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# DUTY TO THIRD PARTIES IN EMPLOYMENT REFERENCES: A POSSIBLE POISONOUS POTION FOR THE HEALTH CARE INDUSTRY?

*Allan J. Jacobs, M.D.\**

A series of cases has applied the Restatement (Second) of Torts § 311 (hereinafter “§ 311”) to find third-party liability for physical harm proximately caused by negligent misrepresentation in employment references. This has a potentially significant effect on health care institutions and physician administrators. Credentialing for privileges in hospitals and other health care institutions requires references. Consequently, and in contrast to other industries, it is customary for health care institutions to provide references for professionals on request. However, health care professionals frequently perform acts that may give rise to a prima facie case for negligence, with damages that include physical harm. The language of § 311, as explicated by comments (d) and (e) and the accompanying examples, seems to permit a third-party cause of action against a recommender based on failure to report such acts, which the recommender may or may not in good faith consider to be negligent. Fortunately, the three courts that have heard cases against recommenders of health care workers have failed to find a cause of action for negligent misrepresentation. Two of these courts do not presently accept § 311 as law. The third court defined negligent misrepresentation as omission of mention of bad acts, as opposed to affirmative praise. These decisions are discussed below. Nonetheless, decisions in cases unrelated to health care in some large states suggest that their courts might rule otherwise. Such rulings would, in my opinion, create a chaotic situation and would impair medical care.

In this article<sup>1</sup> I shall (1) explain the system of credentialing that necessitates exchange of information, including references (2) discuss the

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parameters of duty to provide accurate information in the medical context, and (3) propose appropriate legal boundaries for such a duty.

### I. THE NATURE OF MEDICAL STAFF MEMBERSHIP AND THE CREDENTIALING PROCESS

Residency and credentialing are two institutions that are unique to the medical profession. Residency is a formal, structured program lasting several years. It constitutes a transition between school and independent practice. States typically require some residency training for medical licensure,<sup>2</sup> and successful completion of a residency program ordinarily is required as a prerequisite for obtaining hospital privileges. Residency has characteristics of both an educational program and of employment, constituting “the transitional phase between the pure academics of medical school and the realities of medical practice.”<sup>3</sup> Residents combine medical practice under supervision of senior doctors with formal academic exercises that include gradually increased responsibilities. Satisfactory completion of each year’s work is required for promotion. Residency programs must certify that their graduates are able to practice their medical specialty competently and independently.<sup>4</sup>

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1. Several terms used in this paper may differ from ordinary or legal usage. This is done for purposes of defining classes of actors in a brief, non-awkward manner.

“*Physician*” also denotes dentists, podiatrists, psychologists, and other doctoral level professionals who may practice independently in a hospital setting.

“*Hospital*” also denotes all institutions that share the regulatory requirements for physician credentialing to be discussed in this article. Such institutions include, *inter alia*, nursing homes, outpatient surgical centers, and outpatient clinics under the aegis of comprehensive health care institutions.

“*Employee*” also denotes all physicians who work under institutional supervision, including actual employees, independent contractors, residents, independent physicians with privileges, etc.

2. See, e.g., CAL. BUS. & PROF. CODE § 2096 (West 2003); CAL. CODE REGS. tit. 16, § 1321 (2007); N.Y. COMP. CODES R. & REGS. tit. 8, § 60.3 (2000).

3. *Interfaith Med. Ctr. v. Sabiston*, 527 N.Y.S.2d 48, 49 (N.Y. App. Div. 1988).

4. ACCREDITATION COUNCIL FOR GRADUATE MED. EDUC., COMMON PROGRAM REQUIREMENTS 10 (2007), [http://www.acgme.org/acWebsite//dutyHours/dh\\_dutyHoursCommonPR.pdf](http://www.acgme.org/acWebsite//dutyHours/dh_dutyHoursCommonPR.pdf).

The Accreditation Council for Graduate Medical Education (ACGME), which supervises and accredits American residency programs,<sup>5</sup> has explicit requirements for formal evaluation of residents. Reviews by faculty, patients, peers, self, and other professional staff of residents' performance as "doctors-in-training" are maintained in residents' files.<sup>6</sup> However, in addition to their educational capacity, residents are also employees of the hospitals where they are in training,<sup>7</sup> which makes them eligible for workers' compensation benefits.<sup>8</sup> In fact, New York courts recognize the status of residents as both students and employees.<sup>9</sup>

Residents, as students, invariably make errors that are recognized and documented in their evaluations. Further, resident work, by its very nature, results in a large number of evaluations since residents receive multiple evaluations with variation in quality and accuracy from each of the services through which they rotate. This can result in the existence of arguably unjustified and unrepresentative negative statements of opinion in residents' records. The resulting negative information present in residents' files raises an issue regarding what should be reported in employment references during the credentialing process to avoid liability for misrepresentation.

Credentialing is a formal process that provides a basis for hospitals to supervise the physicians who treat patients in them. Many physicians are neither employed by, nor compensated by, the hospitals to which they admit patients. Regardless of whether they are employees, independent contractors, or receive no compensation, attending physicians must belong to the medical staff of any hospital in which they have responsibility for patient

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5. The ACGME is a private organization that "evaluates and accredits medical residency programs in the United States." ACCREDITATION COUNCIL FOR GRADUATE MED. EDUC., THE ACGME AT A GLANCE 1, <http://www.acgme.org/acWebsite/newsRoom/ataglance.pdf> (last visited Apr. 17, 2008). It is operated by a board appointed by its member organizations: the American Board of Medical Specialties, the American Hospital Association, the American Medical Association, the Association of American Medical Colleges, and the Council of Medical Specialty Societies. *Id.*

6. *Easaw v. St. Barnabas Hosp.*, 537 N.Y.S.2d 944, 948–49 (N.Y. Sup. Ct. 1989).

7. *Samper v. Univ. of Rochester Strong Mem'l Hosp.*, 528 N.Y.S.2d 958, 961 (N.Y. Sup. Ct. 1987) ("[T]he residency program was both a job and an educational prerequisite to the career goals of the plaintiffs.").

8. *Bernstein v. Beth Israel Hosp.*, 140 N.E. 694 (N.Y. 1923).

9. *See Easaw*, 537 N.Y.S.2d at 948–49; *see Samper*, 528 N.Y.S.2d at 961; *see also Allawi v. State Univ. of New York*, slip op. 40502(U) at 2 (N.Y. Sup. Ct. Nov. 15, 2002).

care. As such, the medical staff grants its physicians privileges that specifically denote what procedures the physician may perform and on which categories of patients they may perform them. The Joint Commission for Accreditation of Healthcare Organizations (JCAHO)<sup>10</sup> evaluates hospitals' procedures in granting medical staff membership and privileges, collectively called credentialing, and ensures hospitals' compliance with those procedures.

JCAHO is a non-governmental organization<sup>11</sup> whose accreditation is required for reimbursement by Medicare and by many private insurance companies for inpatient care. JCAHO requires that the hospitals and other health-care organizations it accredits have "an organized, self-governing medical staff that provides oversight of care, treatment, and services provided by practitioners with privileges."<sup>12</sup> Hospital by-laws must define the criteria and qualifications for appointment to the medical staff<sup>13</sup> and must describe the entire credentialing process.<sup>14</sup>

As part of the credentialing process, "current competence . . . is *verified in writing by peers* knowledgeable about the applicant's professional performance."<sup>15</sup> This written evaluation must, at a minimum, document "the applicant's actual clinical performance in general terms, the satisfactory discharge of his or her professional obligations as a medical staff member, and his or her ethical performance."<sup>16</sup> Privileges must be renewed

10. See JOINT COMMISSION ON ACCREDITATION OF HEALTHCARE ORGS., FACTS ABOUT THE JOINT COMMISSION, [http://www.jointcommission.org/AboutUs/Fact\\_Sheets/joint\\_commission\\_facts.htm](http://www.jointcommission.org/AboutUs/Fact_Sheets/joint_commission_facts.htm) (last visited Apr. 17, 2008).

11. *Id.* The members of JCAHO include the American College of Physicians, the American College of Surgeons, the American Dental Association, the American Hospital Association, and the American Medical Association.

12. JOINT COMM'N ON ACCREDITATION OF HEALTHCARE ORGS., COMPREHENSIVE ACCREDITATION MANUAL FOR HOSPITALS: THE OFFICIAL HANDBOOK MS-6 (2007) [hereinafter JCAHO HANDBOOK].

13. *Id.*

14. *Id.* at MS-8.

15. *Id.* (emphasis added). The discussion of this standard implies that these peers are physicians at institutions at which the applicant works or has worked, as it recommends that the hospital obtain data from these peers about the volume of the physician's experience.

16. *Id.* at MS-18.

at least every two years.<sup>17</sup> JCAHO mandates that recommendations from peers in the same professional discipline as the applicant be used as part of the basis for the initial granting of privileges. Peer recommendations are used to recommend individuals for the renewal of clinical privileges when insufficient practitioner-specific data are available.<sup>18</sup> Additionally, federal law requires that hospitals must access the National Practitioner Data Bank (NPDB) each time they grant or renew privileges.<sup>19</sup> The NPDB is a registry maintained by the Bureau of Health Professionals of the Health Resources and Services Administration of the Federal Department of Health and Human Services.<sup>20</sup> Appropriate organizations must report all malpractice payments, adverse licensure actions, and actions that restrict clinical privileges to the NPDB. The JCAHO also requires, as a standard of accreditation, that hospitals access the NPDB whenever they grant or renew privileges.<sup>21</sup> Once credentialed, physicians who practice within a hospital are subject to rules and supervision. For example, they are responsible to a supervisor, who is usually the department chair. Nonetheless, the medical staff relationship does not constitute employment.<sup>22</sup>

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17. JCAHO HANDBOOK, *supra* note 12, at MS-20.

18. *Id.* at MS-25.

19. 42 U.S.C. § 11135 (2006).

20. *Id.* § 11101.

21. JCAHO HANDBOOK, *supra* note 12, at MS-15, 20, 21.

22. First, the medical staff relationship has its basis in the hospital by-laws, and not a collective bargaining or employee-specific agreement. Second, medical staff members may enjoy statutory rights not granted to employees. New York, for example, precludes hospitals from taking adverse actions against a physician's privilege without extending to him the protections specified in its by-laws. See N.Y. PUB. HEALTH LAW § 2801-b(1) (McKinney 2007)

It shall be an improper practice for the governing body of a hospital to . . . exclude or expel a physician . . . from staff membership in a hospital or curtail, terminate or diminish in any way a physician's . . . professional privileges in a hospital, without stating the reasons therefor, or if the reasons stated are unrelated to standards of patient care, patient welfare, the objectives of the institution or the character or competency of the applicant."

*Id.* See also *Gelbard v. Genesee Hosp.*, 664 N.E.2d 1240, 1240 (N.Y. 1996). Depending on the state, medical staff membership with clinical privileges may constitute an

The requirements for hospitals to obtain references (as well as additional background information, as available, for example, by checking the NPDB) may be based on state statute as well as on JCAHO regulations. Such is the case in New York.<sup>23</sup> For example, prior to granting a physician privileges, hospitals must request information from all hospitals to whose staff the physician previously belonged regarding any adverse actions those hospitals took against the physician in question.<sup>24</sup> New York imposes a corresponding duty upon hospitals to respond to such requests.<sup>25</sup> Other states require investigation of physicians prior to admission to the medical staff or the granting of privileges; California, for example, uses the prevailing standards of JCAHO in this regard.<sup>26</sup>

Because of the relationships between hospitals and physicians and the obligations that they entail, hospitals and their agents frequently transmit evaluative information to other hospitals and their agents. The remainder of this article discusses whether inaccurate transmission of such information creates an obligation to parties other than the hospital receiving the information.

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enforceable contract between a hospital and a physician or may impose a unilateral non-contractual obligation on the hospital or the physician, *see* Janda v. Madera Cmty. Hosp., 16 F. Supp. 2d 1181, 1184–86 (E.D. Cal. 1998) for a discussion of this issue, but it usually does not involve compensation. Additionally, medical staff membership differs from an employment relationship in that a physician is not an agent of a hospital by virtue of having privileges there, and the hospital is not vicariously liable for a physician's activities at that hospital by virtue of granting a physician privileges. *See* Megrelishvili v. Our Lady of Mercy Med. Ctr., 739 N.Y.S.2d 2, 6 (N.Y. App. Div. 2002) (quoting Raschel v. Rish, 488 N.Y.S.2d 923, 925 (N.Y. App. Div. 1985)).

23. N.Y. COMP. CODES R. & REGS. tit. 10, §§ 405.4(b)(4)–(5), 405.6(b)(7) (2006).

24. N.Y. PUB. HEALTH LAW § 2805-k(2)(c) (LexisNexis 2008).

25. *Id.* § 2805-k(4).

26. *See* CAL. HEALTH & SAFETY CODE § 32128(a)(2) (West 2007), CAL. CODE REGS. tit. 22 § 71503 (2007).

## II. DUTIES TO THIRD PARTIES IN WRITING EMPLOYMENT REFERENCES

### A. *Relationship Between Negligent Hiring/Credentialing and Negligent Misrepresentation*

Since hospitals have a duty to investigate physicians to whom they give privileges, it is logical to assign responsibility to providers of employment references for making them accurate and meaningful. This requires that evaluators face some form of sanction for providing inaccurate references and establishes the basis of an inquiry regarding to whom recommenders are responsible, and what they must do to make references accurate and meaningful.

### B. *The Role of Restatement (Second) Torts § 311.*

Restatement (Second) of Torts § 311 reads as follows:

#### § 311. Negligent Misrepresentation Involving Risk of Physical Harm

(1) One who negligently gives false information to another *is subject to liability for physical harm* caused by action taken by the other in reasonable reliance upon such information, where such harm results

(a) to the other, or

(b) *to such third persons* as the actor should expect to be put in peril by the action taken.

(2) Such negligence may consist of failure to exercise reasonable care

(a) in ascertaining the accuracy of the information, or

(b) in the manner in which it is communicated.<sup>27</sup>

Liability for negligent misrepresentation under § 311 to third parties who incur physical harm requires nothing more than reasonable reliance on a false statement. The plain language of the Restatement does not require the information provider to intend that the receiving party rely on the information, or that the provider foresee that physical harm may result. Employment references for physicians routinely contain factual and evaluative statements that, if untrue, may lead to third-party harm, even if that harm is unforeseeable.<sup>28</sup> This raises two important questions: First, does

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27. RESTATEMENT (SECOND) OF TORTS § 311 (1977) (emphasis added).

28. Although, § 311 does not state that the physical harm must be foreseeable, this seems to be implied, since proximate cause is required to impute liability for a negligent act, and foreseeability is implied in proximate cause. In fact, comments *d* and *e* to § 311 emphasize the high standards to which an actor is held when he contemplates reliance on his statement. These comments read:



§ 311 tacitly imply a requirement for foreseeability, inasmuch as this is generally considered to be an element of proximate causation? Second, if §

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d. Care in ascertaining facts and forming judgment. Where the actor furnishes information upon which he knows or should realize that the security of others depends, he is required to exercise the care of a reasonable man under the circumstances to ascertain the facts, and the judgment of a reasonable man in determining whether, in the light of the discovered facts, the information is accurate. His negligence may consist of failure to make proper inspection or inquiry, or of failure after proper inquiry to recognize that the information given is not accurate.

Illustration:

8. The A Boiler Insurance Company undertakes as part of its services to inspect the boiler of B. It issues a certificate that the boiler is in good condition for use. In reliance upon this certificate, B uses the boiler. The boiler bursts, owing to a defect which a reasonably careful inspection would have disclosed. Explosion of the boiler wrecks the adjacent building of C and causes bodily harm to him. The A Company is subject to liability to C for his bodily harm and the wrecking of his building caused by the explosion of the boiler.

e. Care in use of language. The negligence for which the actor is liable under the statement in this Subsection consists in the lack of reasonable care to furnish accurate information. It is, therefore, not enough that the actor has correctly ascertained the facts on which his information is to be based and has exercised reasonable competence in judging the effect of such facts. He must also exercise reasonable care to bring to the understanding of the recipient of the information the knowledge which he has so acquired.

Illustration:

9. The A Boiler Insurance Company undertakes as part of its service to inspect the boiler of B. The A Company makes a careful inspection, and correctly concludes that the boiler is unsafe. Through the negligence of its clerk, it issues a certificate which, while correctly stating all the defects in the boiler, gives the misleading impression that the boiler is nevertheless safe. In reliance on the certificate, B continues to use the boiler, which bursts because of the defects and wrecks the adjacent building of C, causing bodily harm to C. The A Company is subject to liability to C for his bodily harm and the wrecking of his building.

311 creates an exception to the need for foreseeability either as an element of duty or an element of causation, should it be applicable to medical employment references? These questions are better answered in light of existing case law applying § 311 to employment references. A discussion of these cases follows below.

C. *Decisions Based on § 311: Randi W. and Related Cases*

There are several reported decisions where liability is imputed to a third party for negligent misrepresentation for failure to accurately disclose negative information regarding a prospective employee. In *Gutzan v. Altair Airlines*, the first reported case to address this issue, the defendant was an employment agency.<sup>29</sup> A jobseeker told the defendant that he had been incarcerated on the basis of unsubstantiated charges of rape while serving in the United States Army.<sup>30</sup> He had, in fact, been convicted of rape, and the defendant would have learned this had it investigated the matter.<sup>31</sup> The defendant agency placed the applicant in a position as a data processor, where he subsequently engaged in inappropriate sexual activity first of a nonviolent nature, but culminating in rape.<sup>32</sup> The employment agency was found liable to the victim for negligent misrepresentation based on § 311.<sup>33</sup>

In *Golden Spread Council, Inc. v. Akins*,<sup>34</sup> the defendant, Golden Spread Council (GSC), which oversaw local Boy Scout troops, recommended Estes as a scoutmaster without reporting to the new troop knowledge that Estes may have molested a child.<sup>35</sup> The troop retained Estes.<sup>36</sup> Estes then persuaded the child who he had been accused of molesting to switch to the new troop, and molested him again. A lawsuit filed on behalf of the child against GSC alleged that GSC had a duty to report the prior molestation

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29. *Gutzan v. Altair Airlines*, 766 F.2d 135, 136 (3d Cir. 1985).

30. *See id.* at 137.

31. *See id.* at 138.

32. *See id.* at 137–38.

33. *See id.*

34. *Golden Spread Council, Inc. v. Akins*, 926 S.W.2d 287, 288 (Tex. 1996).

35. *Id.* at 289.

36. *Id.*

when recommending Estes to the new troop. GSC had not actually hired Estes, so it could not be sued under a negligent hiring doctrine.<sup>37</sup> Although the majority turned to Restatement (Second) of Torts § 302(b)<sup>38</sup> to find that GSC owed a duty to the child,<sup>39</sup> the dissent observed that the duty described by the court was actually that described in § 311.<sup>40</sup> This seems to be the first suggestion of the possibility of liability based on § 311 by an employer supplying a recommendation.

The highly publicized case *Randi W. v. Muroc* attempted to solve the problem of ascribing a duty of care to a third party by developing a theory of indirect reliance.<sup>41</sup> While working as an assistant principal at a middle school in the Livingston Union School District in Livingston, California, Robert Gadams allegedly molested the thirteen-year-old plaintiff.<sup>42</sup> It became known that Gadams had been relieved or forced to resign from employment at three other California school districts, specifically Muroc, Mendota, and Golden Plains, for various acts of sexual touching and other inappropriate behavior towards middle school students.<sup>43</sup> These three districts, all named defendants in this case, each provided very positive employment references for Gadams, at least two of which specifically praised his interaction with students.<sup>44</sup> The California Supreme Court held

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37. *Id.* at 290.

38. *Id.* at 291–92.

39. *Id.* Section 302 states, “[a] negligent act or omission may be one which involves an unreasonable risk of harm to another through the foreseeable action of the other, a third person, an animal, or a force of nature.” RESTATEMENT (SECOND) OF TORTS § 302 (1977) (emphasis added).

40. *Golden Spread Council*, 926 S.W.2d at 295 (Enoch, J., dissenting).

41. *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 584 (Cal. 1997).

42. *Id.* at 585.

43. *Id.* at 585–86.

44. *See id.* The writer from Mendota wrote that he exhibited “‘genuine concern’ for students and [had] ‘outstanding rapport’ with everyone, and concluded, ‘I wouldn’t hesitate to recommend Mr. Gadams for any position!’” An official from Golden Plains stated that he “would recommend him for almost any administrative position he wishes to pursue.” The letter from Medoc cited him for helping to make the school “a safe, orderly and clean environment for students and staff.” It recommended Gadams “for an assistant principal position or equivalent position without reservation.” *Id.*

the defendants liable to the plaintiff for failing to warn Livingston of Gadams's prior history of sexual acts toward students.<sup>45</sup> It found a duty of care under § 311.<sup>46</sup> It held that, in California, "the general rule is that all persons have a duty to use ordinary care to prevent others from being injured as the result of their conduct."<sup>47</sup> It applied the *Rowland* criteria of "foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury . . . the moral blame attached to the defendant's conduct, [and] the policy of preventing future harm."<sup>48</sup> Rejecting the need for foreseeability of injury to the plaintiff<sup>49</sup> or the need for a special relationship between plaintiff and defendant,<sup>50</sup> the *Randi W.* court held that:

consistent with Restatement Second of Torts sections 310 and 311 . . . the writer of a letter of recommendation owes to third persons a duty not to misrepresent the facts in describing the qualifications and character of a former employee, if making these misrepresentations would present a substantial, foreseeable risk of physical injury to the third persons. *In the absence, however, of resulting physical injury, or some special relationship between the parties, the writer of a letter of recommendation should have no duty of care extending to third persons for misrepresentations made concerning former employees. In those cases, the policy favoring free and open communication with prospective employers should prevail.*<sup>51</sup>

The court then concluded that the letters, as written, contained misrepresentations.

[W]e view this case as a "misleading half-truths" situation in which defendants, having undertaken to provide some information regarding

45. *Id.* at 582.

46. *Randi W.*, 929 P.2d at 591. The court also found a duty of care under Restatement (Second) of Torts § 310 (intentional misrepresentation resulting in physical harm). *Id.*

47. *Id.* at 588 (citing *Rowland v. Christian*, 443 P.2d 561, 564 (Cal. 1968)).

48. *Id.* (quoting *Ballard v. Uribe*, 715 P.2d 624, 629 (Cal. 1986)) (emphasis omitted).

49. *Id.* at 588–89 (quoting *Ballard*, 715 P.2d at 629).

50. *Id.* at 588 (citing *Rowland*, 443 P.2d at 563).

51. *Id.* at 591 (emphasis added).

Gadams's teaching credentials and character, were obliged to disclose *all other facts which "materially qualify" the limited facts disclosed*. . . . [H]aving volunteered this information, defendants were obliged to complete the picture by disclosing material facts regarding *charges and complaints* of Gadams's sexual improprieties.<sup>52</sup>

As stated above, the court dealt with the need for reliance by the plaintiff as an element of misrepresentation by adopting a doctrine of indirect reliance. The plaintiff relied upon her school district, and the district, in turn, relied upon the prior employers. This chain of reliance established the duty:

We agree with the [intermediate appellate court's] reliance analysis [that "it was unnecessary under section 311 of the Restatement Second of Torts for plaintiff to plead her own reliance on defendants' misrepresentations, as long as the recipient of those misrepresentations (ultimately, Livingston) reasonably relied on them in hiring Gadams"] . . . . Under the Restatement provisions, plaintiff need only allege that her injury resulted from action that *the recipient* of defendants' misrepresentations took in reliance on them. In a case involving false or fraudulent letters of recommendation sent to prospective employers regarding a potentially dangerous employee, it would be unusual for *the person ultimately injured* by the employee actually to "rely" on such letters, much less even be aware of them.<sup>53</sup>

Thus, the California Supreme Court found a duty to disclose allegations of misconduct that were not formally substantiated to third party plaintiffs about whom the defendant knew nothing. Further, the court emphasized that "[a]s for public policy . . . [o]ne of society's highest priorities is to protect children from sexual or physical abuse."<sup>54</sup>

52. *Randi W.*, 929 P.2d at 592 (emphasis added) (internal citations omitted). It is noteworthy that the court found a duty to disclose "charges and complaints" about alleged improprieties that were not proven in any sort of hearing or other process, judicial or otherwise.

53. *Id.* at 594.

54. *Id.* at 589 (citing *Barela v. Superior Court*, 636 P.2d 582, 587 (Cal. 1981) (describing the duty of all citizens to protect children from sexual abuse); CAL. PENAL CODE § 11166 (describing the duty to report suspected child abuse)). The court might have satisfied this desideratum by finding a cause of action in negligence per se, based on violations of statutes requiring that child abuse be reported. *See* CAL. PENAL CODE § 11166 (duty to report suspected child abuse); CAL. EVID. CODE § 699 (West 2000) (definition of per se negligence). The California negligence per se statute limits negligence to members "of the class of persons for whose protection the statute, ordinance, or regulation was adopted." CAL. EVID. CODE § 699. The court, however, held that the class for whose protection the child abuse statute was adopted included only

A subsequent New Mexico case closely followed the reasoning in *Randi W.*<sup>55</sup> In *Davis v. Board of County Commissioners*, a jail guard resigned rather than face a disciplinary hearing for sexually assaulting female prisoners.<sup>56</sup> He was subsequently hired as a psychiatric mental health technician by a nearby hospital to which the jail had sent a glowing letter of recommendation.<sup>57</sup> The employee then sexually and physically abused a patient at the hospital.<sup>58</sup> Citing *Randi W.* and Restatement (Second) of Torts § 302 (Risk of Direct or Indirect Harm), the court held that the jail may be liable for negligent misrepresentation.<sup>59</sup> The court emphasized, in contrast to the *Randi W.* court, that the facts were confirmed by an investigative report that showed “far more than mere gossip or innuendo.”<sup>60</sup> It also established a standard indicating that “if the [employer] does speak, he must disclose enough to prevent his words from being misleading”<sup>61</sup> and

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those children under the custodial care of those with a duty to report, *Randi W.*, 929 P.2d at 595, and the plaintiff had not been under the custodial care of the defendants. The dissent would have construed the statute broadly, “to include all children who foreseeably could be protected from abuse by compliance with its provisions.” *Randi W.*, 929 P.2d at 596 (Kennard, J., concurring and dissenting) (quoting CAL. PENAL CODE § 11164(b) (West 2000)). The dissenting justice observed that the Reporting Act states its legislative purpose, saying, “[t]he intent and purpose of this article is to protect children from abuse.” *Randi W.*, 929 P.2d at 596. This statutory construction is narrower and less tortured than the theory of indirect reliance that the majority concocted to bring this action under § 311, and it still would have achieved the court’s instrumental objective.

55. *Davis v. Bd. of County Comm’rs*, 987 P.2d 1172, 1174 (N.M. Ct. App. 1999).

56. *Id.* at 1175–76.

57. *Id.* at 1176.

58. *Id.* at 1175.

59. *Id.* at 1178–80.

60. *Id.* at 1179.

61. *Davis*, 987 P.2d at 1177 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 738 (5th ed. 1984)).

emphasized the important public policy consideration of “full and accurate disclosure regarding employees with violent and dangerous propensities.”<sup>62</sup>

Recent cases based on Pennsylvania and Georgia law have also permitted causes of action against suppliers of references based on § 311.<sup>63</sup> In each of these cases, a positive recommendation from a former employer explicitly or implicitly misrepresented a job applicant’s misconduct. The hirer, relying upon the recommendation, hired the employee, who then perpetrated a similar act at the new job, resulting in harm to the plaintiff. In each case, the plaintiff sought to sue the former employer who supplied the references. In some cases, however, the current employer may not have been not liable for the injuries because the conduct occurred outside the scope of employment.<sup>64</sup> Under the doctrine of respondeat superior, an employer is liable for an employee’s conduct only if the employee performed the tortious

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62. *Id.* at 1181. Note that all of the cases discussed to this point have focused on sexual or otherwise dangerous situations. In the medical context, however, we will discuss the duty to report acts performed by individuals without violent propensities.

63. *See* *Wawrzynek v. Statprobe, Inc.*, 422 F. Supp. 2d 474, 486 (E.D. Pa. 2005) (denying in part defendant’s motion to dismiss because defendant “was on notice that the negligence claim was based on the theories of negligent misrepresentation and negligent undertaking” when medical product approved by the United States Food and Drug Administration on the basis of defendant’s false information resulted in injury to the plaintiff); *Govea v. City of Norcross*, 608 S.E.2d 677, 684–85 (Ga. Ct. App. 2004) (finding genuine issue of material fact when former employer of a police officer who gave his gun to a minor to play with whereupon said minor shot himself, failed to disclose information pertaining to the officer’s dismissal, in part, for careless handling of weapon, to the officer’s current employer); *Singer v. Beach Trading Co.*, 876 A.2d 885, 888 (N.J. Sup. Ct. App. Div. 2005) (involving a woman who sued former employee that provided false information to then-current employee that led to firing).

64. *See, e.g.*, *Ross v. Marshall*, 426 F.3d 745, 763–64 (5th Cir. 2005) Under Texas law, a principal “is vicariously liable for the torts of [his agents] committed in the course and scope of their employment.” “To find that the employee acted within the scope of employment, the action of the employee must be: (1) within the general authority given him; (2) in furtherance of the employer’s business; and (3) for the accomplishment of the object for which the employee was employed.” Moreover, “to be within the scope of employment, the conduct must be of the same general nature as that authorized or incidental to the conduct authorized.”

(Internal citations omitted); *see also, e.g.*, *John R. v. Oakland Unified Sch. Dist.*, 769 P.2d 948, 949 (Cal. 1989); *Lunn v. Yellow Cab Co.*, 169 A.2d 103, 104 (Pa. 1961); *Piedmont Hosp., Inc. v. Palladino*, 580 S.E.2d 215, 217 (Ga. 2003).

action in furtherance of the employer's goals.<sup>65</sup> The assets of the employees (who included a police officer, a public school administrator, and a menial hospital employee) likely lacked the assets necessary to sustain a large judgment. This would leave the supplier of the recommendation as the only potential defendant with sufficiently deep pockets to satisfy a substantial award. The use of a negligence cause of action (such as negligent misrepresentation based on § 311) rather than, or in addition to, a cause of action involving intentional misrepresentation, is likely to have brought the judgment under the umbrella of events covered by the former employer's insurance.<sup>66</sup> In the health care industry, as in the situations leading to the cases above, lawsuits against third-party defendants are likely to be motivated by the desire of an injured party to find a defendant financially able to compensate her for damages. As in these other cases, corporate or government employers of someone who supplies a recommendation are more likely to be able to provide such compensation than a recommended person who goes on to cause the injury somewhere else.

California restricts third-party liability for references to cases involving both physical injury and strong public policy considerations; damages based solely on economic injury are excluded.<sup>67</sup> Yet, many medical negligence claims involve economic and emotional damages, as well as damages to compensate for physical harm. Indeed, the non-medical costs often dwarf

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65. See *John R.*, 769 P.2d at 953 (“[A]n employer’s liability extends to torts of an employee committed within the scope of his employment . . . . This includes willful and malicious torts as well as negligence.” (quoting *Martinez v. Hagopian*, 227 Cal.Rptr. 763, 766 (Cal. Ct. App. 1986)); *Id.* (“Whether a tort was committed within the scope of employment is ordinarily a question of fact; it becomes a question of law, however, where the undisputed facts would not support an inference that the employee was acting within the scope of his employment.” (citing *Alma W. v. Oakland Unified Sch. Dist.*, 176 Cal. Rptr. 287, 289 (Cal. Ct. App. 1981)); see also *Carnegie v. J.P. Phillips, Inc.*, 815 N.Y.S.2d 107, 108 (N.Y. App. Div. 2006).

66. Insurance coverage of punitive damages is precluded in California as contrary to public policy because forcing the insured to pay “punish[es] the defendant and [deters] future misconduct by making an example of the defendant.” *PPG Indus. v. Transamerica Ins. Co.*, 975 P.2d 652, 656 (Cal. 1999). Furthermore, casualty policies may exclude intentional torts from coverage. See, e.g., *EMASCO Ins. Co. v. Diedrich*, 394 F.3d 1091, 1094–95 (8th Cir. 2005). The moral hazard involved in indemnifying others for intentional acts they might commit is obvious.

67. See *Gawara v. United States Brass Corp.*, 74 Cal. Rptr. 2d 663, 670 (Cal. Ct. App. 1998) (citing *Randi W.*, 929 P.2d at 584 and stating “*Randi W.* is factually distinguishable. Unlike [*Gawara*], *Randi W.* involved a claim of physical injury to a person.”); see also *Mirkin v. Wasserman*, 858 P.2d 568, 569 (Cal. 1993).



the medical costs. Section 311 appears to sanction at least pecuniary damages when the tort caused physical injury as well.<sup>68</sup> However, no known case has addressed the issue of whether liability under § 311 extends to non-physical damage that accompanies physical damage.

#### D. *Contrary Decisions*

But not all courts have assigned third-party liability to former employers who provided references for tortfeasors, in favor of adhering to more traditional interpretations of duties in tort to third parties. For example, in *Cohen v. Wales*, the New York Supreme Court, Appellate Division, in a case factually similar to *Randi W.*, found no third-party liability by a recommender who had failed to report sexual misconduct by a school employee.<sup>69</sup> The court found that the former employer owed no duty to the plaintiff unless the defendant had a special relationship with “either the person who threatens harmful conduct or the foreseeable victim.”<sup>70</sup> This doctrine was recently followed by a federal district court in New York, pursuant to New York law, in a case regarding negligent referrals.<sup>71</sup>

Similarly, the Supreme Court of Hawaii declined to find third-party liability against a union that recommended employment of a man whom it knew had been imprisoned for homosexual sexual assault<sup>72</sup> when that man then raped a male co-worker.<sup>73</sup> In granting summary judgment, the court found that the union (which routinely recommended employees to ship owners) owed no duty either to the shipping line or, *a fortiori*, to the plaintiff, to screen applicants.<sup>74</sup>

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68. See RESTATEMENT (SECOND) OF TORTS § 311, cmt. d, e, illus. 8, 9. As an example, comment e, illustration 9 states, “The A Company is subject to liability to C for his bodily harm and the wrecking of his building caused by the explosion of the boiler.”

69. *Cohen v. Wales*, 518 N.Y.S.2d 633, 633 (N.Y. App. Div. 1987).

70. *Id.* at 634.

71. See *Estevez-Yalcin v. Children’s Village*, 331 F. Supp. 2d 170, 178 (S.D.N.Y. 2004) (“[T]he mere recommendation of a person for potential employment is not a proper basis for asserting a claim of negligence where another party is responsible for the actual hiring.” (quoting *Cohen*, 518 N.Y.S.2d at 634)).

72. See *Janssen v. Am. Haw. Cruises, Inc.*, 731 P.2d 163, 164 (Haw. 1987).

73. *Id.* at 165.

74. *Id.* at 166.

In *Moore v. St. Joseph Nursing Home*, a Michigan court decided a case in which an employee previously terminated by a former employer for violent behavior, beat to death another employee while working for a subsequent employer.<sup>75</sup> The plaintiff alleged that the former employer had a duty to disclose to the subsequent employer the history of the employee's violence.<sup>76</sup> The court stated that a party cannot be said to owe a "duty to protect another party who is endangered by a third person unless there exists some special relationship between the first party and either the dangerous person or the potential victim."<sup>77</sup> The court determined that the facts of the case did not "indicate an event so foreseeable as to warrant the imposition of a duty."<sup>78</sup>

Taking note of the cases discussed in this section, an Illinois court declined to recognize a cause of action for "negligent referral" in a case not involving physical harm to the defendant.<sup>79</sup> Finally, a Washington case between two school districts<sup>80</sup> involved a complicated series of events in which the Richland School District sued the Mabton School District for negligent misrepresentation in failing to disclose that the employee had been accused of child molestation and had resigned from his original position as a condition for the charges being dropped.<sup>81</sup> The court rejected the *Randi W.* precedent and declined to apply § 311 as a basis for negligent misrepresentation.<sup>82</sup>

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75. *Moore v. St. Joseph Nursing Home*, 459 N.W.2d 100, 101 (Mich. Ct. App. 1990).

76. *Id.*

77. *Id.* at 102.

78. *Id.* at 103.

79. *Neptuno Treuhand-und Verwaltungsgesellschaft GMBH v. Arbor*, 692 N.E.2d 812, 820 (Ill. App. Ct. 1998).

80. *Richland Sch. Dist. v. Mabton Sch. Dist.*, 45 P.3d 580, 583 (Wash. Ct. App. 2002).

81. *Id.* at 584.

82. *See id.* at 587. The court continued and stated "Richland [failed] to establish as a matter of law that Mabton owed it a duty under common law negligence principles to include the dismissed charges of child molestation and the reprimands in [the employee's] letters of recommendation." *Id.* at 589.

These cases follow the traditional common law principle that, absent a special relationship, there is no affirmative duty to warn others of danger. It should be noted, however, that they are distinguishable from *Randi W.* as none of them is based on affirmative misrepresentation of the former employee's character.<sup>83</sup>

*E. Analytical Paradigm for the Randi W. Family of Cases*

*1. The Paradigmatic Situation*

Finding a third-party duty of care in a case such as *Randi W.* requires a detailed chain of inference, which is summarized in Table 1.

Table 1: Chain of inference in § 311 cases involving employment references	
In order for victim W to establish a breach of duty against R, the supplier of an employment recommendation, the following elements must be satisfied:	
1)	Employee, working under the supervision or auspices of employer #1 in a specified role
2)	Committed an initial act or omission A <sub>1</sub>
3)	In circumstances that are either
	a) Under the color of his vocational role or
	b) Under circumstances that caused his employer to discipline him
4)	Act A <sub>1</sub> is reasonably included in the category of acts AA
5)	Either:
	a) Acts in category AA can cause injury (not necessarily physical harm) to a victim, or
	b) Such acts can foreseeably cause physical harm
6)	And one of the following applies to acts in category AA:
	a) Most persons in the employee's role would not perform such an act
	b) Public policy warrants strict liability for these acts
7)	An employee that performs an act in category AA is predisposed to perform other such acts
8)	An evaluator, who may be the employer, his agent, or unrelated to the employer, supplied a reference for the employee to employer #2
9)	The evaluator knew or should have known of A <sub>1</sub> , and either
	a) Failed to inform employer #2 of A <sub>1</sub> , or
	b) Was aware of the employee's predisposition to perform acts in category AA and failed to inform employer #2 of this predisposition
10)	Employer #2 accepted the employee as a supervisee (employee, independent contractor, awardee of clinical privileges, etc.)
11)	Employer #2 relied on the misrepresentation described in Step 9 in accepting the employee
12)	Later, the employee, under color of his role under employer #2's supervision
13)	Committed a second bad act A <sub>2</sub> , which act either
	a) Fell within category AA, or
	b) Fell within category BB, if individuals with a predisposition to perform acts in AA also have a predisposition to perform acts in BB, and
14)	Which caused physical harm to a victim

This chain of inference is either explicitly or implicitly followed in *Randi W.* and related cases. Proof of all of these elements is necessary and

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83. See John Ashby, *Employment References: Should Employers Have an Affirmative Duty to Report Employee Misconduct to Inquiring Prospective Employers*, 46 ARIZ. L. REV. 117, 140 (2004).

sufficient for the establishment of a breach of duty under § 311. The terms “employee” and “employer” are used broadly to denote any vocational relationship involving supervision, and do not imply a legal employment relationship.

Elements one and two of the paradigm are self-explanatory. Element three stipulates that the bad act that requires reporting occurs under one of two circumstances: either the act must occur under color of employment (not necessarily within the scope of employment), or it must occur under circumstances that caused the employer to discipline the employee. In *Randi W.*, Gadams’ acts while working for the recommending school districts were performed against students under his supervision in the context of his employment role. Although these acts were not performed within the scope of his employment, they still satisfy element three. Such acts clearly suffice to alert employers. Had Gadams performed a similar bad act totally unrelated to his employment, but which resulted in discipline by his employer, this would have satisfied this element, for the same reason.

Element four is also crucial to the analysis. In *Randi W.*, the class of act is implicitly defined as inappropriate sexual behavior toward minors. Had Gadams been terminated for embezzlement, it would not have been reasonable to conclude that subsequent child molestation was foreseeable from this unless a demonstrable causal link between embezzlement and inappropriate sexual behavior toward minors existed (see element thirteen b). But the *Randi W.* court still might have defined the class of act differently. For example, it might have defined it as any intentional tort, or as any act that could be defined as a felony under the California criminal code. Such a broad definition might seem reasonable to some observers, and unreasonable to others; the question is whether acts of that class rendered sexual misconduct against minors foreseeable.

A related issue is whether the definition of the category of acts is defined as a question of law or a question of fact. *Randi W.* followed *Rowland*, and enactment of a California statute, making it a question of whether a duty is owed.<sup>84</sup> This is a question of law. But foreseeability may be considered either part of the duty of care or an element of proximate cause.<sup>85</sup>

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84. See *Rowland v. Christian*, 443 P.2d 561, 563–64 (Cal. 1968), quoting CAL. CIV. CODE § 1714(a)

Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself.

*Id.*

85. See DAN B. DOBBS, *THE LAW OF TORTS* § 230, at 584–85 (2000).

Conceptually, a negligent defendant “should have foreseen some harm, of some kind, to some person or property” as a matter of law.<sup>86</sup> “The foreseeability question left to be determined under the proximate cause rules is whether he should have foreseen the kind of harm that in fact resulted, and whether the plaintiff was within the class of persons upon whom such harm might foreseeably befall.”<sup>87</sup> Assigning a question to duty or proximate cause is therefore conclusory rather than descriptive. But while duty is that element that is decided by the court as a matter of law, proximate cause, on the other hand, is decided by the factfinder. In addition, *Rowland* seems to extend the question of foreseeability and defines the relevant consideration of duty to be the “foreseeability of harm to the plaintiff,” rather than foreseeability of a specific harm to the plaintiff.<sup>88</sup>

[A]ll the issues in a negligence case—negligence itself, cause in fact, and proximate cause, even contributory negligence—can be phrased as questions of duty. The judge who wishes to take over the case from the jury can easily express the issue as one of duty. Ideally, therefore, a duty can be cast as a rule of law rather than as a decision about whether the particular actions of a particular defendant should be actionable.<sup>89</sup>

As a result, a judge following the *Rowland* precedent may find a wide scope of duty that is not necessarily based on reasonable empirical considerations. Moreover, such a finding may be limited only by appellate review or legislative oversight.

Element five asserts that the act the evaluator failed to report must, in fact, be a bad act. Thus, for example, failure to report the result of a psychological test required for the original employment would therefore not be required as a duty to the third party. This element is implicit in the *Randi W.* line of cases, in that the employees all committed intentional or reckless acts, but the element is not explicitly stated.

I propose as a sixth element that the bad act be one or a series of acts that most people in the employee’s position would not perform, even as a negligent act. It may seem superfluous to impose such a requirement when

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86. *Id.* § 182, at 448.

87. *Id.*

88. *Rowland*, 443 P.2d at 564, *superseded by* CAL. PENAL CODE § 847 (2008), *as recognized in* *Calvillo-Silva v. Home Grocery*, 968 P.2d 65, 72 (Cal. 1990).

89. DOBBS, *supra* note 85, § 226, at 578.

the act in question consists of mayhem. But if § 311 were applied to negligent acts performed by employees whose job entails infliction of some physical harm to others or placing others in dangerous positions (which has not yet happened), this element would become highly important.<sup>90</sup>

Element seven requires a finding of propensity, which I argue below is identical to foreseeability in this circumstance. For example, if act A<sub>1</sub> does not predict the subsequent performance of act A<sub>2</sub>, then failure to report act A<sub>1</sub> cannot be a proximate cause of A<sub>2</sub>. As with element four, there is a threshold question of whether a finding of propensity would constitute a matter of law or a matter of fact. Furthermore, as with element five, this element is implicit rather than explicit in this line of cases.

Element eight merely defines the scope of who can be a defendant.<sup>91</sup>

Element nine targets an evaluator who knew or should have known of an employee's reportable bad acts but failed to inform potential hirers of such acts. This element addresses two important issues. First, an employer could not claim ignorance as an excuse when it ignores the employee's bad acts though voluntarily engaging in an act of willful blindness. Second, evaluators require guidelines for reporting imperfect knowledge or unsubstantiated information. In *Randi W.*, there was neither a formal finding that Gadams had acted inappropriately, nor a disciplinary action against him. Ultimately, though, the defendants were held liable for failing to report allegations unsubstantiated by formal findings (the credibility of these allegations was not discussed in the opinion). Courts that follow *Randi W.* will need to establish a threshold of credibility that allegations must reach in order to create a duty of reportability in recommendations.

Not all accusations of bad acts are true accusations. Regardless of whether employment references are protected by statutory or common law, conscientious persons will be inclined to protect the reputations of others unless there is either convincing evidence of their culpability or formal findings that substantiate accusations of bad acts. It is disturbing that *Randi W.* appears to implicitly require the transmission of unsubstantiated information. As this field of law develops, the rights and expectations of the employee must be balanced with those of employers who hired on the basis of a reference.

In Section III below, the article will propose institutional requirements to investigate and make findings as to any charges against an employee and to

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90. Element 6a will be discussed later in the medical context as the basis for the problem of overforeseeability. Element 6b's provision on strict liability is also included in the interest of conceptual completeness.

91. See, e.g., *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 585–86 (Cal. 1997).

a set of predefined bad outcomes that result from acts of an employee. Under these circumstances, the institution may exonerate employees, find them deficient, or declare culpability to be indeterminate on the basis of available data. This would partially address both the problem of willful blindness and employers' treatment of unsubstantiated information in employment references.

Elements ten and eleven address hiring by a subsequent employer who relied on misleading statements provided by the first employer. The main issue here is determining what events may comprise an intervening superseding cause. An intervening superseding cause shields the defendant from liability by refuting the claim that the subsequent employer was reliant upon the misrepresentation. Element twelve emphasizes that the extent of employees' liability is dependent on their access to the victim resulting from his particular association with the second employer, and his general vocational role.<sup>92</sup> As in *Gutzan*, the act need not be carried out in the work setting; in this case some of the employee's acts giving rise to liability occurred at a fellow employee's home.<sup>93</sup> On the other hand, plaintiffs unrelated to the employment situation would not have a cause of action based on a theory that but for the employer hiring the employee into the community in which the act took place, the plaintiff would not have been harmed.

Finally, Element thirteen limits such liability to acts that are in the same or related classes of acts as the misrepresentation. The problem with defining the class is discussed above as part of Element four.

## 2. *Special Issues in the Medical Context*

In the absence of actual cases, this article constructs hypothetical scenarios<sup>94</sup> to serve as a basis for applying the analytical paradigm to health care situations. The first is comparable to *Randi W.*:

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92. With the exception of *Gutzan*, the liable defendants all were employers preceding the employees' bad acts, or else were agents of the employers. See, e.g., *Randi W.*, 929 P.2d at 585-86; *Davis v. Bd. of County Comm'rs*, 987 P.2d 1172, 1175-76 (N.M. Ct. App. 1999); *Wawrzynek v. Statprobe, Inc.*, 422 F. Supp. 2d 474, 477-78 (E.D. Pa. 2005); *Govea v. City of Norcross*, 608 S.E.2d 677, 680-82 (Ga. Ct. App. 2004).

93. See *Gutzan v. Altair Airlines*, 766 F.2d 135, 137-38 (3d Cir. 1985).

94. The vignettes are loosely based on the author's professional observations, although they did not necessarily result in litigation.

*Carol Cushing*

Carol Cushing, M.D. was a neurosurgery resident at Pecos Memorial Hospital. While working in the hospital on night call, Cushing punched a first-year resident for changing the television channel in the residents' lounge. Her punch broke the resident's nose. Cushing's supervisor, Barbara Brainpicker, M.D., appointed her as administrative chief resident, approvingly citing her assertiveness. In this position, Cushing frequently threatened to strike junior residents and other hospital staff, but never again did so. After her residency, Cushing took a position at the famed Derry Clinic in Belfast, California. She was not employed by Derry, but had clinical privileges at its hospital. She obtained these privileges partly on the strength of Brainpicker's letter of recommendation. The recommendation read in part, "Cushing's unique leadership talent successfully molded nurses, medical students, and junior residents into a successful team. She was well-liked, and regarded by those she supervised as firm, but reasonable and fair." Several months after beginning work at Derry, a nurse on the postoperative floor, Fred Fragile, refused to remain late at work to care for a patient of Cushing's, because he wanted to attend his child's school pageant. Cushing followed him into the street outside of the hospital and struck him, causing permanent paralysis. Fragile sued Brainpicker and Pecos Memorial for negligent misrepresentation.

Cushing committed multiple acts of assault, and at least one battery, during her residency. She was given a recommendation that praised her in the area in which she was deficient. She subsequently battered a victim in the place of his new employment. As in *John R.*, *Randi W.*, and other cases in this series, the circumstances of the battery upon Nurse Fragile are outside the scope of employment, thereby precluding Derry's liability based on respondeat superior.<sup>95</sup> On the other hand, courts following the traditional doctrine of disallowing third-party liability absent a special relationship that was affirmed by New York in *Cohen*<sup>96</sup> would not hold Pecos and Brainpicker liable. Moreover, the plaintiff would be unable to recover damages. Failure to compensate a victim like Nurse Fragile seems unjust.

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95. See *John R. v. Oakland Unified Sch. Dist.*, 769 P.2d 948, 953 (Cal. 1989); see also *Haybeck v. Prodigy Servs. Co.*, 944 F. Supp. 326, 327 (S.D.N.Y. 1996) (finding employer not liable under the tort theory of respondeat superior for failing to inform employee's sexual partner that employee had the virus that causes AIDS when the employer was aware that employee has AIDS and was having sex with customers in employer's online chat room).

96. See *Cohen v. Wales*, 518 N.Y.S.2d 633, 634 (N.Y. App. Div. 1987).



For this reason, *Randi W.* offers an attractive approach to this problem. Its main problems, however, concern the foreseeability of the injury to the particular victim and the length of the chain of proximate causation.<sup>97</sup>

As the primary tortfeasor, Cushing, may be judgment-proof. Her intentional tort will not be covered by insurance, and a recent residency graduate is unlikely to have sufficient assets to cover a large award. The only remaining possible defendants are Pecos and its agent, Brainpicker, and there seems little question that they would be liable in a state that follows *Randi W.* A court that recognizes a strong enough policy consideration in preventing sexual assault against children to establish a duty in law<sup>98</sup> would likely find a similarly strong policy consideration in the prevention of workplace violence.

Situations like the Cushing scenario are less common than situations like the one that follows:

*Raphael Slowfinger*

Mordor Medical Center in Mordor, California, hired Raphael Slowfinger, who had just finished a fellowship in surgical oncology, to join the senior surgical oncologist, Yetta Yancey, as a junior associate. Although Mordor's mission included education and research as well as clinical practice, Slowfinger pointedly confined his activities to his clinical practice. This grew rapidly, as Slowfinger had superb rapport with patients and referring physicians, and his patients generally did well. However, he regularly failed to show up for teaching assignments and failed to conduct research, even declining to enter his patients into departmental clinical trials. Furthermore, he regularly arrived at least an hour late for surgery, office sessions, and administrative meetings. Yancey developed some concerns that Slowfinger was too surgically aggressive and was operating too slowly. She had seen these traits in many other recently trained physicians, however, and knew that surgical judgment and speed generally improved as young surgeons gained experience. Furthermore, she knew that some respectable oncologists would not

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97. Would it seem as just to hold Pecos and Brainpicker liable if Cushing left Derry for Edinburgh Hospital, went from there to Falmouth, and finally ended at Galway Medical Center, where he struck an employee fifteen years after leaving Pecos? In this case, could Pecos' letter of recommendation to Derry reasonably be characterized as the proximate cause of the injury? What if Pecos had sent a letter directly to Galway based on information in its files ten years after Cushing left, five years after Brainpicker retired, and five years before an assault on a nurse?

98. See *Randi W.*, 929 P.2d at 589.

regard Slowfinger's aggressiveness as exceptional. All of Slowfinger's problems were documented in personnel evaluations, as well as in a letter Yancey wrote to him, warning that his job would be in jeopardy if his performance did not improve. Approximately 10% of that letter dealt with clinical issues, and the rest with his academic and administrative deficiencies. Yancey became convinced that Slowfinger's continued presence on the paid staff was incompatible with Mordor's academic mission. She and the Mordor administration negotiated Slowfinger's resignation as a paid employee. The agreement allowed Slowfinger to retain his hospital credentials and his clinical privileges. Part of the termination agreement was this letter of recommendation:

Slowfinger worked at Mordor Medical Center (MMC) for three years. Throughout his service at Mordor he proved to be an indefatigable worker. He had exceptional rapport with patients, and was conscientious and attentive in their care. He has the potential to make a major impact on your program.

Slowfinger then resigned from the Mordor medical staff. He opened a solo private practice in the exurb of Karakorum, with clinical privileges at Prester John Hospital (PJH). Yancey sent the letter quoted above to PJH in response to a request for credentialing information. In his new practice, Slowfinger's clinical patterns worsened. Faced with the high cost of running a private practice, he performed many operations that were not appropriate. Furthermore, he would operate on patients who were too ill to withstand surgery. His operating time actually doubled from his operating time at MMC.

Four years after beginning practice in Karakorum, and eleven hours into a procedure that ordinarily took four hours, Slowfinger lacerated Valdemar Vick's vena cava, causing him to bleed to death on the operating table. Vick's estate sued Yancey and MMC for negligent misrepresentation based on the letters from Yancey to Slowfinger and PJH, as well as suing Prester John and Slowfinger for medical malpractice.

Although the Slowfinger hypothetical superficially resembles the Cushing hypothetical and *Randi W.*, there are several important distinctions. Here, the act that directly caused the injury arose from negligence, rather than from an intentional violent act. Such situations are more common in medical settings than intentional torts like Cushing's. The issue of reliance is another major distinction. Livingston probably would not have hired Gadams had his misconduct been known, nor would Derry have granted privileges to Cushing had it known of her misbehavior. Whether awareness of the circumstances of Slowfinger's association with Mordor would have deterred Prester John from granting him privileges is not as clear. His academic deficiencies may have been irrelevant to a community hospital like

Prester John. Slowfinger's clinical issues at Mordor most likely reflected mediocrity rather than incompetence<sup>99</sup> and were, in any event, not substantiated problems. Slowfinger might have been the best surgical oncologist that a small exurban community could attract.<sup>100</sup> When the act at the first hospital is negligent, the question of reliance is not as clear as when the act is intentional.

The most important difference between Slowfinger and Cushing involves foreseeability. As discussed above, the *Randi W.* model requires foreseeability of the second act from the first, and establishes this as a matter of law.<sup>101</sup> In the context of employment references, the question is whether it is reasonable to infer the physician's propensity to perform the second bad act from his having performed the first bad act. If this is reasonable, then the second act was foreseeable from the first, and a duty to report that act exists. Conversely, if this is not reasonable, then there is no foreseeability, and no duty to report that act arises. The proposition, "A physician's act A<sub>2</sub> is foreseeable as a result of his act A<sub>1</sub>" is thus operationally equivalent to the proposition, "A physician's act A<sub>1</sub> demonstrates a propensity to perform act A<sub>2</sub>." Hence, this article uses the concepts of foreseeability and propensity interchangeably. There are many issues that influence foreseeability. It is possible to take a restrictive approach, an expansive approach, or one or more intermediate approaches to each of these issues. Each approach is summarized in Table 2 below.

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99. This is stated *in arguendo*, as part of the hypothetical.

100. In practical terms, both Prester John and Mordor would probably be defendants, and the issue would be comparative liability. Prester John would maintain that Slowfinger would not have been accepted to its medical staff had the circumstances been known, and the issue would rest on the credibility of the principals.

101. See, e.g., *Janssen v. Am. Haw. Cruises, Inc.*, 731 P.2d 163, 165 (Haw. 1987) (refusing to find third-party liability and stating, "[w]e have said that a defendant owes a duty of care only to those who are foreseeably endangered by the conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous.") (internal quotations and citations omitted); *Randi W.*, 929 P.2d at 589-90 (allowing third-party liability).

Table 2: Issues affecting foreseeability (Entries in <i>italics</i> denote author's opinion of the desirable legal standard) Legend: E: Employee; H: Hirer; R: Recommender			
PARAMETER	EXPANSIVE CONCEPTION	INTERMEDIATE CONCEPTION	RESTRICTIVE CONCEPTION
Plaintiff	Third party; foreseeable	Third party; special relationship	Direct subject of action by defendant
When employee/actor performed first act	During training, including residency and fellowship	Following training	<i>In recent years following training</i>
Intentionality of first act by employee/actor (unreported by R)	Negligent	<i>Marked deviation from usual practice patterns</i>	<i>Intentional</i>
Certitude regarding the first act	Unsubstantiated reports	Substantiated bad act with no formal finding	<i>Formal finding required to document act</i>
Reporting of opinions regarding competence	Required reporting of all expressed negative opinions	<i>Institutional R required to develop evaluative statement for all supervisees using formal criteria</i>	<i>No liability for non-factual statements</i>
Intentionality of second act	Negligent	<i>Marked deviation from usual practice patterns</i>	<i>Intentional</i>
Where either act is carried out	Anywhere	<i>Under color of employment</i>	<i>Within scope of employment</i>
Similarity of first and second acts	Any bad act	<i>Similar act (e.g., both acts involve striking another person)</i>	<i>Act with identical character</i>
Superseding act by H	None	<i>Learns of first act by E</i>	<i>Enough time to become familiar with E's predispositions</i>

As for the relationship of plaintiff to defendant, the law may either restrict standing to bring a cause of action to persons directly affected by the defendant (currently no jurisdiction does this), allow a lawsuit against third persons with a special relationship of care, or allow suit by any third person foreseeably affected by the negligent action of the defendant. The general rule is that “[u]nless the defendant has assumed a duty to act, or stands in a special relationship to the plaintiff, defendants are not liable in tort for a pure failure to act for the plaintiff’s benefit. The fact that the defendant foresees harm to a particular individual from his failure to act does not change the general rule.”<sup>102</sup> Most states follow this rule, which forms the basis of

102. DOBBS, *supra* note 85, § 314, at 853.

decisions such as *Cohen*. This rule does not apply in those states that accept § 311 as law. The question should be whether such jurisdictions should limit the impact of § 311 with regard to negligent acts in health care situations. The following hypothetical exemplifies a scenario where the employee performed the first bad act.

*Betty Breeze*

Betty Breeze graduated from medical school at age 23 (the usual age is 26), and never had to study very hard. Faculty evaluations during the first year of her four-year residency in obstetrics and gynecology at DeLee Medical Center frequently commented on her immaturity. At the beginning of her second year, she was asked to evaluate a patient, but decided to wait until after lunch to see her. The patient died before Breeze finished her meal. DeLee placed Breeze on academic probation. However, this incident was an epiphany for her, and her subsequent performance was exemplary. Breeze opened a practice in the town of Zephyr, California. DeLee's letter of reference to Carrier Medical Center there described her as a committed, conscientious resident—a description that accurately reflected her performance after the incident. She had no problems and complaints during her first five years in practice. Then, Breeze was called to come to Carrier at 2:00 a.m. one morning to attend a patient of hers who was in labor. She arrived at the hospital 90 minutes later, though she lived ten minutes away. As a result, a cesarean section for fetal distress was delayed, allegedly leading to brain damage in the infant. During the ensuing discovery process, the lawyer for the infant and her family somehow obtained production of Breeze's complete personnel file from DeLee. The family sued DeLee for negligent misrepresentation.

It is during the residency period when physicians receive enough responsibility that their clinical capabilities can be evaluated. This is also the period when they first have enough independence to be able to perform negligent acts. Extensive resident files contain documents dating back to the beginning of the residency recording residents' deficiencies in judgment and knowledge at each stage of a residency period. Although the deficiencies generally diminish or are cured with experience, training, and maturity, the files remain. The actions of a junior resident do not necessarily create a propensity to continue the deficiencies documented in their files. A policy allowing both extensive disclosure of material in resident files and the liberal construction of this material to show a propensity to perform negligent acts would disrupt the medical education system, to the detriment of health care. It would also be unjust to the trainees involved. Therefore, such disclosure should be severely limited.

Physicians continue to improve their skills after the completion of residency, and the acts of an attending physician at one point in his career do not necessarily indicate a propensity to perform those acts many years later. For this reason, there should be a time limit (perhaps seven to ten years would be reasonable) after which a physician's negligent acts are no longer subject to disclosure in references. Thus, if Cushing had refrained from workplace violence for ten years, there would have been a conclusive presumption that she no longer had a propensity towards workplace violence, cancelling any duty incumbent on Pecos to report it.

In considering the intentionality of first act, *Randi W.* and the Cushing hypothetical are distinguishable from the Slowfinger hypothetical in that the undisclosed bad acts were intentional in the first two cases, and were, at worst, negligent in the last. Workplace violence and sexual abuse are easily identifiable. On the other hand, medical malpractice is more difficult to identify. Often, there are major and sincere disagreements between experts over whether an act comprises malpractice. Even when a malpractice action ultimately results in a settlement or a verdict for the plaintiff, reasonable professionals may disagree that the physician acted in a substandard manner.

The association of intentional acts with a propensity to perform similar acts seems intuitive, and it is easy to define the class of act. It is reasonable to assume that a person with a history of even one sexual assault is likely to do it again; this assumption also seems reasonable to conclude about an individual who has stricken a co-worker. Negligence, however, is more protean. Does someone who operates slowly, or someone who negligently operates for an inappropriate indication, have a greater propensity to injure a vital structure than other physicians? This is by no means intuitive. A demonstration that two different kinds of negligence are causally related, or even correlated, requires inferences that currently cannot be drawn based on empirical data.

Furthermore, violence and sexual abuse, while unfortunately occurring more frequently than they should, appear to be the exception and not the rule.<sup>103</sup> By contrast, medical error that gives rise to a prima facie case of malpractice is so common as to be virtually ubiquitous.<sup>104</sup> It is likely that

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103. See Amy D. Whitten & Deanne M. Mosley, *Caught in The Crossfire: Employers' Liability for Workplace Violence*, 70 MISS. L.J. 505, 505-07 (2000); Kimberly Smith, Comment, *A Plea for Mandatory Disclosure: Urging Michigan's Legislature to Protect Employees Against Increasing Phenomena of Workplace Violence*, 79 U. DET. MERCY L. REV. 611, 611 (2002) (summarizing statistics regarding workplace violence).

104. TOM BAKER, *THE MEDICAL MALPRACTICE MYTH* 22-44 (University of Chicago Press 2005), citing Don H. Mills, *Medical Insurance Feasibility Study*, 128 W.J. MED. 279, 360 (1978); Ross M. Wilson, et. al., *The Quality in Australian Health Care Study*,

most physicians will perform such an act in the course of a week's work that entails interviewing and examining over one hundred patients, reviewing hundreds of laboratory and radiology reports, writing numerous prescriptions, and making many other clinical decisions. Fortunately, the vast majority of errors do not lead to adverse consequences. In high-risk fields such as obstetrics, where medical errors are likely to lead to injuries whose severity warrants litigation,<sup>105</sup> most physicians in the field are sued and pay judgments. In 2006, the American College of Obstetricians and Gynecologists surveyed its members and found that 89.8% of senior fellows and junior fellows nationally,<sup>106</sup> and 92.2% of members located in New York<sup>107</sup> had been sued for malpractice during their careers. Additionally, 29.5% and 44%, respectively, had been sued at least four times. Both nationally and in New York, about one-third of claims led to either settlement or an adverse verdict. Nationally, 55% of members had claims opened or closed during the years 2003 to 2005, and 71.8% of New York members had claims opened or closed during the same time period. Furthermore, almost one-third of survey respondents nationally, and over half of the respondents in New York, reported that claims had been filed against them during residency.<sup>108</sup> Regardless of whether they lead to

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163 MED. J. AUSTRAL. 453, 458 (1995); Lori B. Andrews, et. al., *An Alternative Strategy for Studying Adverse Events in Medical Care*, 349 LANCET 295, 309 (1997); TO ERR IS HUMAN—BUILDING A SAFER HEALTH CARE SYSTEM (Linda T Kohn et al. eds., National Academy Press 2000); David M. Studdert, et. al., *Negligent Care and Malpractice Claiming Behavior in Utah and Colorado*, 38 MED. CARE 247, 250 (2000).

105. It is assumed, *in arguendo*, that most judgments and settlements against physicians, and obstetric lawsuits, result from the defendants' negligence. In fact, an undetermined number of these lawsuits are settled either to avoid the costs of litigation or because the defendant or his insurer fears the publicity or the costs of a verdict that is not based on good scientific evidence. On the other hand, many instances of negligence that cause injury do not lead to lawsuits.

106. Fellows are Board certified obstetricians and gynecologists of good moral character who have applied to the College. Junior fellows are, for the most part, residents and recent graduates of residency who have not attained Board certification, which takes at least 1.5 years after completing residency.

107. Fellows may base their membership on their home or office address, at their discretion.

108. Nonda Wilson & Albert L. Strunk, *Overview of the 2006 ACOG Survey on Professional Liability* (Am. Coll. of Obstetricians & Gynecologists), Mar.–Apr. 2007, at 1, 13.

litigation, physicians' alleged errors often are recorded in hospital records. These records include minutes of educational conferences focused on patient complications, administrative investigations of adverse patient outcomes, and complaints by patients, nurses, and other physicians (and responses to them).

Negligent physician error either foresees too much or too little. Physicians commit errors throughout their careers, some of which are likely to result in physical harm. Recommenders are aware of this, as are the hiring or credentialing authorities to whom a reference is directed. For the recommender to tell the credentialing authority that a physician is fallible is not particularly helpful. That a physician is capable of making mistakes is already understood. As such, it is unreasonable to infer a propensity for error or for negligence on the basis of the association of two apparently related events when both the antecedent and the subsequent event are highly likely to happen. Such a mistaken inference can be termed "overforeseeability." When overforeseeability exists, it would be unjust to construe failure to communicate knowledge of the antecedent event as a proximate cause for the subsequent event, despite the plain meaning of § 311. The discussion in the previous paragraph suggests that medical negligence overforesees subsequent negligence. Therefore, failure to transmit the specific nature of known medical errors should not amount to misrepresentation. A physician who has a large number of complications may not be a substandard physician; rather, these complications may result from a practice consisting of patients with an exceptionally high risk for adverse events.

Only the failure to communicate information that actually identifies physicians with a propensity to commit medical errors could be construed as misrepresentation. In the absence of valid models for predicting future errors from past physician negligence, there is no way for a recommender to reliably supply such information.<sup>109</sup> However, there are two classes of negligent acts—not highly likely to occur—that clearly suggest a propensity for subsequent negligent acts, and which should consequently require reporting. The first class consists of negligent acts resulting from physicians' chronic or recurring physical or mental problems. The second class consists of unusual negligent acts that, by virtue of their nature and frequency, deviate substantially from the type of negligence normally expected from a physician. For example, reportable occurrences with regard to appendectomies might include laceration of the liver during an

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109. It should be possible to generate such models through the application of sophisticated techniques of statistics and social science. To the author's knowledge, however, such models have not been published.



appendectomy or a series of several cases in which a ligature came off the appendiceal stump.<sup>110</sup> The standard for reporting proposed here is not deviation from the standard of care, but marked deviation from statistically expected practice patterns.

The requirement to report overforeseeable events can be avoided either by precluding an extensive duty to report physician acts or by restricting the classes of subsequent acts for which there is third-party liability. In other words, one can either have a restrictive approach towards defining the duty or a restrictive approach to defining proximate cause. The second approach is more reasonable from a policy standpoint. If reporting requirements are extensive and explicit, then evaluators' duties are transparent, and they can reasonably be expected to comply. If the reportable class is smaller but the actionable class is larger, then recommenders will be called to account for a greater number of subsequent acts, and they will be subject to second guessing for their omissions. Furthermore, a broad reporting requirement provides more information for a recipient hospital to consider in a credentialing evaluation. As such, third-party causes of action related to § 311 should be allowed for intentional and grossly negligent acts. They should not be allowed when ordinary negligence is alleged, unless the physician has a physical or mental impairment or a pattern of unusual acts.

How certain must an evaluator be that a bad act took place in order for the duty to report the act to vest? Specifically, does an evaluator have a duty to communicate unsubstantiated charges? This problem is illustrated by the following scenario:

#### *Morton Mean*

Morton Mean was an internist employed by Rue Mort Medical Center in Styx, California. He prevailed upon the Medical Center to dismiss his office nurse, Ursula Uvula, for two incidents of administering the wrong medication. Uvula then reported to the Medical Center administration that Mean was in the habit of making late night house calls on his young female patients. The hospital was unable to substantiate these stories. Nevertheless, Mean resigned following a conversation with the president of Rue Mort. He moved to Belle Fourchette and obtained clinical privileges at Fourchette Hospital. Recommendations provided by Rue Mort to Fourchette described Mean as a capable, ethical practitioner. Four months later, Mean impregnated Leona Lonely, a married patient whose husband was on active duty in Iraq. Lonely later read the rumors of Mean's reputation in Styx on an Internet chat room for patients who had affairs with

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110. The appendix normally lies more than six inches from the liver, and the nature of this complication makes it highly deviant; ligatures rarely come off appendiceal stumps.

their physicians. After further investigation, Lonely sued Rue Mort for negligent misrepresentation for having failed to disclose to Fouchette Hospital the circumstances behind Mean's departure.

Employers may be happy to accept the resignation of employees who are accused of inappropriate behavior on the job. An employee's quiet departure protects the institution's reputation. A school district, for example, may not want parents to know that it had employed a child molester. The child molester employee's resignation also saves the considerable time and expense of a disciplinary process. Finally, the formal and informal obstacles to proving charges may leave employers uncertain as to whether they will prevail in a dismissal process. On the other hand, untrue charges may force employees to resign because they fear loss of effectiveness or reputation from publicity regarding the charges, or do not wish to expend the time and money it takes to fight them. Dr. Mean might have left either to escape discipline for actual sexual activity with patients or to avoid harm to his reputation caused by persistent rumors.

This sort of situation presents a quandary to the evaluator. On the one hand, reporting such unsubstantiated charges is protected in most states by common law or statutory qualified privilege.<sup>111</sup> On the other hand, immunity does not create a duty to report uncertain data. Failure to report data such as Uvula's accusation against Mean may be motivated by a desire to avoid informal recriminations or a lawsuit, which would involve substantial time, expense, and stress for the defendant. Moreover, an evaluator may sincerely believe that it is unethical and unjust to broadcast unsubstantiated charges. This article is sympathetic to this point of view. Rue Mort should not be burdened with a duty to report the accusations against Dr. Mean. Even if the hospital were uncomfortable in retaining him on a theory of "when there's smoke, there's fire," Rue Mort should only have the duty of reporting the "fire," and not the duty of reporting the "smoke." However, if hospitals may refrain from reporting unsubstantiated charges that an employee has put persons in their care at physical risk, then they should have a complementary duty to investigate such charges. A Gadams or a Mean should not have the opportunity to walk away without a formal resolution of the charges. This issue is discussed in further detail in Section III below.

#### *Reporting of opinions regarding competence:*

When soliciting references, hospitals generally ask for an evaluation of the physician's competence. They typically send the evaluator a printed

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111. See Cathy A. Schainblatt, Comment, *The New Missouri Employer Immunity Statute: Are Missouri Employers Still Damned if They Do and Damned if They Don't?* 44 St. Louis U. L.J. 693, 722, 722 n.180 (2000).

form for the evaluator to complete and return. The form has a list of professional qualities, such as technical skill and ability to work with others, and calls for the evaluator to check a box labeled “poor,” “fair,” “good,” or “excellent” (or, alternatively, as “satisfactory” or “unsatisfactory”). There are spaces for evaluators to make narrative comments if they choose. (See Appendix A).

Evaluators should not be liable for misrepresentation for opinions, whether made in a check-off form or conveyed in prose, with two exceptions. If an opinion contradicts facts that the evaluator knows or should know, this should constitute misrepresentation. An example of this would be Brainpicker’s praise of Cushing’s ability to work with others. The second exception would be an opinion that contradicts statements the evaluator made repeatedly and publicly, and which fairly represents the evaluator’s true estimation of the situation. For example, if Yancey had frequently indicated that she would not allow Slowfinger to operate on her hamster, then an evaluation stating that Slowfinger’s technical skills were excellent would be a misrepresentation. Otherwise, opinions are too subjective to allow them to be easily characterized as misrepresentation. Yancey may believe that Slowfinger is too aggressive or too slow; another surgical oncologist may not.

Residents and young physicians present a special problem. Their propensities change with experience and maturity. Breeze’s evaluators may have initially deemed her careless, but her fecklessness resolved itself as she gained experience and maturity. For this reason, evaluators should not be held accountable for a duty regarding their opinions of trainees unless they fail to report a pattern of behavior that markedly deviates from the usual pattern of behavior among comparable trainees. Another problem is the use of words of art in narrative evaluations.<sup>112</sup> Reference letters rarely express negative views in clear language. Among the thousands of employment references the author has reviewed in evaluating physicians for various

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112. The following evaluation was given to a medical student whose grade placed him in the lowest 5% of those taking the course: Mr. Moriarty performed satisfactorily. He demonstrated a good fund of knowledge, a sense of responsibility and a motivation to learn. He involved himself with his patients and participated actively in their care. His writeups and presentations were satisfactory and showed improvements during the rotation.

This evaluation used the techniques of adjective inflation and omission of key parameters (in this case, clinical reasoning ability, which a reader would be expected to see evaluated). The following passage from another evaluation shows the third technique, using code words to imply that the student never quite caught on to what was expected of him: It took Mr. Moriarty a long time to settle in his role as primary caregiver, but in the final week he was more assertive and presenting [sic] more comfortably.

positions, fewer than ten have contained frankly adverse comments. These references, however, are read by professionals who are, or should be, familiar with the spectrum of language that they employ. The use of “words of art” alerts the competent and experienced reader to the recommender’s reservations, even in the absence of an overtly negative comment.

Such reservations are communicated through strategic omission, expected adjective inflation, and use of euphemisms. Strategic omission consists of the absence of comment about important parameters of professional performance. For example, failure of an evaluator to mention a candidate’s ethics or medical judgment may constitute an implicit warning of deficiency. If the candidate seems otherwise qualified, a hospital considering privileges should contact the writer to clarify the matter. Also, recommenders inflate their adjectives. For example, the residency application process requires official letters of recommendation from United States medical schools. Typically, the last paragraph of these letters contains a standard evaluative adjective to denote approximate class rank.<sup>113</sup> Finally, euphemisms are often used to alert the reader to possible problems. “This candidate is likely to have a substantial impact on your organization” does not mean that the evaluator anticipates a positive impact. “Assertive” often means obnoxious and argumentative. And the recipient of a letter whose writer suggests that he “would be happy to discuss this candidate by phone” would be remiss if she accepted the candidate without making that call. These devices are unlikely to surrender to frankness. They are universal, and a mentor who did not use them would be reducing his protégées’ employment opportunities.

In summary, statements of opinion should rarely be construed as misrepresentation. In the rare circumstance in which a court finds a prima facie case for a statement of opinion being a proximate cause of injury, the jury should hear evidence regarding the language used in expressing opinions regarding professional qualifications. Jury instructions should make it clear that the jury is to determine what is communicated to an expert reader, and not what the plain meaning of the communication would say to a lay person.

*Intentionality of second act:*

This question has been discussed *supra* with intentionality of the first act.

*Where either act is carried out:*

A bad, or arguably negligent, act can be carried out within the scope of employment, under color of employment, or outside the context of

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113. See *infra* note 125.

employment. In most jurisdictions,<sup>114</sup> there is vicarious liability for the employer only if an act is performed within the scope of employment—that is, unless it performed in service of the employer’s purpose.<sup>115</sup> An act performed under color of employment is one performed while acting outside one’s vocational capacity, but in circumstances with a nexus to the actor’s employment.<sup>116</sup> Cushing’s assault on Fragile and Mean’s sexual relationship with Lonely occurred under color of employment, as they were performed against people with whom the actors had professional relationships. It is reasonable to require reporting of bad acts carried out in the scope of employment or under color of employment. It is less clear whether an employer should have a duty to report acts without a nexus to the employment. If Cushing had beaten his wife or gotten into barroom fights, Brainpicker should not be held liable for failing to report knowledge of such information, unless the employer regarded such information as sufficiently relevant to serve as a basis for disciplinary action. The author is unaware of any case on point.

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114. See, e.g., RESTATEMENT (THIRD) OF AGENCY § 2.04 (“An employer is subject to liability for torts committed by employees while acting within the scope of their employment.”) and Comment (b) (“Additionally, respondeat superior is inapplicable when an employee’s tortious conduct does not fall within the scope of employment as stated in § 7.07(2).”); see also *E. Ala. Behavioral Med., P.C. v. Chancey*, 883 So. 2d 162, 167 (Ala. 2003); *Piedmont Hosp., Inc. v. Palladino*, 580 S.E.2d 215, 217 (Ga. 2003); *Alms v. Baum*, 796 N.E.2d 1123 (Ill. App. Ct. 2003); *Dias v. Brigham Med. Assocs., Inc.*, 780 N.E.2d 447, 452 (Mass. 2002); *Trahan-Laroche v. Lockheed-Sanders, Inc.*, 657 A.2d 417, 419 (N.H. 1995); *Goodyear Tire & Rubber v. Mayes*, 236 S.W.3d 754, 757 (Tex. 2007); but see *Doe v. Samaritan Counseling Ctr.* 791 P.2d 344 (Alaska 1990) (scope of employment is one of several factors to be considered in a balancing test).

115. See *John R. v. Oakland Unified Sch. Dist.*, 769 P.2d 948, 953 (Cal. 1989).

116. Causes of action in negligent hiring and negligent supervision have been found in situations in which an injury was committed by a worker outside the location of employment, working hours, and scope of employment—i.e., not in furtherance of the employer’s interest. See, e.g., *Otis Engineering Corp. v. Clark*, 668 S.W.2d 307, 308 (Tex. 1983) (involving employer that was sent home in his car because he was drunk and injured plaintiff); *Robertson v. LeMaster*, 301 S.E.2d 563, 563 (W. Va. 1983) (involving worker who was forced to labor for 27 consecutive hours and fell asleep while driving, thereby causing accident). This type of situation has been termed as occurring under “color of employment.” See, e.g., *Porter v. Nemir*, 900 S.W.2d 376, 385 (Tex. App. 1995) (involving employee of rehabilitation center that engaged in inappropriate sexual behavior with a former patient outside of the center).

*Similarity of first and second acts:*

In order to find that there is a propensity to commit a certain kind of act, there must be some similarity between the acts. In *T. W. v. City of New York*, a negligent hiring case, a criminal record that included “armed robbery, assault, theft, burglary, and possession of a controlled substance”<sup>117</sup> was held to create a propensity to sexually assault a minor girl.<sup>118</sup> The opinion suggests no empirical basis for finding foreseeability, and the author believes that the case was wrongly decided. A finding of foreseeability should be based on one of two possible circumstances. The first is a situation in which the acts are sufficiently similar and unusual that common sense and reason can correlate them, but where there is no overforeseeability. The first and second acts must be very similar. The second is if empirical correlation between seemingly unrelated classes of acts was demonstrable. For example, if expert testimony had been offered in *T. W.* that burglary created a predisposition toward sexual assault, and that the assailant’s hirer should have known about the correlation, then there would be a prima facie case for finding a duty. A failure to make rounds with residents regularly does not predict that a physician will lacerate a vessel during surgery, but surgical complications with a far greater than normal frequency might so predict. There is no rule that determines when classes of acts are sufficiently similar to justify a conclusion that there is a propensity. This may be the sort of issue best left to the courts.

*Intervening superseding events:*

Intervening superseding events present issues of both reliance and foreseeability. The acquisition of information by the second employer through means other than the reference in question affects reliance. The passage of time affects both foreseeability and reliance.

Suppose Livingston had hired Gadams despite letters from Mendota and Medoc that he had sexually assaulted students, but Golden Plains had sent a glowing reference. This situation would have made Livingston aware of Gadams’ propensity for improper sexual conduct. At the same time, Livingston would have had no need to rely on Golden Plains’ misrepresentation. This knowledge arguably should place the onus of duty on Livingston and relieve Golden Plains of liability.

The passage of time modifies both reliance and foreseeability. Vick’s death from surgery occurred four years after Slowfinger joined the staff of Prester John Hospital. Even if Slowfinger had poor clinical propensities that

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117. *T. W. v. City of New York*, 729 N.Y.S.2d 96, 97 (N.Y. App. Div. 2001).

118. *See id.* at 98.

Mordor and Yancey failed to communicate to Prester John, they were likely evident to his peers and to the hospital administration during the four years that Slowfinger was clinically active at the hospital. There would have been at least two biennial recredentialing investigations of Slowfinger's performance during this interval. If the hospital became aware of Slowfinger's problems through direct observation, then it no longer reasonably relied on the reference from Mordor for knowledge regarding his propensities and must take responsibility for Slowfinger's continued privileges to practice. This knowledge should then constitute an intervening superseding cause that relieves Mordor and Yancey of their duty to Vick. Alternatively, if Slowfinger had spent those intervening years practicing competently and without incident, there would not have been problems to uncover during the credentialing process. An employer could most reasonably conclude that either Yancey's concerns were mistaken or Slowfinger's poor propensities had diminished. This would also be a superseding event in the breach of the duty to Vick. In either case, it would be unreasonable to find Mordor and Yancey liable for Vick's death once Slowfinger's credentials have been renewed.

The retrieval of adverse information from the NPDB should also be an intervening superseding event. If a hospital learns of a physician's prior bad act from another source it can no longer rely on a hospital's failure to report that act to avoid liability.

*F. Medical Employment And Employment Reference Case Law Finding Duty To Third Parties*<sup>119</sup>

There are two cases of note involving health care workers that have fact patterns similar to those in *Randi W.* Both declined to follow the precedent in *Randi W.*, finding instead, in favor of the defendant. In the first case, *Grozdanich v. Leisure Hills Health Center, Inc.*,<sup>120</sup> a federal district court, following Minnesota law, granted summary judgment to a defendant faced with a third-party allegation of negligent misrepresentation.<sup>121</sup> Parson, a male nurse, sexually assaulted the plaintiff, a female nurse working under his supervision in a nursing home.<sup>122</sup> Parson had engaged in similar acts at the hospital that previously employed him, resulting in his resigning under

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119. *Randi W.* and related cases have spawned a voluminous body of literature on the appropriateness of requiring former employers to disclose adverse information in employment references. See generally Ashby, *supra* note 83; Deborah A. Ballam, *Employment References—Speak No Evil, Hear No Evil: A Proposal for Meaningful Reform*, 39 AM. BUS. L.J. 445 (2002); J. Bradley Buckhalter, Comment, *Speak No Evil: Negligent Employment Referral and the Employer's Duty to Warn (Or, How Employers Can Have Their Cake and Eat It Too)*, 22 SEATTLE U. L. REV. 265 (1998); Markita D. Cooper, *Beyond Name, Rank, and Serial Number: "No Comment" Job Reference Policies, Violent Employees and The Need For Disclosure-Shield Legislation*, 5 VA. J. SOC. POL'Y & L. 287 (1988); Terry Ann Halbert & Lewis Maltby, *Reference Check Gridlock: A Proposal for Escape*, 2 EMP. RTS. & EMP. POL'Y J. 395 (1998); Alex B. Long, Note, *Addressing the Cloud over Employee References: A Survey of Recently Enacted State Legislation*, 39 WM. & MARY L. REV. 177 (1997); Susan Oliver, Note, *Opening the Channels of Communication Among Employers: Can Employers Discard Their "No Comment" and Neutral Job Reference Policies?*, 33 VAL. U. L. REV. 687 (1999); Bradley Saxton, *Flaws in the Laws Governing Employment References: Problems of "Overdeterrence" and a Proposal for Reform*, 13 YALE L. & POL'Y REV. 145 (1995); J. Hoult Verkerke, *Legal Regulation of Employment Reference Practices*, 65 U. CHI. L. REV. 115 (1998) (analyzing employment reference law from a law and economics viewpoint). The interested reader is directed especially to the articles by Saxton, Ashby, and Verkerke. This article does not recapitulate their discussion regarding public policy considerations and protection from liability of parties supplying recommendations. Rather, it focuses on the potential implications for health care institutions and personnel who write recommendations on behalf of health care workers.

120. See *Grozdanich v. Leisure Hills Health Ctr., Inc.*, 25 F. Supp. 2d 953, 959 (D. Minn. 1998).

121. *Id.*

122. *Id.* at 962.



pressure.<sup>123</sup> The resignation agreement stipulated disagreement regarding his culpability. The resignation was characterized as voluntary.<sup>124</sup> The agreement also included the text of the employment letter of reference to be used, which stated “Mr. Parson has not been the subject of any disciplinary action.”<sup>125</sup> This letter of reference was used when Parson applied for a new job at a nursing home.<sup>126</sup> In addition, a supervisor of Parson’s at the hospital told the nursing home that Parson had a good relationship with patients,<sup>127</sup> but that he had some difficulty handling some employee issues.<sup>128</sup> Parson was hired by the nursing home and subsequently engaged in unwanted sexual touching of a co-employee at the nursing home.<sup>129</sup> While taking note of the precedents in *Gutzan*, *Golden Spread Council*, and *Randi W.*,<sup>130</sup> the court declined to allow a cause of action for negligent misrepresentation. The court held that the Minnesota Supreme Court had not previously ruled that Minnesota law allowed such a claim, and declined to extend the law to recognize this tort.<sup>131</sup> Furthermore, the court held that the facts could not support a finding of physical harm to the plaintiff as required for a cause of action under § 311.<sup>132</sup> The court ruled, however, that a confidentiality agreement between Parson and the hospital was not a defense.<sup>133</sup> The same

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123. *Id.* at 960.

124. *Id.* (quoting reference letter portion of the Resignation Agreement).

125. *Id.*

126. *See Grozdanich*, 25 F. Supp. 2d at 960.

127. *Id.* at 961.

128. *Id.*

129. *See id.* at 962–64.

130. *See id.* at 987.

131. *See id.* at 987–88 (citing *Smith v. Brutger Cos.*, 569 N.W.2d 408, 413 (Minn. 1997)).

132. *Grozdanich*, 25 F. Supp. 2d at 988.

133. *Id.* at 991.

court declined to reconsider the decision two years later on the basis of subsequent Minnesota jurisprudence.<sup>134</sup>

In the second case, *Passmore v. Multi-Management Services, Inc.*, the Indiana Supreme Court also declined to find a cause of action for negligent misrepresentation.<sup>135</sup> In *Passmore*, a nursing home employee was accused of injuring a patient.<sup>136</sup> The recommendation from a previous employer to the nursing home did not mention that the patient had been accused of assaulting patients there.<sup>137</sup> The court distinguished between intentional misrepresentation based on Restatement (Second) of Torts § 310, which it construed as overtly false representation of facts, and negligent misrepresentation based on § 311, which it construed as failing to report information.<sup>138</sup> On these facts, the court stated that it would have recognized a cause of action based on § 310 had the evidence warranted such a finding. It would not, however, recognize a cause of action based on § 311 because of public policy considerations.<sup>139</sup> The court was concerned that requiring the reporting of unsubstantiated information would squeeze recommenders into a cramped space between writing too much and writing too little and would likely deter evaluators from providing meaningful information.<sup>140</sup> Therefore, in granting summary judgment, the court stated:

[W]e think it rather obvious that declaring employers liable for negligence in providing employment references will lead universally to employer reluctance to provide any information other than name, rank, and serial number. Only those employers dull-witted enough to issue free-wheeling assessments without calling their lawyers would supply any but the most rudimentary information. A legal policy that discourages providing assessments to subsequent employers will not make for safer nursing homes, or other safe workplaces, for that

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134. See *Grozdanich v. Leisure Hills Health Ctr., Inc.*, 48 F. Supp. 2d 885, 886–91 (D. Minn. 1999).

135. *Passmore v. Multi-Mgmt. Servs. Inc.*, 810 N.E.2d 1022, 1028 (Ind. 2004).

136. See *id.* at 1024–25.

137. *Id.*

138. See *id.* at 1026, 1028.

139. See *id.* at 1028.

140. See *id.* at 1026, 1028.

matter. We therefore decline to adopt § 311 as it applies to employment references.<sup>141</sup>

So far, no court has applied § 311 in the medical context. The plain language of comments (d) and (e) to § 311 seems to invite liability based on failure to report medical malpractice and other physician negligence.<sup>142</sup> Foreseeability of the second act is the primary element that § 311 establishes as the requirement for liability. If the evaluator is aware that the physician he recommends has performed acts that foreshadow negligence and the subsequent physical harm to a victim, then failure to mention such acts constitutes negligence on the part of the evaluator under § 311.<sup>143</sup> Most cases are likely to arise under § 311 (negligent misrepresentation) rather than under § 310 (fraudulent misrepresentation) because courts have been reluctant to characterize physician communications to patients as fraud. Rather, they have tended to categorize even statements that physicians knew or should have known were false as failure to render informed consent.<sup>144</sup> One court declined to characterize a surgeon's erroneous statement to a patient that he was Board certified as fraud because it would allow "the possibility of punitive damages, and that would circumvent the requirements for proof of both causation and damages."<sup>145</sup> Another court, however, found in a similar case a cause of action in negligent misrepresentation based on § 311.<sup>146</sup>

Finally, some courts have been freewheeling in finding third-party liability to physicians in circumstances where there is no special relationship

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141. *Passmore*, 810 N.E.2d at 1028.

142. *See supra* note 28 and accompanying text.

143. In the absence of scienter; if scienter is present, this may constitute fraudulent misrepresentation under Restatement (Second) Torts § 311.

144. *See, e.g.*, *Johnson v. Kokemoor*, 545 N.W.2d 495, 497 (Wis. 1996); *Howard v. Univ. of Med. & Dentistry*, 800 A.2d 73, 75 (N.J. 2002). Both of these cases addressed physician misrepresentation to patients about their experience or credentials, and characterized these as failures to obtain informed consent.

145. *Howard*, 800 A.2d at 82.

146. *See Bloskas v. Murray*, 646 P.2d 907, 914–15 (Colo. 2002) (involving a physician who stated that he had performed an orthopedic procedure that he had, in fact, never performed, and failed to disclose that amputation was a possible consequence of the procedure).

in the traditional sense.<sup>147</sup> It is not far-fetched to postulate that these courts will hold physicians liable for the contents of references.

### III. DUTY TO THIRD PARTIES WHEN PROVIDING MEDICAL EMPLOYMENT REFERENCES

#### *A. Policy Considerations*

The primary goal of tort law as applied to health care workers and institutions should be maximization of public health. The compensatory, punitive, and expressive functions of the tort system are secondary. For society to stress the latter, while impairing the ability of physicians and hospitals to care for the health needs of the public, would be counterproductive. An additional goal of tort law should be to create a system that is predictable, transparent, and fair to those affected by it.

One possible effect of holding health care actors widely liable for their employment references could be improvement in health care. Such a policy would make deficient health care workers less employable and would protect hospitals from other hospitals' ridding themselves of problem doctors by allowing them to transfer to another institution. However, this could lead to undesirable results as well. A system that requires extensive reporting of real and suspected bad acts, and of negative opinions, might discourage physicians from entering fields in which they have to tackle difficult problems and are likely to make mistakes. Furthermore, within any given field, they will be encouraged to turn away difficult cases.<sup>148</sup> The

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147. See, e.g., *Renslow v. Mennonite Hosp.*, 367 N.E.2d 1250, 1255 (Ill. 1977) (finding a duty was owed to child born eight years after medical error, and injured by that error); *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 344–45 (Cal. 1976) (finding psychiatrist owed a duty to diagnose intent to injure another, despite statement from the American Psychiatric Association that the ability to do this regularly does not fall within the professional expertise of psychiatrists); *Osborne v. United States*, 567 S.E.2d 677, 681 (W. Va. 2002) (finding a duty was owed to the person injured in motor vehicle accident caused by patient taking improperly prescribed drug); *Blaz v. Michael Reese Hosp. Found.*, 74 F. Supp. 2d 803, 804 (N.D. Ill. 1999) (finding the researcher owed a duty to convey findings to subjects of study consisting of questionnaire and retrospective chart review).

148. The New York State Department of Health publishes raw and corrected mortality statistics for physicians performing cardiac bypass surgery. For links to all annual reports, see DEP'T OF HEALTH, NEW YORK STATE, HEART DISEASE (2007), [http://www.nyhealth.gov/nysdoh/heart/heart\\_disease.htm](http://www.nyhealth.gov/nysdoh/heart/heart_disease.htm). Anecdotally, some cardiovascular surgeons turn down patients with co-morbid conditions that increase risk of mortality because of these reporting requirements. Overall mortality in 1994 (the first year of reporting) was 2.49 percent. In 2003 (the most recent year reported) mortality was 1.61

mobility of physicians might be hampered, which might hamper the ability of some communities to meet their medical manpower needs. And, the additional stress arising from having one's negative accomplishments aired whenever one makes a professional move might deter qualified people from entering medicine altogether. Exposure to further liability may deter physicians from accepting administrative positions, especially in hospitals that do not compensate their clinical chairs. The public has an interest in having these positions filled by willing physicians who are able to provide competent oversight over the work of their colleagues.

Justice for potential patients is advanced when those responsible for screening their caretakers have maximum information about them. On the other hand, justice also requires that physicians be protected from damage arising from the circulation of rumors, unsubstantiated accusations, and unfounded negative opinions. Finally, evaluators merit protection against physically and temporally remote consequences of their recommendations, especially when institutions to which the statements were directed have had ample opportunity to familiarize themselves with the subjects of the recommendations.

Public policy should discourage hospitals from ignoring the bad acts of those they supervise. Tort law should not provide disincentives for avoiding the assumption of responsibility for the safety of others. Consequently, any policy establishing a duty for recommenders should be coupled with complementary policies requiring them to familiarize themselves with any acts that they are obliged to report.

### *B. Proposed Law Regarding Negligent Misrepresentation in Medical Employment References*

The following discussion attempts to propose a set of rules that will establish reasonable bounds for third-party liability for medical employment references in those states that choose to recognize third-party causes of action.<sup>149</sup>

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percent. It is not known to what extent the reporting program, as opposed to changing indications and overall improvement in care contributed to these statistics. If high risk patients are being turned down, it is not known if their outcome was better or worse with medical treatment than it would have been had they undergone bypass surgery. Furthermore, the applicability of this experience to other fields is not necessarily warranted by this data.

149. Although this discussion directly addresses health care issues, particularly with regard to credentialing, it should be clear that many of the points made are applicable to employment situations in other areas.

1. *For What Information Should There be a Duty to Report?*

The starting point should be legislation in various states authorizing service-letters.<sup>150</sup> These letters permit employees to receive a written statement at the conclusion of their employment, to appeal the letter's contents, and to forward the contents of the letter as an employment reference. There is a powerful public policy interest in requiring hospitals to respond to requests for references in support of credentialing actions, and this should be required in all jurisdictions. Regulatory mechanisms should ensure that these references are accurate and transparent. Additionally, a reference should be on file for all physicians beginning with the first biennial recredentialing. This should be the initial instrument sent out in response to requests.<sup>151</sup> A terminal reference letter should be prepared when a physician leaves a hospital staff. State health departments or non-governmental and accrediting bodies such as JCAHO should adopt regulations to ensure that references are equivalent and parallel in content. The content should detail the physician's scope of clinical practice and evaluate the physician's competence with regard to the various attributes of skill and character that contribute to competent performance. References should also require that recommending institutions provide data quantifying physicians' activities, such as the number and kinds of diagnoses and admissions. Other peer recommendations should not be part of the credentialing process. Even the most grossly unprofessional physicians can always find someone to vouch for them. Regardless, these letters contribute little, if any, value.

References should also include all formal findings against a subject physician, subject to time limitations that will be discussed below. On the other hand, unsubstantiated problems and accusations should not be reported, and failure to report them should not be actionable. Complementary policies are required to ensure that hospitals do not maintain a posture of willful ignorance. Hospitals should be required to investigate the role of any physician in all allegations of inappropriate conduct, and in all clinical incidents that the institution is legally required to report to the state or to JCAHO. It should be noted that reporting requirements differ

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150. See Saxton, *supra* note 119, at 57.

151. If a request for a reference is sought prior to the first recredentialing, the hospital should prepare it in accordance with the guidelines provided in this section, and keep it on file. The reference should be updated at the time of each recredentialing, or if the hospital in the interim becomes aware of knowledge that should be included in such a letter.

among the various states, and that JCAHO requires reporting of sentinel events. A sentinel event is defined as:

[A]n unexpected occurrence involving death or serious physical or psychological injury, or the risk thereof. Serious injury specifically includes loss of limb or function. The phrase "or the risk thereof" includes any process variation for which a recurrence would carry a significant chance of a serious adverse outcome.<sup>152</sup>

Hospitals should be required to make a formal finding with regard to any involved physician in any of these circumstances. Records of these investigations and outcomes should be maintained in a data file subject to state inspection and audit. Hospitals would be required to conclude one of four things regarding the physician's role: (1) that the physician's actions met professional standards; (2) that the physician deviated from those standards; (3) that the physician grossly deviated from those standards (e.g., he was unprofessional or reckless); or (4) that it is indeterminate whether the physician met professional standards. This finding would be part of the physician's file and would be communicated as part of any reference that the hospital issued within ten years of the alleged incident. Moreover, this finding would be privileged in malpractice actions, but not in state disciplinary or criminal actions.

Findings would be made by a hospital body whose membership included professional, administrative and public members, with the professionals in a majority. The physician under investigation would have an opportunity to present evidence, and would have both a right to review and a right to appeal adverse findings. The requirement for investigation and reporting should be limited to complaints with a nexus to the hospital, including office-related complaints by patients the physician treated at the hospital. It should also include complaints by or regarding non-patients (such as employees, contractors, and salespeople) who have a nexus to the hospital. Hospitals ordinarily should not be permitted to investigate or report on a physician's activities unrelated to his association with the hospital.<sup>153</sup>

A statement of opinion from the physician's supervisor (usually his department chair) regarding a physician's abilities relative to professional standards and relative to peers should be part of the reference. However, this statement must cite supporting data for any negative judgments.

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152. THE JOINT COMM'N ON ACCREDITATION OF HEALTHCARE ORGS., SENTINEL EVENT POLICY AND PROCEDURES 1 (2007), [http://www.jointcommission.org/NR/rdonlyres/F84F9DC6-A5DA-490F-A91F-A9FCE26347C4/0/SE\\_chapter\\_july07.pdf](http://www.jointcommission.org/NR/rdonlyres/F84F9DC6-A5DA-490F-A91F-A9FCE26347C4/0/SE_chapter_july07.pdf).

153. However, events without a nexus that the hospital can appropriately use as a basis for sanctions against the physician's privileges, such as criminal conviction, would be within a hospital's investigative purview.

Separation agreements that restrict the contents or language of employment references, or that affirmatively stipulate their contents or language, should be void and unenforceable.

Three mechanisms will protect physicians against inappropriately negative recommendations. The first is limitation of the subject matter of recommendations, as detailed above. The second is the opportunity for physicians to review and appeal factual material included in the reference. Finally, material in the reference whose subject is outside the scope of the specified parameters should not be privileged. Compliance with these reporting requirements would protect evaluators from third-party liability for misrepresentation under a *Randi W.* theory based on § 311. Failure to comply, on the other hand, would make evaluators liable for negligent misrepresentation, subject to the following additional constraints.

2. *For What Subsequent Acts by a Subject Should an Evaluator be Liable?*

Failure to report required information would be a breach of duty, resulting in liability for a foreseeable injury. This rule requires elaboration because foreseeability is, to a large extent, conclusory rather than predictive. A fair foreseeability rule must deal with the problem of overforeseeability—the problem that ubiquitous acts appear to predict other ubiquitous acts if there seems to be a rational nexus. As discussed above, acts of medical negligence are overforeseeable. Since these proposed reporting requirements are heavily biased in favor of reporting documented incidents of physician negligence, a fair rule will ordinarily not allow a cause of action against the evaluator for subsequent acts of simple negligence by the subject of the reference. Furthermore, there is no reason to believe that allowing a claim of negligence to climb so far up a ladder of causality will improve medical care. However, two situations would require third-party liability by the evaluator. One is failure to report physical or mental limitations that interfere with the physician's practice. The other is a physician's marked deviation from usual practice patterns, as described in Section II above. This article, therefore, proposes the following rule, which should satisfy the requirements of fairness:

With regard to references for a physician or other health care worker:

1. *Reckless and intentional acts:* It shall be a presumption rebuttable by a preponderance of evidence that a reckless or intentional act by a physician or other health care worker, acting under the color of a relationship with a referring institution, that results in injury to or that endangers the physical safety of a patient, an employee or agent of the institution, or other person on the premises of the institution, constitutes a propensity to repeat the act.

2. *Negligent acts:* It is a presumption rebuttable by clear and convincing evidence that a negligent act by a physician or other health



care worker, acting under the color of a relationship with a referring institution, that results in injury to or that endangers the physical safety of a patient, an employee or agent of the institution, or other person on the premises of the institution, does not constitute a propensity to repeat the act. Evidence of a physician's physical or mental impairment, or of a pattern of unusual acts by a physician deviating markedly in nature or frequency from acts that are within the scope of behavior of a normal practitioner of the same sort (which scope of behavior includes departures from accepted standards of practice occasionally, but not frequently seen in a normal practitioner), will, however, rebut this presumption.

3. Evidence that may be used to affirm or rebut the presumption in (1) or (2) may include, but is not limited to,

A. Any act that the physician or other health care worker committed before an institution supplied the reference, which the institution knew or should have known about prior to supplying the reference, or

B. Any opinion that the institution or its agents expressed about the physician or other health care worker prior to supplying the reference.

Certain intervening events should supersede reliance and, therefore, eliminate liability. First, if an institution that granted privileges or medical staff admission becomes aware of the offending physician's propensities prior to occurrence of the bad act under litigation and unreasonably failed to act, then the recommending institution should not be liable for failure to report that bad act. Second, any liability would be terminated by the second hospital's recredentialing the physician, provided such recredentialing occurs at least twelve months following the initial appointment.<sup>154</sup> Third, hospitals have no duty to report acts that occurred more than ten years before the date of the reference. Finally, any breach of duty resulting in a cause of action arising from negligent misrepresentation must arise from the same sort of act that an evaluator failed to communicate in the reference.

### 3. *Miscellaneous Considerations*

Individuals preparing references on behalf of hospitals should be considered agents of those hospitals, and should be protected by vicarious liability, unless they knowingly write a false recommendation without the hospital's knowledge or permission. Cases involving references should be adjudicated using the substantive law of the state where the reference

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154. By granting a physician credentials for a second time, a hospital is acknowledging that it is able to evaluate that physician independent of references from other institutions that were required for initial admission to the staff.

originated. It is unfair to hold evaluators responsible for knowledge of rules in a myriad of jurisdictions, and applying the strictest rule would, in effect, give the state that promulgated that rule unfair extraterritorial reach.

#### IV. CONCLUSION

The Restatement (Second) of Torts § 311 has given rise to a series of cases that find liability to injured third parties for misleading employment references. Because of the importance of references in physician employment and the complexity of the issues surrounding these references, this development has potentially far-reaching implications for the health care industry. Rigorous application of § 311 to information transmitted about physicians from one hospital to another has the potential to cause significant damage to the processes of physician education and employment. The suggestions in this article will allow institutions to exchange information without fear, and at the same time will protect the public against hospitals' using falsely positive recommendations to dump problem physicians on other institutions.

## Appendix A

Sample Hospital Questionnaire for Initial Granting of Privileges  
(adapted from several actual forms)

The above named practitioner is a candidate for appointment/reappointment to the medical staff of XXX Hospital. His/her application indicates that he/she has been a staff member at \_\_\_\_\_ hospital since \_\_\_\_\_. Attached is a copy of the applicant's Release of Information Statement. In accordance with [State] Public Health Law § [code provision], please provide us with the following information:

Name of practitioner: \_\_\_\_\_

How long have you known the practitioner? \_\_\_\_\_

To the best of your knowledge, has the applicant's license, clinical privileges, hospital staff membership, or any aspect thereof, or other professional status ever been denied, challenged, investigated, suspended, revoked, placed on probation or under focused review or involuntarily surrendered, or do you have knowledge of any such actions that are pending? No \_\_\_\_\_ Yes \_\_\_\_\_ No information \_\_\_\_\_

Is the applicant currently a member in good standing of your medical staff? Yes \_\_\_\_\_ No \_\_\_\_\_

If not, did he/she resign in order to avoid hospital imposed disciplinary sanctions? Yes \_\_\_\_\_ No \_\_\_\_\_

Are you aware of any pending medical malpractice actions, settlements, or judgments of medical malpractice in which the applicant was a defendant? If yes, please attach details. Yes \_\_\_\_\_ No \_\_\_\_\_

To the best of your knowledge has there been:

-any information concerning the applicant that has been or should be reported in accordance with the requirements of section [code provision] of the [State] Public Health Law? Yes \_\_\_\_\_ No \_\_\_\_\_

-any information relative to findings of violations of patients' rights by this individual? Yes \_\_\_\_\_ No \_\_\_\_\_

-any reason to believe that the applicant has or had a physical, medical, or mental health condition, including alcohol or drug dependence, that is reasonably likely to interfere with his/her satisfactory practice of medicine? Yes \_\_\_\_\_ No \_\_\_\_\_

**For any YES answer, please submit full details on a separate sheet.**

	Poor	Fair	Good	Superior
<b>Patient care</b>				
Availability and thoroughness				
Makes informed decisions based on evidence-based practice and appropriate clinical judgment				
<b>Medical/Clinical knowledge</b>				
Medical/technical knowledge				
Clinical judgment				
<b>Practice-based learning and improvement</b>				
Demonstrates an ability to learn from difficult practice experiences, consistently evaluates own performance, incorporates feedback into improvement activities				
<b>Interpersonal and communication skills</b>				
Listens, shares information and communicates well with patients, families, nurses and medical staff				
Effectively documents the patient encounter				
<b>Professionalism</b>				
Committed to continuous professional development (as evidenced by CME, participation in medical staff, and chart completion)				
<b>System-based practice</b>				
Practices cost-effective health care and resource allocation that does not compromise the quality of health care				

Comments: Please indicate any notable strengths and weaknesses or explanations of above answers and indicate the basis of your responses (e.g., direct observation and chart reviews)

**Recommendations:**

- I recommend without reservation for appointment
- I recommend for appointment with reservations (note reservations on separate sheet)
- I do not recommend for appointment (note reasons on separate sheet)

Name/Title

Signature

Date

Tel.

Name of Facility