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REPUTATIONAL INJURY WITHOUT A REPUTATIONAL ATTACK: ADDRESSING NEGLIGENCE CLAIMS FOR PURE REPUTATIONAL HARM

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This Note examines the unsettled relationship between defamation and negligence. The law of defamation, through the torts of libel and slander, constitutes a well-developed and complex body of state common law and constitutional considerations. However, some claims for reputational harm may fall outside of this framework, as the law of defamation does not account for all of the ways that an individual's reputation may be injured. Thus, plaintiffs sometimes bring negligence claims to seek redress for damage to reputation.

When a plaintiff brings a negligence claim for pure reputational harm, the court is faced with a variety of options for handling the claim. This Note argues that courts should adopt a multistep approach to handling such claims. The court should first determine whether the claim is communication-based or not. If it is a noncommunicative claim, it should be allowed to stand as a simple negligence claim. If, however, the claim is communication-based, it should be presumptively displaced by the torts of libel and slander.

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INTRODUCTION

The law of defamation provides the traditional route for plaintiffs seeking to recover for unjustified injury to reputation.[1] However, despite this complex and well-developed framework, some injuries to reputation fall outside the traditional bounds of defamation. Consider a case recently decided by the Second Circuit, *Dongguk University v. Yale University*.[2]

1. *See* RESTATEMENT (SECOND) OF TORTS ch. 27, spec. note (1977) ("The tort law of libel and slander has been conceived as of serving three separate functions: (1) to compensate the plaintiff for the injury to his reputation, for his pecuniary losses and for his emotional distress, (2) to vindicate him and aid in restoring his reputation and (3) to punish the defendant and dissuade him and others from publishing defamatory statements.").

2. 734 F.3d 113 (2d Cir. 2013).

Dongguk, a well-regarded South Korean university, hired an art history professor who claimed that she received her PhD in art history from Yale.[3] Dongguk contacted Yale to corroborate her resume, and Yale—mistakenly—verified her credentials.[4] Two years later, amid suspicions that the professor had plagiarized her dissertation, Dongguk again contacted Yale.[5] However, this time Yale informed Dongguk that the professor had not received a degree from Yale.[6] Yale further denied having ever verified the professor's degree.[7] Following the professor's resignation, the Korean media reported extensively on the scandal.[8] Only after a subpoena from the U.S. Attorney's Office (at the request of Korean prosecutors) did Yale uncover its initial error of authenticating the professor's degree.[9]

Dongguk brought negligence claims against Yale, alleging that, as a result of Yale's mistakes, it had suffered public humiliation and shame, as well as economic harm from reduced government funding and donations.[10] These specific allegations were likely not actionable as defamation claims because the statements made by Yale were not defamatory in nature, nor were they made to a third party.[11] Additionally, the statute of limitations for defamation may have barred a claim regarding Yale's initial mistake because the mistake occurred too far in the past.[12] Some courts have refused to recognize negligence claims for injury to reputation, holding that damages for reputational harm are recoverable only under a theory of defamation.[13] However, the Second Circuit recognized these negligence claims as valid,[14] although the court ultimately decided that they failed due to constitutional restrictions and issues of proximate cause.[15] By recognizing Dongguk's negligence claims, the court left open the possibility that a plaintiff could recover for reputational damage caused by private communications between two parties—a recovery well outside the traditional boundaries of defamation.

When a plaintiff brings a negligence claim to recover for "pure reputational harm" (i.e., where reputational harm is the predicate injury), the court is faced with several difficult questions[16]: Should the negligence claim be displaced or preempted by the law of defamation and its well-

3. *See id.* at 117.
4. *See id.*
5. *See id.* at 117–18.
6. *Id.* at 118–19.
7. *See id.*
8. *See id.* at 119–20.
9. *See id.* at 120–21.
10. *See id.* at 121–22, 129.
11. *See infra* Part I.B.1.
12. *See infra* Part I.C.3.
13. *See infra* Part III.A.
14. In analyzing the plaintiff's negligence claims, the court did not acknowledge or discuss the conflict that is the topic of this Note.
15. *Dongguk*, 734 F.3d at 130–31. Constitutional considerations are discussed in Part I.D.
16. *See generally* 3 DAN B. DOBBS ET AL., THE LAW OF TORTS § 649 (2d ed. 2011) (discussing a broad array of cases in which plaintiffs bring negligence claims to seek recovery for harm to reputation).

developed torts of libel and slander?[17] If the claim is not displaced, should it nevertheless be rejected because it lacks a predicate physical injury?[18] Should the claim be allowed to stand and proceed as simple negligence?[19] Or should the court import some of the procedural and constitutional restrictions typically associated with the law of defamation into the negligence analysis?[20]

This Note addresses the unsettled relationship between defamation and negligence, as illustrated by cases involving a reputational injury without a reputational attack. Part I of this Note describes the interests involved in protecting against and providing redress for injury to reputation. It then discusses claims for libel and slander, outlining the common law requirements, defenses, procedural hurdles, and constitutional requirements. It lays out the prima facie elements for a modern defamation claim and discusses why some claims for reputational injury do not fit within that framework. Part II then describes five contexts in which negligence claims for reputational injury have frequently arisen. Drawing on the case law presented in Part II, Part III categorizes the various approaches courts have adopted in addressing these claims. Part IV recommends that courts should divide these claims into two categories: those that are based on communications and those that are not. It then argues that noncommunicative claims should be actionable as negligence, while communication-based claims should be presumptively displaced by defamation.

I. REPUTATIONAL INJURY AND TRADITIONAL FORMS OF RECOVERY

For thousands of years, society has understood the importance of maintaining a good name and positive reputation,[21] and it is clear that protecting one's reputation continues to be a widespread concern of great importance.[22] It is less clear, however, if the law should provide redress for injury to reputation, and if so, how this redress is best accomplished.

Part I.A of this Note begins by discussing why individuals and society both value reputational interests, and why the law provides redress for injury to reputation. This discussion is followed in Part I.B by a description of the common law requirements of claims for libel and slander. Part I.C continues with traditional common law defenses to claims of libel and slander, as well as procedural hurdles that plaintiffs must overcome. Part I.D then discusses how constitutional considerations have augmented the common law requirements. Part I.E concludes by outlining the

17. *See infra* Part III.A.
18. *See infra* Part III.B.
19. *See infra* Part III.C.
20. *See infra* Part III.D.
21. *See, e.g.*, *Proverbs* 22:1 (New Revised Standard Version) ("A good name is to be chosen rather than great riches, and favor is better than silver or gold.").
22. This fact is illustrated by the growth of online reputation management services. *See* Nick Bilton, *The Growing Business of Online Reputation Management*, N.Y. TIMES BITS BLOG (Apr. 4, 2011, 7:00 AM), http://bits.blogs.nytimes.com/2011/04/04/the-growing-business-of-online-reputation-management/.

elements for a prima facie claim of defamation and discusses why some claims for injury to reputation do not fit well within defamation's well-developed framework.

A. Reputation: What It Is and Why It Matters

"People who say they don't care what people think are usually desperate to have people think they don't care what people think."[23]

Common law has long recognized the rights of individuals and institutions to protect their reputations from destructive attacks.[24] Damage to reputation lowers one's standing among one's peers and, at the extreme, may even destroy the ability to remain a part of the community itself.[25] Damage to one's reputation may also endanger economic security, as it often impairs the ability to obtain or maintain employment, conduct business, or secure credit.[26]

Given the many personal interests that inhere in reputation, it is unsurprising that most discussions of reputational injury focus primarily on the injury suffered by the individual plaintiff.[27] However, legal protections against unjustified injury to reputation benefit not only the individual himself but also society as a whole.[28] Society also suffers harm from an injury to an individual's reputation in the form of unduly diminished interaction.[29] Unjust damage to reputation also imposes heightened search costs on society, as people frequently rely on reputation in choosing their friends and conducting business.[30] It has further been argued that

23. GEORGE CARLIN, NAPALM & SILLY PUTTY 9 (2001).

24. *See* Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546, 546 (1903); *see also* WILLIAM K. JONES, INSULT TO INJURY: LIBEL, SLANDER, AND INVASIONS OF PRIVACY 9 (2003).

25. *See* JONES, *supra* note 24, at 9 ("[A] defamed individual may be ostracized by his or her social circle, deprived of economic opportunity, and neutralized in debates about collective policies impinging on important personal interests.").

26. *See, e.g.*, Wolfe v. MBNA Am. Bank, 485 F. Supp. 2d 874, 878–79 (W.D. Tenn. 2007); *infra* notes 260–70 and accompanying text.

27. *See* Laura A. Heymann, *The Law of Reputation and the Interest of the Audience*, 52 B.C. L. REV. 1341, 1359 (2011).

28. *See* Rosenblatt v. Baer, 383 U.S. 75, 86 (1966) ("Society has a pervasive and strong interest in preventing and redressing attacks upon reputation."); *see also* JONES, *supra* note 24, at 9 ("[A]n individual's stake in reputation is high. But what is less widely recognized is the *social* interest in protecting private reputations."); Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 693 (1986) (discussing the concepts of reputation as corresponding "to an implicit and discrete image of the good and well-ordered society").

29. *See* JONES, *supra* note 24, at 9; David S. Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 HARV. C.R.-C.L. L. REV. 261, 262 (2010) ("[I]njuries to reputation are not borne exclusively, or even primarily, by the affected individual. In many ways, reputation is a quintessential public good. We cannot have a reputation except insofar as it is created in cooperation with others and relative to our relationships with them.").

30. Heymann, *supra* note 27, at 1346, 1359.

protecting reputation against unjust attack is essential to encouraging good behavior and maintaining social cohesion.[31]

Despite such weighty individual and societal interests, reputation is not provided any explicit constitutional recognition or protection.[32] Yet, as communications technology has further advanced, one's reputation has become both more important and harder to protect.[33] It has become increasingly easy to defame another individual through electronic media, such as blogs, Twitter, YouTube, and social networking websites.[34] This change in the cultural landscape may ultimately influence how courts choose to analyze claims for reputational harm.[35]

The law of defamation—traditionally divided into the torts of libel and slander—provides the primary route for plaintiffs seeking to recover for damage to reputation caused by communication to a third party.[36] The legal norms providing redress for injury to reputation developed at common law and have continued to evolve throughout the courts, often with little intervention from the legislature.[37] However, because defamation usually (or perhaps necessarily)[38] involves the communication of an idea, First Amendment protections are often implicated. Therefore, the U.S. Supreme Court has at times offered guidance regarding the requirements that the Constitution places on the law of defamation, and these constitutional minimums sit atop an already complex body of state common law.[39]

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31. *See* JONES, *supra* note 24, at 10 ("The social interest in protecting reputation against unjustified attack is an important means of avoiding the perils of anarchy at the one extreme and oppressive government at the other.").

32. *See* Paul v. Davis, 424 U.S. 693, 697–714 (1976); *see also* JONES, *supra* note 24, at 10.

33. *See* Ardia, *supra* note 29, at 262 (arguing that the decline of low-participation mass media and the increase of high-participation platforms (e.g., blogs and social networks) require a rethinking of defamation's damages and remedies).

34. *See, e.g.*, 1 RODNEY A. SMOLLA, LAW OF DEFAMATION § 1:21, at 1-55 (2d ed. 1999) ("It is now easier to defame another person than at any time in world history, as the Internet makes everyone a potential mass-media publisher.").

35. *But see* W.J.A. v. D.A., 43 A.3d 1148, 1159–60 (N.J. 2012) ("In today's world, one's good name can too easily be harmed through publication of false and defaming statements on the Internet. . . . We are not persuaded that the common law of this state need change to require such victims to demonstrate compensatory losses in order to proceed with a cause of action."). The topic of presumed damages is discussed in Part I.B. Ardia offers a different take: "Although the global communication networks that are the hallmarks of our networked society have brought new reputational challenges, they also provide novel solutions to prevent and ameliorate those harms." Ardia, *supra* note 29, at 264.

36. *See* 1 ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 1:1, at 1-2 (4th ed. 2014).

37. *See* Veeder, *supra* note 24, at 546 ("It is a mass which has grown by aggregation, with very little intervention from legislation, and special and peculiar circumstances have from time to time shaped its varying course.").

38. The necessity of communication for a defamation claim is discussed in Part I.B and Part IV.

39. *See infra* Part I.D.

B. Libel and Slander: Background and Common Law Requirements

The common law generally distinguishes between libel and slander: in short, libelous publications are printed while slanderous publications are spoken.[40] While the line separating libel and slander has blurred over the years,[41] the distinction is important, as each has its own—albeit overlapping—requirements.[42] Historically, it was easier for a plaintiff to maintain a cause of action for libel than for slander because the written word was thought to be more lasting, and therefore more harmful.[43] However, for both libel and slander, the law imposed something approaching strict liability, as the plaintiff was not required to establish a requisite level of fault on the part of the defendant.[44] Rather, the law presumed that the publication was made with malice.[45] The law further presumed that the publication was false.[46]

Traditionally, all libel claims were actionable per se.[47] In other words, the plaintiff was not required to prove actual pecuniary harm, otherwise known as "special damages."[48] Injury to reputation was presumed upon the publication of defamatory material.[49] A plaintiff needed only to prove that (1) the defendant published defamatory material to a third party, and (2) the material was of and concerning the plaintiff.[50] On the other hand, to bring a

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40. *See* RESTATEMENT (SECOND) OF TORTS § 568 (1977) ("(1) Libel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words. (2) Slander consists of the publication of defamatory matter by spoken words, transitory gestures or by any form of communication other than those stated in Subsection (1).").

41. The proliferation of electronic media has exponentially complicated the distinction. *See* 1 SACK, *supra* note 36, § 2:3, at 2-12. While courts may look at several factors in determining whether a publication is best viewed as libel or slander, a publication's classification as slander will often turn on its transitory nature. *See* 3 DOBBS ET AL., *supra* note 16, § 534, at 222–23.

42. Whether libel and slander should continue to be treated separately remains a topic of debate. *See* 1 SACK, *supra* note 36, § 2:3, at 2-12. According to Judge Sack, "it seems likely that the distinctions . . . will tend to vanish, and we will eventually see libel and slander replaced by the single tort of 'defamation.'" *Id.*

43. *Id.* at 2-10.

44. *See* 1 SMOLLA, *supra* note 34, § 1:7 ("[I]n the words of Justice Holmes: 'Whatever a man publishes, he publishes at his peril.'" (quoting Peck v. Tribune Co., 214 U.S. 185, 189 (1909)); *see also* 3 DOBBS ET AL., *supra* note 16, § 519, at 173–75.

45. Common law malice is generally defined as "ill will, spite, or hatred" and should not be confused with the *New York Times* "actual malice" standard discussed in Part I.D. *See generally* 1 SMOLLA, *supra* note 34, § 3:46 (detailing the difference between constitutional "actual malice" and common law "ill-will" malice).

46. Constitutional considerations have shifted the burden of falsity to the plaintiff in many contexts. *See infra* Part I.D; *see also* 3 DOBBS ET AL., *supra* note 16, § 533, 216–17.

47. *See* 3 DOBBS ET AL., *supra* note 16, § 535, at 288.

48. *See* 1 SACK, *supra* note 36, § 2:8.3, at 2-123; *see also id.* § 2:8, at 2-114 (discussing special damages).

49. This rule is still followed by many courts where constitutional considerations do not compel otherwise. *See, e.g.*, Ryan v. Herald Ass'n, 566 A.2d 1316, 1320–21 (Vt. 1989). However, plaintiffs are now often required to prove "actual injury." *See infra* Part I.D; *infra* note 151 and accompanying text.

50. *See* 3 DOBBS ET AL., *supra* note 16, § 519, at 173–74.

cause of action for slander, the plaintiff additionally had to prove special damages.[51] This requirement was waived, however, if the publication fell within one of four traditionally recognized categories: allegations that the plaintiff committed a crime; allegations of the type that would injure the plaintiff's trade, business, profession, or office; allegations that the plaintiff had contracted a "loathsome disease" (such as leprosy or a sexually transmitted disease); or allegations of serious sexual misconduct.[52] While a number of Supreme Court decisions have altered the common law framework substantially,[53] states still often follow these common law rules when constitutional minimums do not require otherwise.[54]

1. Publication of Defamatory Material to a Third Party

In the law of defamation, "publication" is defined broadly to include any communication, direct or indirect, to another party who can understand its meaning.[55] Communication is not limited to spoken statements and written words; paintings, photos, gestures, and other nonverbal actions may also constitute publication.[56] For example, in *Tumbarella v. Kroger Co.*,[57] a cashier sued her employer for defamation after being accused of stealing five dollars from the register.[58] The court held that "the security guard's statement, 'Where's the money', and the sequence of events which followed fit into the category of 'dramatic pantomime', found to constitute publication."[59] Similarly, escorting a terminated employee through a store while in handcuffs has been held to constitute publication of defamatory material.[60] However, simply escorting a fired employee from the premises, without other words or actions, has been held to fall outside the category of "dramatic pantomime."[61]

A defendant will not be liable for publishing defamatory material unless he has done so intentionally or negligently.[62] This requirement should not

51. *See* 1 SACK, *supra* note 36, § 2:8.2, at 2-117; *see also* RESTATEMENT (SECOND) OF TORTS § 570 (1977).

52. RESTATEMENT (SECOND) OF TORTS § 570.

53. Supreme Court decisions guiding the law of defamation are discussed in Part I.D.

54. *See, e.g.*, *Ryan*, 566 A.2d at 1320–21.

55. *See* RESTATEMENT (SECOND) OF TORTS § 577.

56. *See id.* § 568 cmt. d. The Restatement draws upon *Schultz v. Frankfort Marine, Acc. & Plate Glass Ins. Co.*, 139 N.W. 386 (Wis. 1913) for an example of nonverbal communication. In *Schultz*, the defendant hired two detectives to "shadow" the plaintiff in an open and notorious manner. *See id.* at 387–88. The court held that this type of public surveillance constituted defamation. *Id.* at 390.

57. 271 N.W.2d 284 (Mich. Ct. App. 1978).

58. *See id.* at 286–87.

59. *Id.* at 289. The court further noted that "[a]ccusation of commission of a crime is also slander per se." *Id.*

60. *See* Caldor, Inc. v. Bowden, 625 A.2d 959, 970 (Md. 1993). The court noted that "[w]e have long recognized that defamatory statements may be published through actions as well as through written or spoken word." *Id.*

61. *See* Theisen v. Covenant Med. Ctr., 636 N.W.2d 74, 85–86 (Iowa 2001).

62. *See, e.g.*, Roberts v. English Mfg. Co., 46 So. 752, 752–53 (Ala. 1908). The plaintiff's wife opened a letter from the defendant to the plaintiff, which accused the plaintiff of obtaining goods under false pretenses. *See id.* The court held that the letter did not

be confused with a requirement of fault, as it relates only to the act of communicating the material—not to the material's falsity or resulting harm.[63] For instance, if an individual negligently leaves a defamatory note or drawing on an office desk where a passerby can easily see it, the individual has negligently published libelous material.[64] However, negligent publication is somewhat rare, as publication most often results from an intentional act.[65]

The defamatory communication must be made to a third party; publication only to the plaintiff himself is (generally) not actionable.[66] However, the theory of compelled self-publication complicates this requirement.[67] Under this theory, a defendant may be liable for publication only to the plaintiff himself if the plaintiff will foreseeably be compelled to communicate the defamatory information to others.[68] A leading case in this area is *Lewis v. Equitable Life Assurance Society of the United States*.[69] In *Lewis*, the plaintiffs, who were fired by the defendant employer for "gross insubordination," sued for breach of contract and defamation, arguing that they were forced to disclose the reasons for termination to potential employers.[70] The court allowed recovery on both claims,[71] holding that "in an action for defamation, the publication requirement may be satisfied where the plaintiff was compelled to publish a defamatory statement to a third person if it was foreseeable to the defendant that the plaintiff would be so compelled."[72] However, many jurisdictions have rejected this doctrine as a viable theory of recovery in defamation.[73]

Even if a publication causes harm to the plaintiff, it is not actionable as libel or slander unless it has a defamatory quality.[74] Which types of speech should be considered "defamatory" has long been the subject of debate.[75] Definitions of "defamatory" are often somewhat vague and imprecise: for example, the Restatement (Second) of Torts defines defamatory communications as those that "tend[] so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons

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constitute a publication without "evidence to show that the party who sent it knew that some other person was in the habit of opening letters, or that in the ordinary course of business the contents of the letter would come to the knowledge of some third person." *Id.*; *see also* RESTATEMENT (SECOND) OF TORTS § 577 (1977).

63. *See* 3 DOBBS ET AL., *supra* note 16, § 520, at 179.

64. *See* RESTATEMENT (SECOND) OF TORTS § 577 cmt. k.

65. 3 DOBBS ET AL., *supra* note 16, § 520, at 179.

66. *See, e.g.*, Kamelgard v. Macura, 585 F.3d 334, 342 (7th Cir. 2009).

67. *See generally* 2 SMOLLA, *supra* note 34, § 15:14.

68. *See, e.g.*, Lane v. Schilling, 279 P. 267, 268 (Or. 1929) (allowing a blind man to recover damages for a libelous letter read by his wife). In *Lane*, the court reasoned that the defendant knew that the "plaintiff was blind and would necessarily be compelled to have his wife or somebody else read the letter to him." *Id.*

69. 389 N.W.2d 876 (Minn. 1986).

70. *See id.* at 880.

71. *Id.* at 884, 888.

72. *Id.* at 888.

73. *See* 2 SMOLLA, *supra* note 34, § 15:11, at 15-15.

74. *See* Frinzi v. Hanson, 140 N.W.2d 259, 261–62 (Wis. 1966).

75. *See generally* 1 SACK, *supra* note 36, § 2:4.

from associating or dealing with him."[76] What constitutes a "defamatory" publication is very contextual and frequently necessitates a "you-know-it-when-you-see-it" analysis.[77]

2. The "Of and Concerning" Requirement

A defamatory publication must be sufficiently "of and concerning" the plaintiff to be actionable.[78] The Restatement's formulation, which has been employed by several courts,[79] requires the fact-finder to conclude that the recipient correctly, or mistakenly but reasonably, believed that the publication was intended to refer to the plaintiff.[80] In certain circumstances, a defamatory publication may cause incidental but actual injury to other individuals.[81] However, if the publication was not "of and concerning" those individuals, they will not have an actionable claim of defamation.[82]

3. Damages

Damages for harm to reputation are often complex.[83] Under certain circumstances, a jury may be permitted to presume damages—in other words, the plaintiff need not provide evidence of any particular amount of damages.[84] In other situations, constitutional considerations may now require the plaintiff to prove "actual injury,"[85] even though the injury itself

76. RESTATEMENT (SECOND) OF TORTS § 559 (1977).

77. *See* 1 SACK, *supra* note 36, § 2:4.1, at 2-18 (describing what defamation and hardcore pornography have in common). For examples of defamatory content, see 3 DOBBS ET AL., *supra* note 16, § 525.

78. *See* Kirch v. Liberty Media Corp., 449 F.3d 388, 398–400 (2d Cir. 2006).

79. *See* SDV/ACCI, Inc. v. AT&T Corp., 522 F.3d 955, 960 (9th Cir. 2008); MacDonald v. Riggs, 166 P.3d 12, 15 (Alaska 2007); Bierman v. Weier, 826 N.W.2d 436, 464 (Iowa 2013).

80. RESTATEMENT (SECOND) OF TORTS § 564.

81. *See* Gillikin v. Bell, 118 S.E.2d 609, 611 (N.C. 1961) (explaining that libelous statements against a deceased person upset "others of the same family, blood or society").

82. *See* Dean v. Dearing, 561 S.E.2d 686, 687–90 (Va. 2002) (holding that defendant mayor's defamatory statements about the local police force were not sufficiently "of and concerning" the plaintiff police officer). *But see id.* at 688 (noting that, in certain circumstances, "if the defamatory language is directed towards 'a comparatively small group of persons . . . and is so framed as to make defamatory imputations against all members of the small or restricted group, any member thereof may sue.'" (quoting Ewell v. Boutwell, 121 S.E. 912, 914 (Va. 1924))).

83. *See* 1 SACK, *supra* note 36, § 10:1, at 10-2 ("Damage issues in tort law provide knotty problems. In the law of defamation, the knots are Gordian.").

84. *See* W.J.A. v. D.A., 43 A.3d 1148, 1158–60 (N.J. 2012); *see also supra* notes 47–52 and accompanying text. *But see* 3 DOBBS ET AL., *supra* note 16, § 574, at 336 & n.2.50 (stating that "[t]he presumed damages rule may be headed for extinction" but noting that "[i]t is not dead yet").

85. "Actual injury," in the constitutional sense, is distinct from pecuniary harm. *See infra* note 151 and accompanying text.

may be unquantifiable.[86] Still, other circumstances may require the plaintiff to prove special damages, or quantifiable pecuniary loss.[87]

Even if the plaintiff is not required to prove special damages, he may recover for pecuniary losses or other consequential damages proximately caused by the defamatory publication.[88] While the estimated harm to reputation is the central focus of damages in a defamation action,[89] plaintiffs often seek damages for loss of employment, reduced earning capacity, and emotional distress resulting from the defamation.[90] However, for pecuniary injuries that accompany the reputational harm, the plaintiff must provide proof of actual damages.[91]

C. Defenses and Procedural Hurdles

Because common law imposed liability without fault, the defendant needed to assert an affirmative defense to avoid liability. The following subsections describe the affirmative defenses available to defendants at common law: truth and privileges. The section concludes by discussing the shorter statute of limitations imposed on libel and slander.

1. Truth

Traditionally, because the falsity of published defamatory material was presumed, truth was an affirmative defense.[92] Some courts may still describe truth as an affirmative defense.[93] However, as described in Part I.D below, constitutional considerations now require that plaintiffs prove falsity in most contexts.[94] Truth may still exist as an affirmative defense in a narrow class of claims—claims brought by private plaintiffs not involving a matter of public concern.[95] However, because plaintiffs often bear the burden, truth is not a true defense for many defendants.

2. Privileged Communications

Although common law imposed strict liability for defamatory statements, the law of defamation has long recognized the difficulty of providing redress for reputational injury "without sacrificing freedom of thought and

86. For a discussion of the constitutional limitations on the recovery of general damages, see RESTATEMENT (SECOND) OF TORTS § 621 cmt. b (1977).

87. *See supra* note 52 and accompanying text.

88. *See* 3 DOBBS ET AL., *supra* note 16, § 574, at 337–38.

89. *See id.* at 338.

90. *See, e.g.*, Jorgensen v. Mass. Port Auth., 905 F.2d 515, 517 (1st Cir. 1990) (at trial, the verdict form divided damages into: (1) loss of personal property; (2) loss of wages; (3) physical injury and related emotional distress; (4) loss of earning capacity; and (5) "emotional distress because of harm to reputation and earning capacity"). *Jorgensen* is discussed in greater detail in Part III.C. *See infra* notes 312–317 and accompanying text.

91. 3 DOBBS ET AL., *supra* note 16, § 574, at 338.

92. *See* RESTATEMENT (SECOND) OF TORTS § 581A cmt. b (1977).

93. *See, e.g.*, G.D. v. Kenny, 15 A.3d 300, 314–18 (N.J. 2011).

94. *See infra* Part I.D.

95. *See* 3 DOBBS ET AL., *supra* note 16, § 537.

the benefit of public discussion."[96] Therefore, courts have held that some communications must be privileged—i.e., not subject to liability as libel or slander—to ensure the exchange of certain types of information.[97] The privileges recognized at common law divide into "absolute" privileges and "qualified," or "conditional," privileges.[98] Both absolute and qualified privileges are considered defenses in a defamation action, and whether a privilege applies to the statements in question will be determined by the court as a matter of law.[99]

a. Absolute Privileges

A privilege is deemed "absolute" if it cannot be defeated even upon showing that the statements were recklessly false or motivated by a desire to harm the plaintiff.[100] This immunity is based on the speaker's position or status.[101] Common law traditionally granted absolute immunity from liability to judicial officers, legislators, and executive officers for defamatory statements made in the course of their duties.[102] State and federal governments are said to have inherent and absolute sovereign immunity against tort claims,[103] and absolute privileges often extend to government employees as well.[104] Thus, whether a cause of action for defamation can be brought against the government, a government agency, or a government official depends upon whether, and to what extent, the immunity has been waived by statute.[105] This common law privilege is reflected in the Federal Tort Claims Act[106] (FTCA) and the Federal Employees Liability Reform and Tort Compensation Act of 1988[107]

96. Veeder, *supra* note 24, at 546.

97. *See generally* 1 SACK, *supra* note 36, §§ 8–9. "Even though reputation may be seriously injured by defamation that is privileged, courts concluded that on balance the damage visited upon the ability to speak and write, and the consequent danger of loss to society of such communications, were too great to permit the defamed person to recover." *Id.* § 1:1.

98. *See* 2 SMOLLA, *supra* note 34, § 8:2, at 8-5 to -7.

99. *See* 1 SACK, *supra* note 36, § 9:5, at 9-57 to -58. However, some courts include the absence of a privilege as one of the elements of a prima facie claim. *See, e.g.*, Dillon v. City of New York, 704 N.Y.S.2d 1, 5 (App. Div. 1999).

100. *See* 3 DOBBS ET AL., *supra* note 16, § 538, at 238.

101. *See id.* ("[A]bsolute privilege applies principally to (1) judicial proceedings and certain preparations therefor; (2) legislative proceedings; (3) to a limited number of executive publications; (4) publications consented to, (5) publications between spouses; (6) publications required by law, and (7) any absolute privilege accorded by statute, including the immunity of internet service providers for defamatory material posted by others.").

102. 1 SACK, *supra* note 36, § 8:2, at 8-3.

103. *Id.* § 8:2.9.

104. *See, e.g.*, Barr v. Matteo, 360 U.S. 564, 574 (1959).

105. 1 SACK, *supra* note 36, § 8:2.9, at 8-63 to -64 ("The federal government, Iowa, and Massachusetts, for example, have retained total sovereign immunity relating to defamation claims; New York and Illinois have not.").

106. 28 U.S.C. §§ 1346(b), 2671–2680 (2012).

107. 28 U.S.C. § 2679. The Westfall Act provides that, upon certification by the Attorney General, the United States will be substituted as defendant in tort claims against federal employees, thus making the FTCA the exclusive path to recovery. *See* Osborn v.

(Westfall Act), which immunize a federal employee speaking "within the scope of his office or employment at the time of the incident out of which the claim arose."[108]

Absolute immunities may also exist as the result of state and federal legislation. For example, in Illinois, health providers conducting peer review are provided by statute absolute protection against claims of defamation,[109] and at the federal level, banks reporting suspicious activities may be afforded protection.[110]

b. Qualified, or Conditional, Privileges

A qualified, or conditional, privilege is defined by the context in which the defamatory statement is made, rather than by the speaker's position or status.[111] A qualified privilege is considered an affirmative defense.[112] Qualified privileges are based on the idea that the social utility of certain communications outweighs the reputational harm that may accompany their dissemination.[113] Nevertheless, for the speaker to receive such protection, the statement must be published on the occasion that makes it privileged and must not be otherwise abused.[114]

While absolute privileges apply only in a limited number of circumstances, qualified privileges are less defined and more expansive.[115] The Restatement (Second) of Torts enumerates several occasions on which a defamatory communication is likely to be considered privileged, such as when the speaker seeks to protect his or her own interest; the speaker seeks to protect the interest of the recipient or a third person; or the speaker is an inferior public official who has been held not to be entitled to an absolute immunity, but who may make defamatory communications required by or permitted in the performance of his or her official duties.[116]

Some activities have commonly been granted a qualified privilege. For example, credit reporting agencies frequently have been granted qualified privileges in issuing credit reports.[117] This privilege has also been extended

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Haley, 549 U.S. 225, 229–30 (2007). The Act further provides that actions begun in state court will be removed to federal court. *See id.*

108. 28 U.S.C. § 2679(d)(1). *See id.* § 2680(h) (exempting claims "arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights").

109. *See* Tabora v. Gottlieb Mem'l Hosp., 664 N.E.2d 267, 272 (Ill. App. Ct. 1996).

110. 31 U.S.C. § 5318(g) (2012).

111. *See* 2 SMOLLA, *supra* note 34, § 8:39, at 8-54.9.

112. 1 SACK, *supra* note 36, § 9:6 (noting that the defense must ordinarily be asserted in the defendant's answer).

113. *See* Chandok v. Klessig, 632 F.3d 803, 814–15 (2d Cir. 2011).

114. *See* RESTATEMENT (SECOND) OF TORTS § 593 (1977). Abuse of qualified privileges is discussed in greater detail in Part I.C.2.c.

115. *See* 3 DOBBS ET AL., *supra* note 16, § 544, at 251.

116. *See* RESTATEMENT (SECOND) OF TORTS §§ 594–598.

117. *See* 1 SACK, *supra* note 36, § 9:2.2, at 9-22 ("A large majority of states that have considered the question hold that reports made by a credit-rating agency to enable a subscriber to determine whether to extend credit are conditionally privileged.").

to those providing information to credit reporting agencies.[118] This common law privilege is partially reflected in the Fair Credit Reporting Act[119] (FCRA). The FCRA requires that credit reporting agencies "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates."[120] The statute also creates a cause of action against those who are "negligent in failing to comply" with the requirements.[121] However, if the disclosure of the report is required by the FCRA itself, the statute provides that the disclosing party will not be liable for claims in the nature of "defamation, invasion of privacy, or negligence" for defamatory information contained within a credit report unless the plaintiff can prove that the information was "furnished with malice or willful intent to injure such consumer."[122] This requirement has widely been interpreted to mirror the "actual malice" standard set forth in the Supreme Court decision *New York Times Co. v. Sullivan*.[123]

c. Abuse of a Qualified Privilege

A speaker who is afforded a qualified privilege will nevertheless be held liable for a defamatory falsehood if the privilege is abused.[124] In the words of Judge Sack, the privilege "is not a license to defame."[125] A privilege is abused if the defendant acts outside the scope of the privilege.[126] In other words, the statement must be "appropriate to the occasion" and "related to the reason for the recognition of the privilege."[127] For instance, a defendant acts outside the scope of the privilege if he engages in excessive publication.[128] Traditionally, a defendant lost the qualified privilege if he acted out of spite or ill will.[129] Now, however, to overcome a qualified privilege, courts generally require that the plaintiff prove that the defendant knew the communication was false or acted with reckless disregard as to its truth or falsity.[130]

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118. *Id.*

119. 15 U.S.C. §§ 1681–1681x (2012).

120. *Id.* § 1681e(b).

121. *Id.* § 1681o.

122. *Id.* § 1681h(e); *see* 3 DOBBS ET AL., *supra* note 16, § 536, at 236 (noting that "[i]n permitting the suit to proceed if malice is shown, this preemption, where applicable, has the same effect as the traditional privilege.").

123. 376 U.S. 254 (1964). The Court's *New York Times* decision is discussed in Part I.D. *See also* 1 SACK, *supra* note 36, § 9:2.2, at 9-24.

124. *See generally* RESTATEMENT (SECOND) OF TORTS § 599 (1977) ("One who publishes defamatory matter concerning another upon an occasion giving rise to a conditional privilege is subject to liability to the other if he abuses the privilege.").

125. 1 SACK, *supra* note 36, § 9:3, at 9-38.

126. *See* RESTATEMENT (SECOND) OF TORTS § 599.

127. 1 SACK, *supra* note 36, § 9:3, at 9-38.

128. *See, e.g.*, Avins v. White, 627 F.2d 637, 645 (3d Cir. 1980) (holding that the jury could have determined that the defendant abused his qualified privilege by overpublication).

129. *See* 3 DOBBS ET AL., *supra* note 16, § 544, at 251.

130. *See* Luster v. Retail Credit Co., 575 F.2d 609, 612 (8th Cir. 1978); *see also* RESTATEMENT (SECOND) OF TORTS § 600.

Whether a negligent falsehood can or should constitute an abuse of a qualified privilege remains a topic of debate. It has been noted that such a standard could threaten to undermine the very purpose underlying the qualified privilege.[131] Furthermore, because under the Supreme Court's decision in *Gertz v. Robert Welch, Inc.*[132] a plaintiff must establish that the defendant was at least negligent regarding the publication's falsity, "[q]ualified privilege[s] would thus disappear entirely in all cases in which *Gertz* applies."[133]

3. Statutes of Limitations

Claims for libel and slander are subject to shorter statutes of limitations, typically one or two years.[134] However, at what point the cause of action accrues is not always clear. Statutes of limitations typically begin to run when the defamatory statement is first made to the general public.[135] For defamatory statements that are repeated throughout the media, the first publication will be regarded as the only relevant publication for the statute of limitations inquiry.[136] Still, in some jurisdictions, the statute of limitations will not begin to run until the would-be plaintiff discovers or should have discovered the existence of the defamatory statement.[137]

D. Constitutional Requirements

Although the law of defamation remains largely the province of state law, the Supreme Court has announced that the Constitution requires that plaintiffs establish certain elements when bringing a claim. Given defamation's implications for the freedom of speech, claims may be subject to First Amendment scrutiny, and since the Court's decision in *New York*

131. 1 SACK, *supra* note 36, § 9:3.4, at 9-52 ("Negligence standards are dangerous because they tend to present jury issues, and juries are usually permitted to decide the issue on the basis of their own individual concepts of 'reasonableness.' . . . The possibility of hindsight judgments, moreover, is unlikely to give a hesitant speaker the confidence necessary for him or her to speak out—precisely what the privilege is supposed to encourage.").

132. 418 U.S. 323 (1974); *infra* notes 143–48 and accompanying text.

133. 1 SACK, *supra* note 36, § 9:3.4, at 9-53.

134. *See, e.g.*, N.Y. C.P.L.R. § 215 (MCKINNEY 2006) (providing a one-year statute of limitations for libel and slander).

135. *See, e.g.*, Wilson v. Erra, 942 N.Y.S.2d 127, 129 (App. Div. 2012) ("A cause of action alleging defamation accrues at the time the alleged statements are originally uttered.").

136. *See* 1 SACK, *supra* note 36, § 2:6.1, at 2-105 to -106 (noting that the single publication rule, followed in most American jurisdictions, "has a significant impact on the statute of limitations inquiry").

137. *See* Burks v. Rushmore, 534 N.E.2d 1101, 1104 (Ind. 1989); *see also* 1 SACK, *supra* note 36, § 2:6.2, at 2-106 to -107 ("So as not to undercut the repose that statutes of limitations are supposed to supply, the discovery rule tends to be strictly applied, with the burden on the plaintiff to establish that it is properly invoked.").

Times Co. v. Sullivan, the law of defamation has sought to balance First Amendment protections with traditional common law principles.[138]

In *New York Times*, the Court set the standard for libel suits by public officials against the press, and in the course of doing so, implicitly "subjected all actions for defamation to constitutional scrutiny."[139] The Court concluded that the Constitution "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[140] The plaintiff must prove such "actual malice" with "convincing clarity."[141] The Court subsequently extended these requirements to plaintiffs who are "public figures" as well.[142]

In *Gertz v. Robert Welch, Inc.*,[143] the Court addressed the fault level required in defamation claims brought by private plaintiffs.[144] Interpreting the First Amendment, the Court held that states could no longer impose the common law rule of strict liability for defamation.[145] States are free to adopt their own standard of liability so long as they do not impose liability without fault.[146] It is widely agreed that this requirement necessitates the defendants to have been at least negligent regarding the truth or falsity of the defamatory falsehood.[147] And it appears that the majority of states have adopted negligence as the minimum fault level for defamation claims involving private plaintiffs (neither a public official nor a public figure) and private matters.[148] However, for claims involving issues of "public concern," heightened First Amendment protections may apply.[149]

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138. New York Times Co. v Sullivan, 376 U.S. 254, 269 (1964) ("[L]ibel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."); *see also* 1 SACK, *supra* note 36, § 1:1, at 1-2.

139. 1 SACK, *supra* note 36, § 1.2.2, at 1-7.

140. *New York Times*, 376 U.S. at 279–80. Constitutional "actual malice" is distinct from the common law malice standard of spite or ill will. "As courts have said, the Constitutional focus [is on] the defendant's attitude toward the truth, not his attitude toward the plaintiff." 3 DOBBS ET AL., *supra* note 16, § 555, at 281.

141. *New York Times*, 376 U.S. at 285–86; *see also* RESTATEMENT (SECOND) OF TORTS § 580A (1977).

142. *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 154 (1967); *see also* 1 SMOLLA, *supra* note 34, § 1:18.

143. 418 U.S. 323 (1974).

144. *See id.* at 347–48.

145. *Id.* at 339–47.

146. *See id.* at 347–48; *see also* RESTATEMENT (SECOND) OF TORTS § 580B.

147. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS ch. 25, topic 3, spec. note ("At common law strict liability was imposed for the publishing of a false and defamatory statement about another. . . . This has now been changed as a result of Supreme Court interpretation of the First Amendment to the Constitution. Liability is not now imposed unless the defendant was at least negligent regarding the truth or falsity of his statement.").

148. *See* 1 SACK, *supra* note 36, § 6:1, at 6-2 ("As of this writing, at least thirty-four states appear to have adopted the negligence standard while as many as four others have adopted variations of the 'actual malice' standard in matters of public interest or concern. . . . Several other states have chosen a standard somewhere between 'actual malice' and negligence.").

149. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985) (plurality opinion) ("It is speech on 'matters of public concern' that is 'at the heart of

The *Gertz* court also held that plaintiffs could not recover presumed or punitive damages without proof of actual malice.[150] Absent actual malice, a plaintiff may only recover for "actual injury."[151] "Actual injury" is distinct from "special damages," in that the plaintiff need not prove quantifiable pecuniary harm.[152] However, the damages must be "supported by competent evidence."[153] In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[154] the Court further clarified the *Gertz* requirement that plaintiffs demonstrate actual malice.[155] The Court held that a private plaintiff need not prove actual malice to recover presumed or punitive damages if the defamatory material did not involve "matters of public concern."[156]

The Supreme Court's guidance on constitutional matters notwithstanding, the law of defamation has continued to develop within state courts.[157] As a result, this body of law has at times grown incongruently, as courts struggle to accommodate competing concerns of personal interests and public discourse.[158]

E. Elements of a Modern Cause of Action

A modern prima facie defamation claim thus requires that the plaintiff satisfy constitutional minimums as well as state common law elements. The overall requirements will change depending on the status of the parties involved, the status of the speech in question, and the particular state's laws.[159] However, a prima facie defamation claim generally requires the following elements: (1) a false and defamatory statement (2) of and concerning the plaintiff (3) published to a third party by the defendant, (4) who was at least negligent regarding the statement's falsity, (5) causing the plaintiff to suffer special damages, absent per se actionability.[160]

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the First Amendment's protection.'" (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978))); *see also* Snyder v. Phelps, 131 S. Ct. 1207, 1215–16 (2011).

150. *Gertz*, 418 U.S. at 349–50.

151. *Id.*

152. *See* 1 SMOLLA, *supra* note 34, § 1:19 (defining "actual harm" as "not limited to 'special' or pecuniary loss, but including general damage to reputation and personal anguish, humiliation, and suffering").

153. *Gertz*, 418 U.S. at 350.

154. 472 U.S. 749 (1985) (plurality opinion).

155. *See id.* at 751.

156. *Id.* at 757–61; *see also* 1 SMOLLA, *supra* note 34, § 1:20, at 1-53.

157. *See* 50 AM. JUR. 2D *Libel and Slander* § 15 (2013) (footnotes omitted) ("A state can limit, modify, or perhaps take away a cause of action for defamation through the operation of testimony of privileges, absent any claim of constitutional deprivation. The existence of a judicial remedy for injury to reputation is thus purely a matter of state law, and defamation actions involving private plaintiffs and private issues must be analyzed under state common-law principles.").

158. *See id.* ("The applicable law in defamation is subject to fluctuating change, due in large measure to the struggles of modern courts in delineating the scope of First Amendment rights.").

159. *See* 1 SMOLLA, *supra* note 34, § 1:34, at 1-94.

160. For comparable formulations, see *Salvatore v. Kumar*, 845 N.Y.S.2d 384, 388 (App. Div. 2007), and *Smith v. Maldonado*, 85 Cal. Rptr. 2d 397, 402 (Ct. App. 1999).

Despite this large body of law, some claims for injury to reputation do not fit well inside this framework. Perhaps the publication was not made to a third party[161] or the statement was not defamatory.[162] Perhaps the plaintiff's reputation was injured not by a defamatory communication, but by the defendant's actions.[163] Perhaps a common law privilege or statutory restriction prevents the plaintiff from bringing a claim of libel or slander,[164] or perhaps the claim is time-barred by the statute of limitations.[165]

Such deficiencies will not, however, always preclude a plaintiff's recovery for injury to reputation. While the rules of libel and slander provide the primary means of redress for injury to reputation, several related causes of action provide recovery for similar injuries.[166] Claims for injurious falsehood, malicious prosecution, intentional interference with contract, and invasion of privacy frequently contain a reputational component as part of the alleged injury.[167] Nevertheless, plaintiffs regularly attempt to overcome these deficiencies by pursuing recovery for damage to reputation under a theory of negligence, endeavoring to meet its elements of injury, duty, breach, and causation.[168]

II. COMMON CLAIMS AND CONFLICTING ANALYSES: SURVEYING THE CONTEXTS THAT TEST THE LIMITS OF DEFAMATION

Part II looks at five different types of negligence claims for injury to reputation: (1) negligent maintenance of personnel records; (2) negligent investigation by governmental entities; (3) negligent polygraph, psychological, and drug testing; (4) products liability claims for reputational harm; and (5) negligent issuance of credit. Within each

161. *See* Dongguk Univ. v. Yale Univ., 734 F.3d 113, 117–19 (2d Cir. 2013) (detailing the private communications that allegedly caused the plaintiff reputational harm); *see also supra* notes 2–10 and accompanying text.

162. *See Dongguk*, 734 F.3d at 119–22. The statements at issue in Dongguk's negligence claims were not defamatory in the typical sense.

163. *See, e.g.*, Jorgensen v. Mass. Port Auth., 905 F.2d 515, 517–18 (1st Cir. 1990). *Jorgensen* is discussed in Part III.C.

164. *See* Quinones v. United States, 492 F.2d 1269 (3d Cir. 1974); *infra* Part II.A.

165. *See* Morrison v. Nat'l Broad. Co., 227 N.E.2d 572 (N.Y. 1967); *infra* notes 284–90 and accompanying text.

166. *See* Kate Silbaugh, Comment, *Sticks and Stones Can Break My Name: Nondefamatory Negligent Injury to Reputation*, 59 U. CHI. L. REV. 865, 875 (1992) ("[M]ost states allow recovery for a number of other narrowly-defined torts that injure reputation. Specifically, these states allow recovery for injury to reputation for specific intentional torts, such as malicious prosecution, malicious arrest, abuse of process, and third party contract interference.").

167. For example, injurious falsehood operates to protect a plaintiff's property from disparagement. *See* 3 DOBBS ET AL., *supra* note 16, § 649, at 588–89. A publication asserting that a business's product was defective or harmful is better suited for an injurious falsehood claim than a defamation claim because libel and slander are typically considered to be personal, rather than economic, torts. *See id.*

168. While courts refer to the law of defamation as having "heightened standards," see, for example, *Landon v. Kroll Laboratory Specialists*, 977 N.Y.S.2d 676, 680 (2013), negligence, of course, has its own requirements that are often difficult to meet. *See, e.g.*, Hatch v. State Dep't of Highways, 887 P.2d 729, 732 (Mont. 1994).

context, courts have taken differing approaches—sometimes overlapping, sometimes divergent—in addressing these claims.

A. Negligent Recordkeeping

One line of notable cases involves allegations that the defendants' negligent maintenance of personnel records caused damage to the plaintiffs' reputation, typically resulting in loss of employment opportunities. These claims are often brought against government entities. Thus, under the FTCA, the plaintiff may pursue recovery for negligence but not for libel and slander.[169] Two early cases, *Quinones v. United States*[170] and *Jimenez-Nieves v. United States*,[171] illustrate opposite approaches to analyzing negligence claims in this context.

In *Quinones*, a former federal employee brought claims against the United States government under the FTCA, alleging that the government's failure to use due care in maintaining his personnel records resulted in damage to his reputation.[172] The plaintiff claimed that, after resigning for personal reasons, the government erroneously and negligently informed prospective employers that he was unfit for service.[173] The Third Circuit distinguished between the duty to disseminate accurate information and the duty to maintain accurate records.[174] The court concluded that, while a claim based solely on the former would be barred by the FTCA, a claim based on the latter was actionable as negligence.[175]

Relatedly, in *Jimenez-Nieves*, the plaintiff brought an action against the United States for injury to reputation when, as a result of a bookkeeping error, the Social Security Administration stopped payment on the plaintiff's benefit checks.[176] In contrast to *Quinones*, the First Circuit held that the claims involving injury to reputation were in essence alleging defamation and thus barred by the FTCA.[177] The court's analysis hinged on the communication implicit in the plaintiff's claim.[178] The court reasoned that the agency's actions in dishonoring the checks implicitly communicated defamatory statements; therefore, as a claim for defamation, it was barred by the FTCA.[179] The court concluded that "[s]uch claims resound in the heartland of the tort of defamation: the injury is to reputation; the conduct is the communication of an idea, either implicitly or explicitly."[180]

169. *See supra* note 108.
170. 492 F.2d 1269 (3d Cir. 1974).
171. 682 F.2d 1 (1st Cir. 1982).
172. *Quinones*, 492 F.2d at 1271–72.
173. *Id.*
174. *See id.* at 1280–81.
175. *See id.*
176. *Jimenez-Nieves*, 682 F.2d. at 2.
177. *See id.* at 6.
178. *See id.*
179. *See id.*
180. *Id.*

Other courts have also focused on the communicative element implicit in plaintiffs' claims. For example, in *Talbert v. United States*,[181] the Fourth Circuit dismissed a claim for negligent maintenance of personnel records based on facts similar to those in *Quinones*.[182] Similar to *Jimenez-Nieves*, the court focused on the communicative aspect of the plaintiff's claim.[183] The court reasoned that the maintenance of personnel records and the dissemination of their contents were inseparable—the former without the latter would not result in injury.[184] The court concluded that because any injury to the plaintiff would necessarily involve the communication of defamatory information, it was in essence defamation and barred by § 2680(h) of the FTCA.[185]

Some courts have followed *Quinones* in holding that injury to reputation resulting from negligent maintenance of records is distinct from defamation and therefore actionable as negligence.[186] However, it seems that the majority of courts addressing the issue—at least, so far as the FTCA is concerned—have agreed with the *Jimenez-Nieves* court in concluding that such claims are in essence defamation and statutorily barred.[187]

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181. 932 F.2d 1064 (4th Cir. 1991).

182. The Department of Commerce terminated the plaintiff's employment due to "excessive unauthorized absence and unavailability for work"; however, the plaintiff claimed that the records were erroneous and that he was only absent from work for medical reasons. *Id.* at 1065.

183. *See id.* at 1066.

184. *See id.* at 1066–67.

185. *See id.*; *see also infra* note 108 and accompanying text (discussing privileges retained and waived by the FTCA).

186. *See, e.g.*, Doe v. United States, 520 F. Supp. 1200, 1203 (S.D.N.Y. 1981) ("[H]aving determined that plaintiff in the instant action has a maintainable claim under the FTCA for the Government's negligent record keeping, we need not consider whether or not any separate and distinct claims he might have brought would have been barred by one or more of the [FTCA] exceptions."). The court determined that the defendants owed a statutory duty to the plaintiff and did not reach the question of whether the defendants were liable for breach of a common law duty. *See id.* at 1202 n.3; *c.f.* Vigil v. State Auditor's Office, 116 P.3d 854 (N.M. Ct. App. 2005). The *Vigil* court considered "whether, under a theory of negligence, a certified public accountant owes a duty to a third party who is the subject of an audit." *Id.* at 859. The court did not foreclose the plaintiff's ability to bring a claim of negligence to recover for reputational harm; however, it denied the plaintiff's recovery on the grounds that there was no "duty established by the relationship between the defendant and the plaintiff." *Id.* at 860.

187. *See* Moessmer v. United States, 760 F.2d 236, 237–38 (8th Cir. 1985) (declining to adopt the *Quinones* court's distinction between the maintenance of records and the dissemination of inaccurate information and holding that "[i]f the gravamen of his complaint is that the CIA communicated defamatory material . . . then his claim falls within the libel and slander exception to the FTCA"); Bergman v. United States, 751 F.2d 314, 317 (10th Cir. 1984) (affirming the district court's conclusion that "[the plaintiff's] claim based on negligence is actually one for 'misrepresentation, deceit and slander' and therefore is barred by the immunity retained under 28 U.S.C. § 2680(h)"); Baker v. United States, 943 F. Supp. 270, 274–75 (W.D.N.Y. 1996) (adopting the reasoning of *Talbert* and holding that "the gravamen of plaintiff's complaint is that defendant disclosed inaccurate information to third parties"); Williams v. United States, No. CIV-89-522E, 1991 WL 37828, at *1–2 (W.D.N.Y. Mar. 12, 1991) (declining to follow Doe v. United States, 520 F. Supp. 1200 (S.D.N.Y. 1981), and holding that a state law cause of action for breach of a statutory or regulatory duty to maintain accurate records would not overcome the defamation exemption found in the FTCA).

In other cases closely resembling *Quinones*, plaintiffs have brought negligence claims against former employers for injury to reputation caused by the negligent preparation of an employment reference.[188] Perhaps one of the best-known cases comes from the United Kingdom. In *Spring v. Guardian Assurance Plc.*,[189] the House of Lords concluded that the plaintiff should recover for reputational harm suffered as a result of the damaging referral letter negligently prepared by the defendant, a former employer.[190]

A New York court faced with the same issue reached the opposite conclusion. In *Ramsay v. Mary Imogene Bassett Hospital*,[191] a physician brought an action against his former employer for allegedly making derogatory statements to prospective employers.[192] In addition to defamation, the plaintiff brought causes of action of negligence, interference with prospective contractual relations, intentional infliction of emotional harm, and prima facie tort.[193] Citing *Morrison v. National Broadcasting Co.*,[194] a New York case discussed in Part III.A, the court concluded that each claim was in essence one of defamation and thus subject to defamation's one-year statute of limitations.[195]

However, in *Singer v. Beach Trading Co.*,[196] a New Jersey state court allowed such a claim to stand outside of libel and slander.[197] The court concluded that the referral was not itself defamatory in nature and thus was not actionable as a defamation claim.[198] The court allowed the claim to proceed, not under negligence, but under the theory of negligent misrepresentation, imposing a shorter one-year statute of limitations for discovery purposes.[199] This application of negligence misrepresentation is at odds with the position taken by many courts; when faced with analogous claims, courts often conclude that negligent misrepresentation is not the appropriate vehicle because the plaintiff himself did not rely on the information.[200]

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188. These cases are outliers, as plaintiffs more typically attempt to recover under defamation rather than negligence. *See generally* Matthew L. Mac Kelly, *Employer Liability for Employment References*, WIS. LAW., Apr. 2008, at 8.

189. [1995] 2 A.C. 296 (H.L.) (appeal taken from Eng.) (Eng.).

190. *See id. But see* Elspeth Reid, *Malice in the Jungle of Torts*, 87 TUL. L. REV. 901, 910 (2013) ("Admittedly the action in negligence compensated Spring for his economic loss rather than vindicating reputation . . . ."). This distinction is discussed further in Part IV.

191. 495 N.Y.S.2d 282 (App. Div. 1985).

192. *Id.* at 283.

193. *Id.* at 284.

194. 227 N.E.2d 572 (N.Y. 1967); *infra* notes 284–90 and accompanying text.

195. *See Ramsay*, 495 N.Y.S.2d at 284 ("A fair reading of plaintiff's complaint reveals that each cause of action defines the damage to plaintiff in terms of damage to his reputation."). Interestingly, the court did not address whether the communications to prospective employers would have been privileged.

196. 876 A.2d 885 (N.J. Super. Ct. App. Div. 2005).

197. *See id*. at 894–95.

198. *See id.*

199. *Id.* at 894.

200. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 5 cmt. g (Tentative Draft No. 1, 2012) ("In some cases, a plaintiff suffers economic loss not from reliance on a defendant's negligent statements, but because the statements are relied upon by a third party; the negligent statements affect judgments the third party makes about the plaintiff. Courts

B. Negligent Investigation

In a separate line of cases with facts comparable to those in *Quinones* and *Jimenez-Nieves*, plaintiffs allege that a governmental entity's negligent investigation led to loss of reputation.[201] In this context of claims, courts routinely reject negligence claims for reputational injury, although sometimes for different reasons. For example, in *Kugel v. United States*,[202] the plaintiff brought claims under the FTCA against the FBI, alleging that its agents "negligently initiated and conducted an investigation of his business practices," which in turn forced him to declare bankruptcy and triggered health problems.[203] The D.C. Circuit based its decision on reasoning found in *United States v. Shearer*,[204] in which the Supreme Court rejected an FTCA claim of negligent supervision of a serviceman who committed assault and battery.[205] Drawing on this precedent, the court concluded that "the cause of [the plaintiff's] injury was not the FBI's execution of the investigation but its dissemination of information associated with the investigation."[206] Thus, because the claim was one of defamation, it was not permitted under the FTCA.[207]

Other courts, however, have additionally noted that the conduct at issue in these claims falls within the discretionary function exception to the FTCA. For instance, in *Edmonds v. United States*,[208] the plaintiff, who worked as a translator for the FBI, claimed that the organization's negligent investigation of her whistleblower allegations led to—among other injuries—loss of reputation.[209] The court rejected the plaintiff's claims for negligent investigation because she had failed to exhaust her administrative remedies.[210] However, the court also noted that these claims would

routinely reject tort liability on these facts for the party who made the misrepresentation. The result can be explained by noting the plaintiff's lack of reliance, or by observing that the defendant's purpose was not to supply information for the plaintiff's benefit or guidance."); *see also* Douglas Asphalt Co. v. QORE, Inc., 657 F.3d 1146, 1158 (11th Cir. 2011) (approving the lower court's dismissal of the plaintiff's negligent misrepresentation claim and noting that the plaintiff's reliance "is necessary to form the basis for this type of claim").

201. This section does not address internal investigations that occur in the context of private employment. *See, e.g.*, Vice v. Conoco, Inc., 150 F.3d 1286, 1291 (10th Cir. 1998) (noting that Oklahoma courts have not recognized the tort of negligent investigation); Theisen v. Covenant Med. Ctr., Inc., 636 N.W.2d 74, 81–83 (Iowa 2001).

202. 947 F.2d 1504 (D.C. Cir. 1991).

203. *See id.* at 1505.

204. 473 U.S. 52 (1985).

205. *See Kugel*, 947 F.2d at 1507.

206. *Id.*

207. *Id.* The court also noted that even if the claim were to proceed under negligence theory it would fail for want of duty. *Id.*; *accord Popovic v. United States*, No. 98-1432, 1999 WL 228243, at *3, *5 (4th Cir. Apr. 20, 1999) (per curiam) (concluding that the plaintiff's claims of negligent investigation "arose out of" defamatory acts and were thus barred); Hobdy v. United States, No. CIV. A. 90-4003-S, 1990 WL 203160 (D. Kan. Nov. 9, 1990).

208. 436 F. Supp. 2d 28 (D.D.C. 2006).

209. *See id.* at 32.

210. *See id.* at 34–35.

otherwise be dismissed "because they fall under the discretionary function exception to the FTCA, 28 U.S.C. § 2680(a)."[211]

Similar reasoning has been employed by the Tenth Circuit in *Cooper v. American Automobile Insurance Co*.[212] In analyzing the plaintiff's claims of negligent investigation against the U.S. Department of Agriculture and the Packers and Stockyards Administration, the Tenth Circuit held that the plaintiff had failed to demonstrate that the defendant had a duty to the plaintiff to conduct its investigations nonnegligently.[213] The court further held that, assuming such a duty existed, the claim would fall under the discretionary function exception of 28 U.S.C. § 2680(a).[214] The court also noted that the substance of the plaintiff's claims appeared to be that the defendants "negligently brought false information to the attention of third parties," and thus were barred by the libel and slander exception to the FTCA.[215]

C. Negligent Testing

Claims for "negligent testing" constitute a large, unsettled area of law. In these cases, plaintiffs who have undergone polygraph, psychological, or drug testing typically allege that the tester negligently conducted the test or negligently reported the results, causing reputational injury or loss of employment.[216] The subject being tested will often have difficulty maintaining a claim of libel or slander due to the tester's conditional privilege.[217] Although these claims may not always explicitly allege injury to reputation, reputational harm is always implicated.[218]

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211. *Id.* at 35 n.4. With regard to the plaintiff's other claims, the court reasoned that "[b]ecause the claims for negligent disclosure, negligent endangerment, negligent infliction of emotional distress, and negligent interference with prospective economic opportunity arise from defamation, they are barred under [the FTCA]." *Id.* at 36–37.

212. 978 F.2d 602 (10th Cir. 1992).

213. *See id.* at 605, 611.

214. *Id.* at 611–12; *cf.* Nogueras-Cartagena v. United States, 172 F. Supp. 2d 296, 318 (D.P.R. 2001), *aff'd sub nom.* Nogueras-Cartagena v. U.S. Dep't of Justice, 75 F. App'x 795 (1st Cir. 2003) (rejecting the plaintiff's claim under the discretionary function exemption without discussing whether the claim arose out of defamation).

215. *Cooper*, 978 F.2d at 613 (citing Jimenez-Nieves v. United States, 682 F.2d 1, 6 (1st Cir. 1982)).

216. For a discussion of this area of the law, see Travis M. Wheeler, Note, *Negligent Injury to Reputation: Defamation Priority and the Economic Loss Rule*, 48 ARIZ. L. REV. 1103, 1116 (2006). For the implications regarding other possible similar claims, see 3 DOBBS ET AL., *supra* note 16, § 649, at 590 n.13 ("Educational testing, for admission to schools, for example, may harm reputation and thus inflict economic harm if the plaintiff's true score is seriously under-reported." (citing Vincent R. Johnson, *Standardized Tests, Erroneous Scores, and Tort Liability*, 38 RUTGERS L.J. 655 (2007))). *See also* Russo v. NCS Pearson, Inc., 462 F. Supp. 2d 981, 995–96 (D. Minn. 2006) (allowing the plaintiff's negligence claim "that the College Board should have timely identified errors in scoring prior to the reporting of scores" to proceed).

217. *See, e.g.*, Willis v. Roche Biomedical Labs., Inc., 61 F.3d 313, 316 (5th Cir. 1995); Baggs v. Eagle-Picher Indus., 750 F. Supp. 264, 270–71 (W.D. Mich. 1990).

218. *See* 3 DOBBS ET AL., *supra* note 16, § 649, at 592 ("These cases literally involve reputational harm—the implication that the plaintiff uses illicit drugs, for example.").

In a paradigmatic drug-testing case, *Sharpe v. St. Luke's Hospital*,[219] the plaintiff-employee sued a hospital which had conducted drug tests on behalf of her employer.[220] When her urine sample tested positive for cocaine, she alleged that the hospital had negligently conducted or misidentified her sample and sought recovery for "direct and immediate harm to both her reputation and economic status resulting from the termination of her employment."[221] Although a communication to a third party is implicit in the plaintiff's claim (i.e., the tester's disclosure of the test results to the plaintiff's employer), the court bypassed the issue of whether the claim was in essence one for defamation.[222] The court, instead, focused on the duty of care between the defendant and the plaintiff and allowed the case to go forward under a negligence framework.[223]

While courts are divided on this issue,[224] many have allowed plaintiffs to pursue recovery under a negligence theory, finding a duty between the employee and the party conducting the testing.[225] An Illinois court based the duty of care between a drug-testing company and the employee being tested on several policy considerations: a false-positive had serious consequences, such as reduced job opportunities; an erroneous result could greatly damage the employee's reputation; and the lab was in the best position to guard against negligence.[226] The drafters of the Restatement (Third) of Torts note that, in such situations, the employee being tested is in a poor position to bargain for protection and that an employee's right to sue might help enforce the drug tester's obligations.[227] Nevertheless, the drafters suggest that the law of defamation might do a better job of

219. 821 A.2d 1215 (Pa. 2003).

220. *Id.* at 1217.

221. *Id.*

222. *See id*. at 1220–21. This approach stands in contrast to the reasoning found in *Talbert v. United States*, 932 F.2d 1064 (4th Cir. 1991). *See supra* notes 181–85 and accompanying text.

223. *See Sharpe*, 821 A.2d at 1221.

224. *See* 3 DOBBS ET AL., *supra* note 16, § 649, at 592 ("In this area courts are definitely divided. A number have allowed the plaintiff to recover."); *see also* 2 KEVIN B. ZEESE, DRUG TESTING LEGAL MANUAL § 5:12 (2d ed. 1996).

225. *See, e.g.*, Spiker v. Sanjivan PLLC, No. CV-13-00334-PHX-GMS, 2013 WL 5200209 (D. Ariz. Sept. 16, 2013) (collecting cases) (allowing the plaintiff to allege reputational injury and emotional distress as damages within a negligence claim, rather than separate claims of defamation or negligent infliction of emotional distress; holding that specimen screeners and collectors owe a duty to employees). For courts rejecting such claims, see, for example, *Willis v. Roche Biomedical Laboratories, Inc.*, 61 F.3d 313, 316 (5th Cir. 1995) (holding that under current Texas law, the tester owed the employee "no duty of reasonable care in testing his urine for drugs"); *Santagada v. Lifedata Medical Services, Inc.*, No. 92 CIV. 6110 (PNL), 1993 WL 378309 (S.D.N.Y. Sept. 22, 1993); and *Hall v. UPS*, 555 N.E.2d 273, 276–78 (N.Y. 1990) (holding that negligent administration of a lie detector test not actionable because claim sounded in defamation). *But see* Santiago v. Greyhound Lines, Inc., 956 F. Supp. 144, 149–52 (N.D.N.Y. 1997).

226. Stinson v. Physicians Immediate Care, Ltd., 646 N.E.2d 930, 933–34 (Ill. App. Ct. 1995).

227. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 1 cmt. e (Tentative Draft No. 1, 2012).

addressing such claims, noting that the court would have the option of modifying the tester's conditional privilege when appropriate.[228]

While federal courts had long speculated how New York law would treat claims of negligent drug testing,[229] New York's highest court recently addressed the issue and allowed the claim to proceed as negligence, finding a duty between a drug-testing company and the subject being tested. In *Landon v. Kroll Laboratory Specialists*,[230] the plaintiff, who was required to submit to drug testing as a condition of his probation, alleged that the defendant's negligence in reporting a false-positive result to the police department resulted in a violation of his probation.[231] Echoing the reasoning of the Illinois court in *Stinson*, the *Landon* court noted that a false-positive report "will have profound, potentially life-altering, consequences for a test subject" and that the tester is in "the best position to prevent false positive results."[232]

The decision seems at odds with the court's previous ruling in *Hall v. UPS*,[233] in which the court held that the plaintiff, who allegedly lost his employment as the result of a negligently administered polygraph test, could not maintain his negligence claim.[234] The court noted two factors supporting dismissal: First, because the plaintiff sought to recover damages for injury to reputation, the claim was in essence defamation and subject to a qualified privilege.[235] Second, the state legislature had adopted limited remedial measures regarding lie detector tests.[236] The court reasoned that "[t]he Legislature's choice to regulate the use of some lie detector devices in certain limited contexts suggests that this court should stay its own hand and refrain from crafting additional remedial measures."[237] The *Landon* court distinguished *Hall*, noting that, unlike the plaintiff in *Hall*, the plaintiff here did not "seek to recover for damage to his reputation and there is no apparent statutory remedy for a victim of negligence whose injury was caused by a false positive drug test."[238]

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228. *Id.* ("If the plaintiff is an at-will employee, however, permitting the suit creates anomalies. At-will employees cannot sue their employers if fired on false charges of drug use; nor can they sue other employees who negligently make such charges or report test results negligently to the employer."). This topic is discussed further in Part IV.

229. *Compare Santiago*, 956 F. Supp. at 149–52 (concluding that New York law would acknowledge a duty between drug tester and employee), *with Santagada*, 1993 WL 378309, at *5 (concluding that New York would treat the claim as displaced by defamation).

230. 977 N.Y.S.2d 676 (2013).

231. *See id.* at 677–78.

232. *Id.* at 679.

233. 555 N.E.2d 273 (N.Y. 1990).

234. *See id.* at 275, 278.

235. *See id.* at 276.

236. *See id.* at 277.

237. *Id.* at 278.

238. *See* Landon *v.* Kroll Lab. Specialists, 977 N.Y.S.2d 676, 680 (2013) (noting that, in *Hall*, "the problem was . . . that plaintiff sought to recover for injury to his reputation—harm that is subject to the heightened standards of a defamation cause of action" (citing *Hall*, 555 N.E.2d at 276–77)). *But see id.* at 283–85 (Smith, J., dissenting) (agreeing that *Hall* was not controlling, but nevertheless arguing that the claim should be viewed as defamation and the communication privileged).

While courts seem increasingly willing to recognize negligence claims against drug-testing companies by individuals being tested, courts have largely refused to apply similar reasoning to psychological testing.[239] For example, in *Brockway v. VA Connecticut Healthcare Systems*,[240] the plaintiff brought a claim against the Veterans Administration Connecticut Healthcare System under the FTCA, alleging that "a false and improper diagnosis of 'bipolar disorder'" caused him "injury to his career, personal life, and reputation."[241] Employing reasoning similar to that in *Talbert*, the court concluded that, "[b]ecause plaintiff's alleged damages stem from disclosure of his medical records which damaged his reputation, the crux of his claim is defendant's communication of what he considers false information about him."[242] Thus, the plaintiff's claim sounded in defamation and was barred by the FTCA.[243]

D. Products Liability

Products liability claims for reputational harm comprise a distinct and complex body of law. In a much-discussed case, *Kennedy v. McKesson Co.*,[244] New York's highest court allowed a dentist to pursue recovery for injury to reputation in his negligence claim against the manufacturer of an anesthetic machine.[245] After repairing the machine, the defendant returned it with the color codes identifying oxygen and nitrous oxide reversed, resulting in the dentist administering to his patient a deadly dose of nitrous oxide.[246] The court did not discuss whether libel or slander would have been a more appropriate vehicle for the claim.[247] Rather, the court summarily held that "a plaintiff who states a cause of action in his own right predicated upon a breach of duty flowing from defendant to plaintiff may recover the pecuniary expenses he has borne as a result of that breach."[248]

Other New York cases have allowed plaintiffs to recover on similar grounds.[249] However, in *Catalano v. Heraeus Kulzer, Inc.*,[250] a case with

239. *Compare* Duncan v. Afton, Inc., 991 P.2d 739, 744–45 (Wyo. 1999) (holding that the defendant could be liable in negligence for reputational harm caused by negligent drug testing), *with* Erpelding v. Lisek, 71 P.3d 754, 760 (Wyo. 2003) (holding that "under the particular facts of this case, [the defendant], in performing an independent psychological evaluation for the benefit of [the plaintiff's] employer, did not owe [the plaintiff] a duty of care").

240. No. 3:10-CV-719 (CSH), 2012 WL 2154263 (D. Conn. June 13, 2012).

241. *Id.* at *9.

242. *Id.*

243. *See id.*; *see also* Hoesl v. United States, 451 F. Supp. 1170, 1171 (N.D. Cal. 1978).

244. 448 N.E.2d 1332 (N.Y. 1983).

245. *See id.* at 1336. The plaintiff sought recovery for emotional injury, as well as injury to reputation. *See id.* at 1333. The court denied recovery for emotional harm but reinstated "so much of the complaint as seeks to recover damages for other than emotional injuries." *Id.* at 1336.

246. *Id.* at 1333.

247. *See id.* at 1333–36.

248. *See id.* at 1334.

249. *See* Adirondack Combustion Techs., Inc., v. Unicontrol, Inc., 793 N.Y.S.2d 576, 578–79 (App. Div. 2005) (allowing the plaintiff, who sold the defendant's boiler controller

facts similar to those in *Kennedy*, a New York appellate court reached the opposite conclusion.[251] A dentist brought a products liability claim against the manufacturer of dental restorations, alleging that their faulty design caused them to fail after installation, which in turn caused the dentist to suffer loss of professional reputation and business good will.[252] Without discussing *Kennedy*, the court dismissed this portion of the claim, holding that without a predicate physical injury, the claim failed under the economic loss rule.[253]

The Supreme Court of Oregon addressed analogous issues in *Oksenholt v. Lederle Laboratories*.[254] Reaching a conclusion similar to that in *Kennedy*, the court held that a physician could maintain an action in negligence against a prescription drug manufacturer for loss of reputation when the plaintiff alleged that the defendant knew or should have known about the hazards of the drug and/or deliberately withheld information.[255]

Although the plaintiffs in the cases above sought recovery for injury to reputation, there is debate about how to properly characterize the harm involved. Notably, the Restatement (Third) of Torts treats *Kennedy* as a leading example of when economic loss is recoverable under the theory of products liability.[256] Using the facts of the case as an illustration, the Restatement concludes that a doctor's "interest in her professional reputation is an interest protected by tort law against economic loss arising from harm to a patient in her care."[257] Others have taken the view that the reputational harm in products liability cases should be viewed as an element of the damages caused by the defect, rather than a separate cause of action.[258]

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device, to pursue a products liability claim for damage to business reputation when device failed to function); Vitolo v. Dow Corning Corp., 634 N.Y.S.2d 362, 365–66 (Sup. Ct. 1995) (distinguishing Morrison v. Nat'l Broad. Co., 227 N.E.2d 572 (N.Y. 1967) (discussed *infra* Part III.A) and allowing a doctor to proceed with a negligence claim against the manufacturer of breast implants for damage to his reputation when the implants ruptured or leaked in several of his patients).

250. 759 N.Y.S.2d 159 (App. Div. 2003).

251. *See id.* at 160.

252. *Id.* at 161.

253. *See id.* The economic loss rule is discussed in greater detail in Part III.B.

254. 656 P.2d 293 (Or. 1982).

255. *See id.* at 296–98.

256. *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 21 cmt. c (1998). *Kennedy* is used to support the rule that economic loss is recoverable if caused by harm to "the person of another when harm to the other interferes with an interest of the plaintiff protected by tort law." *Id.* § 21(b).

257. *Id.* § 21 cmt. c. The inclusion of subsection (b) was itself controversial. *See* Gerald W. Boston, *ALI Adopts Final Version of New Products Liability Restatement*, 100 PRODS. LIAB. ADVISORY 12, 11 (1997) ("Those opposing subsection (b) argued that it created a new class of plaintiffs whose right to recover economic losses would not turn on damage to persons or property. The proposal to delete subsection (b) was defeated on a voice vote.").

258. *See* 3 DOBBS ET AL., *supra* note 16, § 649, at 589 ("In such a case, the economic damage would simply be a 'parasitic' recovery, not a stand-alone tort."); *see also* Diaz v. Little Remedies Co., 918 N.Y.S.2d 281, 282 (App. Div. 2011) (reinstating the plaintiff's claims against laxative manufacturer for damage to her reputation to the extent that those claims were based upon alleged pecuniary losses).

E. Negligent Issuance of Credit

Another line of cases involves negligence on the part of a defendant financial institution in failing to verify an imposter's identity before opening an account in the plaintiff's name. This form of negligence is distinguishable from a duty to safeguard confidential financial information or prevent identity theft.[259] This distinction was pointed out in *Wolfe v. MBNA America Bank*.[260] In *Wolfe*, the defendant financial institution received a credit account application in the spring of 2000 bearing the plaintiff's name but not his address.[261] The defendant issued a credit card in the plaintiff's name to an unknown individual residing at the address, who then authorized charges in excess of its credit limit.[262] When no payments were made, the defendant transferred the account to a debt collection agency and notified credit reporting agencies.[263]

In January 2005, the plaintiff applied for a job at a bank but was not hired due to his poor credit score.[264] Although the plaintiff notified the defendant that his identity had been stolen, the defendant continued to list the plaintiff as delinquent and did not correct the information it provided to credit reporting agencies regarding the account.[265] The plaintiff brought claims of negligence, gross negligence, and defamation, as well as a state statutory cause of action.[266]

The court held that the plaintiff's negligence claims regarding the bank's alleged failure to investigate the authenticity of the credit account before reporting the account as delinquent were preempted by the FCRA.[267] However, applying Tennessee law, the court allowed the plaintiff to proceed with his negligence and gross negligence claims regarding the defendant's duty to verify the authenticity and accuracy of the credit account application before issuing the credit card.[268] The court based the duty to verify on the increase in identity theft; the foreseeable and preventable damages; the potentially devastating extent of the damage; and the defendant's unique position in preventing the damage.[269] The court also held that the plaintiff's libel claim was not preempted by the FCRA, as he alleged recklessness, satisfying the actual malice pleading requirement.[270]

Similarly in *Patrick v. Union State Bank*,[271] the plaintiff sued the defendant bank, alleging that the bank negligently allowed an imposter to

259. *See generally* 3 DOBBS ET AL., *supra* note 16, § 650.
260. 485 F. Supp. 2d 874 (W.D. Tenn. 2007).
261. *Id.* at 878–79.
262. *See id.* at 879.
263. *See id.*
264. *Id.*
265. *See id.*
266. *Id.* at 878.
267. *See id.* at 882–87. The FCRA is discussed in Part I.C.2.b.
268. *Id.* at 881–82.
269. *See id.* at 882.
270. *Id.* at 891–92.
271. 681 So. 2d 1364 (Ala. 1996).

open a checking account in the plaintiff's name.[272] The imposter issued numerous worthless checks, which ultimately resulted in several warrants for the plaintiff's arrest and the plaintiff spending ten consecutive days in jail.[273] On appeal, the court held that the bank owed a duty of care to the plaintiff to verify that the person opening the account was not an imposter, thus allowing the plaintiff's negligence claim to proceed.[274]

Several other courts have reached opposing conclusions when faced with similar facts. However, rather than analyzing the plaintiffs' negligence claims as essentially defamation, the courts have generally dismissed the claims for lack of duty.[275] For example, in *Brunson v. Affinity Federal Credit Union*,[276] identity theft resulted in the plaintiff being arrested and spending thirteen days in jail.[277] The court noted that "[t]he expansive holding in *Patrick* . . . has met with near universal disapproval" and declined to adopt its rule.[278] Even so, the court's holding is distinguishable from that in *Patrick* in that it speaks to a bank's duty to investigate potential fraud, rather than its duty to verify the initial credibility of the account.[279] Further, the court did not foreclose the plaintiff's ability to bring such a claim, but rather the claim failed for want of duty.[280]

Wolfe is treated by the drafters of the Restatement (Third) of Torts as an example of when courts should recognize an exception to the general rule that "[a]n actor has no general duty to avoid the unintentional infliction of economic loss on another."[281] The drafters reason that such a duty may be recognized when the set of potential plaintiffs is limited, the defendant's potential liability is clear and proportionate, and the plaintiffs are in a poor position to allocate loss.[282] However, the Restatement's treatment of *Wolfe* seems to focus more heavily on the economic aspect of the plaintiff's injury, rather than the reputational.

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272. *See id.* at 1365.

273. *Id.* at 1366.

274. *Id.* at 1368–70.

275. *See* Smith v. AmSouth Bank, Inc., 892 So. 2d 905, 909 (Ala. 2004) (distinguishing, and noting disapproval without overruling, *Patrick*); Ladino v. Bank of Am., 861 N.Y.S.2d 683, 687 (App. Div. 2008) (holding that "New York does not recognize a cause of action for 'negligent enablement of imposter fraud'"); Huggins v. Citibank, N.A., 585 S.E.2d 275, 277 (S.C. 2003) ("The relationship, if any, between credit card issuers and potential victims of identity theft is far too attenuated to rise to the level of a duty between them. Even though it is foreseeable that injury may arise by the negligent issuance of a credit card, foreseeability alone does not give rise to a duty."). *But see* Simons v. Wal-Mart Stores E., L.P., No. 8:11-CV-03180-JMC, 2013 WL 417671, at *4 (D.S.C. Feb. 1, 2013) (distinguishing *Huggins* by holding that the bank owed a duty to the plaintiff as a result of their existing relationship).

276. 972 A.2d 1112 (N.J. 2009).

277. *See id.* at 1116.

278. *Id.* at 1123–24.

279. *See id.* at 1117.

280. *See id.* at 1124–25.

281. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 1 (Tentative Draft No. 1, 2012). *See id.* cmt. e, illus. 2.

282. *See id.* cmt. e.

III. CONTRADICTORY APPROACHES IN NEED OF COHESION

Part II looked at several areas in which plaintiffs have sought to recover for injury to reputation under a theory of negligence. As seen above, these claims are often treated inconsistently. Part III codifies the various approaches courts have taken in analyzing negligence claims for reputational harm. Under one approach, the negligence claim is displaced by libel and slander because the claim sounds in defamation. Under another approach, the claim is allowed to proceed but fails under the economic loss rule for lack of predicate physical injury. A third approach allows the negligence claim to proceed unfettered by defamation displacement or the economic loss rule. The final approach discussed in Part III allows the claim to proceed, although it is restricted by defamation-specific limitations.

A look across one jurisdiction—New York—illustrates that, even within the same jurisdiction, courts often approach these claims inconsistently. Although New York courts were among the first to analyze negligence claims for reputational harm, they have not consistently followed one approach.[283]

A. Defamation Displacement: When a Claim Sounds in Defamation

One approach, seen in *Jimenez-Nieves*, *Talbert*, *Kugel*, and *Hall*, holds that if a negligence claim is in essence one for defamation, it will be displaced by the torts of libel and slander. This approach has its roots in a New York case, *Morrison v. National Broadcasting Co*.[284] In *Morrison*, a professor brought claims of intentional infliction of economic injury after being a participant in the rigged TV quiz show "21."[285] The hoax became a national scandal and prompted investigations by grand juries and a special subcommittee of the House of Representatives.[286] Although the plaintiff was not privy to the fraud, he alleged that he was denied two fellowships as a result of his association with the scandal.[287] Although the appellate court reasoned that the causative acts were different from those in defamation, New York's highest court disagreed.[288] The court reasoned that defamation is "defined in terms of the injury, damage to reputation, and not in terms of the manner in which the injury is accomplished."[289] The court held that,

283. Other jurisdictions have also been inconsistent in their approach. *Compare* Ross v. Gallant, Farrow & Co., 551 P.2d 79, 82 (Ariz. Ct. App. 1976) (holding that injury to reputation resulting from an audit report was not actionable under a negligence theory), *with* Las Corrientes, L.L.C. v. The Sundt Cos., No. 1 CA-CV 09-0374, 2010 WL 3025520, at *1–3 (Ariz. Ct. App. Aug. 3, 2010) (allowing the owner of a golf course to proceed with a negligence claim against a company doing roadwork that obstructed the course's entrance but finding for the defendant on causation and lack of evidence of reputational harm).

284. 227 N.E.2d 572 (N.Y. 1967).

285. *Id.* at 573–74.

286. *Id.* at 573.

287. *See id.*

288. *See id.* at 573–74.

289. *Id.* at 574.

because his claims sounded in defamation, they were subject to defamation's shorter statute of limitations and, thus, time-barred.[290]

Although the plaintiff in *Morrison* brought a claim of "intentional infliction of economic injury" rather than negligence, this reasoning frequently has been applied to negligence claims for injury to reputation as well.[291] The policy concerns motivating this approach are clear: courts wish to prevent plaintiffs from circumventing the shorter statute of limitations or other defamation-specific restrictions simply by recharacterizing libel or slander claims as negligence.[292]

However, whether a claim sounds in defamation is not always clear, as even within this approach, courts have disagreed about how to make this determination. The *Morrison* court's analysis focused more heavily on the nature of the alleged injury than on how it was inflicted.[293] Under this framework, any claim alleging reputational harm as the predicate injury will be displaced by defamation.[294] However, the courts in *Jimenez-Nieves* and *Talbert* focused more heavily on how and when the harm actually occurred in determining that the claims sounded in defamation.[295] Courts following this approach look for the presence of a communication to a third party in concluding that the negligence claim will be displaced.[296]

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290. *Id.*

291. *See, e.g.*, Four Directions Air, Inc. v. United States, No. 5:06-CV-283 NAM/GHL, 2007 WL 2903942, at *4–6 (N.D.N.Y. Sept. 30, 2007) (citing *Morrison*, 227 N.E.2d at 574) (holding that the plaintiffs' negligence claim sounded in defamation); Ross v. Gallant, Farrow & Co., 551 P.2d 79, 82 (Ariz. Ct. App. 1976) ("Defamation is the gist of the claim. Since it is, the legal rules which pertain to defamation apply. Common law negligence is not an alternative basis for recovery. This is not necessarily a result of logic; it is a product of the historical development of the law of defamation."); *see also* Greives v. Greenwood, 550 N.E.2d 334, 338 (Ind. Ct. App. 1990) (holding that "[d]amages for loss of reputation are only available in actions for libel, slander, abuse of process, malicious prosecution, and third party contract interference"); Lawrence v. Grinde, 534 N.W.2d 414, 420 (Iowa 1995) (holding that "reputation damages are not a legal remedy available in a damage action premised on a defendant's negligent act").

292. *See* Lesesne v. Brimecome, 918 F. Supp. 2d 221, 224 (S.D.N.Y. 2013) ("[C]ourts in New York have . . . kept a watchful eye for claims sounding in defamation that have been disguised as other causes of action. . . . New York courts maintain this distinction because '[a] contrary result might very well enable plaintiffs in libel and slander cases to circumvent the otherwise short limitations period' for defamation claims." (quoting *Morrison*, 227 N.E.2d at 574)).

293. *See* Jorgensen v. Mass. Port Auth., 905 F.2d 515, 520 (1st Cir. 1990) (noting that "[s]ome courts have emphasized the injury to reputation element more heavily than the communication element in ruling that claims alleging harm to reputation sound in defamation rather than in ordinary negligence or any other tort" (citing *Morrison*, 227 N.E.2d at 574)).

294. However, Silbaugh argues that the reasoning of *Morrison* is (1) today, outmoded and (2) even then, misleading. *See* Silbaugh, *supra* note 166, at 874–75 ("At one time, defamation may have been the only tort to cover damage to reputation. But damage to reputation did not define the entire cause of action—other elements were also essential."). This topic is discussed further in Part IV.A.

295. The *Jorgensen* court also follows this approach. *See infra* Part III.C.

296. *See Jorgensen*, 905 F.2d at 520; *infra* Part III.C; *see also* Lines v. Cablevision Sys. Corp., No. 04 CV 2517 DRH ETB, 2005 WL 2305010, at *4 (E.D.N.Y. Sept. 21, 2005) (concluding that, because of the communications involved, "a plain reading of the allegations reveals that Plaintiff's claim sounds in defamation").

B. Economic Loss: When a Claim Fails for Lack of Predicate Physical Injury

Another approach, seen in *Catalano*, allows the plaintiff's negligence claim to stand but nevertheless bars recovery under the economic loss rule.[297] The economic loss rule stands for the proposition that a plaintiff cannot recover in negligence for so-called pure economic harm without a predicate physical injury.[298] In other words, when a plaintiff sues in negligence for a physical injury, he may be able to recover for other economic damages that are "parasitic" to the underlying physical harm.[299] Courts following this approach, therefore, equate reputational harm with economic loss.[300] This approach raises interesting questions, as defamation is typically thought of as a dignitary tort or personal injury, rather than an economic tort.[301] However, it should be noted that stand-alone negligence claims for reputational injury very often seek to recover for purely financial injury—often loss of employment or reduced earning capacity—rather than generalized and unquantifiable damage to reputation.[302]

In *Four Directions Air, Inc. v. United States*,[303] after a plane struck equipment on the runway while preparing for takeoff, the pilot and the airline both sued for damage to reputation allegedly resulting from a crew's negligence in failing to move the equipment or warn of the obstruction.[304] Applying the reasoning found in *Catalano*, the court dismissed both

297. *See* Four Directions Air, Inc. v. United States, No. 5:06-CV-283 NAM/GHL, 2007 WL 2903942, at *3 (N.D.N.Y. Sept. 30, 2007) ("Under the 'economic loss rule,' 'a negligence action seeking recovery for economic loss will not lie.'" (quoting Suffolk Cnty. v. Long Island Lighting Co., 728 F.2d 52, 62 (2d Cir. 1984))).

298. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 1 (Tentative Draft No. 1, 2012) ("An actor has no general duty to avoid the unintentional infliction of economic loss on another."). *But see id.* cmt. b ("A minority of courts have stated an 'economic loss rule' to the effect that there is generally no liability in tort for causing pure economic loss to another. This Restatement does not use the expression in that manner or describe the law in that way. Subsection (a) states a more limited principle: not that liability for economic loss is generally precluded, but that duties of care with respect to economic loss are not general in character . . . .").

299. *See, e.g.*, Duffin v. Idaho Crop Imp. Ass'n, 895 P.2d 1195, 1200 (Idaho 1995) ("[E]conomic loss is recoverable in tort as a loss parasitic to an injury to person or property.").

300. Although the *Kennedy* court did not discuss the economic loss rule, it characterized the plaintiff's loss of reputation as pecuniary harm. *See* Kennedy v. McKesson Co., 448 N.E.2d 1332, 1334 (N.Y. 1983); *see also supra* note 248 and accompanying text.

301. *See* W.J.A. v. D.A., 43 A.3d 1148, 1159 (N.J. 2012) ("That defamation is a dignitary tort is not a matter of dispute. The question is whether its damage analysis should account for the dignitary aspect of the wrong." (quoting Rocci v. École secondaire Macdonald-Cartier, 755 A.2d 583, 592 (N.J. 2000) (internal quotation marks omitted))); 3 DOBBS ET AL., *supra* note 16, § 656, at 616 ("The tort action for defamation thus addresses dignitary, not pure economic harms."); *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 2 (Tentative Draft No. 1, 2012) ("Wrongs that might seem to cause only economic loss are sometimes regarded otherwise because the law takes an expansive view of what counts as a personal injury. Defamation, for example, is regarded as inflicting a kind of personal injury: harm to the plaintiff's reputation.").

302. *See* 3 DOBBS ET AL., *supra* note 16, § 649, at 588 n.1.

303. No. 5:06-CV-283 NAM/GHL, 2007 WL 2903942 (N.D.N.Y. Sept. 30, 2007).

304. *Id.* at *1–2.

plaintiffs' claims for reputational injury.[305] It reasoned that, because neither the pilot nor the airline suffered any predicate physical injury either to person or equipment (the airline rented, rather than owned, the plane), the claims were barred under the economic loss rule.[306]

The court also provided separate grounds for dismissing the pilot's claim: his claim of damage to reputation sounded in defamation (applying *Morrison*) and was thus time-barred by the one-year statute of limitations.[307] The court, however, refused to apply this restriction to the airline's claim.[308] The court noted that the airline was also pursuing "claims of loss of net revenue and expenses associated with procuring a replacement aircraft for its scheduled charter flights."[309] The court reasoned that it was "not clear that [the airline was] pursuing damages recoverable exclusively under a theory of defamation."[310] While this reasoning appears to reflect a restricted reading of *Morrison*, it nevertheless reaffirms the notion that the nature of the injury will determine the analysis: if the alleged injury is reputational, it will be treated as a defamation claim and subject to defamation's heightened limitations.[311]

C. Localizing the Wrong in the Defendant's Actions: When a Claim Proceeds Unfettered

As seen in cases such as *Kennedy*, *Quinones*, *Sharpe*, and *Wolfe*, some negligence claims for injury to reputation are allowed to proceed unencumbered by defamation displacement or economic loss considerations. These cases focus on the negligent actions taken by defendants, rather than on the defamatory information that may have been disseminated as a result.

This approach is well illustrated in another case brought by airline pilots, *Jorgensen v. Massachusetts Port Authority*.[312] Here, the pilots alleged that the airport operator, Massport, was negligent in failing to clear ice from the runway,causing their plane to skid off the runway.[313] The pilots claimed that, although Massport's negligence was found to be the proximate cause of the accident, their reputations had been harmed, resulting in impaired earning capacity.[314] Citing *Morrison*, the court noted that "[s]ome courts have emphasized the injury to reputation element more heavily than the communication element in ruling that claims alleging harm to reputation sound in defamation rather than in ordinary negligence or any other tort."[315]

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305. *Id.* at *4.
306. *Id.* at *3–4. The court rejected the plaintiffs' reliance on *Kennedy*, concluding that *Catalano* "represents the more current analysis of this issue." *Id.* at *3 n.3.
307. *Id.* at *6.
308. *See id.*
309. *Id.*
310. *Id.*
311. *See* Morrison v. Nat'l Broad. Co., 227 N.E.2d 572, 574 (N.Y. 1967).
312. 905 F.2d 515 (1st Cir. 1990).
313. *Id.* at 517–18.
314. *See id.*
315. *Id.* at 520.

However, the court reasoned that the pilot's claims did not allege communication by the defendant: "[T]he defendant's conduct here is not what conveyed to others the idea that caused harm to the plaintiffs' reputations. . . . And without a communication, plaintiffs' claims do not sound in defamation . . . ."[316] The court allowed the plaintiffs' claims to stand as negligence claims but, nevertheless, held that the evidence of the operator's negligence was insufficient to sustain the claims.[317]

D. The Hybrid Approach: Importing Defamation's Restrictions into Negligence

Yet another option exists. A court may allow a plaintiff's negligence claim for injury to reputation to stand but will import certain restrictions associated with the law of defamation. Such was the case in *Dongguk University v. Yale University*.[318] The court allowed the plaintiff to pursue a negligence claim for reputational injury but held that any communications involving matters of "public concern" were entitled to heightened First Amendment protections.[319] The court noted that "[t]he fact that statements may have been communicated privately does not remove them from the ambit of speech entitled to First Amendment protections."[320]

It should be noted that courts are often unclear about whether the plaintiff's negligence claim has simply been restricted by some of defamation's limitations or whether it has been completely displaced. In cases brought under the FTCA, the issue is faced head-on, as the statutory exemption of libel and slander claims requires a concrete classification of the claim.[321] However, in *Morrison*, for example, the court answered the question only for the purposes of dismissing the plaintiff's claim as time-barred.[322] It did not directly address whether defamation's statute of limitations was simply being imported as a restriction or whether the claim was completely displaced. Nonetheless, it seems fair to assume that by applying a statutory restriction specific to defamation, the court is fully classifying the claim as defamation, rather than a quasi-negligence claim.

316. *Id.*
317. *Id.* at 519–24.
318. 734 F.3d 113 (2d Cir. 2013); *see supra* notes 2–10.
319. *See Dongguk*, 734 F.3d at 131.
320. *Id.* at 129.
321. *See* 28 U.S.C. § 2680(h) (2012); *see also supra* note 108 and accompanying text.
322. *See also* Hamilton v. Powell, Goldstein, Frazer & Murphy, 306 S.E.2d 340, 343 (Ga. 1983) (holding that, because the plaintiff's legal malpractice suit sounded in tort as well as contract, the plaintiff "had one year within which to bring his action for damage to his reputation").

IV. A MULTIFACETED APPROACH FOR MULTIFACETED CLAIMS

"Well done is better than well said."[323]

Part IV puts forth a unified approach for handling these claims, advocating a multistep analysis that draws from the various approaches. Part IV.A argues that, when faced with negligence claims for reputational injury, courts should follow the *Jorgensen* court's approach by inquiring whether the injury is based on a communication. Part IV.B asserts that if the claim is not communication-based, it should be allowed to proceed as a simple negligence claim. Part IV.B speculates that most of these claims will fail: to succeed, the plaintiff must still meet the elements of a negligence claim (injury, duty, breach, and causation), and the claim will also be subject to that jurisdiction's rules regarding economic loss.

In contrast, Part IV.C argues that communication-based claims should be presumptively displaced by libel and slander. Courts should be careful to guard against plaintiffs simply recharacterizing libel and slander claims as negligence in order to avoid common law and statutory restrictions. However, Part IV.C then contends that certain types of claims that appear to be communication-based are nevertheless better characterized as negligence. When a defendant undertakes an action that, if performed negligently, will have foreseeable and dramatic consequences, that action should be the basis of a negligence claim.

A. Not All Claims "Sound" Alike: Distinguishing Between Communication-Based Claims and Noncommunicative Claims

While it may be convenient for a court to refer to a claim as sounding in defamation, the reasoning used in arriving at this conclusion has often been poorly defined. Courts following the approach taken by the *Morrison* court reason that defamation is "defined in terms of the injury" and that therefore all claims seeking recovery primarily for damage to reputation should be displaced by defamation.[324] Courts following the approach taken in *Jimenez-Nieves*, *Talbert*, and *Jorgensen*, however, ask whether the injury occurred as a result of a communication, either direct or indirect, by the defendant to a third party.[325]

While *Morrison*'s injury-based analysis provides courts with clear guidance on how to classify claims, it fails to account for other causes of action that also provide redress for injury to reputation—such as injurious falsehood, malicious prosecution, and intentional interference with contract.[326] Further, an injury-based analysis fails to reflect the more flexible approach actually taken by courts. For instance, although *Morrison* remains an often-cited case in New York, New York courts have not always closely hewed to its reasoning. In *Kennedy*, *Vitolo v. Dow Corning*

323. BENJAMIN FRANKLIN, POOR RICHARD: FOR THE YEARS 1733-1758, at 50 (The Heritage Press 1964) (1733–1758).

324. *See supra* notes 284–94 and accompanying text.

325. *See supra* notes 295–96, 312–17 and accompanying text.

326. *See supra* notes 166–67; *see also* Silbaugh, *supra* note 166, at 875.

Corp.,[327] and *Adirondack Combustion Technologies, Inc. v. Unicontrol, Inc.*,[328] the plaintiffs were allowed to proceed with their negligence claims despite the fact that they were seeking recovery for reputational harm.[329]

Courts should instead follow the approach taken by the courts in *Jorgensen*, *Jimenez-Nieves*, and *Talbert* in determining whether the injury to reputation was caused by the defendant's publication of defamatory material to a third party or whether the injury was the result of the defendant's noncommunicative actions. By doing so, courts will in essence determine whether, based on the facts alleged, the plaintiff's claim would otherwise be actionable as libel or slander. In other words, the *Jorgensen* analysis serves as proxy for determining whether the plaintiff's claim would meet the basic elements of a prima facie defamation claim. Because the presence of a communication to a third party will often determine whether the plaintiff has a prima facie defamation claim, courts may simply refer to these claims as being "communication-based."[330]

This analysis requires that courts acknowledge that there are two distinct types of negligence claims for injury to reputation: those that are communication-based and those that are not.[331] Each requires different policy and doctrinal consideration. Therefore, as a first step in analyzing a negligence claim for reputational injury, the court should determine whether or not it is communication-based.

B. Noncommunicative Claims: A Simple Solution

A claim that is not based on the defendant's communication of defamatory material to a third party should not be forced through the legal framework of defamation or be subject to defamation's heightened requirements. Because the plaintiff would be unable to meet the requirements of a prima facie defamation claim, the claim should be allowed to stand as a simple negligence claim. This class of claims includes those brought by the pilots in both *Jorgensen*[332] and *Four Directions*,[333] as well as products liability cases.[334] Several factors operate in favor of allowing these claims to proceed on their own terms, rather than displacing them with defamation.

Common law privileges cease to function in the context of noncommunicative claims. Privileges shield defendants from liability in libel and slander in order to encourage socially useful communications.[335] However, because noncommunicative negligence claims do not involve the

327. 634 N.Y.S.2d 362 (Sup. Ct. 1995).
328. 793 N.Y.S.2d 576 (App. Div. 2005).
329. *See supra* notes 244–49 and accompanying text.
330. *See* Silbaugh, *supra* note 166, at 886. While Silbaugh does not use this terminology, she also recommends that courts "ask at the outset whether there is any communication by the defendant associated with the harm." *Id.*
331. *See* Wheeler, *supra* note 216, at 1115–16 (drawing the same distinction).
332. *See supra* notes 312–17 and accompanying text.
333. *See supra* notes 303–11 and accompanying text.
334. *See supra* Part II.D.
335. *See supra* Part I.C.2.

communication of an idea, either direct or indirect, the common law restrictions of defamation should not apply. Further, to the extent that the claim does involve a communication, matters of "public concern" may still be entitled to heightened First Amendment protections.[336]

The nature of the wrong involved in noncommunicative negligence claims is qualitatively different from the nature of the wrong in libel and slander. Negligence claims for reputational injury typically involve instances of "misplaced blame."[337] In other words, the defendant's negligent actions caused an injury that is then, mistakenly, attributed to the plaintiff; while in the eyes of the law the plaintiff is exonerated of wrongdoing, in the eyes of the public, he is the responsible party.[338] These claims trace their injury to the defendants' actions rather than the defendants' communications.[339] Purely "action-based" claims are more within the province of negligence than libel and slander, and the law of defamation is ill equipped to handle these claims.

Allowing plaintiffs to pursue recovery for this type of wrong under a theory of negligence is unlikely to lead to an increase in liability. Plaintiffs will often have difficulty recovering damages, as they must still succeed in meeting the elements of a negligence claim—i.e., injury, duty, breach, and causation.[340] As was the case in *Jorgensen* and *Dongguk*, many of these claims will likely fail as a matter of law due to problems with proximate cause.[341]

Further, these claims will face an uphill battle due to the economic loss doctrine.[342] Courts and commentators alike often have trouble determining whether the injuries in these types of claims are best characterized as reputational or economic.[343] While injury to reputation and economic loss are not often interchangeable,[344] these claims almost always seek to recover for purely financial injury[345]—typically loss of employment or lowered earning capacity. And by bringing a claim of negligence, the plaintiff has foregone the possibility of presumed damages. Thus, for the purposes of analyzing negligence claims for pure reputational harm, the injury often will be best characterized as economic loss.[346] Therefore, a negligence

336. *See, e.g.*, *supra* notes 318–19 and accompanying text (discussing *Dongguk*). It is arguable that Dongguk's negligence claims would have been better characterized as negligent misrepresentation. *See supra* note 200 and accompanying text. This raises the separate question of whether the negligence claims should have been displaced by negligent misrepresentation. While the question is beyond the ambit of this Note, it seems possible that the answer is "yes." *See generally* RESTATEMENT (SECOND) OF TORTS § 552 (1977).

337. *See* Silbaugh, *supra* note 166, at 892.

338. *See supra* notes 312–17 and accompanying text (discussing *Jorgensen*).

339. *See supra* notes 312–17 and accompanying text (discussing *Jorgensen*).

340. *See supra* note 168 and accompanying text.

341. *See supra* notes 2–10, 312–17 and accompanying text.

342. *See supra* Part III.B.

343. *See supra* notes 256–58 and accompanying text; *see also supra* Part III.B.

344. *See supra* Part I.B.3.

345. *See* 3 DOBBS ET AL., *supra* note 16, § 649, at 588.

346. *See* Wheeler, *supra* note 216, at 1127.

claim for injury to reputation should be subject to the economic loss rules of that jurisdiction.

When noncommunicative negligence claims for damage to reputation are viewed this way—as action-based and alleging financial, rather than purely reputational, injury—it seems clear that these claims should not be displaced by defamation but rather should be treated as simple negligence claims. Under this framework, the court's treatment of the pilot's claim in *Four Directions* is only half-correct.[347] While economic loss considerations may have militated against allowing the pilot's claim to proceed, the court should not have dismissed it on the alternative grounds that it sounded in defamation.

One could argue that applying either the economic loss rule or defamation displacement to these claims would produce the same result.[348] However, this would be true only in jurisdictions that rigidly bar recovery for economic loss. For instance, by such reasoning, the plaintiffs in *Kennedy* and *Vitolo* should not have been allowed to pursue recovery. But these cases are in accord with the Restatement's current treatment of the issue.[349] Interestingly, the *Kennedy* court did not discuss *Morrison*, defamation displacement, or the economic loss rule. However, according to current Restatement theory, such a claim resounds in the heart of products liability.[350]

C. Communication-Based Claims: A Context-Sensitive Analysis

Negligence claims that involve a communication to a third party present additional challenges for courts, as these claims often appear to satisfy the requirements for a prima facie defamation claim. This class of claims includes those for negligent maintenance of personnel records,[351] negligent investigation,[352] negligent drug testing[353], and negligent issuance of credit.[354] Because communication-based claims often would otherwise be actionable as either libel or slander, they really do sound in defamation. For this reason, one could argue that communication-based claims should be handled exclusively as defamation claims.[355]

Several policy considerations support this approach. First, a bright-line rule displacing all communication-based claims with defamation would

347. *See supra* notes 303–11 and accompanying text.

348. *See* 3 DOBBS ET AL., *supra* note 16, § 649, at 588 n.2 (citing Wheeler, *supra* note 216, at 1107).

349. *See supra* note 256 and accompanying text.

350. *Catalano* did not discuss *Kennedy* and reached an opposite conclusion. *See supra* notes 250–53 and accompanying text. The *Four Directions* court noted the disagreement and concluded that *Catalano* represented the most current state of the law. *See supra* note 306 and accompanying text. Under the analytical framework proposed by this Note, *Kennedy* and the Restatement (Third) of Torts would instead be most on point.

351. *See supra* Part II.A.

352. *See supra* Part II.B.

353. *See supra* Part II.C.

354. *See supra* Part II.E.

355. *See* Wheeler, *supra* note 216, at 1115–16 (advocating this approach).

provide courts with clear guidance for handling these claims. Second, it would prevent plaintiffs from circumventing some of defamation's heightened limitations—such as common law privileges, as well as statutes of limitation and statutory exemptions—by simply recharacterizing their claims as negligence.[356] Third, this approach would force courts to closely scrutinize the nature of the plaintiff's injury, regardless of what is pleaded.[357] Fourth, it would prevent plaintiffs from pursuing concurrent claims for the same injury, potentially exposing defendants to double liability.

Within this framework, courts would retain the option of removing or relaxing common law privileges to allow meritorious claims to move forward.[358] For example, if the risk of extreme harm is foreseeable, then judges could hold that a qualified privilege should not apply.[359] While this determination would necessarily be made on a case-by-case basis, this approach would force judges to directly confront the issue of privileges, rather than avoiding the issue with a negligence analysis.[360]

However, as seen above, courts often have not adhered to this rule, and not without good reason. In many of the communication-based cases discussed above, the injury can be traced back to a negligent action of the defendant, and arguably, the undertaking of this action by the defendant creates a duty to the plaintiff—a duty above and beyond the generalized duty not to injure another's reputation through libel and slander.

Take, for example, the *Quinones* court's analysis of the plaintiff's claim for negligent management of personnel records.[361] The court distinguished between the duty to maintain accurate personnel records and the duty not to disseminate defamatory information. The court allowed the plaintiff to pursue recovery under a negligence theory because it focused on the defendant's noncommunicative actions. However, this bifurcation is troubling, as it risks redundancy. The negligent maintenance of records is not in itself harmful to the plaintiff. It is only when this information is communicated to a third party that the plaintiff suffers any harm. Additionally, this analytical framework potentially exposes the defendant to double liability, as the plaintiff would conceivably have two claims—one for negligence and one for defamation.[362]

This same reasoning could be applied to claims for negligent testing and negligent issuance of credit. Much like the maintenance of personnel

356. *See supra* note 292.

357. *See supra* note 238.

358. This approach is advocated by the drafters of the Restatement (Third) of Torts with respect to negligent testing claims. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 1 cmt. e (Tentative Draft No. 1, 2012).

359. *See* 3 DOBBS ET AL., *supra* note 16, § 649, at 591 n.14 ("[T]he existence of a general privilege in defamation law does not necessarily mean that, as a matter of defamation law, the privilege should be applied in every situation.").

360. *See* Wheeler, *supra* note 216, at 1115–16.

361. *See supra* notes 172–75 and accompanying text.

362. The issue of double liability was moot in *Quinones* because the government retained immunity for libel and slander under the FTCA.

records, negligently conducting a urinalysis that results in a false-positive is not itself harmful to the plaintiff. The plaintiff is injured only when the defamatory information is conveyed to a third party. Similarly, a financial institution that negligently issues credit to an imposter does not injure the plaintiff until it communicates the delinquency of the account to a third party.

However, courts rightly are more inclined to allow plaintiffs to pursue recovery for negligent drug testing and negligent credit issuance under a theory of negligence. In these cases, the defendant has undertaken an action that will have dramatic and highly foreseeable consequences if performed negligently. The injury is markedly more foreseeable than that in a garden-variety libel or slander claim and, arguably, more foreseeable than any injury resulting from the negligent management of personnel records.

Further, as with noncommunicative claims discussed above, the alleged injury might be better viewed as economic rather than reputational. Indeed, in many of the drug-testing cases, the plaintiffs did not plead injury to reputation, although reputational injury is clearly implicated. Courts have seized on this opportunity to justify allowing the claims to proceed as negligence.[363]

Given these considerations, it becomes understandable why courts are willing to recognize a duty to the plaintiff emanating from the defendant's actions, and it begins to appear that negligence, not defamation, is the better vehicle for these claims. The wrong finds its genesis in actions undertaken by the defendant. The context in which these claims arise is narrow and well defined, so the defendant will not be exposed to unlimited liability from an indeterminate class of plaintiffs. The injury is both highly foreseeable and drastic, and it is better characterized as economic than as purely reputational. Further, the defendant is in the best position to prevent the injury from occurring. These same considerations make *Wolfe* a leading case for the drafters of the Restatement.[364]

Therefore, communication-based claims—i.e., claims that would appear to be otherwise actionable as defamation—are best thought of as *presumptively* displaced by libel and slander. However, in limited contexts, this presumption may be overcome by actions undertaken by the defendant that establish a duty between the defendant and the plaintiff. Because foreseeability of harm remains a key factor in allowing the plaintiff to pursue recovery under a negligence theory, the alleged injury will be better characterized as economic rather as than reputational. However, as with noncommunicative claims, communication-based negligence claims for reputational harm that are not displaced by defamation nevertheless will be subject to the economic loss considerations of that particular jurisdiction.

363. *See, e.g.*, *supra* note 238 and accompanying text.
364. *See supra* notes 281–82 and accompanying text.

CONCLUSION

When plaintiffs bring claims of negligence to recover for injury to reputation, courts are faced with difficult questions and often have taken divergent approaches in dealing with these claims. One approach holds that the law of defamation provides the exclusive path to recovery for reputational harm; thus, negligence claims for injury to reputation are displaced by defamation. Another approach allows the claim to stand but nevertheless bars recovery under economic loss justifications. Still another approach allows the plaintiff to pursue recovery without discussion of defamation displacement or economic loss restrictions.

Courts faced with these claims should first determine if the injury is based on a communication by the defendant to a third party. If the claim is noncommunicative in nature, it should be allowed to proceed as a simple negligence claim, but one that is subject to the economic loss considerations of that jurisdiction. If, however, the negligence claim is communication-based, it should be presumptively displaced by the law of defamation. This presumption may be overcome if the injury has its origins in actions taken by the defendant and these actions establish a duty between the defendant and plaintiff. The claim then should be allowed to proceed as a negligence claim, but—as with noncommunicative claims—subject to the economic loss doctrines of that jurisdiction.