a duty to not misrepresent the adequacy of a convicted rapist as a potential employee for its client, an airline, since the applicant’s explanation of the conviction was insufficient).

<sup>61</sup> John W. Belknap, *Defamation, Negligent Referral, and the World of Employment References*, 5 J. Small & Emerging Bus. L. 113, 114 (2001).

<sup>62</sup> *Id.* (citing Markita D. Cooper, *Beyond Name, Rank and Serial Number: “No Comment” Job Reference Policies, Violent Employees and the need for Disclosure-Shield legislation*, 5 Va. J. Soc. Pol’y & L. 287, 298 (1998)).

<sup>63</sup> Olson, *supra* note 54 at 20.

<sup>64</sup> Belknap, *supra* note 61 at 114-115; *See also* Ashby, *supra* note 56, 46 Ariz. L. Rev. at 128-129. Ashby explains that “[a]pplying Section 311 to the [following] hypothetical, Employer A may be found to have given ‘false information’ to Employer C, who took action ‘in reasonable reliance’ on that information. Harm resulted to Worker D, a third party whom Employer A

and negligent misrepresentation law leaves only one choice for employers: a “no-comment” policy whereby they report only “name, job description, and dates of employment.”<sup>65</sup> This catch-22 created by Section 311 liability harms companies, employees and consumers alike.

## 2. The Lesser of Many Evils: Widespread No-Comment Policies

Potential liability for negligent misrepresentation has stifled the free flow of important information from previous employers to prospective employers.<sup>66</sup> Quinnipiac Law School Dean Bradley Saxton argues that “widespread adoption of ‘no comment’ reference strategies restricts the flow of information that is critical to employers’ abilities to make well-informed, responsible hiring (and related management) decisions.”<sup>67</sup> Further, “[m]ost commentators” agree that

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should have expected ‘to be put in peril by the action taken,’ the hiring of Worker B by Employer C. Thus, according to Section 311, Employer A may be liable for the physical harm to Worker D because of Employer A’s misrepresentation by omission of material negative information in the employment reference concerning Worker B.” (citing Bradley Saxton, *Flaws in the Laws Governing Employment References: Problems of “Overdeterrence” and a Proposal for Reform*, 13 Yale L. & Pol’y Rev. 45, 68 (1995) (discussing how “no comment” policies restrict critical information from employers and hinder well-informed hiring decisions).

<sup>65</sup> Belknap, *supra* note 61 at 115; *see also* Ashby, *supra* note 56, 46 Ariz. L. Rev. at 129 (“Basically the employer is trapped between a defamation lawsuit and a misrepresentation claim”: to “avoid defamation liability” employers limit negative information disclosure but to avoid misrepresentation, must disclose any violent tendencies); *see also* discussion of Woodward v. University of Utah, *infra* at notes 81-84 and accompanying text.

<sup>66</sup> *See* Bradley Saxton, *Flaws in the Laws Governing Employment References: Problems of “Overdeterrence” and a Proposal for Reform*, 13 Yale L. & Pol’y Rev. 45 (1995).

<sup>67</sup> *Id.* at 49 (“accurate employment reference information based upon past performance is one of the best indicators of an applicant’s likely future work performance”) (referencing Robert A. Prentice & Brenda J. Winslett, *Employee References: Will a “No Comment” Policy Protect Employers Against Liability for Defamation?*, 25 Am. Bus. L. J. 207, 224-25 (1987) (“[m]anagement experts consider contacting former employers to be one of the best methods for evaluating prospective employees. Indeed, studies show the best predictor of future job performance is not seniority or experience in similar jobs, but past job performance.”); *see also* James W. Fenton, Jr. & Kay W. Larimore, *Employment Reference Checking, Firm Size and Defamation Liability*, 30 J. Small Bus. Mgmt. 88 (1992) (“[R]esearch has shown that the more frequently an employer checks references, the less likely the employer [is] to experience employee related problems including absenteeism, tardiness, attitude, and work quality and quantity.”); Lawrence S. Kleiman & Charles S. White, *Reference Checking Dilemma: How to*

“honest, detailed references from former employers ... enable employers (1) to hire employees who are best suited for the positions for which they have applied; and (2) to learn about applicants’ particular strengths and weaknesses, information that permits the employer to make early, helpful adjustments in supervisory strategies.”<sup>68</sup>

The California Supreme Court discounted these policy concerns, however, in *Randi W. v. Muroc Joint Unified School District* and reaffirmed California’s adoption of Section 311<sup>69</sup> in a case specifically involving employment references.<sup>70</sup> In *Randi W.*, a thirteen year old student

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*Solve It?*, 52 Supervision 6 (Apr. 1991) (“[O]ne of the most valuable methods of gathering information [to support sound hiring decisions] is reference checking.”); Seymour Adler, *Verifying a Job Candidate’s Background: The State of Practice in a Vital Human Resources Activity*, 15 Rev. Bus. 3 (Dec. 22, 1993) (“[V]erification of the relevant details of an applicant’s background has become a fundamental component of prudent personnel practices in the 1990’s.”).

<sup>68</sup> Saxton, *Flaws in the Laws Governing Employment References*, *supra* note 66 at 49; see also Mark Disney, *Reference Checking to Improve Hiring Decisions*, 36 INDUS.MGMT. 3 (March/April 1994) available at <http://www.entrepreneur.com/tradejournals/article/15350477.html>. (Explaining the difficult position employers face in knowing “[h]ow [to] find out if [a] candidate is as good as you think?” by gathering “factual information regarding the candidate’s capabilities and performance history” but without “infring[ing] upon [the] candidates’ rights to privacy and equal employment opportunities” because “poor hiring decisions and negligent hiring liability are more likely if you do not check references.” Thus Disney recommends inquiring after “the candidate’s responsibilities, achievements, technical knowledge, honesty, reliability, interpersonal skills, communication skills, work habits, level of supervision required, innovation, problem solving methods and skills, ability to handle pressure, areas of strength, areas requiring improvement and reason for leaving the company, if applicable” in order to “ask questions that will confirm or eliminate pertinent doubts you have about the candidate.”).

<sup>69</sup> The California Supreme Court first adopted Section 311 in *Garcia v. Superior Court*, 789 P. 2d 960, 963 (1990) (“Negligent misrepresentations involving a risk of physical harm are actionable under the circumstances described in Restatement Second of Torts, *supra* Section 311.”). In that case, the California Supreme Court directed the children and heirs of a woman killed by a paroled convicted murderer to amend their complaint to state a cause of action for negligent misrepresentation involving risk of physical injury, rather than to continue on the wrongful death claim against the parole officer in charge of the murderer. The Court held that to win on negligent misrepresentation Plaintiffs had only to show that the decedent actually and reasonably relied on the parole officer’s misrepresentations regarding the threat the murderer posed.

<sup>70</sup> *Randi W.*, *supra* note 60, 929 P.2d at 584 (“Although policy considerations dictate that ordinarily a recommending employer should not be held accountable for failing to disclose

sued the four school districts that were all former employers of the student's vice-principal, Robert Gadams, who, she alleged, sexually molested her in his office.<sup>71</sup> Although she also sued Gadams directly for the sexual assaults, she sued the school districts on the theory that despite their knowledge of prior charges or complaints of sexual misconduct and impropriety, each district wrote unreservedly positive references for Gadams' placement as an administrator in the plaintiff student's middle school.<sup>72</sup> By making affirmative representations of Gadams' good character, the plaintiff student argued and the California Supreme Court concurred that the representations of the school districts "essentially recommending Gadams for any position without reservation or qualification," amounted to "affirmative representations that strongly implied Gadams was fit to interact appropriately and safely with female students."<sup>73</sup> Consequently, the Court held that in light of the numerous reports of sexual misconduct the letters were "misleading half-truths that could invoke an exception to the general rule excluding liability for mere nondisclosure or other failure to act."<sup>74</sup> The Court dismissed concerns that employers would be or had been chilled from writing reference letters because it concluded that liability would only apply in cases in which there was a foreseeable risk of physical injury to someone involved, which it presumed would occur in an insignificant number of cases.<sup>75</sup> In dismissing this policy concern (that employers would be discouraged from writing references)

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negative information regarding a former employee, nonetheless liability may be imposed if, as alleged here, the recommendation letter amounts to an affirmative misrepresentation presenting a foreseeable a substantial risk of physical harm to a prospective employer or third person").

<sup>71</sup> *Id.* at 584-85.

<sup>72</sup> *Id.* at 585-86. For example, one of the school district's recommendation letter "noted numerous positive aspects of Gadams's tenure in Mendota, including his 'genuine concern' for students and his 'outstanding rapport' with everyone, and concluded, 'I wouldn't hesitate to recommend Mr. Gadams for any position!'

<sup>73</sup> *Id.* at 593.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 590-91.

the Court failed to explain (a) the parameters for determining whether a foreseeable risk of physical injury exists, and (b) what it is that makes employers qualified to assess such a condition. Further, even assuming employers could adequately determine when a foreseeable risk of physical injury was sufficiently likely to subject them to liability, the Court simply ignored the already prevalent practice of no-comment reference policies deriving directly from fear of liability.<sup>76</sup>

By 1997, rather than risk recommending someone who may later harm a third party, many employers had transitioned to a “wholly uninformative name-rank-and-serial-number recitation of dates worked and titles” held.<sup>77</sup> Many companies had adopted no comment reference policies for fear of civil liability by the time the *Randi W.* Court dismissed this rationale in 1997. Cases like *Randi W.* virtually nullify any remaining common law qualified privilege<sup>78</sup> for defamatory communications because when the case proceeds as a negligent

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<sup>76</sup> See Ashby, *supra* note 56 at 119; see also Olson, *supra* note 54 at 20.

<sup>77</sup> *Id.*

<sup>78</sup> According to the *Introductory Note to the Restatement (Second) Division 5 Defamation: Chapter 25. Defenses To Actions For Defamation: Topic 2. Absolute Privileges: Title B. Absolute Privilege Irrespective Of Consent*, the common law conditional privilege is based in “public policy that recognizes that it is desirable that true information be given whenever it is reasonably necessary for the protection of the actor’s own interests the interests of a third person or certain interests of the public.” For the rules describing occasions that give rise to a conditional privilege, see RESTATEMENT (SECOND) OF TORTS §§ 594 – 598A. Section 595 restricts defendants from full to conditional privilege, if, under the circumstances, the defendant information provided was under a duty to provide the defamatory information or if he or she is responding to an official request. For cases in which a qualified or conditional privilege was applied or considered see *Bender v. City of Seattle*, 664 P. 2d 492, 503 (Wash. 1983) (holding that a police officer’s knowledge of or reckless disregard as to the falsity of statements made to the media could overcome any qualified privilege the officer held); *Bickling v. Kent General Hosp., Inc.*, 872 F. Supp. 1299, 1301, 1305-07 (1994) (holding hospital president enjoyed a qualified privilege in making defamatory statements about plaintiff to persons interviewing for plaintiff’s former job); *Graziani v. Epic Data Corp.*, 305 F. Supp. 2d 1192, 1198 (D. Colo. 2004) (holding qualified privilege for defendant to disclose to plaintiff’s employer plaintiff’s attempts to embezzle \$740,000 in defendant’s payments to plaintiff’s employer because of a sufficiently important common interest in the information); *Calero v. Del Chemical Corp.*, 228 N.W.2d 737,

misrepresentation case and not a defamation case, defenses to defamation no longer apply. And even those states that have statutorily strengthened that privilege find employers' confidence unrestored and thus find them unwilling to comment.<sup>79</sup> Because immunity and other countermeasures have been ineffective this propensity to withhold information will likely continue unless the risks are convincingly reduced.

Despite "negative societal effects" that hinder efficient hiring, "employers continue to withhold employment information in an attempt to avoid liability."<sup>80</sup> In one Louisiana case, a doctor and former resident at the University of Utah Medical School sued his former employer, the school, for failing to give a "facts only" letter and instead responding to inquiries about his residency with a "Final Letter of Residency" which did not give a "positive final recommendation."<sup>81</sup> In the letter the employer stated the former resident had shown "poor clinical judgment, ... difficulty working with staff, ... a level of confidence ... out of proportion to his clinical skills," had "generated complaints from patients and staff, and was placed on probation for 'negative behaviors noted by multiple evaluators.'"<sup>82</sup> It is arguably foreseeable to any medical school that a resident's poor performance could lead to poor performance as a physician, and possible harm to future patients. Consequently it is reasonable for a medical school to disclose such information. However, in this case, the doctor sued his former employer

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744 (Wis. 1975) (affirming trial courts conclusion that "the defendants' communications to prospective employers of the plaintiff, made at the request of those firms, were entitled to a qualified or conditional privilege."); *Duffy v. Leading Edge Products, Inc.*, 44 F. 3d 308, 312 -13 (5th Cir. Tex., 1995) (holding defendant had a "qualified privilege to make the allegedly defamatory statement").

<sup>79</sup> Olson, *supra* note 54 at 20.

<sup>80</sup> Ashby, *supra* note 56 at 119-120.

<sup>81</sup> *Woodard v. University of Utah*, 776 So. 2d 528, 530 (La. App. 3 Cir., 2000).

<sup>82</sup> *Id.*

for *defamation*.<sup>83</sup> If the school had not made such representations, but had merely given a “facts only” letter, then the school would have opened itself to negligent misrepresentation suits from any future patients injured by the doctor’s poor judgment. The doctor’s case was dismissed for lack of jurisdiction<sup>84</sup> but had he instituted the suit in the proper venue, the costs to fight and successfully win such a suit, might have encouraged a quick, though perhaps unjust, settlement. Consequently, employers are caught between two unenviable, incompatible positions.

### **3. Employers Are Not Equipped to Predict their Employees’ Future Actions**

Employers are ill-qualified to assess employees’ mental states or predict employees’ potential future behaviors. Mental health professionals, those most qualified to predict potential future behaviors, often disagree significantly with other professional colleagues in the content of their predictions.<sup>85</sup> In 1985, the United States Supreme Court stated that “Psychiatry is not . . . an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis . . . and on likelihood of future dangerousness.”<sup>86</sup> And in 2008 the California Supreme Court held that “[M]ental health professionals do not necessarily agree on what constitutes mental illness.”<sup>87</sup> If mental health professionals have so much

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Analysis of human beings’ mental states is not sufficiently scientifically advanced for even the mental health professionals to agree on diagnosis and treatments of most “mental illnesses.” See Melli, Walker, Pease & Ruhly, S.C., *Depression Is Significant Workplace Problem, Studies Say*, 8 NO. 11 Wis. Emp. L. Letter 5 (November 1999) (employer supervisors “aren’t . . . qualified to handle . . . diagnose, or treat employee problems” since “mental health, including depression, is not easy to define. Neither the diagnosis nor the treatment is as yet anywhere close to as certain or as scientific as the treatment of a broken bone or a virus”). See also *Ake v. Oklahoma*, and *Cuen v. Evans*, *infra* notes 86-87;

<sup>86</sup> *Ake v. Oklahoma*, 470 U.S. 68, 81 (Okla., 1985).

<sup>87</sup> *Cuen v. Evans*, Slip Copy, 2008 WL 1808493, page 11 (N.D. Cal., 2008).

difficulty diagnosing mental conditions, how can employers be qualified to make legally binding predictions as to their employees' future actions?<sup>88</sup>

Not only are employers grossly under-qualified to predict employees' behaviors, the duty required of employers under Section 311 is unreasonable. To decide whether an employer has a Section 311 duty to disclose certain information, the employer must first assess the employee's prior acts and then determine whether there is anything in those actions that would indicate a likelihood of future violence.<sup>89</sup> However this would be difficult for even licensed professionals.<sup>90</sup> If the employer chooses to disclose such information he faces defamation liability, even if what

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<sup>88</sup> See The Federal Judicial Center's October 2003 Handbook for Working with Defendants and Offenders with Mental Disorders (Third Edition) (available on Westlaw at FJC-MISC-2003-4) which says that the criteria in the commonly used mental health diagnosis book (DSM-IV) "are provided to help ... identify possible mental disorders and symptoms" but that "[d]iagnoses should only be made by qualified mental health professionals." (emphasis added).

<sup>89</sup> See, e.g., Randi W., *supra* note 60; see also Bradley Saxton, *Employment References in California After Randi W. v. Muroc Joint Unified School District: A Proposal For Legislation to Promote Responsible Employment Reference Practices*, 18 Berkeley J. Emp. & Lab. L. 240 (1997).

<sup>90</sup> See notes 86 and 87, *supra*; see also Ewing v. Northridge Hosp. Medical Center, 120 Cal.App.4th 1289, 1300, 16 Cal.Rptr.3d 591, 598-99 (2004) ("Predicting a patient's dangerous propensities according to the standards of the [mental health professionals] presents four serious problems. First, it is almost universally agreed among mental health professionals themselves that therapists are poor predictors of future violent behavior.... Second, fear of liability may cause therapists to err on the side of overpredicting dangerousness, eliciting unnecessary warnings or even causing them to avoid treating potentially dangerous patients altogether.... Third, imposing upon a therapist a duty to report may cause the therapist single-mindedly to focus on a patient's "dangerousness," at the expense of treating his other mental health needs.... Fourth, the rule holds psychotherapists to an ill-defined community standard. *Tarasoff* imposes on the therapist the duty to protect a potential victim if the therapist decides, or should have decided, the patient is potentially dangerous. "Determining whether the therapist should have diagnosed the patient as dangerous is problematic because the standard depends upon agreement in the mental health community. If psychotherapists as a group can only weakly and imprecisely predict future dangerousness, then there can be no criteria against which to judge the therapists' actions.... [V]iolent behavior is a relatively rare event, and rare events are by their nature difficult to predict.") (citing D.L. Rosenhan, Terri Wolff Teitelbaum, Kathi Weiss Teitelbaum, and Martin Davidson, *Warning Third Parties: The Ripple Effects of Tarasoff* 24 Pac. L.J. 1165, 1185-1189 (1993)).

he reveals is true;<sup>91</sup> but if he chooses to remain silent he faces potentially greater liability from the negligent misrepresentation lawsuit for physical damages.

Another problem with imposing this duty on employers is that the duty illogically presupposes that prior poor employee behavior is prima facie evidence of future danger. Although the propensity rule is an evidentiary rule applicable in criminal law and therefore arguably inapposite to tort law, the rationale behind its existence in evidence law warrants similar treatment here:<sup>92</sup> It is wrong to impose a duty to disclose information based entirely on ability to predict future bad acts from past actions because such inferences are inherently unfair, inconsistent, and inaccurate.<sup>93</sup>

Stanford Law Professor George Fisher addressed the rationale behind propensity rules and explained that “the problem is that such evidence can cause unfair prejudice” by either influencing the jury to give excess weight to former bad acts, or by influencing a jury that one deserves to be punished simply because he or she is the type of person who is “better kept off the

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<sup>91</sup> See Section III. A. 2, *The Lesser of Many Evils: Widespread no-Comment Policies*, *supra*.

<sup>92</sup> Although used primarily to protect criminal defendants from unfair inferences, the propensity problem is not unique to Criminal Law. It is built into the Federal Code of Evidence. F.R.E. Rule 404(a) states in relevant part that “Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion” except in 3 situations. See F.R.E. Rule 404(a)(3). Propensity character evidence including prior bad acts may be used to impeach a witness. See F.R.E. Rule 607. Prior bad acts propensity character evidence may be used to attach a witness’s credibility in very limited circumstances governed by F.R.E. Rule 608(b). And, finally the specific prior bad act of being convicted of a crime may be used to impeach a witness’s credibility within certain restrictions in F.R.E. Rule 609. Still, these rules do require that the prior bad acts evidence be used only to impeach credibility, and never to *prove* actions in conformity with the prior actions. Thus, the law of evidence, for the purpose of protecting people from making improper and illogical assumptions, precludes this type of assumptive logic. The careful analysis put into the propensity ban should be imported into tort doctrines to keep justice functioning fairly.

<sup>93</sup> As discussed *infra* notes 99-100, an employer would of course, still have a duty to make the workplace safe, which could be triggered merely by a single unsafe, dangerous behavior.

streets even if he is not guilty of the crime charged.”<sup>94</sup> In either case, it is a well established principle that propensity evidence unfairly prejudices fact-finders against defendants.”<sup>95</sup> Even if it is foreseeable that a person who has quarreled before will quarrel again,<sup>96</sup> this is an improper presumption upon which to base *legal* liability.<sup>97</sup>

Because of its inherent unreliability, propensity analysis is rarely tolerated in the law of evidence. Consequently, it should not be encouraged by the law of torts. Thus, while one’s past actions may be *relevant*<sup>98</sup> to one’s future actions, past action is not adequate legal proof of future action.<sup>99</sup> But, in essence, the negligent misrepresentation tort as embodied in Section 311

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<sup>94</sup> GEORGE FISHER, EVIDENCE 132 (University Casebook Series Ed. Bd., Foundation Press 2003) (2002).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* Fisher explains that “[t]he problem with [propensity] evidence is not that it is not relevant” since according to Justice Cardozo, “there may be cogency in the argument that a quarrelsome defendant is more likely to start a quarrel than one of milder type....” *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> See note 92, *supra* discussing the propensity rule of evidence.

<sup>99</sup> Cf. Deborah J. La Fetra, *A Moving Target: Property Owners’ Duty To Prevent Criminal Acts on the Premises*, 28 Whittier L. Rev. 409, 412 (Fall 2006) (describing cases that follow the “Prior Similar Acts” theory of liability). One of the theories of premises liability holds property owners liable for injuries to persons on their property because of the existence of prior similar acts of violence which are held to have put owners on notice that such crimes may occur in the future. See *id.* In her article Ms. La Fetra explains that the “‘prior similar acts’ rule states that ‘in the absence of prior similar incidents, an owner of land is not bound to anticipate the criminal activities of third persons, particularly where the wrongdoer was a complete stranger to both the landowner and the victim and where the criminal activity leading to the injury came about precipitously.’” *Id.* (citing *Isaacs v. Huntington Meml. Hosp.*, 695 P. 2d 653, 658 (Cal.1985)). Premises liability is therefore based upon the theory of putting one *on notice* that a particular risk may occur. Similarly, employers have a duty to keep the work environment safe. If an employer becomes aware that an employee has endangered co-workers, from then on the employer would be estopped from arguing that the risk was unknown and would be liable for failing to take protective measures to ensure the workplace was safe. The difference between this and negligent misrepresentation is line-drawing: while bad behaviors put one *on notice* that more bad behavior is a possibility, they do not prove the certainty of future bad acts.

requires of employers precisely what the law of evidence precludes: it requires that employers assume from even one bad act<sup>100</sup> that a person has a propensity for wrongful acts.

#### **4. Unnecessary, Unintended Consequences of Section 311 Jurisprudence**

Sympathy for injured plaintiffs has promoted a tort system which tilts toward compensating those who have suffered, independent of whether there is any wrongdoer. Out of sympathy for injured plaintiffs comes a tort system that cares more about compensating than it does about uncovering all facts and making a fair decision for all parties.<sup>101</sup> Thus we now find that businesses can be held liable for the misdeed of their former employees working in new jobs. Moreover, the “brunt of these [disclosure requirement] policies will be born[e] by small businesses that, to secure themselves from potential liability, would need to acquire liability insurance for those instances when no-comment policies would be illegal.”<sup>102</sup> On a purely economic basis, the likelihood of greater liability would raise insurance premiums and other operating costs, further burdening small businesses, and their customers and the public in general.<sup>103</sup>

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<sup>100</sup> Even one single bad act, though later clearly an aberration, could be the basis for liability under Section 311 because there is nothing in the section to the contrary; Instead, Section 311 should be constrained so that a single aberration is not the type of information which, if not revealed, would subject the information provider to liability.

<sup>101</sup> La Fetra, *Freedom, Responsibility and Risk: Fundamental Premises of Tort Reform*, *supra* note 128, 36 Ind. L. Rev. at 646. (The current system favors “an abdication of individual choice and responsibility in favor of a victim mentality that looks for others to blame”).

<sup>102</sup> Belknap, *supra* note 61 at 116; *see also e.g.*, *Moore v. St. Joseph Nursing Home, Inc.*, 184 Mich. App. 766, 459 N.W.2d 100 (1990) (estate of individual who was savagely beaten and murdered by co-worker sued co-worker’s former employer alleging that former employer was negligent in failing to disclose to prospective employer co-worker’s record of 24 disciplinary warnings for acts ranging from outright violence to alcohol and drug use).

<sup>103</sup> Belknap, *supra* note 61 at 116; *see e.g.*, Maxwell J. Mehlman, *Quality of Care and Health Reform: Complementary or Conflicting*, 20 Am. J. L. & Med. 129, 132-33 (1994) (the costs of rising malpractice premiums are passed on to consumers, thus making healthcare less affordable).

There is also another looming and largely ignored potential cost to Section 311 unconstrained jurisprudence: negligent hiring suits.<sup>104</sup> Negligent hiring suits are those in which an employer faces liability for an employee's torts when the employer did not exercise reasonable care in checking the employee's background.<sup>105</sup> Further, the "increasing prevalence of 'no comment' policies will often frustrate employers in their efforts to investigate applicants backgrounds in a meaningful way," resulting in the obstruction of the policy considerations underlying negligent hiring torts.<sup>106</sup> Therefore when applied without appropriate constraints, Section 311 unreasonably burdens everyone.<sup>107</sup>

There are even cases in which employers, who must avoid risking both defamation and negligent misrepresentation cases, are also required by the justice system to actually provide employment references. In one case, an electrical company fired an employee for a medical disability upon the termination of her disability benefits since the Benefits Committee

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<sup>104</sup> See e.g., *Ruic v. Roman Catholic Diocese of Rockville Centre*, 51 A. D. 3d 1000, 1001, (N. Y. S. 2d 2008) (holding pastor was negligent by hiring and retaining the man who abused the plaintiffs); See Julie Forster, *25 States Adopt "Good Faith" Job Reference Laws to Shield Business from Liability*, West's Legal News, July 2, 1996, at 6402 (available at 1996 WL 363324) (noting that companies feel "damned" if they do and "damned" if you don't give out information on requests for references).

<sup>105</sup> Saxton, *Flaws in the Laws Governing Employment References*, *supra* note 66; see also Linda Lye, *Title VII's Tangled Tale: The Erosion and Confusion of Disparate Impact and the Business Necessity Defense*, 19 Berkeley J. Emp. & Lab. L. 315, 359-60 (1998).

<sup>106</sup> Saxton, *Flaws in the Laws Governing Employment References*, *supra* note 66; see also, Robert S. Adler & Ellen R. Peirce, *Encouraging employers to abandon their "no comment" policies regarding job references: A reform proposal*, 53 WASH & LEE L. Rev. 1381, available at [http://findarticles.com/p/articles/mi\\_qa3655/is\\_199601/ai\\_n8751390/pg\\_19](http://findarticles.com/p/articles/mi_qa3655/is_199601/ai_n8751390/pg_19) (discussing social impact of no comment policies); see also e.g., *Ponticas v. K.M.S. Investments*, 331 N.W.2d 907 (1983); see also e.g., *Medina v. Graham's Cowboys, Inc.*, 113 N.M. 471, 827 P.2d 859 (1992); see e.g., Randi W., *supra* note 60.

<sup>107</sup> See, Elizabeth Kaleva, *When a Former Employee Is a Criminal: Does Your Reference Policy Protect Your School and Children?*, 23-AUG Mont. Law. 25, 26 (1998) (noting the adverse affect Section 311 has upon prospective employees and employers alike).

determined she was “unable to return to sustained industrial work as a result of her asthma.”<sup>108</sup>

The court determined that firing the plaintiff violated the handicap discrimination under the California Fair Employment and Housing Act <sup>109</sup> and that consequently, among other forms of relief, the employer was required to expunge “all references” to the plaintiff’s “discriminatory discharge” and to respond to all written or verbal inquiries that plaintiff “voluntarily left.”<sup>110</sup>

Commenting on this case, Olson deems it a “remarkable example of compulsory insincere speech for the purpose of fooling blameless third parties.”<sup>111</sup> In so holding, the court effectively requires employers to make intentionally false representations to inquiring third parties. If, due to that plaintiff’s disability, she were to be unable to perform her new job or were to cause harm doing it, (if, for example, she were hired to operate a fork lift, but had a depth perception problem), a third party harmed by her actions could sue the *former* employer for complying with a court order because it was reasonably foreseeable that a third party might be injured.

Unless courts stop expanding negligent misrepresentation, these negative effects will not stop with employment law. There will always be people harmed by the insolvent, the incompetent or undiscovered tortfeasor. It may be unsettling that in the American justice system

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<sup>108</sup> Ackerman v. Western Electric, 643 F. Supp. 836, 842 (1986).

<sup>109</sup> See Cal. Gov’t. Code §§ 12900 – 12996. FEHA prohibits employment discrimination or retaliation for filing or helping to file charges for violating FEHA and covers employers, labor organizations, employment agencies, on the basis of race, color, religion, national origin or ancestry, physical disability, mental disability, medical condition, marital status, gender, sexual orientation, age (over 40), pregnancy, childbirth, or related medical conditions.

<sup>110</sup> Ackerman, *supra* note 108 at 857.

<sup>111</sup> Olson, *supra* note 54 at 20 (referencing Ackerman v. Western Electric, 643 F. Supp. 836, 857 (1986)). Although this may be an aberration, future injustices could be prevented by a clear articulation of duty accounting for conflicting employer responsibilities.

some victims will not be compensated; but it is far more unjust for an innocent and guiltless party to be forced to compensate a victim.<sup>112</sup>

Typically, when courts decide negligent misrepresentation cases outside of the employment law context, Section 311 is not applied. When it is applied, however, judges have not followed the rationales in the employment reference cases.<sup>113</sup> For example, in *Holt v. Kolker*,<sup>114</sup> a plumber was not liable for injuries that occurred to the homeowner when a porch collapsed even though he represented to the homeowner that it was safe to walk on. The plumber escaped liability because even though it was foreseeable that someone could be hurt by relying on his information, he had “no special knowledge” about the porch and was simply expressing a casual opinion.<sup>115</sup> However, because this case is sixty years old and predates the Second Restatement<sup>116</sup> there is no reason to expect that today’s courts would use the same limiting

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<sup>112</sup> There are many examples of cases in which a blameless party is sued primarily because the party responsible is unavailable. *See, e.g.,* *Simonetta v. Viad Corp.*, 151 P.3d 1019 (Wash. 2007) (holding that a manufacturer of an evaporator that the Navy insulated with asbestos had a duty to warn the potential users and maintainers of the evaporator of the dangers of asbestos insulation despite the fact that the Navy, with governmental immunity, had the option and the control of which insulating material was used), *rev’d* 197 P.3d 127 (2008); *Gianocostas*, *infra* note 113 (travel agency did not cause plaintiff’s sickness or death but was the only defendant available for suit in Massachusetts jurisdiction since the medical care providers who may have caused her death were located in the Dominican Republic) *dismissed* forum non conveniens, 881 N. E. 2d 134 (Mass. 2008); *Western Investments, Inc. v. Urena*, 162 S. W. 3d 547 (Tex. 2005) (Texas Supreme Court reversed for lack of proximate cause an appellate court decision holding landlord liable for tenant-on-tenant sexual assault for failing keep safe premises).

<sup>113</sup> *See generally* *Gianocostas v. Interface Group-Massachusetts, Inc.*, 881 N.E. 2d 134, 143-44 (Mass. 2008), in which the Massachusetts Supreme Judicial Court (dismissing that case as forum conveniens stated in dicta that Massachusetts has “not, at this time, a recognized cause of action in Massachusetts” for “negligent misrepresentation causing physical injury” as embodied in Section 311. *See* discussion *infra* pp. 36-39.

<sup>114</sup> 57 A.2d 287 (Md.,1948).

<sup>115</sup> *Id.* at 289.

<sup>116</sup> Though decided in 1948, this case is not an anachronism since it is cited by the Restatement (Second) of Torts in both Sections 311 and 552. Further scholars in the area of negligent misrepresentation still reference this case as instructive. *See, e.g.,* Jean A. Brodie, *Foster v. American Home Products Corp.: Tort Liability For Injuries Caused By Someone Else’s*

principle. Had the Maryland court in *Holt* applied Section 311, it could have found, by following recent employment reference cases such as *Randi W.* and *Davis*, that the plumber was liable only because the plaintiff relied upon his representation.<sup>117</sup>

Unconstrained negligent misrepresentation torts allow plaintiffs to recover damages from the “deep pockets” of defendants who bear little or no responsibility for that injury. In one 1993 case, a car dealership was sued for the damages from an accident caused by the brake failure on a negligently operated car. Although there was no evidence presented that the dealership knew the brakes were faulty, the trial court held that the negligent misrepresentation action was sufficiently pled for the case to proceed.<sup>118</sup> Even if proximate cause exists,<sup>119</sup> negligent misrepresentation law results in injustice unless it is constrained to those in the best position to assess the quality and condition of the car at the time of the accident. Therefore, if the vehicle has just been serviced and the dealership’s negligent inspection fails to detect a defect, then it is reasonable to hold the dealership liable. But if the dealership did not recently assess the vehicle, it would be inconsistent with the purposes of tort law to hold the dealership more responsible than the driver or owner of the vehicle at the time of the accident.

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*Product?* 12 T.M. Cooley L. Rev. 431, 433 (1995) (“ . . .the concept of duty soon gained prominence in [Maryland] negligent misrepresentation decisions. In a 1948 case, [*Holt v. Kolker*] the Maryland Court of Appeals . . . [held] that to recover for negligent misrepresentation, “there must be such a relation that one party has the right to rely for information upon the other, and the other giving the information owes a duty to give it with care.”)

<sup>117</sup> See note 60, *supra*.

<sup>118</sup> See *Thompson v. Hardy Chevrolet-Pontiac-Buick*, 417 S.E.2d 358, 361, *appeal after remand* 439 S.E.2d 689 (Ga. 1993).

<sup>119</sup> In *Thompson v. Hardy*, *supra* note 118, it is inherently unjust to hold the dealership responsible in this situation because the dealerships representations were not sufficiently related to the accident to be held the cause of that injury.

Thus, the burden should be upon those who are in the best position to assess and prevent risks.<sup>120</sup> Instead, Section 311 places the incentives in the wrong places, encouraging individuals to blindly rely on others' assessments without verifying their credentials or the veracity of their statements, and then to sue if they are injured. Section 311 provides no incentives to take necessary precautions since the injured may recover from "deep pockets" after a preventable accident has occurred.<sup>121</sup> Instead, the law should encourage responsibility to prevent injuries rather than simply ensuring that someone will pay for accidents when they happen.<sup>122</sup>

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<sup>120</sup> Following this logic, consumer report websites could be liable to injured parties who relied upon the representations on the website since, according to the restatement, purely gratuitous information carries a legal duty when physical harm is foreseeable. *See, e.g.*, Andrew Pollack, *Isuzu Is Denied Damages in a Lawsuit Against Consumer Reports*, N.Y. Times, April 7, 2000 (*available at* <http://query.nytimes.com/gst/fullpage.html?res=9E02E3DB103FF934A35757C0A9669C8B63>) (consumer reports sued for defamation by Isuzu for making allegedly false statements about the Isuzu Trooper); *Suzuki Motor Corp. v. Consumers Union of U.S., Inc.*, 330 F.3d 1110 (9th Cir. 2003) (involving car manufacturer who sued Consumer Reports (owned by Consumers Union) for product disparagement because it published reports that manufacturer's SUV had unacceptable tendency to roll over.) If this law suit states a cause of action, the next logical expansion would be for *Consumer Reports* and similar services to be sued in instances where they made a representation about physical safety and someone was harmed; *see also e.g.*, *Gentry v. eBay, Inc.*, 99 Cal.App.4th 816, 121 Cal.Rptr.2d 703 (2002) (a statement made online may support a cause of action for negligent misrepresentation only if it speaks to a matter of fact, not opinion).

<sup>121</sup> *See* Deborah J. La Fetra, *Freedom, Responsibility and Risk: Fundamental Premises of Tort Reform*, 36 Ind. L. Rev. 645, 658 (2003). ("Many victims believe themselves entitled to recovery, and, if at all possible, eagerly transfer blame for their predicament away from themselves. They may find such lawsuit appealing as they are cast as the underdog against what they perceive as a huge, faceless corporation.").

<sup>122</sup> *See generally, id.* at 667, 669 (2003) ("tort liability is intended to reduce the consumption of risky products (i.e., those with a greater likelihood of causing injury) by increasing their prices and thereby discouraging people from buying them." Instead, the current tendency in tort law is increasingly focused on "victimhood," rather than the general reduction of hazardous goods; the system now turns only on "assign[ing] blame for any misfortune to anyone but oneself."); *see also* Joint Statement of 140 Nationwide Organizations for Tort Reform as Articulated in the Law Firm of Sidley and Austin's Article, *The Need for Legislative Reform of the Tort System: A Report on the Liability Crisis from Affected Organizations*, 10 Hamline L. Rev. 345, 384 (1987) ("The tort system, as applied by the courts, has departed substantially from [the] goal" of compensating individuals for "injuries caused by the fault of another." Instead, courts have ". . .

## **B. Expanding Past Employment Law: Health Related Misrepresentation.**

Representations regarding those who need medical treatment inherently carry the danger that misinformation could result in increased physical harm and consequently much more frequent tort liability. Important, time-sensitive decisions must be made regarding health and safety. If parties who have information are subjected to the risk of such liability, both potentially life-threatening and potentially life-saving information may be withheld. Less information necessarily harms everyone in the process: preventing those with information from helping and those seeking information from receiving it. One recent wrongful death suit implicated all of these concerns.<sup>123</sup>

In *Gianocostas v. Interface Group-Massachusetts, Inc.*, a twenty year old college student and insulin-dependant diabetic, Jennifer Gianocostas, went away on spring break to the Puerto Plata Hotel in the Dominican Republic.<sup>124</sup> While there, she became quite ill, experiencing severe vomiting and dehydration aggravated by diabetes. She was treated for several days at the hotel's medical clinic.<sup>125</sup> By the sixth day of her vacation, her condition had worsened; Jennifer was too weak to walk, was hallucinating and her eyes were rolling back in her head.<sup>126</sup> Later that

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imposed a form of social insurance upon defendants who are not to blame for injuries, but who are deemed by the judiciary to be able to pay for them.”); *see also* Michael S. Moore, *Four Reflections on Law and Morality*, 48 Wm. & Mary L. Rev. 1523, 1559 (2007) (arguing that a “social insurance” system “is not a tort system at all” but is an “alternative to tort law”)(citing Oliver Wendell Holmes, Jr., *The Common Law*, 77-78 (Little, Brown & Co. 1923) (1881); *See Hartline v. Kaiser Foundation Hospitals*, 132 Cal. App. 4th 458, 468-69, 33 Cal.Rptr.3d 713 (2005) (noting distinction between social insurance function that inspires workers’ compensation statutes and but does not animate common law causes of action).

<sup>123</sup> *See Gianocostas v. Interface Group-Massachusetts, Inc.*, 881 N.E.2d 134 (Mass. 2008).

<sup>124</sup> *Id.* at 136.

<sup>125</sup> *Id.* at 137-138.

<sup>126</sup> *Id.* at 139.

morning she was transferred to the hospital where she was diagnosed with acute severe diabetic ketoacidotic coma, severe metabolic acidosis, and severe dehydration.<sup>127</sup>

During this time, her parents were in sporadic contact with the defendant's tour representative, Ms. Harris, a concierge-type agent located at the Puerto Plata Hotel.<sup>128</sup> While Jennifer was still at the hotel clinic, Ms. Harris, allegedly told Jennifer's parents that Jennifer's condition was improving, there was no need to fly to the Dominican Republic and bring Jennifer home, that she was in very good hands at the hotel clinic. Ms Harris also told the family that she herself was from New Hampshire and that the medical care in Puerto Plata was excellent.<sup>129</sup> On the basis of these representations, Jennifer's parents claimed negligent misrepresentation against the defendant (Ms. Harris's employer) claiming that they relied upon the agent's representations and that the agent failed to use appropriate care in ascertaining the validity of her position that the care was of good quality and that Jennifer was safe.<sup>130</sup> Learning of her condition at the hospital, Jennifer's mother flew to the Dominican Republic and personally had her airlifted to a hospital in Miami, Florida. But by that time she was in critical condition and died the following month "as a result of complications from severe diabetic ketoacidosis."<sup>131</sup>

Jennifer's parents alleged that they stated a claim for negligent misrepresentation because Harris's "statements were false, and, as a result of the false statements, [Jennifer's parents]

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 139-40.

<sup>129</sup> *Id.* Further, Ms. Harris disputed making many of the representations and said she told Jennifer's father while Jennifer was still in the hotel clinic that she "did not think that [Jennifer] was well or strong enough to fly home."

<sup>130</sup> *Id.* at 140. Jennifer's parents negligent misrepresentation claim was based on "separate statements made by Harris . . . concerning Jennifer's medical condition and the quality of care available to Jennifer in Puerto Plata" and that therefore under Section 311 the defendant "[wa]s liable for their daughter's death."

<sup>131</sup> *Id.* at 136.

delayed their efforts to evacuate their daughter from the Dominican Republic.”<sup>132</sup> Her parents asserted that without Harris’s statements they would have evacuated Jennifer sooner to a location where she would have received proper medical care, and that therefore she would not have experienced the “fatal deterioration of her health” that resulted in her death.<sup>133</sup> Importantly, the Massachusetts Supreme Judicial took this case particularly in order to *decide* whether or not Section 311 had in fact been adopted in that state.<sup>134</sup> If Massachusetts had recognized a cause of action under Section 331, or if the Court had decided to adopt the cause of action in this case,<sup>135</sup> proving a prima facie case of misrepresentation might have been successful because Harris (1) negligently gave false information because she did not use reasonable care in ascertaining whether the information she told the parents was true, (2) to another, Jennifer’s parents, (3) Jennifer’s parents relied upon that information in determining their actions and (4) harm resulted to their daughter (a third person that Harris should have expected to be imperiled by her words).<sup>136</sup> And, although the defendant correctly argued that any reliance on Harris’s statements was unreasonable because she had no medical expertise, under the Restatement standard, her expertise is not relevant.<sup>137</sup> That is why it is important for courts to incorporate more explicit criteria into the current, vague restatement standard. A better rule would state with specificity

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<sup>132</sup> *Id.* at 140. The only area element of this standard which is not clearly met by Jennifer’s parents is whether or not they were reasonable to rely upon Harris’s statements and whether or not they actually acted in reliance therein. Although this is a factual matter for a jury to determine, a clearer standard as to what yields reasonable reliance is greatly needed to aid juries, courts and the public in knowing where the line is drawn.

<sup>133</sup> *Id.*

<sup>134</sup> *See id.* at 143-44.

<sup>135</sup> *Id.* at 140 (The Court decided to dismiss on the ground that the Dominican Republic was the proper forum for all claims (“We need not address any aspect of this claim, however, because we conclude that a court in Massachusetts is not the appropriate forum in which to resolve it.”)).

<sup>136</sup> *See* RESTATEMENT (SECOND) OF TORTS § 311 (1965).

<sup>137</sup> Gianocostas, *supra* note 113, 881 N.E. 2d at 140.

that people may only reasonably rely upon defendants who are experts in the subject area in which they offer a factual assertion or opinion.

Relevant health-related information could come from many sources: a doctor, nurse or other medical care professional talking to a patient, a medical care professional talking about a patient to someone else, a casual observer, a police or government observer, a receptionist, a bystander at the scene of an accident, a flight attendant, a hotel concierge,<sup>138</sup> etc. Although most of those people are not qualified to give medical diagnoses, they may be perfectly capable of describing the cause of an injury or the closest medical care facility. The more information available, the better the chance that those in medical emergencies will receive aid. Although in cases like *Gianocostas*, misinformation and miscommunications may occur, if Ms. Harris had been more concerned about liability, she might have been unwilling to communicate with anyone on the subject of Jennifer's health. A patient's relatives might not even be informed that he or she were ill. Fear of liability will inhibit not just bad communications but good ones too. The more broad negligent misrepresentation torts grow, the greater will be the burden upon information exchange, and consequently, on safety.

Finally, a recent California offshoot of the *Randi W.* case further demonstrates how the ever-expanding tort of negligent misrepresentation can be used to completely eviscerate normal causation requirements. In late 2008, the California Court of Appeal decided a case called *Conte v. Wyeth*.<sup>139</sup> The court held that Wyeth, name-brand manufacturer of the pharmaceutical drug Reglan could be sued for failing to use adequate care in Reglan's product warnings for alleged harm caused to a patient (Conte) who was prescribed and took the generic form of Reglan (metoclopramide), merely because it was foreseeable that the patient's doctor could have relied

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<sup>138</sup> See, e.g., *id. supra* note 113.

<sup>139</sup> 168 Cal. App. 4th 89, 101 (2008) *petition for rev. denied*, January 21, 2009.

upon Reglan’s product information in prescribing the generic drug.<sup>140</sup> Despite the fact that the California Supreme Court’s ruling in *Randi W.* was explicitly limited to the “circumstances of [that] case,”<sup>141</sup> the Court of Appeals in *Conte* nonetheless applied *Randi W.*’s adoption of Section 311 to justify its holding in a pharmaceutical case, completely unrelated to employment reference law.<sup>142</sup> Even more troubling was the court’s rationale: it interpreted *Randi W.* as stating that foreseeability alone is enough to impose a duty of care.<sup>143</sup>

This finding forces name-brand pharmaceutical manufacturers to be the insurers of generic manufacturers. It does so by requiring name-brand manufacturers to use due care in their own product information to make accurate representations about a competitor’s generic drugs that are not in their control, that they cannot inspect, and from which they cannot profit. It is completely irresponsible for a physician be able to seek legally binding information about a drug from a company that does not itself produce, control, or profit from the sale of that drug. Therefore, it is improper for a plaintiff patient to sue the name-brand drug company under misrepresentation theories because the physician’s reliance upon that company was unfounded. But Section 311 inquiry focuses on how to compensate an injured party, rather than asking who is responsible for the injury. Consequently, not only is this ruling unfair, it also encourages plaintiffs and their doctors to rely on the wrong information, hoping that if harm occurs, a deep pocket defendant, in this case the name-brand drug company, will be sent to the chopping block.

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<sup>140</sup> *Id.* at 102. (holding that anyone who “authors and disseminates information about a product manufactured and sold by another may be liable for negligent misrepresentation where the defendant should reasonably expect others to rely on that information and the product causes injury, even though [that person] would not be liable in strict products liability because it did not manufacture or sell the product.”).

<sup>141</sup> *Randi W.*, *supra* note 60, 929 P. 2d at 588 (emphasis added).

<sup>142</sup> *Conte*, *supra* note 139, 168 Cal. App. at 102.

<sup>143</sup> *Id.* at 105 (“...because by law the generic and name-brand versions of drugs are biologically equivalent ... it is also eminently foreseeable that a physician might prescribe generic metoclopramide in reliance on Wyeth’s representations about Reglan.” ).

It is not unreasonable to assume that the California Court of Appeal's decision in *Conte v. Wyeth* could be used to support application of Section 311 liability in an entirely new area of the law. Outside the drug context, other product manufacturers will have an incentive to reduce the amount of information they provide, lest they be held liable not only for their own product's flaws, but also for the flaws of their imitating competitors.

#### **IV. Limitations on Section 311 Liability**

A problem that arises in personal injury cases is that juries sympathize with and strongly desire to compensate the victim.<sup>144</sup> Consequently, some juries will hold a defendant liable though he or she did not cause the harm.<sup>145</sup> To avoid this well-intentioned injustice, tort doctrines must be constrained by legal principles that make it "fair" to impose accountability: absent a "duty of due care under the circumstances, no claim based on negligence can be sustained, even though injury may have occurred."<sup>146</sup> As one court explained, "[w]hether a legal duty of due care should be recognized, therefore, is essentially a question of fairness under contemporary standards."<sup>147</sup>

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<sup>144</sup> See, e.g., *Pool Drain Accident Suit Settled For \$30.9 Million: Lakey v. Sta-Rite Industries*, [1997] Andrews Consumer Prod. Litig. Rep. 6344 (see also *Lakey v. Sta-Rite Industries*, 458 S.E.2d 188) (A North Carolina jury awarded \$25 million in damages to five-year-old Valerie Lakey and her family after finding Sta-Rite industries, the manufacturer for a pool drain cover, liable for Valerie's injuries when she was mostly disemboweled by the pool's drain. While the jury was deciding whether and how many punitive damages to award, Sta-Rite settled for the \$25 million.); *Romo v. Ford Motor Co.*, 113 Cal. App. 4th 738, 6 Cal.Rptr.3d 793 (2003) (A jury awarded \$5 million in compensatory damages and \$290 million (reduced to \$23 million on remand from the United States Supreme Court) in punitive damages after determining that the defendant, Ford Motor Co. was 78% responsible for the deaths and injuries to the Romo family when their Ford Bronco rolled over and the roof collapsed); *Williams v. Philip Morris Inc.*, 176 P. 3d 1255 (Or., 2008.) (A jury awarded a cigarette smoker's widow \$800,000 in compensatory damages and \$79.5 million in punitive damages from Philip Morris, the cigarette manufacturer, for negligence and deceit in the smoking-related lung-cancer death of her husband.)

<sup>145</sup> See e.g., *Simonetta, Gianocostas, and Urena*, *supra* note 112.

<sup>146</sup> *University of Denver v. Whitlock*, 744 P. 2d 54 (Colo.1987).

<sup>147</sup> *Bailey v. Huggins Diagnostic & Rehabilitation Center, Inc.*, *supra* note 22, 952 P.2d at 772 (Colo. App., 1997.) (citing generally *Connes v. Molalla Transport System, Inc.*, 831 P.2d 1316 (Colo.1992)); see also *Prosser and Keeton on the Law of Torts, Limited Duty* § 53, at 356 (5th

The solution strikes a balance between protecting free information exchange and compensating victims of negligently inaccurate speech.

### **A. The Proper Negligent Misrepresentation Standard for Affirmative Statements**

Throughout the growth of the negligent misrepresentation tort, the Restatement authors and many courts have attempted to define under what circumstances a person must use care in his or her communications.<sup>148</sup> Liability for negligent misrepresentation should attach only where a person is at someone else's mercy for information. Contrasting drastically with the expansive language of Section 311,<sup>149</sup> this limited duty has some support among existing courts that have declined to adopt the Restatement's language. For example, in *Jacques v. First Nat'l Bank of Maryland*, the court held a special relationship or "intimate nexus" between information provider and injured party may be unnecessary to establish duty "where the risk created is one of personal injury."<sup>150</sup> So, the court held that absent a special "relationship, ... the principal determinant of duty becomes foreseeability."<sup>151</sup> Further, in *Ashburn v. Anne Arundel County*, another Maryland

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ed. 1984) ("A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another."); *Sinn v. Burd*, 404 A.2d 672, 681 (Pa. 1979) (citing Prosser, *Palsgraf Revisited*, 52 Mich. L. Rev. 1, 14-15 (1953) ("In the decision whether or not there is a duty, many factors interplay: the hand of history, our ideas of morals and justice, the convenience of administration of the rule, and our social ideas as to where the loss should fall.")).

<sup>148</sup> See RESTATEMENT (SECOND) OF TORTS: MISREPRESENTATIONS THREATENING PHYSICAL HARM § 311 cmt. d, which imposes a duty of "the care of a reasonable man under the circumstances" when a person "furnishes information upon which he knows or should realize that the security of others depends." See also *Jacques v. First Nat'l Bank of Maryland*, 515 A. 2d 756 (Md. 1986) (holding a bank's consent to process a customer's loan application yields a duty owed by the bank to process the application with care); *Ashburn v. Anne Arundel County*, 510 A.2d 1078 (Md. 1986) (holding no duty owed by police officer who noticed but did not detain a drunk driver to those later injured by him).

<sup>149</sup> See *id.*

<sup>150</sup> *Jacques*, *supra* note 148, 515 A.2d 756, 760 (Md. 1986).

<sup>151</sup> *Id.*

appellate court cautioned that “‘foreseeability’ must not be confused with ‘duty’” since foreseeability alone “does not itself impose a duty in negligence terms.”<sup>152</sup>

The *Ashburn* Court appears to be applying the standard rule that for liability to attach “it is not enough that the defendant [in a negligent misrepresentation tort] ought reasonably to have foreseen reliance by someone such as the plaintiff.”<sup>153</sup> One can therefore conclude that in addition to foreseeability, another factor is necessary to establish a duty in a negligent misrepresentation tort absent a special relationship recognized in tort law.<sup>154</sup> By analyzing cases in which a duty was found absent a special relationship,<sup>155</sup> scholar Jean A. Brodie deduces that

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<sup>152</sup> *Ashburn*, *supra* note 148, 510 A.2d 1078, 1083; *see also* *Bailey v. Huggins Diagnostic*, *supra* note 22, 952 P.2d at 772 (“Mere foreseeability of harm, however, does not alone give rise to a duty of care.”). For an examination of the difficulty in distinguishing between foreseeability and duty *see* Deborah J. La Fetra, *A Moving Target: Property Owners’ Duty To Prevent Criminal Acts on the Premises*, 28 Whittier L. Rev. 409, 410 (Fall 2006) (“Foreseeability is the key because it is an element both of duty and of causation. . . . This dual role complicates matters because courts sometimes do not identify whether their focus is on duty or causation and courts even more frequently use duty-foreseeability cases as precedent to support causation-foreseeability holdings and vice versa. Duty-foreseeability cases center on the question of whether the property owner should have provided security measures that would have reduced the probability of a certain type of criminal attack. Causation-foreseeability cases consider whether the property owners’ adoption of the duty-required security measures would have prevented the actual attack that precipitated the lawsuit.”).

<sup>153</sup> W. Page Keeton et al., *Prosser and Keeton on Torts* 747 (5th ed. 1984).

<sup>154</sup> *See also* *Bailey v. Huggins Diagnostic*, *supra* note 22, 952 P.2d at 772 (“In addition to the element of foreseeability, the court must consider a number of other factors. . . .”).

<sup>155</sup> Legal duties may arise by statute, by contract, or by other special relationship. According to Prosser, ‘A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.’ Prosser, *Torts* (4th ed.), § 53, p. 324. Sometimes these duties arise due to actions taken, such as in the case the person who undertakes to aid a person in danger, in so doing, that helper has incurred a continual duty to leave the person no worse off. *See* *Farwell v. Keaton*, 240 N.W.2d 217, 220 (Mich. 1976). When there is a legally recognized special relationship between the parties, a legal duty to use care in making representations is always present. *See*, for example, *Kannavos v. Annino*, 247 N.E.2d 708, 711-12 (1969) (nondisclosure may be actionable where relationship of parties creates an obligation to communicate all facts). By “special relationship” a court may mean anything from a familial obligation (*see* *Broadbent v. Broadbent*, 907 P. 2d 43 (Az. 1995) (holding “parents always owe a parental duty to their minor child” and that therefore “the issue of liability” revolved around “whether the parents have breached this duty”)), to a business

this *other factor* requires the representations were “made directly to the injured party about an object owned by, or a condition under the control of” the person making the representations.<sup>156</sup> In *Virginia Dare Stores v. Schuman*, a hardware store hired a company to wash its inside walls. The store manager told the washer that a display case would hold the washer’s weight, but when it did not, he fell and was hurt. The washer sued for negligent misrepresentation. The court noted that *if* the washer had “the same or an equal opportunity to ascertain the condition of the [display case] and whether it was safe to bear his weight, then [the] verdict must be for the [hardware store].”<sup>157</sup> But because the store owned the display case, the washer could not have otherwise reasonably ascertained the information, and because the store manager knew the washer was relying on him to convey accurate information, the court held the defendant liable.<sup>158</sup>

By contrast, in *Holt v. Kolker*, discussed *supra*, the plumber owed no duty to the injured homeowner for his failure to ascertain and communicate the true danger presented by the rotting and unstable porch.<sup>159</sup> The homeowner’s situation (in *Holt*) is far different from the window washer in *Virginia Dare Stores* because the homeowner could easily have hired any number of experts in architectural soundness or engineering to inspect the safety of his porch, while the washer was clearly at the mercy of the store to make accurate representations about the safety of the building. The duty to represent with care exists where the communicator and receiver are in

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relationship in which a financial interest is at stake (see Kannavos, *supra*). If courts find such a relationship, a duty to use due care arises. Therefore, the interesting inquiry regarding negligent misrepresentation is whether a duty arises when there is no legally binding special relationship.

<sup>156</sup> Jean A. Brodie, *Foster v. American Home Products Corp.: Tort Liability for Injuries Caused by Someone Else’s Product?*, 12 T.M. Cooley L. Rev. 431, 434 (1995);

<sup>157</sup> *Virginia Dare Stores v. Schuman*, 1 A.2d 897, 902 (Md. 1938).

<sup>158</sup> *Id.*

<sup>159</sup> *Holt v. Kolker*, *supra* note 116, 57 A. 2d 287, 289 (Md. 1948) (plumber had “no special knowledge as to the condition of the porch”)

“such a relation that one party has the right to rely for information upon the other.”<sup>160</sup> Since the plumber was expressing a casual opinion—“a mere concurrence [of] the landlord’s statement,”<sup>161</sup>—he therefore had no duty of care toward the plaintiff.<sup>162</sup> Likewise, in *Bailey v. Huggins Diagnostic & Rehabilitation Center, Inc.*, the dentist who told a television interviewer that people should have their dental fillings removed was only one source of information about dental fillings available to the viewer who was injured having her fillings removed.<sup>163</sup> A reasonable person in the viewer’s situation would not have proceeded without “obtaining additional professional advice of a treating dentist.”<sup>164</sup> The court noted that “if the recommendation of that treating dentist was [to remove the filling,] the legitimate argument could be made that it was that later specific recommendation, and not any earlier statement made by [the T.V. Dentist], that caused any resulting harm.”<sup>165</sup>

Indeed, the Restatement itself reflects the understanding that liability should apply to a defendant who “knows or should realize that the safety of the person and of others *may depend upon* the accuracy of the information.”<sup>166</sup> Comment c of Section 311 likewise notes that there is “no reasonable justification” for trusting a “casual bystander ... as to the safety of a bridge or a scaffold,” while it might be reasonable to rely on “one who purports to have special knowledge of the matter.”<sup>167</sup> But, because the text of Section 311 does not require dependence upon special

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<sup>160</sup> *Id.* at 288.

<sup>161</sup> *Id.* at 289.

<sup>162</sup> *Id.*

<sup>163</sup> *Bailey v. Huggins Diagnostic*, *supra* note 22, 952 P.2d at 772.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 772-773.

<sup>166</sup> RESTATEMENT (SECOND) OF TORTS § 311, *supra* note 3, cmt. b.

<sup>167</sup> *Id.* at cmt. c.

knowledge as an element of negligent misrepresentation, the standard has been loosely applied.<sup>168</sup>

Without the element of the plaintiff's dependence, the negligent misrepresentation tort encourages plaintiffs to choose ignorance, relying on incomplete or inaccurate information rather than investigating the truth of the information, as a form of insurance.<sup>169</sup> This is why courts applying the negligent misrepresentation tort have generally required the plaintiff to prove an inability to acquire the information by some reasonable alternative means.<sup>170</sup>

The best approach to this dependency problem would achieve a balance between protecting information-exchange and compensating injured parties: duty should arise only when there is a good reason to rely upon the information provider to state the facts accurately because the information receiver is at the provider's mercy for that information.<sup>171</sup> This "good reason" exists when the representations are about something within the information provider's ownership or control or when he or she stands to gain economically from the information exchange.

### **B. What is Reasonable Reliance?**

The purpose of the negligent misrepresentation tort is to ensure that those who possess expertise—those upon whom non-experts are therefore entitled to rely—conduct themselves in a

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<sup>168</sup> See *Howard v. Pfeifer*, 443 P. 2d 39, 42 (Alaska 1968) ("principles of law in this area are not well defined").

<sup>169</sup> See also *Foremost Ins. Co. v. Parham*, 693 So. 2d 409, 413 (Ala. 1997) (plaintiff is not justified in relying on defendant's representation if it is "so patently and obviously false that he must have closed his eyes to avoid the discovery of truth.").

<sup>170</sup> See, e.g., *Hanlon v. Thornton*, 462 S.E. 2d 154, 156 (Ga. 1995) ("one cannot be permitted to claim that he has been deceived by false representations about which he could have learned the truth of the matter and could have avoided damage." (citation omitted)); *Independent-Eastern Torpedo Co. v. Price*, 258 P. 2d 189, 203 (Okla. 1953) ("the parties must be in such relationship to each other that one is dependent upon the other to exercise due care and caution in what he is...saying.").

<sup>171</sup> See, e.g., *Bailey v. Huggins Diagnostic*, *supra* note 22, 952 P. 2d 768 (plaintiff was not at the defendant's mercy for the information and should have consulted a personal dentist rather than relying upon the television dentist).

reasonable way and do not recklessly advise others to take perilous courses of action.<sup>172</sup> But where a speaker has not held himself out to be an expert, and has offered a suggestion, judgment, or assurance merely as a casual or personal view, the speaker should not be liable. As Judge William Andrews explained in *Int'l Products Co. v. Erie R. Co.*,<sup>173</sup> “[n]ot every casual response, not every idle word, however damaging the result, gives rise to a cause of action.”<sup>174</sup> Some opinions “cost nothing, and bind no one.”<sup>175</sup> Instead, liability should attach only if “there is a duty, if one speaks at all, to give the correct information.”<sup>176</sup> To prove such a duty, a plaintiff must not only establish he was at the mercy of the defendant for the information and that the defendant knew this—“knowledge, or its equivalent, that the information is desired for a serious purpose,”—but also that “he to whom it is given intends to rely and act upon it.”<sup>177</sup> To explain the concept of proper reliance, Judge Andrews cautioned that the plaintiff must show the “relationship of the parties, arising out of contract or otherwise, must be such that in morals and good conscience the one has the right to rely upon the other’s information, and the other giving the information owes a duty to give it with care.”<sup>178</sup> To this end, Andrews distinguishes between “an inquiry made of a stranger” and that made of a person with whom one “has entered, or is about to enter, into a contract.”<sup>179</sup> Then, only once duty has been established, and reasonable

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<sup>172</sup> W. Page Keeton, et al., *Prosser and Keeton on Torts* § 107 at 745 (5th ed. 1984).

<sup>173</sup> 155 N.E. 662 (N.Y. 1927), *supra* note 6.

<sup>174</sup> *Id.* at 664.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*; see also *Bily v. Arthur Young & Co.*, 834 P.2d 745, 768 (Cal. 1992) in which the California Supreme Court held that the “class of persons entitled to rely upon [] representations is restricted to those whom or for whom the misrepresentations were made.”

<sup>178</sup> *Int'l Products*, *supra* note 6, 155 N.E. at 664.

<sup>179</sup> *Id.* The problem with Judge Andrews’ distinction is that it fails to determine where the line is drawn between stranger and contract parties. See, e.g., the discussion of *Conte v. Wyeth*, *supra* at Section III.B. *Medical and Health Related Misrepresentation*. The name-brand manufacturer in *Conte* was not anticipating a contract with a patient prescribed the generic drug. However, the

reliance proven, may the plaintiff complete the proof of the tort by showing information was “erroneous” and that he was “injured in person or property” because of the faulty information.<sup>180</sup>

Many standards have been used to assign the sufficient degree of reliance for liability to attach. According to one scholar, these standards are sometimes called “reasonable,” sometimes “justifiable,” and sometimes the terms are used interchangeably.<sup>181</sup> The Utah Supreme Court’s approach is one of the most successful at achieving a proper balance between compensation to the victim and information sharing. Utah modeled its negligent misrepresentation tort on Restatement (Second) of Torts § 552(1)<sup>182</sup> (which requires “justifiable reliance”) but requires instead that a plaintiff establish “reasonable reliance upon a second party’s careless or negligent misrepresentation of a material fact.”<sup>183</sup> In addition to the requirement that the plaintiff be induced to act by a misrepresentation, in *Price-Orem Inv. Co. v. Rollins, Brown and Gunnell, Inc.*,<sup>184</sup> the Utah Supreme Court established three objective criteria which help to prevent the abuse of the tort against defendants who have only casually stated their opinions: “a party injured by reasonable reliance upon a second party’s careless or negligent misrepresentation of a material fact may recover damages resulting from that injury when the second party had [1] a pecuniary interest in the transaction, [2] was in a superior position to know the material facts,

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court found a duty of care existed to the generic-drug using patient too. Instead, the more proper rule is that the “class of persons” rule espoused in *Bily*, *supra* note 177, 834 P.2d at 768, (emphasizing that “[e]ven though the defendant should have anticipated that the misinformation might reach others [outside the class of persons for whom the information was meant], *he is not liable to them.*”) (emphasis added).

<sup>180</sup> *Id.*

<sup>181</sup> Jeremy N. Trousdale, *Reasonable or Justifiable Reliance: Who Can We Believe?*, 21 Am. J. Trial Advoc. 385, 398 (1997) (referring to the District of Columbia, Indiana, Kansas, and Washington State cases who make no distinction between the terms but each have varying standards nonetheless).

<sup>182</sup> See RESTATEMENT (SECOND) OF TORTS: NEGLIGENT MISREPRESENTATION § 552 full text, *supra* note 9.

<sup>183</sup> Trousdale, *supra* note 181 at 396.

<sup>184</sup> 713 P. 2d 55 (Utah 1986)

and [3] should have reasonably foreseen that the injured party was likely to rely upon the fact.”<sup>185</sup>

*Pecuniary interest:* Utah’s first requirement is apt because a person disclosing information about a transaction in which he or she has a financial interest is reasonably on notice of a duty to use care in making representations, because failure to do so could be fraud in the inducement.<sup>186</sup> Absent the existence of a special relationships recognized by tort law to yield an affirmative duty,<sup>187</sup> where one is merely offering a gratuitous representation about a subject of no financial interest to him, that person has no duty to make accurate representations. For example, in *DeRose v. Commercial Credit Co.*, a person considering whether to accept an automobile as collateral for a private loan contacted the defendant finance company to inquire whether there were liens on three automobiles.<sup>188</sup> The finance company said there were no liens on two cars, and promised to find out and contact him if one existed on the third car, but the company representative did not further investigate the situation or inform the plaintiff.<sup>189</sup> The plaintiff, who assumed that the third car was clear of encumbrances, made the loan and, when it turned out

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<sup>185</sup> *Id.* at 59.

<sup>186</sup> See *Black’s Law Dictionary*, (8th ed. 2008) (“Fraud in the Inducement “Fraud occurring when a misrepresentation leads another to enter into a transaction with a false impression of the risks, duties, or obligations involved; an intentional misrepresentation of a material risk or duty reasonably relied on, thereby injuring the other party without vitiating the contract itself, esp. about a fact relating to value.”)

<sup>187</sup> For example a teacher/student or parent/child relationship yields a duty regardless of financial interest. See, e.g., Angelita Martinez, *Parents As Mandatory Reporters Of Child Abuse And Neglect: Establishing An Explicit Duty To Protect*, 51 Wayne L. Rev. 467, 470-71 (2005) (“A common law affirmative duty to act is required in relationships where one person is in a position of dependency or vulnerability to another who ‘holds considerable power over the [person’s] welfare.’”) (quoting W. Page Keeton et al, *Prosser and Keeton on the Law of Torts*, § 56 at 374 (5th ed. 1984); see also Nancy Levit, *Ethereal Torts*, 61 Geo. Wash. L. Rev. 136, 149 n. 72 (1992) (“The special relationships that create a duty to act cover a wide range of relational categories-such as carriers-passengers, teachers-students, and hosts-guests-based on policy considerations such as reliance, companionship, and foreseeability of harm.”).

<sup>188</sup> *DeRose v. Commercial Credit Co.*, 39 Pa. D. & C. 300, 301 (Pa. Com. Pl. 1941).

<sup>189</sup> *Id.*

that there was in fact a lien on the third car, he sued the finance company.<sup>190</sup> The court held that because the plaintiff had “chose[n] to act without full information,” he could not “fasten negligence on the defendant” since the defendant had no financial interest in the information provided.<sup>191</sup> Although the defendant was “in the finance business,” there was “nothing in the testimony indicating that the supplying of information to others concerning its customers is part of that business . . . . There certainly was no obligation on defendant company to call [the plaintiff] on the following day concerning the one automobile referred to in the testimony.”<sup>192</sup> Because the defendant had no financial interest in the accuracy of the information provided to the plaintiff, it was not reasonable for the plaintiff to rely on the finance company.

*Superior Knowledge of Material Facts:* the second condition adopted by the Utah court encourages responsible behavior because plaintiffs can sue a defendant for misrepresentations only when the defendant is in a better position to know the material facts than is the person receiving the information.<sup>193</sup> Without this condition, a plumber, for example, could ask the homeowner in whose home he is working about the plumbing and hold the homeowner liable for failing to exercise due care in representing the situation when the plumber was called to determine that very question. If the plumber truly has superior knowledge, he cannot claim that it is reasonable to rely upon the homeowner.<sup>194</sup> In *Kimmell v. Schaefer*, the New York Court of Appeals similarly recognized that “liability for negligent misrepresentation has been imposed

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<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 306

<sup>192</sup> *Id.* at 306.

<sup>193</sup> The determination of which parties were in the better positions to know material facts would, of course, necessitate a case-by-case inquiry.

<sup>194</sup> Further, take the case described *supra*, where an automobile owner was in a far better position to know the condition of his vehicle several months (or longer) after purchase than was the dealership who had first sold him the vehicle. *See* *Thompson v. Hardy*, *supra* note 118, 417 S.E. at 361.

only on those persons who possess *unique or specialized expertise*, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified.”<sup>195</sup>

*Reasonably foreseen reliance:* Finally, the third condition ensures that each party bears an equitable share of the burden to behave reasonably. In *Sampson v. MacDougall*,<sup>196</sup> the plaintiff’s son was rendered a quadriplegic when, after becoming intoxicated at the defendant’s home, he jumped off of a fence.<sup>197</sup> The court found the defendants “should not have reasonably foreseen that [the woman’s injured son] would be put in peril by” her inaction in reliance on the defendants’ statements discouraging her from examining the basement where a beer keg was located.<sup>198</sup> Thus, the court correctly concluded that the defendants were not liable for negligent misrepresentation because they could not have anticipated the plaintiff’s son would become a quadriplegic as a result of the plaintiff’s reliance on the defendants’ statements.<sup>199</sup>

Even where a defendant has a pecuniary interest in the relationship with the plaintiff, liability may not necessarily attach. In *Renn v. Provident Trust Co.*,<sup>200</sup> a building association sought to foreclose a real estate property for which it had granted a second mortgage.<sup>201</sup>

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<sup>195</sup> *Kimmell v. Schaefer*, 675 N.E. 2d 450, 454 (N.Y. 1996) (holding the Chief Executive Officer/corporation’s chairman owed a duty to speak with care to prospective investors due to his expertise and special knowledge).

<sup>196</sup> 802 N.E. 2d 602 (Mass. 2004).

<sup>197</sup> *Id.* at 609.

<sup>198</sup> *Id.*

<sup>199</sup> Similarly in *Bailey v. Huggins Diagnostic*, *supra* note 22, the court found it “questionable “whether one could reasonably rely upon [the dentist’s] views without obtaining additional professional advice of a treating dentist.” It was unreasonable to assume that without outside consultation, the plaintiff would rely on the defendant’s televised statements. Thus, the court concluded there was “no duty of due care to [the] plaintiff.” 952 P.2d at 772 (Colo.App.,1997.)

<sup>200</sup> 29 Pa. D. & C. 689 (Pa. Com. Pl. 1937).

<sup>201</sup> *Id.* at 689.

The defendant bank that had the primary mortgage on the property, provided the building association a will showing that the decedent who owned the property had encumbered the assets by creating a trust.<sup>202</sup> The will turned out to be the wrong will, and the association proceeded with foreclosure, only to discover that the delay cost them significant financial loss.<sup>203</sup> The association then sued the bank for furnishing the wrong will.<sup>204</sup> The court found in favor of the bank, however, noting it “was not engaged in the business of furnishing copies of wills, nor was it paid by plaintiffs for this copy of the will, nor did it furnish the copy of the will in order to influence the conduct of plaintiffs. It merely, by way of courtesy, did what it was under no obligation to do. If liability is to be incurred by such conduct all of us must be extremely careful not to let our politeness overcome our caution.”<sup>205</sup> The fact that the bank had a pecuniary interest in the relationship with the defendant did not establish the existence of a duty: “one engaged in the business of giving information in one matter is not liable for information given in regard to another matter. So, a lawyer may incur liability if, in the transaction of his business, he gives wrong information concerning a legal matter, but he would not be liable if he gives what is known as a ‘curbstone’ opinion, nor would he be liable if he undertakes to advise someone as to the proper treatment for typhoid fever.”<sup>206</sup>

Finally, in addition to the burden of proving the three above conditions regarding the defendant, a plaintiff does not meet the reasonable reliance element, and therefore fails to make his prima facie case, if he does not use reasonable care assessing the truth of the

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<sup>202</sup> *Id.* at 690.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 691.

<sup>205</sup> *Id.* at 693.

<sup>206</sup> *Id.* at 693.

communication.<sup>207</sup> As the *Forsberg* Court explained, a plaintiff “is precluded from holding someone else to account for the consequences of his own neglect,”<sup>208</sup> and will not meet the reasonable reliance requirement for “heedlessly accept[ing] as true whatever is told him”<sup>209</sup> where he fails to exercise “such degree of care to protect his own interest as would be exercised by an ordinary, reasonable and prudent person under the circumstances.”<sup>210</sup> Alabama has a similar requirement, which is termed a “justifiable reliance standard.” In *Foremost Ins. Co. v. Parham*,<sup>211</sup> a plaintiff does not establish justifiable reliance on a defendant’s speech if the representation is “so patently and obviously false that he must have closed his eyes to avoid the discovery of truth.”<sup>212</sup> Likewise, in Georgia, justifiable reliance is satisfied when a plaintiff relies

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<sup>207</sup> Importantly, however, the plaintiff has no affirmative duty to the defendant to use care in interpreting the defendant’s representation. In other words, the defendant would not have an affirmative defense that the plaintiff willfully or negligently misinterpreted the defendant’s representation. The requirement that the plaintiff only establishes reasonable reliance if he or she uses appropriate care in assessing the representation’s truth has no bearing on the affirmative defenses of contributory or comparative negligence. Contributory negligence as an affirmative defense (which completely barred the plaintiff’s recovery for partly contributing to the injury) originated in an English case called *Butterfield v. Forrester*, 11 East. 60, 103 Eng. Rep. 926 (1809). But, according to the Restatement (Third) of Torts § 7, cmt. a., only five jurisdictions—Alabama, Maryland, North Carolina, Virginia, and the District of Columbia—currently use contributory negligence as a complete defense. The rest of American jurisdictions use a variety of comparative fault doctrines to reduce the plaintiff’s recovery by his or her percentage of responsibility for the harm. *Id.* For the purposes of the negligent misrepresentation reasonable reliance element, however, the distinction that is relevant is whether the plaintiff can prove that his or her assessment or interpretation of the representation in question was reasonable because he or she used appropriate care under the circumstances to determine the validity of the communication. The plaintiff’s other potential contributorily negligent actions—for example if Vince from Section I, *supra*, had been speeding when his car was hit by the train—are all irrelevant to proving reasonable reliance upon the communication but will be relevant to any affirmative defenses the defendant may assert.

<sup>208</sup> *Forsberg v. Burningham & Kimball*, 892 P.2d 23, 26 (Utah. App. 1995) (quoting *Jardine v. Brunswick Corp.*, 423 P.2d 659, 662-63 (Utah 1967)).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> 693 So. 2d 409, 413 (Ala. 1997)

<sup>212</sup> *Id.* at 413.

on information only after having applied his own “duty of due diligence.”<sup>213</sup> In that case, the court held the plaintiff did not meet his burden since “one cannot be permitted to claim that he has been deceived by false representations about which he could have learned the truth of the matter and could have avoided damage.”<sup>214</sup>

### **C. Limitations on the Duty to Disclose.**

Although there is no “affirmative duty to act on another’s behalf in most situations” some states hold employers liable for “negligent misrepresentation or negligent referral when the employee has a history of violent or criminal actions that may put others at risk.”<sup>215</sup> In so doing, these states hold those who omit material facts to the same standards as those who falsely represent information. This is a mistake. There are inherently greater consequences for

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<sup>213</sup> Hanlon v. Thornton, 462 S.E.2d 154, 156 (Ga. App. 1995).

<sup>214</sup> *Id.* at 156 (quoting *Lester v. Bird*, 408 S.E.2d 147, 150 (Ga. App. 1991)); see also Jonathan L. Marcus, *Note*, Model Penal Code Section 2.02(7) and Willful Blindness, 102 Yale L.J. 2231, 2233-34 (1993) (explaining the doctrine of willful blindness which courts use to presume mens rea in order to prevent deliberate ignorance when mens rea is necessary for a conviction). The doctrine of willful blindness in criminal law first appeared in English case law in the 1860s when the judge in a case called *Regina v. Sleep*, 169 Eng. Rep. 1296 (Cr. Cas. Res. 1861), ruled that “an accused could not be convicted for possession of ‘naval stores’ unless the jury found that he ‘knew that the goods were government stores or willfully shut his eyes to the fact.’” *Id.* at 2233. And, according to Marcus, courts had begun to note that “actual knowledge was unnecessary for conviction if the defendant purposefully abstained from acquiring this knowledge.” *Id.* at 2234. Today, according to Marcus, “[t]he actor who is aware of a high probability of a fact’s existence has been ‘put on notice;’ that is, he has the opportunity, if he cares, to investigate and eliminate any doubt before acting or, in any event, to refrain from acting.” *Id.* at 2236 (referencing Model Penal Code § 2.02 cmt. 9).

<sup>215</sup> *Belknap supra* note 61 at 115 (citing Janet Swerdlow, *Negligent Referral: A Potential Theory for Employer Liability*, 64 S. Cal. L. Rev. 1645 (1991); Bradley Saxton, *Flaws in the Laws Governing Employment References, supra* note 66 at 109 (Proposing affirmative disclosure duty for current and former employees with violent propensities)); see also *Hornback v. Archdiocese of Milwaukee*, 752 N.W. 2d 862, 872 (2008) (“In contrast with *Randi W.’s* approach recognizing tort claims for employers’ failure to disclose information about past employees, most states stand by a traditional ‘no duty to act’ approach in employment referral contexts.”).

expanding a duty to warn<sup>216</sup> than for requiring due care when speaking.<sup>217</sup> The kind of care required to anticipate those facts, which, when omitted might result in someone's physical harm, is too great to require of the ordinary person except in the most rare circumstances.<sup>218</sup>

Nonetheless, the current trend and advice of commentators strongly suggest the duty to disclose will only continue to grow, particularly in the context of employment reference liability.<sup>219</sup> This duty has been gradually expanding, creeping into the law of negligent misrepresentation without proper constraints to ensure that a measure of both justice and fairness are achieved.

According to Prosser and Keeton On Torts, “[i]n many situations, a failure to disclose the existence of a known danger may be the equivalent of misrepresentation, where it is to be expected that another will rely upon the appearance of safety.”<sup>220</sup> But all the examples given by

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<sup>216</sup> The rule that there is no a duty to warn or help another is nearly as old as the common law itself and reflects an important difference between failing to act and acting wrongly. *See W. Page Keeton, Prosser and Keeton on the Law o/Torts* § 56, at 373-75 (5th ed. 1984).

<sup>217</sup> A duty to use appropriate care when acting or speaking is significantly different than an affirmative duty to act. Lord Macaulay eloquently explained that the problem is one of “line drawing.” Thomas B., Lord Macaulay, *Notes on the Indian Penal Code, reprinted in The Legal Enforcement of Morality* 161-62 (Thomas C. Grey ed., 1983) (“... the [wealthy] man who . . . suffers a fellow creature to die of hunger at his feet, is a bad man, a worse man, probably, than many of those for whom we have provided very severe punishment. But we are unable to see where, if we make such a man legally punishable, we can draw the line. If the rich man who refuses to save a beggar's life at the cost of a little copper is a murderer, is the poor man just one degree above beggary also to be a murderer if he omits to invite the beggar to partake of his hard-earned rice?”); *see also* Joseph Ellin, *The Mind of a Bad Samartian, in Civility and Its Discontents* 233, 242 (Christine T. Sistare ed., 2004) (“Scrooge is better dealt with by the Spirit of Christmas than by the shadow of the hangman.”).

<sup>218</sup> The exceptional difficulty in defining an affirmative duty to speak or act weighs against its adoption as a rule for any tort, not just negligent misrepresentation. Further, when one has not affirmatively undertaken to represent information, the class of persons needing to be warned may be unending or unquantifiable. *See Hornback, supra* note 215, 752 N.W. 2d at 872-73 (“Foreseeability of specific victims becomes relevant when an affirmative obligation is argued, such as the obligation to warn.”).

<sup>219</sup> Belknap, *supra* note 61 at 116.

<sup>220</sup> W. Page Keeton et al., *Prosser and Keeton on Torts* 207 (5th ed. 1984).; *See also* Hornback, *supra* note 215, 752 N.W. 2d at 872 (emphasizing that “[t]he failure to warn is not without

Prosser and Keeton—a surgeon who does not disclose failure to retrieve a tool during surgery or an air traffic controller who fails to disclose weather conditions—are situations in which each non-discloser owes a duty to those involved not merely because of a special relationship or his expertise but because it is his or her occupational responsibility to do so.<sup>221</sup>

California also expanded the duty to warn regarding therapists and their patients' potential victims.<sup>222</sup> The expansion of tort doctrines to include a duty to warn primarily began with the *Tarasoff* case where a murdered student's parents were permitted to sue the murderer's psychiatrist for failing to warn the victim that she might be in danger; this was because (1) a special relationship existed between the information holder and the potential criminal, (2) the harm was foreseeable, and (3) the information holder could reasonably identify the potential victim in order to warn her.<sup>223</sup> Applying *Tarasoff*-type reasoning to employment references, one scholar argued that although a former employee and employer do not have a "special relationship" they should be considered to have one with respect to "information that a prospective employer seeks."<sup>224</sup> Carrying this principle further, Dean Bradley Saxton urged that therapist-patient and employer-employee relationships are "'so analogous' that the *Tarasoff* rule should apply in employment references cases" since the intimate patient knowledge a therapist gains during treatment mirrors the "special knowledge" an employer acquires "of an [employee's] dangerous or criminal tendencies."<sup>225</sup> As discussed above,<sup>226</sup> however, employers

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limitations and parameters" and that it depends upon the circumstances whether or not a "failure to warn ... may be a breach of the duty of ordinary care.")

<sup>221</sup> *Id.*

<sup>222</sup> See *Tarasoff* and Cal. Civ. Code § 43.92, *infra* note 227, and its progeny.

<sup>223</sup> *Tarasoff v. Regents of the Univ. of Cal.*, 551 P. 2d 334 (1976).

<sup>224</sup> Janet Swerdlow, *Negligent Referral: A Potential Theory for Employer Liability*, 64 S. Cal. L. Rev. 1645, 1662 (1991).

<sup>225</sup> Belknap, *supra* note 61 at 121 (citing Saxton, *supra* note 65, *Flaws in the Laws Governing Employment References*, *supra* note 66 at 93-94.)

are not qualified to assess mental health; and even if they were, expanding the duty to warn in this way is inadvisable if not reckless.

*Tarasoff*, which presents a particularly sympathetic case because the victim was so easily identifiable and would have been easily warned, is not the current law in California. In 1985, the California legislature enacted Civil Code § 43.92 which limited therapist liability to instances in which the patient “communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims” and limited the therapist’s duty regarding such information to make “reasonable efforts” to tell the victim and local law enforcement.<sup>227</sup> The line of cases following *Tarasoff* after 1985, interpreted the duty much more narrowly, consistent with the new legislation. California Civil Code § 43.92 imposes upon therapists a duty to warn only if there is a foreseeable and “serious risk of grave bodily injury to another.”<sup>228</sup> The statute restricts the duty to warn to those cases in which great injury is likely *and* where the intended victim is reasonably identifiable.<sup>229</sup>

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<sup>226</sup> See *supra* Section III.A.4. *Unnecessary, Unintended Consequences of Section 311 Jurisprudence*.

<sup>227</sup> Cal. Civ. Code § 43.92 (2007) requires (a) There shall be no monetary liability on the part of, and no cause of action shall arise against, any person who is a psychotherapist as defined in Section 1010 of the Evidence Code in failing to warn of and protect from a patient’s threatened violent behavior or failing to predict and warn of and protect from a patient’s violent behavior except where the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims. (b) There shall be no monetary liability on the part of, and no cause of action shall arise against, a psychotherapist who, under the limited circumstances specified above, discharges his or her duty to warn and protect by making reasonable efforts to communicate the threat to the victim or victims and to a law enforcement agency.

<sup>228</sup> *Ewing v. Goldstein*, 120 Cal. App. 4th 807, 811, 15 Cal.Rptr.3d 864, 866 (2004); *Calderon v. Glick* 131 Cal. App. 4th 224, 231, 31 Cal.Rptr.3d 707, 711-12 (2005).

<sup>229</sup> See Cal. Civ. Code. § 43.92., *supra* note 227. And, although this therapist duty to warn is governed by statute, the common law is an appropriate vehicle to govern others’ duties to warn that are not covered by responsibilities that come in conjunction with licensing and professional standards.

The California Appellate Courts' logic in the post-1985 *Tarasoff* cases<sup>230</sup> can be used as a standard to apply in negligent misrepresentation cases. In the employment references arena this standard would impose upon employers a much more limited duty to warn than is imposed by Section 311. If an employer had reason to foresee great bodily injury to some reasonably identifiable victim, he or she would need to warn law enforcement and the potential victim, but would have no obligation to disclose information to potential future employers. The reasonably identifiable victim standard has been fleshed out in the California case law: a potential victim is reasonably identifiable if referenced by name, or by distinguishing characteristics so that he or she could be uniquely located.<sup>231</sup> However when someone makes a verbal threat, or behaves in a way that suggests he or she will harm a third party but does not uniquely identify the intended victim or victims, California courts have so far dealt with these issues on a case-by-case basis. For example, a victim is reasonably identifiable if he or she is a regular full time worker on a particular floor of a high-rise building,<sup>232</sup> but when a imprisoned juvenile offender known to be "extremely dangerous and violent [toward] young children" threatened to kill "a young child" if he was released, and subsequently did so, the court held that threat was not sufficient to yield a reasonably identifiable potential victim.<sup>233</sup> The California Supreme Court held that when a communication is "a generalized threat to a segment of the population" and a threat to "a

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<sup>230</sup> See, e.g., *Ewing and Calderon*, *supra* note 228.

<sup>231</sup> See *Thompson v. County of Alameda*, 614 P. 2d 728 (Cal. 1980) ("In those instances in which the released offender poses a predictable threat of harm to a named or readily identifiable victim or group of victims who can be effectively warned of the danger, the court held a releasing agent may well be liable for failure to warn such persons."); see also *Hornback*, *supra* note 215, 752 N.W.2d at 873 (analyzing how where "specific victims were unforeseeable" it would be unreasonable to impose an affirmative duty to warn them).

<sup>232</sup> *Barry v. Turek*, 218 Cal. App. 3d 1241, 1245, 267 Cal. Rptr. 553, 555 (Cal. App. 1 Dist., 1990)

<sup>233</sup> *Thompson v. County of Alameda*, *supra* note 231, 614 P. 2d at 730.

member of a large amorphous public group of potential targets” that communication does not provide a reasonably identifiable victim.<sup>234</sup>

This standard would have the additional beneficial consequence of a strict foreseeability requirement: there must be a recognizable person or persons who will be harmed if the information is not revealed, and otherwise, action is not legally obligated.<sup>235</sup> Thus, with regard to employer negligent misrepresentation, it appears that the burden on the employer to warn the future or prospective employer is a far more stringent requirement than is imposed on therapists with regard to violent clients. It seems incongruous for a therapist, with presumably more information of greater certainty about patients than an employer has about employees, to be under a lesser disclosure obligation. One of the main problems with drawing analogies between employers and therapists when discussing a duty to disclose information is that there is no logical place to draw the line determining who is an appropriate potential defendant. For example, friends, family members, and lifetime acquaintances know far more “intimate” information about each other than do employers and employees. Should those friends, extended family members, and lifetime acquaintances have a duty to disclose possible dangerous tendencies anytime they make positive representations regarding their friend, extended family member and lifetime acquaintance? For the purpose of disclosure, what makes friendship different from therapy or employment? Is it perhaps the fact that the employment or therapeutic relationship is far more proscribed, and formal and that money is exchanged? If so, what logical distinction exists to allow money exchange to render the relationship subject to a legal disclosure obligation? Absent a reasonable rationale, a duty to warn could easily expand into dangerous,

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<sup>234</sup> *Id.* at 733, 738.

<sup>235</sup> *See id.*; *see also* Hornback, *supra* note 215, 752 N.W. 2d at 873.

harmful territory making freely exchanged information a relic of the past before anyone realizes what has happened.<sup>236</sup>

Many states, including California, have incorporated much of the policy from the *Tarasoff* case into the area of employment references. For example, in *Randi W.*,<sup>237</sup> a failure to inform a future employer of the employee's full record, including allegations of sexual misconduct, was actionable against the former employers when a child was molested.<sup>238</sup> The *Randi W.* court directly referenced *Tarasoff*, *Thompson*, and other *Tarasoff*-progeny in its analysis of whether or not the former employers had duties of care to warn the future employers about Gadams' sexual misconduct.<sup>239</sup> In another case, the New Mexico Court of Appeals, held that sexual harassment allegations about a former employee were "far more than mere gossip or innuendo."<sup>240</sup> Relying in part upon the *Randi W.* decision,<sup>241</sup> the Court consequently found "reasonable person[s] who had this information should have foreseen that omission of the report and disciplinary actions in the recommendation would pose a threat of physical harm" to those who might be harassed in the future.<sup>242</sup> This sort of finding also reaches to employment agencies use of references to check their applicants' qualifications. In *Gutzan v. Altair Airlines, Inc.*,<sup>243</sup> an

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<sup>236</sup> See, e.g., *id.* at 876 (applying important policy considerations to prevent the plaintiffs negligent misrepresentation claim where "... allowing recovery would be the beginning of a descent down a slippery slope with no sensible or just stopping point" because "[a] decision to the contrary would create precedent suggesting that employers have an obligation to search out and disclose to all potential subsequent employers, which could include in an employment context every school in the country or beyond, all matters concerning an ex-employee's history.").

<sup>237</sup> See *Randi W.*, *supra* note 60, 929 P. 2d 582.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 558.

<sup>240</sup> *Davis*, *supra* note 60, 987 P. 2d at 1180.

<sup>241</sup> *Id.* at 1178-79.

<sup>242</sup> *Richland School Dist. v. Mabton School Dist.*, 45 P.3d 580, 587 (Wash. App. 2002) (citing *Davis*, 987 P.2d 1172).

<sup>243</sup> *Gutzan v. Altair Airlines, Inc.*, 766 F. 2d 135 (3d Cir. 1985).

employment agency recommended a convicted rapist for employment at an airline. The Court held that the agency had failed to adequately examine the man's explanation for the conviction and further held that the agency negligently recommended him for employment.<sup>244</sup> The court held the airline's "decision[] to hire [the rapist], to afford him no special supervision, and to shield the fact of his prior conviction from his co-workers were based on the unwarranted assumption that he posed no danger to his fellow workers," an assumption apparently "founded on reassurances made by [the agency]."<sup>245</sup> The court found the agency failed to adequately examine the man's explanation for a rape conviction and imprisonment and was subsequently negligent in vouching for the man's qualifications to be an airline employee.<sup>246</sup>

Michigan has also addressed negligent misrepresentation regarding employee references but with a different result. In two cases, the Michigan Court of Appeals held that the mere existence of a qualified privilege for employers to disclose information did not amount to an affirmative duty to do so.<sup>247</sup> In *Moore v. St. Joseph Nursing Home, Inc.*, a security guard was savagely beaten and murdered by a co-worker who had previously been employed by the defendant, St. Joseph Nursing Home.<sup>248</sup> The estate of the deceased security guard's family sued St. Joseph's claiming the nursing home was negligent in failing to disclose the co-worker's 24 disciplinary warnings with regard to violence and drug abuse.<sup>249</sup> But, the *Moore* Court required a

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<sup>244</sup> *Id.* 766 F. 2d at 141.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 137.

<sup>247</sup> *Moore v. St. Joseph Nursing Home, Inc.*, 459 N.W. 2d 100, 102 (Mich. App. 1990) (holding that existence of absolute privilege for defamation did not yield a duty on the part of a former employer to warn new employer of disciplinary history of former employee); *Murdock v. Higgins*, 559 N.W. 2d 639, 644 (Mich. 1990) (holding no duty to warn of former employee's history of inappropriate behavior with minors absent an affirmative statement by a former employer regarding employee's fitness for employment).

<sup>248</sup> *Moore*, *supra* note 247 at 102-103

<sup>249</sup> *Id.*

“special relationship” between the deceased security guard and St. Joseph’s for any duty to warn to arise despite the possibility that employers in Michigan had absolute immunity from defamation suits.<sup>250</sup> The Michigan Courts, in these holdings, have shown a better understanding of the consequences of required disclosure than have other courts that addressed these issues. By refusing to find that a qualified privilege is sufficient to impose a duty to warn, Michigan demonstrates that a law intended to protect an individual who provides gratuitous information with no self-interest should not be used as the basis for finding a duty to disclose such information wherever it exists. Qualified immunity laws are intended to encourage the interchange of valuable information to the public by buffering possible tort liability that would normally arise.<sup>251</sup> Finally, merely strengthening the common law qualified immunity for employers does not solve the problem. States that have already done so have merely “mirror[ed] the existing common law” and thus have failed to engender any real security from referral liability.<sup>252</sup> Absent absolute immunity for employer references, those who cannot afford liability insurance will be forced to choose whether or not to make any statements at all about current or former employees, thus further hampering the free “flow of information between employers.”<sup>253</sup>

## V. CONCLUSION

The expanding tort of negligent misrepresentation promotes knowing reliance upon unjustified authority and propagates an attitude that permits people to blame others for their own

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<sup>250</sup> *Id.*

<sup>251</sup> *See, e.g.,* Montague v. Cooley, 735 So. 2d 51, 512 (Fla. App. 2 Dist., 1999) (“The purpose of qualified immunity in this context is to protect law enforcement officers from suit and monetary liability.”) (Referencing *Siegert v. Gilley*, 500 U.S. 226, (1991)); *see also* California’s Labor Code which despite other limitations permits employers to provide a “truthful statement concerning the reason for the discharge of an employee or why an employee voluntarily left the service of the employer.” Cal. Labor Code § 1053 (2008).

<sup>252</sup> Belknap, *supra* note 61 citing Alex B. Long, *Addressing the cloud Over Employee References: A Survey of Recently Enacted State Legislation*, 39 Wm. & Mary L. Rev. 177 (1997).

<sup>253</sup> *Belknap, supra* note 61 at 116.

poorly researched or executed choices. Negligent misrepresentation as embodied in Section 311 punishes information providers with legal liability and stifles the sharing of even properly verified information. It also requires certain communications be made regardless of the risk of tort liability because of the possibility that a material omission might result in unnecessary harm.<sup>254</sup> Section 311 is not the appropriate standard because, in an ironic contradiction, it both unnecessarily chills and conversely requires speech in ways that are not in the best interests of the potentially injured person or anyone else.

Thus, a tort system that does not overly burden information providers better balances the benefits of freedom and sincerely rendered information with the benefits of tort imposed responsibility. In attempting to constrain this damaging and expanding doctrine, courts could help by limiting holdings to their facts or overruling judicial decisions that eviscerate qualified privileges and impose increasing duties of disclosure upon the wrong parties. New, more stringent standards must be adopted to clearly set out when a duty arises to use accurate speech, and when a person who hears information can reasonably rely on it. Finally courts must set out reasonable restrictions on a duty to disclose information so that such a duty does not conflict with duties not to make misrepresentations. If made, these changes will foreclose the use of the “but he told me it was safe” defense that so frequently is used to shift responsibility from a responsible party to another.

Currently, everyone loses because information is stifled and yet compelled. A newly articulated standard will appropriately place incentives to ensure that consumers, employers, employees, medical professionals, and people in general will be encouraged to behave more

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<sup>254</sup> See generally *Randi W. and Davis*, *supra* note 60.

responsibly, providing more accurate information and in return having more access to such information.