Speak No Evil: Negligent Employment Referral and the Employer's Duty to Warn (Or, How Employers Can Have Their Cake and Eat It Too)

J. Bradley Buckhalter[*]

> The utility of deductive logic is great, but strictly limited. It will not tell you what to believe, but only that, *if* you believe A, you must believe B. . . . Deduction tells you what follows from your premises, but does not tell you whether your premises are true.[1]
>
> [Y]ou cannot have both truth and what you call civilisation.[2]

I. INTRODUCTION

Anyone who watches the evening news either knows or quickly learns that the law places constraints both on what conduct it considers wrongful and on what a lawyer can do about any given wrongful act.[3] One of those constraints appears in the "no duty to act" rule of tort doctrine, a rule which all lawyers learned early in their study of the law.[4] Briefly stated, the "no duty to act" rule holds that, with certain

---

* J.D. Candidate 1999, Seattle University School of Law; B.A., Northeast Louisiana University. The author wishes to thank Kalai Lau, Craig Weaver, and their editorial committee for their hard work and insightful comments. The author also wishes to recognize the legal writing faculty of Seattle University School of Law for developing in their students the most useful tool that a lawyer will ever possess. Finally, the author wishes to thank his wife, Kim, for her constant devotion and unflagging support.

1. Bertrand Russell, *The Art of Drawing Inferences*, *in* THE ART OF PHILOSOPHIZING 37, 43 (1983).

2. IRIS MURDOCH, A SEVERED HEAD 64 (1986).

3. *See, e.g.*, Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988), *reprinted in* FEMINIST LEGAL THEORY, FOUNDATIONS 58 (D. Kelly Weisberg ed., 1993).

4. Professor Bender relates how her own torts students reacted to the "no duty to act" rule: "[A] majority of my students initially find this legal 'no duty' rule reprehensible. After the rationale is explained and the students become immersed in the 'reasoned' analysis, and after they take a distanced, objective posture informed by liberalism's concerns for autonomy and liberty, many come to accept the legal rule that intuitively had seemed so wrong to them. They are taught to reject their emotions, instincts, and ethics, and to view accidents and tragedies abstractly, removed from their social and particularized contexts, and to apply instead rationally derived universal principles and a vision of human nature as atomistic, self-interested, and as free from constraint as possible." *Id.* at 67.

exceptions, the law imposes on actors neither a duty to act for another's benefit nor liability for failure to act.[5] Although the rule continues in force in modern tort doctrine, it is slowly being eroded, with courts sometimes imposing both a duty to act and liability for failure to do so.[6]

Like others in the legal community, employment lawyers function under the presumption that the law recognizes no general duty to act. Those lawyers advise their employer clients that the law does not require them to act affirmatively for the benefit of others except in limited situations. Rather, employment lawyers counsel their clients simply to take care that their conduct harms no one else. The law, they tell their clients, says "you must not harm others"; the law does not say "you must help others."[7]

With the recent emergence of defamation actions in the employment context, the "no duty to act" rule became a valuable tool in the employment lawyer's box. Increasingly, discharged employees began to file defamation actions against former employers who allegedly disclosed malicious or unfavorable reference information about them.[8] Lawyers relied on the "no duty to act" doctrine as a liability shield in advising their clients that the law imposed no duty to disclose unfavorable reference information about current and former employees,[9] even if prospective employers pointedly asked for such information. By refusing to disclose unfavorable reference information, employers could reduce their exposure to defamation liability.[10] However, employers soon saw the trade-off for their reduced exposure to liability, as it became increasingly difficult for them to obtain the necessary background information about their own prospective employees.[11]

The California Supreme Court's recent decision in *Randi W. v. Muroc Joint Unified School District*[12] called into question the employment lawyer's presumably fail-safe advice that the law imposes no duty

---

5. W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 56, at 373 (5th ed. 1984).

6. *Id.* at 377.

7. *See generally* Bradley Saxton, *Flaws in the Laws Governing Employment References: Problems of "Overdeterrence" and a Proposal for Reform*, 13 YALE L. & POL'Y REV. 45, 48-49 (1995) [hereinafter Saxton, *Flaws in the Laws*].

8. Deborah Daniloff, Note, *Employer Defamation: Reasons and Remedies for Declining References and Chilled Communications in the Workplace*, 40 HASTINGS L.J. 687, 687-88 (1989).

9. Saxton, *Flaws in the Laws*, *supra* note 7, at 48-49.

10. *Id.* at 48.

11. Daniloff, *supra* note 8, at 688-89.

12. 929 P.2d 582 (Cal. 1997).

to act for another's benefit in the employment reference context. The *Muroc* court held that, if an employer gives a reference for an employee and if that employee presents a substantial and foreseeable risk of harm to third persons, then a duty exists to disclose all material facts about the employee that created the risk of harm.[13] The *Muroc* decision both generated academic debate[14] and triggered dismayed commentary in legal trade journals.[15]

While stepping away from traditional tort doctrine in imposing its duty of disclosure, the *Muroc* court placed considerable limitations on its rule.[16] This article builds on the reasoning of the *Muroc* court by incorporating previous scholarship advocating the novel tort theory of negligent employment referral[17] to propose an affirmative duty of disclosure more comprehensive than that imposed in *Muroc*.

Section II of this article begins by surveying the evolution of tort doctrine and the "no duty to act" rule. It then proceeds to examine current theories of employer liability in the referral and hiring context and moves on to trace the history of the negligent employment referral claim. Next, this section scrutinizes the *Muroc* decision and ends with a brief discussion of the future of negligent employment referral.

Section III begins by exploring the implications of nondisclosure of reference information for both tort policy and tort doctrine. It then

---

13. *Id.* at 591.

14. *See, e.g.*, J. Hoult Verkerke, *Legal Regulation of Employment Reference Practices*, 65 U. CHI. L. REV. 115, 116 (1998); Bradley Saxton, *Employment References in California After* Randi W. v. Muroc Joint Unified School District: *A Proposal for Legislation to Promote Responsible Employment Reference Practices*, 18 BERKELEY J. EMP. & LAB. L. 240 (1997) [hereinafter Saxton, *Employment References*]; Anthony J. Sperber, *When Nondisclosure Becomes Misrepresentation: Shaping Employer Liability for Incomplete Job References*, 32 U.S.F. L. REV. 405 (1998).

15. *See CA Supreme Court Says Employers Must Warn of Known Employment Risk*, SEXUAL HARASSMENT LITIG. REP., March 1997, at 9; Denlinger et al., *Don't Stand So Close to Me: Misleading Job References Can Lead to Liability*, OHIO EMPLOYMENT L. LETTER 6 (1997); Felhaber et al., *References: Is It a No-Win Situation for Employers?*, 7 MINN. EMPLOYMENT L. LETTER 3 (1997); John P. Furfaro & Maury B. Josephson, *Issues and Trends in Employment References and Defamation*, N.Y.L.J., June 6, 1996, at 3; Steven P. Garmisa, *Negligence References Create Liability Despite Immunity Law*, CHICAGO DAILY L. BULL., Feb. 21, 1997, at 5; Rodney H. Glover, *Don't Say Anything at All*, N.J.L.J., May 19, 1997, at 24; Holland & Hart LLP, *The Reference Dilemma*, 2 MONT. EMPLOYMENT L. LETTER 3 (1997); Littler et al., *Letters of Recommendation: Silence is Golden*, 6 CAL. EMPLOYMENT L. MONITOR 23 (1997); Perkins Coie, *Even a Positive Recommendation May Create Trouble for an Employer*, 2 ALASKA EMPLOYMENT L. LETTER 5 (1997); Richard J. Reibstein, Esq., *Favorable Job Reference Claims: A New Cause of Action*, EMPLOYMENT LITIG. REP., March 25, 1997, at 22029; Allan H. Weitzman & Kathleen McKenna, *Employees' References May Spawn Litigation*, NAT'L L. J., May 19, 1997, at B4.

16. *See Muroc*, 929 P.2d at 590-91.

17. *See, e.g.*, Janet Swerdlow, Note, *Negligent Referral: A Potential Theory for Employer Liability*, 64 S. CAL. L. REV. 1645 (1991); *see also* Saxton, *Flaws in the Laws*, supra note 7.

proposes an affirmative duty of disclosure as a solution by amalgamating the reasoning of *Muroc* with that of *Tarasoff v. Regents of the University of California*.[18] This section concludes by illustrating how such a duty comports with both tort policy and doctrine and by assessing the effect of the proposed affirmative duty of disclosure on current theories of employer liability in the referral and hiring context.

In Section IV, the article concludes that underlying policy considerations and current tort doctrine justify imposing an affirmative duty of disclosure on employers and that such a duty will benefit both employers and potential victims of employee misconduct.

II. BACKGROUND

A. *Evolution of Tort Doctrine and the "No Duty to Act" Rule*

The early common law of tort originally operated under a system very similar to modern strict liability.[19] Although the law recognized the distinction between misfeasance and nonfeasance, a defendant remained liable for the consequences of his action whether or not he was at fault.[20]

The negligence theory emerged in the mid-nineteenth century and coincided with the rise of industrialized production.[21] Commentators speculate that this concurrent development was less than coincidental.[22] Rather, the commentators reason that the courts consciously, or perhaps unconsciously, sought to limit the liability of infant industry by shifting tort doctrine away from strict liability and toward the negligence theory.[23]

The requirement of duty was, and remains, the hallmark of the negligence theory.[24] Under the negligence theory, the law requires an existing duty on the defendant's part before he will face liability for his harmful conduct.[25] The law and its commentators offer various definitions of duty. However, one useful definition states that duty is "an obligation, to which the law will give recognition and effect, to

---

18. 551 P.2d 334 (Cal. 1976).

19. KEETON ET AL., *supra* note 5, at 356-57.

20. Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972), *reprinted in* PERSPECTIVES ON TORT LAW 14, 15 (Robert L. Rabin, ed., 3d ed. 1990).

21. *Id.* at 15-16; *see also* KEETON ET AL., *supra* note 5, at 357.

22. KEETON ET AL., *supra* note 5, at 356-57; *see also* Posner, *supra* note 20, at 15.

23. KEETON ET AL., *supra* note 5, at 356; *see also* Posner, *supra* note 20, at 15.

24. KEETON ET AL., *supra* note 5, at 357.

25. *Id.*

conform to a particular standard of conduct toward another."[26] In negligence cases, the duty remains the same at all times: the defendant must engage in conduct that is reasonable under the circumstances.[27] Duty in tort law thus dictates the defendant's conduct; it defines what a defendant must do or refrain from doing to avoid liability.[28]

Under the negligence theory, the law faults only those who cause harm.[29] The notion of fault flows from duty and is bound up with the idea of foreseeability.[30] Tort duty requires an actor to refrain from engaging in conduct with harmful results. When an actor foresees a harmful result, he must choose whether or not to avoid that result.[31] If the actor chooses to engage in the harmful conduct, then the law will find fault and, in most cases, impose liability.[32]

Although the negligence theory prohibits actors from engaging in harmful conduct, it consistently refuses to impose a general duty to act for another's benefit.[33] Commentators explain this distinction by pointing to the concepts of misfeasance and nonfeasance that underlie tort doctrine.[34] By misfeasance, the law means active misconduct that causes a positive injury to another.[35] Misfeasance creates a risk of injury.[36] That risk, which did not exist before the defendant's conduct, justifies holding the defendant liable for that conduct.[37] By nonfeasance, the law means passive inaction that may or may not result in injury to another.[38] The nonfeasant actor, rather than creating a risk of injury, merely fails to act to protect someone from injury.[39] Essentially, nonfeasant conduct is conduct that fails to benefit another.[40] With certain exceptions, conduct that fails to work a

---

26. *Id.* at 356. Somewhat more cynically, Professor Prosser once stated bluntly that "[t]here is a duty if the court says there is a duty." William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 15 (1953).

27. KEETON ET AL., *supra* note 5, at 358-59.

28. *Id.*

29. Theodore M. Benditt, *Liability for Failing to Rescue*, *in* JUSTICE, RIGHTS, AND TORT LAW 211, 211 (Michael D. Bayles and Bruce Chapman eds., 1983).

30. *See generally* KEETON ET AL., *supra* note 5, § 53.

31. *See* Oliver Wendell Holmes, THE COMMON LAW, LECTURE III, 77-80, 88-99, 107-10 (1881), *reprinted in* PERSPECTIVES ON TORT LAW 2 (Robert L. Rabin, ed., 3d ed. 1990).

32. *Id.* at 9.

33. KEETON ET AL., *supra* note 5, at 357.

34. *Id.* at 374.

35. Harold F. McNiece & John V. Thornton, *Affirmative Duties in Tort*, 58 YALE L.J. 1272, 1273 (1949).

36. *Id.*

37. *See id.*

38. *Id.*

39. *Id.*

40. *Id.*

positive benefit, as opposed to conduct that works a positive injury, does not justify a finding of liability.[41] Rather, in most cases, the law applies the "no duty to act" rule to insulate a defendant from liability when his otherwise nonfeasant conduct results in harm to another.[42]

Courts occasionally recognize exceptions to the "no duty to act" rule[43] when a relationship exists between parties such that social policy justifies imposing a duty to act.[44] The courts will often find a duty to act in at least three "relational" situations.

First, a special relation between a defendant and a third person may impose a duty on the defendant to control the third person's tortious conduct.[45] Moreover, a special relation between a defendant and a potential victim of a third person's tortious conduct may give the victim a right of protection.[46]

Second, the courts may impose a duty to act where the plaintiff occupies a vulnerable position as compared to a defendant who possesses knowledge that the plaintiff does not, and, thus, who holds considerable power over the plaintiff's welfare.[47] The courts reason that knowledge constitutes power over another who does not possess the same knowledge or information.[48] By imposing a duty in those

---

41. McNiece & Thornton, *supra* note 35, at 1275.

42. *See id.*

43. *Id.*

44. *See* KEETON ET AL., *supra* note 5, at 374.

45. *See* RESTATEMENT (SECOND) OF TORTS § 315 (1965). Section 315 cmt. a, states that Section 315 "is a special application of the general rule stated in § 314." RESTATEMENT (SECOND) OF TORTS § 315 cmt. a (1965). Under Section 314 "[t]he fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." RESTATEMENT (SECOND) OF TORTS § 314 (1965).

However, Section 314 cmt. c, states that: "[L]iability for non-feasance was slow to receive any recognition in the law. It appeared first in, and is still largely confined to, situations in which there was some special relation between the parties, on the basis of which the defendant was found to have a duty to take action for the aid or protection of the plaintiff . . . . It appears inevitable that, sooner or later such extreme cases of morally outrageous and indefensible conduct will arise that there will be further inroads upon the older rule." RESTATEMENT (SECOND) OF TORTS § 314 cmt. c (1965).

46. RESTATEMENT (SECOND) OF TORTS § 315(a) (1965).

47. *See* KEETON ET AL., *supra* note 5, at 374.

48. *See* MARSHALL S. SHAPO, TORT LAW, POWER & PUBLIC POLICY 14 (1977). Contract doctrine emphasizes the importance of parity of knowledge. Information disparity places one of the bargaining parties in a position of superior bargaining power. Thus, disparity of informational power in contractual relations allows the party with the superior information to act opportunistically by taking advantage of the other party's information deficit. Similarly, informational disparities in relationships recognized by tort doctrine as supporting a duty of care confers power on the party who possesses information that could present harm to another. *See id.* at 14-15 (discussing information disparity in the medical context).

situations, the courts acknowledge the central role that power plays in tort liability.[49]

Third, the courts may impose a duty to act where the defendant enjoys an economic benefit from her interactions with the plaintiff.[50] Such a duty embodies the benefit principle. The benefit principle holds that the law should impose a duty on a defendant to act affirmatively when the defendant receives a benefit from her interaction with the plaintiff.[51] Where the defendant reaps an economic benefit from her interactions with the plaintiff, the duty, or the likelihood of the court finding a duty, increases proportionately with the benefit.[52]

Beyond the duty to act imposed by relational situations, the law recognizes other exceptions to the "no duty to act" rule. For example, a court may impose a duty to act where the defendant's otherwise innocent prior conduct created an unreasonable risk of harm to another and where that conduct has already harmed the other.[53] The law may also impose a duty to act where one gratuitously undertakes to act.[54] In that case, the law holds that, if one undertakes to act, then one must act with reasonable care or face liability for any harm caused.[55] The law rationalizes this gratuitous act exception by reasoning that the defendant who gratuitously undertakes to act voluntarily assumes a duty.[56] Once having assumed a duty, a defendant will face liability if he or she fails to act with reasonable care.[57]

B. Current Theories of Employer Liability in the Referral and Hiring Contexts

Employers typically face liability for a wide range of tortious conduct. However, the two potential causes of action relating most directly to the subject of this article are defamation and negligent hiring.

1. Defamatory References

Although defamation certainly is not a novel cause of action, defamation claims arising in the employment reference context are

---

49. *Id.* at 4.
50. KEETON ET AL., *supra* note 5, at 374.
51. McNiece & Thornton, *supra* note 35, at 1282-83.
52. *Id.*
53. KEETON ET AL., *supra* note 5, at 377.
54. McNiece & Thornton, *supra* note 35, at 1282.
55. *Id.*
56. *Id.*
57. *Id.*

relatively recent phenomena.[58] Defamation occurs in the employment reference context when an employer makes a false or potentially disparaging remark about a present or former employee in an employment reference.[59]

The law recognizes two defenses to a defamation claim. First, truth is an absolute defense.[60] Second, employers enjoy a qualified privilege to defamation claims in the employment reference context.[61] The qualified privilege allows an employer to disclose potentially defamatory information about an employee if he or she reasonably believes that (1) the information affects an important interest of the recipient or a third person, and (2) the law or generally accepted standards of decent conduct require disclosure.[62]

Although employers enjoy a qualified privilege to defamation claims, the privilege does not apply when he or she discloses the defamatory information with malice.[63] To show that an employer acted maliciously, a plaintiff must prove that the employer (1) knew or recklessly disregarded the falsity of the defamatory information,[64] (2) disclosed the information for an improper purpose,[65] (3) excessively disclosed the defamatory information,[66] or (4) did not reasonably believe that disclosure of the defamatory information would accomplish an otherwise privileged purpose.[67]

The potential for defamation liability often affects the willingness of employers to disclose reference information regarding current or former employees. For instance, many employers are beginning to adopt "no comment" policies in an effort to avoid defamation claims.[68] Those employers who continue to respond to requests for reference information often disclose only name, rank, and serial number information regarding current and former employees.[69] Ultimately,

---

58. *See* Swerdlow, *supra* note 17, at 1647.

59. Saxton, *Flaws in the Laws*, *supra* note 7, at 71. *See also* RESTATEMENT (SECOND) OF TORTS §§ 558-559 (1965).

60. RESTATEMENT (SECOND) OF TORTS § 581A (1965).

61. *See* RESTATEMENT (SECOND) OF TORTS § 595 cmt. f (1965).

62. RESTATEMENT (SECOND) OF TORTS § 595 (1965).

63. Saxton, *Flaws in the Laws*, *supra* note 7, at 73.

64. *Id.*; *see also* RESTATEMENT (SECOND) OF TORTS §§ 600-602 (1965).

65. RESTATEMENT (SECOND) OF TORTS § 603 (1965).

66. RESTATEMENT (SECOND) OF TORTS § 604 (1965).

67. RESTATEMENT (SECOND) OF TORTS §§ 605, 605A (1965).

68. Robert S. Adler & Ellen R. Peirce, *Encouraging Employers to Abandon Their 'No Comment' Policies Regarding Job References: A Reform Proposal*, 53 WASH. & LEE L. REV. 1381, 1385-88 (1996).

69. Swerdlow, *supra* note 17, at 1645. Many excellent scholarly articles focus on the effects of employers' unwillingness to disclose reference information. *See, e.g.*, Valerie L. Acoff,

the "no comment" policies and "bare bones" references drastically reduce the amount of employee reference information available to prospective employers. As a result, the quid pro quo for decreased exposure to defamation liability often assumes the form of increased exposure to liability for negligent hiring.

2. Negligent Hiring

The negligent hiring claim imposes on employers a duty to exercise reasonable care in hiring their employees.[70] Under the doctrine of *respondeat superior*, the law traditionally held employers liable for the unintentional torts of employees acting within the scope of employment.[71] However, the negligent hiring claim imposes liability on an employer for all the acts of its employees, including those beyond the scope of employment and those occurring after work hours if the plaintiff proves that the employer acted negligently in deciding to hire the employee.[72]

The key issue in the negligent hiring claim revolves around the employer's investigation of the prospective employee's background.[73] Most courts hold that, to avoid liability for negligent hiring, an employer must adequately investigate a prospective employee's background to determine his or her fitness for the position.[74] The most useful information regarding a prospective employee's background generally comes from his or her present or former employer.[75] Thus, a prospective employer can best avoid liability for negligent hiring by receiving reference information from the prospective employee's present or former employer.

The prospective employer's dependence on other employers for reference information highlights the way in which one employer's attempt to avoid defamation liability shifts the costs of his conduct onto another: an employer's refusal to disclose full reference information increases the potential negligent hiring liability of the employer

---

References Available Upon Request . . . Not! - Employers are Being Sued for Providing Employee Job References, 17 AM J. TRIAL ADVOC. 755 (1994); Adler & Peirce, *supra* note 68; Daniloff, *supra* note 8; Edward R. Horkan, Note, *Contracting Around the Law of Defamation and Employment References*, 79 VA. L. REV. 517 (1993); Ramona L. Paetzold & Steven L. Willborn, *Employer (Ir)Rationality and the Demise of Employment References*, 30 AM. BUS. L.J. 123 (1992); Saxton, *Flaws in the Laws*, *supra* note 7.

70. Swerdlow, *supra* note 17, at 1649.

71. *Id.*

72. *Id.*

73. *Id.* at 1651.

74. *See id.*

75. *See id.*

seeking the information. The theory of negligent employment referral attempts to address exactly the issue of increased negligent hiring liability resulting from underdisclosure of reference information.

C. *The Emergence of the Negligent Employment Referral Theory*

The negligent employment referral theory, while drawing on existing tort doctrine, has not yet attained the status of doctrine itself. Instead, the theory remains just that—an emerging and untested theory that arose from the legal scholarship commenting on those cases with facts ripe for its application.

While several reported cases reviewed facts ripe for a negligent employment referral claim, no court has yet explicitly adopted the theory. Rather, courts skirt the issue by applying traditional tort doctrine, particularly the "no duty to act" rule and the provisions of the Restatement (Second) of Torts. This section gathers those cases and reviews the legal scholarship commenting on them.

1. The Pre-*Muroc* Cases

The earliest published case with facts ripe for a negligent employment referral claim appeared in 1985. In *Gutzan v. Altair Airlines, Inc.*,[76] defendant Joseph W. Farmer sought the help of defendant Romac & Associates, an employment service, in securing a position as a data programmer.[77] Romac learned that Farmer had been incarcerated during his military service when Farmer presented a positive letter of reference from the United States Disciplinary Barracks in Ft. Leavenworth, Kansas.[78] Farmer explained to Romac that his incarceration stemmed from charges of rape brought against him by his German girlfriend while he was stationed in Germany but assured Romac that his incarceration merely reflected "a policy of military courts to appease foreign women who made such charges."[79] A Romac employment counselor telephoned Fort Leavenworth to verify the reference but did not inquire into the facts underlying Farmer's conviction.[80]

Romac subsequently recommended Farmer for a data processing position with Altair.[81] Although Romac informed Altair of Farmer's

76. 766 F.2d 135 (3d Cir. 1985).
77. *Id.* at 137.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*

military incarceration, Altair chose to hire him.[82] Approximately one year later, Farmer assaulted and raped the plaintiff, a coworker at Altair.[83] Soon after the rape, both Altair and Romac learned that Farmer's military incarceration resulted from his conviction for assaulting and raping a coworker.[84]

The plaintiff settled with Altair before trial.[85] However, she proceeded with her claim against Romac and received a jury verdict in her favor.[86] Romac then moved for judgment notwithstanding the verdict.[87] The district court granted Romac's motion and denied the plaintiff's subsequent motions for a new trial and to set aside the judgment.[88]

On appeal, the plaintiff argued that the court should either (1) grant her a new trial because the district court failed to give the jury her requested instructions on sections 311 and 324A of the Restatement (Second) of Torts[89] or (2) reverse the judgment because the district court erred in granting Romac's post-trial motion.[90]

---

82. *Gutzan*, 766 F.2d at 137.
83. *Id.* at 138.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Gutzan*, 766 F.2d at 138.
89. *Id.* Section 311 of the Restatement (Second) of Torts states:

(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.

RESTATEMENT (SECOND) OF TORTS § 311 (1965).

Section 324A states:

One who undertakes . . . to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
  (a) his failure to exercise reasonable care increases the risk of such harm, or
  (b) he has undertaken to perform a duty owed by the other to the third person, or
  (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

RESTATEMENT (SECOND) OF TORTS § 324A (1965).

90. *Gutzan*, 766 F.2d at 140.

Because the appellate court found that the district court did not err in failing to include the specific language of sections 311 and 324A in the jury instructions, it did not reverse the district court's decision denying the plaintiff a new trial.[91] The court reasoned that the instructions as a whole properly informed the jury of the concepts of duty, negligence, and negligent omission.[92]

However, the court reversed the judgment notwithstanding the verdict.[93] The court stated that, in granting the motion, the district court concluded that Romac owed no duty to the plaintiff[94] and that the duty to protect the plaintiff had shifted from Romac to Altair.[95] The court relied on Section 452(2) of the Restatement (Second) of Torts in finding that the duty did not shift to Altair.[96] Section 452(2) states that

> [w]here, because of lapse of time or otherwise, the duty to prevent harm to another threatened by the actor's negligent conduct is found to have shifted from the actor to a third person, the failure of the third person to prevent such harm is a superseding cause.[97]

The court reasoned that, under the circumstances of the case, "the lapse of one year alone would not be sufficient for a finding that a duty shifted to Altair."[98] Altair's assumption that Farmer posed no danger to fellow workers "rested on reassurances made by Romac . . . and the passage of one year alone would not suffice to immunize the assumption from challenge."[99]

The genesis of a theory of negligent employment referral arose from the decision in *Gutzan*. The author of a 1987 article briefly discussed *Gutzan* and concluded that plaintiffs who unsuccessfully seek to hold employers liable under a negligent hiring theory may turn to former employers in suits "for misrepresentation arising out of the inaccurate references given to the current employer."[100] Although the author did not explicitly posit a theory of negligent employment referral, he implicitly recognized its potential.

---

91. *Id.* at 138.
92. *Id.* at 139-40.
93. *Id.* at 142.
94. *Id.* at 141.
95. *Id.*
96. *Gutzan*, 766 F.2d at 141.
97. RESTATEMENT (SECOND) OF TORTS § 452(2) (1965).
98. *Gutzan*, 766 F.2d at 141.
99. *Id.*
100. *See* Kyle E. Skopic, *Potential Employer Liability for Employee References*, 21 U. RICH. L. REV. 427, 452 (1987).

After *Gutzan*, the case law evolved fitfully while managing to ignore a theory of negligent employment referral. In *Cohen v. Wales*,[101] for example, the plaintiffs raised claims remarkably similar to those in *Muroc*. The complaint alleged that the codefendant Warwick School District recommended a former teacher for a teaching position with the Tri-Valley School District.[102] However, Warwick failed to inform Tri-Valley that the teacher had been charged with sexual misconduct while at Warwick.[103] Eleven years after Tri-Valley hired the teacher, he "caused injury to the infant plaintiff."[104] The plaintiffs sued for negligence but the trial court granted Warwick's motion to dismiss plaintiff's complaint.[105] The appellate court affirmed the trial court's dismissal.

In a three-paragraph opinion, the court held that Warwick had no duty to warn Tri-Valley of the teacher's prior sexual misconduct charges.[106] The court reasoned that "[t]he common law imposes no duty to control the conduct of another or to warn those endangered by such conduct, in the absence of a special relationship between either the person who threatens harmful conduct or the foreseeable victim."[107]

The court in *Moore v. St. Joseph Nursing Home, Inc.*[108] reached a result similar to that in *Cohen*. In *Moore*, the decedent, a security guard at a facility serviced by Maintenance Management Corporation, was murdered by Allen St. Clair, a fellow employee.[109] St. Clair worked for defendant St. Joseph Nursing Home prior to his employment by Maintenance Management.[110] While employed by St. Joseph, St. Clair received twenty-four disciplinary warnings for misconduct ranging from alcohol and drug abuse to outright violence.[111] In its defense, St. Joseph asserted that Maintenance Management never contacted it to obtain reference information regarding St. Clair.[112] However, St. Joseph admitted that it would have provided only St. Clair's dates of employment had Maintenance

---

101. 518 N.Y.S.2d 633 (N.Y. App. Div. 1987).
102. *Id.*
103. *Id.*
104. *Id.* at 634.
105. *Id.*
106. *Id.*
107. *Cohen*, 518 N.Y.S. at 634.
108. 459 N.W.2d 100 (Mich. Ct. App. 1990).
109. *Id.* at 101.
110. *Id.*
111. *Id.* at 102.
112. *Id.*

Management requested information.[113] The plaintiffs claimed that St. Joseph had a duty as a matter of law voluntarily to disclose St. Clair's history of misconduct to Maintenance Management.[114]

The court held that St. Joseph had no duty to disclose and affirmed the trial court's summary judgment of dismissal.[115] The court stated that a defendant owes no duty to protect one endangered by a third party's conduct unless a special relationship existed between either the defendant and the endangered party or the defendant and the dangerous third party.[116] The court rejected plaintiffs' argument that St. Joseph and Maintenance Management enjoyed a special relationship "arising from a moral and social duty which [the] law recognizes as existing between an individual's former and prospective employers."[117] Although moral and social obligations might compel the former employer to disclose such information, the court reasoned that the law imposes no similar obligation.[118]

Finally, the trial court in the recent, unreported case of *Jerner v. Allstate Ins. Co.*[119] implicitly approved a negligent employment referral claim. In *Jerner*, Fireman's Fund Insurance Companies hired Paul Calden after he left a low-level management job at Allstate following his violation of the company's policy against carrying a handgun to work.[120] After his discharge from Fireman's Fund, Calden shot and killed three and wounded two Fireman's Fund employees.[121] The plaintiffs alleged that Allstate recommended Calden to Fireman's Fund out of fear of retaliation for a negative reference.[122]

After filing the action, the plaintiffs moved to amend their complaint to seek punitive damages against Allstate.[123] The trial

---

113. *Id.*

114. *Moore*, 459 N.W.2d at 102.

115. *Id.* at 103.

116. *Id.* at 102.

117. *Id.*

118. *Id.*

119. Jerner v. Allstate Ins. Co., 1995 Daily Lab. Rep. (BNA) No. 160, at D7 (Fla. Cir. Ct. Aug. 18, 1995).

120. *See Workplace Violence: Allstate Settles Lawsuit Connected to 1993 Shooting Deaths*, 1995 Daily Lab. Rep. (BNA) No. 193, at D17 (Oct. 5, 1995).

121. *Id.*

122. *Id.*

123. *See Workplace Violence: Judge Allows Plaintiffs to Seek Damages Over Recommendation of Violent Employee*, 1995 Daily Lab. Rep. (BNA) No. 160, at D7 (Aug. 18, 1995).

judge granted the plaintiffs' motion[124] and Allstate settled with the plaintiffs less than two months later.[125]

Despite the varied results of the pre-*Muroc* cases, the courts in each case refused to look beyond hornbook tort doctrine in resolving the issues before them. Although the court in *Gutzan* granted the plaintiff the relief that she sought, it premised its decision on the traditional doctrine of shifting duty. Both the *Cohen* and *Moore* courts premised their holdings on the traditional "no duty to act" rule. Despite the intriguing possibilities of *Jerner*, the court's reasons for granting the plaintiffs' motion to amend their complaint must remain nothing more than an intriguing possibility, as the parties settled and the case was unreported.

Although plaintiffs faced with facts such as those in the above cases sometimes prevail under traditional tort doctrine, the cases illustrate the necessity of a doctrine that can bring order to this corner of the law. The theory of negligent employment referral attempts to provide that order while also providing plaintiffs a remedy. In doing so, the theory encourages courts to look beyond mere hornbook tort doctrine and toward both evolving case law and the policy underlying it.

2. Negligent Employment Referral and the *Tarasoff* Rationale

Janet Swerdlow offered the first express enunciation of a negligent employment referral theory in a 1991 article.[126] Swerdlow based her theory on the California Supreme Court's reasoning in *Tarasoff v. Regents of the University of California*.[127]

In *Tarasoff*, the plaintiffs alleged that the defendant psychotherapist's patient, Prosenjit Poddar, confided to the psychotherapist his intent to kill the plaintiffs' daughter, Tatiana Tarasoff.[128] The police briefly detained Poddar at the psychotherapist's request.[129] However, they released Poddar once he appeared rational,[130] and the psychotherapist's superior advised the police to take no further action to

124. *Id.*

125. *See Workplace Violence: Allstate Settles Lawsuit Connected to 1993 Shooting Deaths*, *supra* note 120 at D17.

126. *See* Swerdlow, *supra* note 17.

127. 551 P.2d 334 (Cal. 1976); *see* Swerdlow, *supra* note 17, at 1659.

128. *Tarasoff*, 551 P.2d at 339.

129. *Id.*

130. *Id.* at 339-40.

detain him.[131] No one warned Tarasoff or her family of Poddar's threats.[132] Poddar subsequently killed Tarasoff.[133]

The *Tarasoff* court held that the plaintiffs could amend their complaint to state a claim against the defendant psychotherapist and his employer for breach of a duty to exercise reasonable care to protect Tatiana.[134] In doing so, the court imposed a novel duty on a psychotherapist to warn third persons who face imminent physical danger from one of the psychotherapist's patients.[135] The court acknowledged that no independent relationship existed between the psychotherapist and Tatiana.[136] However, the court found that a special relationship existed between the psychotherapist and Poddar.[137] The special nature of that relationship, the court reasoned, supported an affirmative duty to act for the benefit of a third person like Tatiana Tarasoff.[138]

The *Tarasoff* court set out a three-part test which, if satisfied, imposes on a defendant a duty to warn third parties of potential danger. First, the court cited to Section 315 of the Restatement (Second) of Torts in holding that a special relationship must exist between the defendant and either (1) the potentially dangerous person or (2) the third-party potential victim.[139] The court reasoned that, although no relationship existed between Tarasoff and the defendant therapist, a special relationship existed between Poddar and his therapist sufficient to support a finding of duty.[140]

---

131. *Id.* at 340.
132. *Id.*
133. *Id.* at 339.
134. *Tarasoff*, 551 P.2d at 348.
135. *See id.* at 347-48.
136. *Id.* at 343.
137. *Id.*
138. *Id.*
139. *Id. See also* Swerdlow, *supra* note 17, at 1660. RESTATEMENT (SECOND) OF TORTS § 315 (1965). Section 315 cmt. a, states that Section 315 "is a special application of the general rule stated in § 314." RESTATEMENT (SECOND) OF TORTS § 315 cmt. a (1965). Under Section 314, "[t]he fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." RESTATEMENT (SECOND) OF TORTS § 314 (1965). However, Section 314 cmt. c, states that: "[L]iability for non-feasance was slow to receive any recognition in the law. It appeared first in, and is still largely confined to, situations in which there was some special relation between the parties, on the basis of which the defendant was found to have a duty to take action for the aid or protection of the plaintiff. . . . It appears inevitable that, sooner or later such extreme cases of morally outrageous and indefensible conduct will arise that there will be further inroads upon the older rule." RESTATEMENT (SECOND) OF TORTS § 314 cmt. c (1965). It seems that the *Tarasoff* court took full advantage of the final sentence of cmt. c in imposing a duty on the defendant psychotherapist.
140. *Tarasoff*, 551 P.2d at 345-46.

Second, the court stated that the risk of harm to the victim must be foreseeable.[141] Foreseeability, according to the court, becomes the most important consideration when examining the existence of duty.[142] However, despite foreseeability's importance, the court essentially merged the element of foreseeability into its analysis of the defendant psychotherapist's relationship to his patient. The court stated that

> when the avoidance of foreseeable harm requires a defendant to control the conduct of another person, or to warn of such conduct, the common law has traditionally imposed liability only if the defendant bears some special relationship to the dangerous person or to the potential victim. Since the relationship between a therapist and his patient satisfies this requirement, we need not here decide whether foreseeability alone is sufficient to create a duty to exercise reasonable care to protect a potential victim of another's conduct.[143]

Thus, although the court included foreseeability in its duty calculus, it became a nonissue under the facts in *Tarasoff*. The plaintiffs' complaint alleged that Poddar explicitly told his psychotherapist that he intended to kill Tarasoff[144] and the record showed that the psychotherapist informed the police of Poddar's threat.[145] The defendants clearly foresaw the threat to Tarasoff. Given established foreseeability of harm, the *Tarasoff* court focused principally on the special psychotherapist-patient relationship.

Professor Peter Lake suggests that the California Supreme Court's focus on the special relationship requirement, or what he calls the "special relationship caveat," allowed it to "unhook" the foreseeability requirement from its more or less narrow holding.[146] Lake focuses on the *Tarasoff* court's statement that, "[s]ince the relationship between a therapist and his patient satisfies this requirement, we need not here decide whether foreseeability alone is sufficient to create a duty to exercise reasonable care to protect a potential victim of another's conduct."[147] According to Lake, "[t]his sentence serves to fortify an

---

141. *Id.* at 342-43. *See also* Swerdlow, *supra* note 17, at 1660.

142. *Tarasoff*, 551 P.2d at 342.

143. *Id.* at 342-43.

144. *Id.* at 341.

145. *Id.*

146. Peter F. Lake, *Revisiting Tarasoff*, 58 ALB. L. REV. 97, 122-23 (1994). The narrow holding here is that a defendant psychotherapist has a duty to warn third persons of threats by a potentially dangerous patient.

147. *Tarasoff*, 551 P.2d at 343.

interpretation that the case rests on a doctrinal acceptance of 'special relationship' rules."[148] *Tarasoff*, Lake states, implies that, "because the special relationship rules permit liability based on a duty of reasonable care," foreseeability is of secondary importance.[149] The court's discussion of foreseeability, then, becomes "mere dicta" and is subsumed by the special relationship requirement.[150]

As the third element of its test, the *Tarasoff* court stated that the potential victim must be identifiable.[151] However, the court refused to define "identifiable" and urged, instead, a contextual approach: "[t]he matter [of identifiability] is one which depends upon the circumstances of each case, *and should not be governed by any hard and fast rule.*"[152]

By more or less brushing aside its identifiability requirement, the California Supreme Court offered little guidance to subsequent courts faced with the issue of victim identifiability when applying the three-part *Tarasoff* test. However, the same court shed some light on the *Tarasoff* identifiability requirement when it decided *Thompson v. County of Alameda*[153] four years after *Tarasoff*. Applying the *Tarasoff* identifiability factor, the *Thompson* court stated that a defendant has no duty to warn of possible harm when the plaintiff "was not a known identifiable victim, but rather a member of a large amorphous public group of potential targets."[154]

Although the *Thompson* holding appears facially to undermine *Tarasoff*, the holding cannot be separated from the facts of the case. In *Thompson*, the County of Alameda (County) released a juvenile offender into his mother's custody despite the fact that he told County workers that he intended to kill an unnamed child who lived nearby.[155] The County did not warn the police, the juvenile offender's mother, or the parents in the offender's neighborhood of the offender's threat.[156] Within 24 hours of his release, the juvenile offender killed the plaintiffs' son.[157]

148. Lake, *supra* note 146, at 122.
149. *Id.* at 124.
150. *Id.* at 125.
151. *Tarasoff*, 551 P.2d at 345 n.11.
152. *Id.* (emphasis added).
153. 614 P.2d 728 (Cal. 1980).
154. *Id.* at 738.
155. *Id.* at 730.
156. *Id.*
157. *Id.*

In analyzing the County's duty to warn, the court weighed both policy considerations and "*'foreseeability' within the context of this case.*"[158] As the court made clear, its foreseeability and identifiability analyses were context-driven. In fact, the analysis turned almost exclusively on the logistical problems of imposing a duty to warn on governmental entities that release potentially dangerous persons into the community. First, the court reasoned that the sheer volume of parolees released each year prohibited state and local governments from notifying the general public of each potentially dangerous person.[159] The court then distinguished *Tarasoff* by stating that a warning given directly to an isolated individual such as Tatiana Tarasoff would have a greater effect than a general warning given to a broad segment of the population.[160] Next, the court reasoned that warning the police of a potentially dangerous offender would serve little purpose unless the police subsequently went door to door warning each resident in the juvenile offender's neighborhood.[161] Finally, the court reasoned that requiring the County to give public notice of the presence of a potentially dangerous person would undermine the government's efforts to rehabilitate offenders.[162]

The facts in *Thompson*, as the court itself recognized, differed greatly from those in *Tarasoff*. While the victims in *Thompson* were arguably "identifiable" in the broad sense of the term, under the court's reasoning, any attempt to warn those victims required too much effort in return for too little protection. In the end, the *Thompson* court employed the term "identifiable victim" exactly as the *Tarasoff* court intended: contextually.

The court's refusal in *Tarasoff* to define its identifiability requirement left room for it and future courts to make highly contextual decisions, as illustrated by *Thompson*. Moreover, while the *Tarasoff* court set out what it claimed was a three-part test for courts to use in analyzing a defendant's duty to warn, the court focused primarily on the special relationship requirement.[163] As Professor Lake suggests, the court "unhooked" the foreseeability requirement from its specific holding for the exact reason that it wished to focus on special relationship rules.[164]

---

158. *Id.* at 734 (emphasis added).
159. *Thompson*, 614 P.2d at 736.
160. *Id.*
161. *Id.*
162. *Id.* at 737.
163. *Id.* at 733.
164. Lake, *supra* note 146, at 123.

In her article advocating the tort of negligent employment referral, Swerdlow adopted the *Tarasoff* special relationship rationale. She reasoned that a special relationship much like that between a psychotherapist and a patient exists between an employer and a current or former employee.[165] Given that relationship, Swerdlow argued, the law should impose an affirmative duty of disclosure on employers who possess information that would make it reasonably foreseeable that an employee or former employee poses a risk of harm to a third person.[166]

Since Swerdlow's article, a second commentator followed her lead in arguing that the *Tarasoff* rationale could support an affirmative duty of disclosure.[167] However, others argue that *Tarasoff* cannot support such a duty.[168] For example, Professors Adler and Peirce reason in their article that the severance of the master-servant relationship terminates any special relationship between an employer and an employee.[169] Moreover, Adler and Peirce point out that courts, although willing to extend the *Tarasoff* rationale to other contexts, have not yet extended it to the employment reference context.[170] Instead, Adler and Peirce believe that, if courts adopt the *Tarasoff* rationale in the employment reference context, it will be limited to especially compelling cases.[171]

Despite the theory's detractors, Swerdlow's original argument postulated that a theory of negligent employment referral represents a natural extension of *Tarasoff*. According to Swerdlow, negligent employment referral presents a viable doctrinal alternative to courts faced with a plaintiff's claim that she suffered injury at the hands of a former employee negligently referred by a former employer.[172] The California Supreme Court faced exactly that situation in *Randi W. v. Muroc Joint Unified School District*.[173]

---

165. Swerdlow, *supra* note 17, at 1660-63.

166. *Id.* Although Swerdlow analogizes the relationship between an employer and a current or former employee to that between a psychotherapist and patient, she does not discuss the analogy at length.

167. *See* Saxton, *Flaws in the Laws*, *supra* note 7, at 91.

168. *See* Adler & Peirce, *supra* note 68.

169. *Id.* at 1440.

170. *Id.* at 1442-43.

171. *Id.* at 1443-44.

172. Swerdlow, *supra* note 17, at 1672-73.

173. 929 P.2d 582 (Cal. 1997).

D. *Randi W. v. Muroc Joint Unified School District*

In *Muroc*, codefendant Robert Gadams worked for three California school districts before his employment with defendant Livingston Union School District.[174] The plaintiff alleged that each of the school districts provided positive letters of recommendation regarding Gadams to the placement office of Fresno Pacific College.[175] The defendants made the recommendations on forms provided by Fresno Pacific, which clearly stated that the information provided would "'be sent to prospective employers.'"[176] Fresno Pacific subsequently released the recommendations to Livingston Union School District.[177] The plaintiff alleged that the school districts failed to disclose in their recommendations to Fresno Pacific that Gadams had a verifiable history of sexual misconduct during his employment with all three districts.[178] The plaintiff further alleged that Gadams, while employed by Livingston, "'negligently and offensively touched, molested, and engaged in sexual touching of [the] 13-year old [plaintiff] proximately causing injury to her.'"[179]

The plaintiff's complaint raised six claims, including negligent misrepresentation and fraud.[180] The trial court dismissed the complaint with prejudice on the defendants' demurrer.[181] The Court of Appeal reversed as to the negligent misrepresentation and fraud claims.[182]

The California Supreme Court affirmed the Court of Appeal and allowed the negligent misrepresentation and fraud claims to proceed.[183] The court noted that, absent some special relationship between the parties or a specific threat of harm, defendants such as the school districts traditionally owed no duty to the plaintiff.[184] The plaintiff alleged no special relationship, but argued, as did the plaintiff in *Gutzan*, that Section 311 of the Restatement (Second) of Torts allowed recovery in this situation.[185] The court accepted the plain-

174. *Id.* at 585.
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Muroc*, 929 P.2d at 585.
180. *Id.* at 585-86.
181. *Id.* at 586.
182. *Id.* at 586-87.
183. *Id.* at 595.
184. *Id.* at 588.
185. *Muroc*, 929 P.2d at 588.

tiff's argument under Section 311 and then went beyond the plaintiff's argument to incorporate Section 310 of the Restatement into its reasoning.

Section 310 of the Restatement states:

> An actor who makes a misrepresentation is subject to liability to another for physical harm which results from an act done by the other or a third person in reliance upon the truth of the representation, if the actor
>
> (a) intends his statement to induce or should realize that it is likely to induce action by the other, or a third person, which involves an unreasonable risk of physical harm to the other, and
> (b) knows
>
> (i) that the statement is false, or
> (ii) that he has not the knowledge which he professes.[186]

Section 311 of the Restatement states:

> (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.[187]

While ultimately accepting and expanding the plaintiff's argument under the Restatement, the *Muroc* court made other notable findings. First, the court acknowledged that the plaintiff's claims presented an issue of first impression.[188] As such, it undertook an analysis to determine whether the defendants owed the plaintiff a duty not to misrepresent Gadams's qualifications or character in their letters of recommendation.[189] In its analysis, the court found, among other

186. RESTATEMENT (SECOND) OF TORTS § 310 (1965).
187. RESTATEMENT (SECOND) OF TORTS § 311 (1965).
188. *Muroc*, 929 P.2d at 588.
189. *Id.* at 586-87.

things, that the defendants could have foreseen the injury to the plaintiff and that, on the facts alleged in the complaint, the defendants' conduct proximately caused the plaintiff's injury.[190] The court also found that the defendants could have engaged in alternative courses of conduct to avert the plaintiff's injury and that imposing a duty of care on the defendant employers would not run counter to public policy considerations.[191] The court reasoned that its initial findings warranted imposing a duty on the defendants not to engage in misrepresentations.[192]

Second, the court found that the defendants' letters of recommendation constituted affirmative, misleading misrepresentations rather than mere nondisclosure for purposes of Sections 310 and 311.[193] The court stated that the defendants' unqualified recommendations for Gadams "were false and misleading in light of defendants' alleged knowledge of charges of Gadams's repeated sexual improprieties."[194] The court thus concluded that the plaintiff's allegation of misleading half-truths warranted an exception to the general rule precluding liability for mere nondisclosure or failure to act.

Third, the court concluded that the plaintiff need not plead her own reliance on the defendants' misrepresentations.[195] The court

---

190. *Id.* at 588.

191. *Id.* at 589-91. The court stated that "[a]s for public policy, the law certainly recognizes a policy of preventing future harm of the kind alleged here." *Id.* at 589. The court continued by stating that "'[w]hen deciding whether to expand a tort duty of care, courts must consider the potential social and economic consequences.'" *Id.* at 590 (quoting Macias v. California, 897 P.2d 530 (1995)).

In considering the potential social and economic consequences, the court rejected the defendants' arguments that imposing tort liability on writers of recommendation letters would result in fewer employers writing such letters and that disclosure of more than minimal employment information would result in increased exposure to liability for defamation, breach of privacy, or wrongful interference with employment. *Id.* at 590. While the court did not clearly state the reasons for its conclusion, it discussed at some length California Civil Code, Section 47, subdivision (c). *Id.* That section grants employers a "qualified privilege for nonmalicious communications regarding a job applicant's qualification." *Id.* Under Section 47, subdivision (c), the qualified privilege "applies to and includes a communication concerning the job performance or qualifications of an applicant for employment, based upon credible evidence, made without malice, by a current or former employer of the applicant to, and upon request of, the prospective employer." *Id.* at 590-91. Despite its discussion of Section 47, subdivision (c), the court stated that the provision did not apply in this case because the defendants did not disclose Gadams's reference information on Livingston's request. *Id.* at 591.

California Civil Code, Section 47, subdivision (c), parallels in many respects Washington's proposed Senate Bill 6699. *See infra*, note 206.

192. *Muroc*, 929 P.2d at 591.

193. *Id.* at 592.

194. *Id.* at 593.

195. *Id.* at 594.

reasoned that, as this case involved fraudulent letters of recommendation, the plaintiff likely could not personally rely on the misrepresentations.[196] In such a case, the court stated, the Restatement (Second) of Torts contemplated only that the recipient of the misrepresentations need rely on them and that the plaintiff need only allege that her injury resulted from the recipient's reliance.[197]

Finally, the court concluded that the defendants' misrepresentations proximately caused the plaintiff's injury.[198]

Because the court concluded that the defendants' conduct violated Sections 310 and 311 of the Restatement (Second) of Torts, it found that the trial court erred in dismissing the plaintiff's complaint and remanded the matter for further proceedings.[199]

Although the *Muroc* court ultimately imposed a duty of disclosure on employers, it did not make that duty absolute. In reaching its conclusion, the court stated that

> 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 those 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.[200]

---

196. *Id.*

197. *Id.*

198. *Muroc*, 929 P.2d at 594. The court resolved the issue of proximate cause in one paragraph. The court stated that "[d]efendants do not suggest that the complaint fails to state sufficient facts to establish proximate causation, assuming the remaining elements [under Sections 310 and 311 of the Restatement (Second) of Torts] of duty, misrepresentation and reliance are sufficiently pleaded." *Id.* The court then concluded that "[b]ased on the facts alleged in the complaint, plaintiff's injury foreseeably and proximately resulted from Livingston's decision to hire Gadams in reliance on defendants' unqualified recommendation of him." *Id.*

Because the defendants, in *Muroc*, conceded the issue of proximate cause, the court avoided some potentially difficult causation issues. For example, had the defendants contested causation, they possibly could have argued that Livingston's decision to hire Gadams constituted, if not a superseding cause relieving them of liability, then at least comparative faut on the part of Livingston. However, the court expended the bulk of its energy in addressing the issue of duty. This Comment does the same and leaves the issue of proximate cause in negligent employment referral cases for future commentary and future trial judges and juries. Perhaps it is enough to recognize that the parties to any negligent employment referral case will in all likelihood hotly contest the issue of causation. Of course, litigation of causation presupposes a duty, which this Comment argues exists.

199. *Id.* at 595.

200. *Id.* at 591.

The rule announced in *Muroc* steps away from the presumptive "no duty to act" rule that traditionally guided employer reference practices. Yet, viewed contextually, the *Muroc* rule functions only in narrow situations. The rule seems to apply only when (1) the employer foresees that a present or former employee presents a substantial risk of physical injury to third persons, (2) despite the foreseeable risk, the employer writes a letter of recommendation or provides a reference, and (3) either physical injury to a third person actually results or a special relationship exists between the parties. In *Muroc*, Gadams caused physical injury to the plaintiff, thus triggering the physical injury exception. As the plaintiff did not allege the existence of a special relationship, the court had no occasion to examine the relationship between the defendants and either Gadams or the plaintiff.

The *Muroc* court further narrowed its holding by offering employers the chance to opt out of the limited duty that its rule imposes. The majority wrote that

> defendants had *alternative courses of conduct* to avoid tort liability, namely, (1) writing a "full disclosure" letter revealing all relevant facts regarding Gadams's background, or (2) writing a "no comment" letter omitting any affirmative representations regarding Gadams's qualifications, or merely verifying basic employment dates and details. The parties cite no case or Restatement provision suggesting that a former employer has an affirmative duty of disclosure that would preclude such a no comment letter. As we have previously indicated, liability may not be imposed for mere nondisclosure or other failure to act, at least in the absence of some special relationship not alleged here.[201]

The problem with the *Muroc* opt-out provision becomes obvious on close scrutiny. The opt-out provision allows employers the choice between (1) writing a full disclosure letter, (2) writing only a "name, rank, and serial number" letter, or, presumably, (3) remaining silent altogether. Given those options, any reasonable, risk-averse employer will choose either the second or third option. Choosing to write a full disclosure letter would result in an increase in the employer's exposure to defamation liability.

Despite the shortcomings of the *Muroc* rule and its opt-out provision, the court planted a diamond in the terrain of its reasoning. It hinted in the language of the opt-out provision that it might impose

---

201. *Id.* at 589 (emphasis in original).

an affirmative duty of disclosure on employers who possess valuable reference information. The court stated that "liability may not be imposed for mere nondisclosure or other failure to act, *at least in the absence of some special relationship not alleged here.*"[202] The italicized language implies that, if a complaint alleges a special relationship among plaintiff, defendant employer, or tortious employee, then a court could impose liability "for mere nondisclosure or other failure to act."[203] Thus, with that language, the *Muroc* court unlocked the door to liability based on a "duty to act."

E. The Future of Negligent Employment Referral

The future of negligent employment referral remains unclear. To date, no court has relied on either the *Muroc* rule or the broader theory of negligent employer referral as authority for finding a duty to disclose in the employment referral context.[204] Moreover, both the *Muroc* and *Gutzan* courts relied on arguably strained interpretations of the Restatement (Second) of Torts in finding a duty of disclosure. Neither court appeared willing to fashion a more expansive rule that would embrace the negligent employment referral theory.

However, courts in California and across the country will likely continue to face similar claims in the future.[205] Perhaps even more importantly, states such as Washington are attempting to address through legislation the issues arising out of cases like *Muroc*.[206]

---

202. *Id.* (emphasis added).

203. *Muroc*, 929 P.2d at 589.

204. *See, e.g.*, California Service Station and Auto. Repair Ass'n v. Am. Home Assurance Co., No. A074157, 1998 WL 151466, at *4 (Cal. Ct. App. Apr. 12, 1998) (holding the *Muroc* duty to disclose inapplicable to insurance contract negotiations); *see also* Neptuno Treuhand-und Verwaltungsgesellschaft MBH v. Arbor, 692 N.E.2d 812, 819 (Ill. App. Ct. 1998) (refusing to follow *Muroc* and other "negligent referral" cases in finding no liability for a nonemployer defendant's referral of a prospective employee who later caused the employer over $5 million in economic damages).

205. California courts will surely face similar claims because *Muroc* opened a new door on employer liability in that state. Other jurisdictions will likely face similar claims because of the effect that developments in California tort law traditionally have on national trends in tort litigation. *See, e.g.*, Tarasoff v. Regents of the University of California, 551 P.2d 334 (Cal. 1976).

206. *See, e.g.*, S.B. 6699, 55th Leg., Reg. Sess. (Wash. 1998). The Washington legislature intended to create in Senate Bill 6699 a partial liability shield to an employer sued by a former employee for allegedly disclosing defamatory reference information. Under Senate Bill 6699

> an employer is presumed to be acting in good faith and is immune from civil liability to an employee for disclosing information to a prospective employer, as long as the information relates to ability to do the job; diligence, skill, or reliability; and illegal or wrongful acts. To rebut the presumption requires clear and convincing evidence that the disclosure was knowingly false or deliberately misleading.

Id.

Because of the increased likelihood of claims similar to those in *Muroc*, the bar and the courts should reexamine the question of negligent employment referral. A proactive stance will help to avoid strained readings of existing law and the *ad hoc* jurisprudence of courts past.

III. ANALYSIS

A. *The Implications of Underdisclosure*

The underdisclosure of reference information holds implications for tort law on both policy and doctrinal levels.[207]

On the policy level, underdisclosure first implicates the basic principles of fault and foreseeability. The problem assumes an almost syllogistic form. The "no duty to act" rule imposes on employers no duty to act affirmatively for the benefit of another; even if harm results, an employer's failure to act is traditionally characterized as nonfeasant and carries with it no liability. An employer who fails to disclose reference information that could prevent foreseeable harm to a third person engages in conduct that results in harm. However, the "no duty to act" rule characterizes the employer's conduct as nonfeasant and refuses to impose liability for the harm caused. Absent the traditional "no duty to act" rule, the employer's choice to engage in that harmful conduct would lead to imposition of fault. Liability would then follow if foreseeable harm resulted. Thus, the question

---

Although Senate Bill 6699 passed both houses of the Washington State Legislature, Governor Gary Locke vetoed the bill on April 1, 1998. Veto Message on S.B. 6699, 55th Leg., Reg. Sess. (Wash. 1998). In his veto message, Governor Locke stated that he

> strongly agreed with the intent of this legislation . . . . It is clear that the laws applying to employee references need to be reformed. In recent years, employers have been reluctant to provide job reference information regarding former employees, for fear of liability. The consequence is that employers often cannot get adequate information to make good hiring decisions. This can be a big problem in the case of workplace violence or theft. . . . However, SB 6699 is not crafted finely enough to properly solve these problems. . . . Among other concerns, SB 6699 conflicts with the state's anti-blacklisting statue (RCW 49.44.010) and would effectively take away any civil remedy an employee could seek if blacklisted.

Id. Governor Locke urged interested parties to work with one another to draft legislation that "satisfies employers' need for freer flow of information, while maintaining meaningful protection for employees." *Id.*

Although the Washington State Legislature attempted to resolve one of the key issues addressed by the theory of negligent employment referral by proposing SB 6699, no reported Washington case has raised issues ripe for application of the negligent employment referral theory.

207. As Judge Dean Morgan of the Washington Court of Appeals, Division II, likes to remind his Evidence students, law itself is nothing more than social policy. Thus, the division of this section into separate discussions of "policy" and "doctrine" recognizes a distinction that, perhaps, does not exist. However, the author chooses to make that distinction for purposes of clarity and ease of discussion.

becomes whether the employer's choice to engage in harmful conduct warrants departure from the "no duty to act" rule and the imposition of liability.

Second, underdisclosure implicates the relational principle of tort policy. An employer who withholds reference information that could avert possible harm to others holds power over the welfare of a potential victim who does not possess that same information. By withholding that information, the employer increases the possibility of harm to the victim. Disclosure decreases the possibility of harm. Thus, the question once again becomes whether the relationship of disparate power justifies imposing a duty of disclosure.

Finally, the relationship among employers within the employment community implicates the benefit principle of tort policy. By seeking reference information about prospective employees, employers access an informal but reciprocal reference system.[208] By accessing the reference system, employers receive a substantial benefit: the information that they receive helps them to hire the most competent employees, thereby limiting their exposure to liability for negligent hiring. As with the previous policy considerations, the law must decide whether the benefit that employers receive by accessing the reference system warrants imposing on them an affirmative duty of disclosure.

On the doctrinal level, underdisclosure most immediately implicates negligent hiring and defamation claims. To avoid liability for negligent hiring, prospective employers must adequately and reasonably investigate a prospective employee's background.[209] As plaintiffs increasingly bring and prevail on defamation claims in the employment context, employers have become increasingly wary of disclosing reference information that could lead to defamation suits.[210] The more wary of disclosure that employers become, the less reference information they will provide to prospective employers.

The decrease in available reference information also holds obvious significance for employers defending against negligent hiring claims. Employers who cannot obtain full reference information on prospective employees cannot conduct adequate and reasonable background investigations.[211] Failure to investigate adequately leads to increased negligent hiring liability.

---

208. *See* Swerdlow, *supra* note 17, at 1661 (theorizing that prospective employers depend on former employers for valuable reference information).

209. *See id.* at 1651.

210. *See* Adler & Peirce, *supra* note 68, at 1385.

211. *See* Swerdlow, *supra* note 17, at 1651.

While the *Muroc* court stepped away from the "no duty to act" rule, its opt-out provision encourages employers to withhold valuable reference information. In its opt-out provision, the *Muroc* court essentially told employers that they need not write a full disclosure letter. Instead, the court told employers that they could choose to write either a "name, rank, and serial number" letter, or, presumably, no letter at all. As such, *Muroc* does little to solve the problem of underdisclosure. Faced with the choices in the *Muroc* court's opt-out provision, any reasonable employer will likely choose to provide only bare bones reference information if they provide any information at all.

Muroc neither offers injured plaintiffs the full remedy that they need nor adequately addresses the mounting pressure between the doctrines of negligent hiring and defamation. Instead, *Muroc* will allow former employers to continue passing the liability buck to those who hire potentially dangerous employees while injured plaintiffs pay the physical price.

B. The Solution

The law needs an escape valve to release the mounting pressure between the doctrines of negligent hiring and defamation while providing a remedy for plaintiffs like Randi W. Such a device must respond to both tort policy and doctrine without inordinately increasing employers' exposure to liability.

The negligent employment referral theory can release that pressure with minimal impact on employer liability[212] by imposing on employers an affirmative duty of disclosure. Moreover, the theory will respond to both tort policy and doctrine. First, the theory will give effect to the fault and foreseeability principle and the relational principle of tort policy. Second, the theory will comport with the *Tarasoff* rationale while reconciling the conflict between the doctrines of negligent hiring and defamation.

However, the duty of disclosure must be limited. First, an employer should provide full reference information to prospective employers or intermediaries,[213] but only if that information would make it reasonably foreseeable that an employee or former employee poses a risk of physical harm[214] to a prospective employer or a third

---

212. *See* discussion *infra* Part III.B.2.b.

213. An intermediary may be an employment service, as in *Gutzan*, a school placement office, as in *Muroc*, or any other similar entity.

214. Of course, a former employee could foreseeably cause economic harm to his or her employer or psychological harm or emotional distress to his or her victim by threatening, stalking, and the like. However, the physical harm limitation attempts to draw a bright line only beyond

person. Second, the duty would require disclosure only *on request* by a prospective employer.[215] Finally, the duty would require disclosure only where the employer possesses verifiable information regarding the misconduct of a present or former employee.[216] Tempered by reasonable limitations, the negligent employment referral theory will release the mounting pressure between the doctrines of negligent hiring and defamation and provide a remedy to innocent victims of a former employee's misconduct, all with minimal impact on employer liability.

1. The Affirmative Duty of Disclosure and Tort Policy

By imposing on employers a duty to disclose information that would make it reasonably foreseeable that an employee or former employee poses a risk of harm to a potential victim, the negligent employment referral theory will give effect to both the fault and foreseeability principle and the relational principle of tort policy.

a. Fault and Foreseeability

An affirmative duty of disclosure will comport with the tort principle of fault and foreseeability. If an employer knows with reasonable certainty that an employee is dangerous or violent, then the employer knows that the employee will likely present a continuing risk of harm to others. An employer who chooses to withhold such information chooses to engage in conduct that ultimately results in harm to innocent victims. The choice to withhold reference information that could prevent foreseeable harm places an employer within the realm of legal fault. Because an employer's disclosure of reference information could prevent foreseeable harm to a prospective employer or a third person, failure to do so warrants departure from the "no duty to act" rule.

For example, the actions of the defendant school districts in *Muroc* implicated the principle of fault and foreseeability. Because Gadams had a verifiable history of sexual misconduct with female students

---

which the law will impose liability on a former employer for negligently referring a former employee.

215. The "on request" proviso represents a commonsensical limitation: the law should not impose on employers an open-ended duty to warn anyone and everyone that an employee or former employee poses a risk of physical harm. Rather, the law should impose on employers a duty to warn only where the employee's past conduct creates a foreseeable risk of harm to identifiable victims or class of victims. *See, e.g.*, CAL. CIV. CODE § 47(c) (West 1998) (limiting liability for employers who disclose reference information to prospective employers, but only when disclosed on the prospective employer's request).

216. *See* discussion *infra* Part III.B.2.b.

during his employment with each of the three recommending school districts, each district knew that he likely presented a continuing risk of harm to other female students. By choosing to withhold information regarding Gadams's history of sexual misconduct, the recommending school districts engaged in conduct that ultimately resulted in harm to the plaintiff, a female student. The choice to withhold that information placed the school districts within the traditional realm of legal fault. Because disclosure of that information could have prevented foreseeable harm to the plaintiff, the failure of the school districts to do so warranted departure from the "no duty to act" rule.

b. The Relational Principle of Tort Policy

An affirmative duty of disclosure will also give effect to the relational principle of tort policy. First, the relationship of disparate power between an employer and a former employee's potential victims justifies imposing an affirmative duty to warn. The employer who possesses reference information that could prevent foreseeable harm holds power over potential victims because the employer knows what the victim does not: that a former employee poses a risk of harm. Disclosing that information to prospective employers will avert harm to potential victims, while withholding that information exponentially increases the risk of harm. Because of the relationship of disparate power between former employers and potential victims, the law should impose on the employer an affirmative duty to warn and should impose liability when harm results from failure to warn.

A case like *Muroc* illustrates the principle of the disparate power relationship. In *Muroc*, the referring school districts possessed information that could have prevented harm to the plaintiff. Because they knew what the plaintiff did not, namely that Robert Gadams had a verifiable history of sexual misconduct that made it likely that he would reoffend, they held power over the plaintiff. Had the school districts disclosed that information to Fresno Pacific College, they could have averted the harm to the plaintiff. Their failure to do so increased the risk of harm to such an extent that it eventually became a reality. Therefore, the relationship of disparate power between the defendant school districts and the plaintiff justified imposing an affirmative duty to warn and liability for the harm that the plaintiff suffered.

Second, the relationship among employers, as embodied in the benefit principle, should lead to the imposition of an affirmative duty of disclosure. No one could seriously argue that former employers receive a benefit from interacting with a former employee's potential

victims. However, as discussed earlier, employers do receive substantial benefits from accessing the employment reference system. The information that employers receive from the reference system helps them to hire the most competent employees. By hiring the most competent employees, employers may limit their exposure to negligent hiring liability. Thus, employers receive a benefit from the employment reference system in the form of decreased exposure to negligent hiring claims.

The relationship among the school districts in *Muroc* shows the benefit principle in action. Livingston Union School District, in which the plaintiff was enrolled as a student, hired Gadams after accessing the employment reference system and receiving information from his previous employers via Fresno Pacific College.[217] Presumably, Livingston accessed the system to choose a competent employee. Had the system functioned properly and Gadams's former employers disclosed full reference information about him, Livingston could have received a substantial benefit by accessing the system: it could have avoided hiring a potentially dangerous employee, thus averting the risk of harm to the plaintiff while limiting its own exposure to negligent hiring liability. Unfortunately, because of the former employers' refusal to disclose information regarding Gadams's sexual misconduct, the employment reference system failed.

By imposing on employers a duty to disclose information that would make it reasonably foreseeable that an employee or former employee poses a risk of harm to a potential victim, the negligent employment referral theory will respond to the policy underlying tort doctrine. First, the duty of disclosure will comport with the principle of fault and foreseeability. Second, the duty of disclosure will give effect to the relational principles of tort policy by recognizing both the relationship of disparate power between an employer and a potential victim and the relationship among employers who access the employment reference system.[218]

---

217. *Muroc*, 929 P.2d at 585.

218. Of course, countervailing policy considerations also support arguments against the negligent employment referral theory. For example, in addition to those considered by the *Muroc* court, *see id.* at n.201, the likely expansion of litigation and liability following the negligent employment referral theory would probably have some economic impact on the community of employers. However, any expansion of potential liability will have varying economic effects on various segments of the economy. For instance, the advent of Section 402(A) of the Restatement (Second) of Torts and strict products liability greatly impacted the potential liability of manufacturers, distributors, and wholesalers. Despite any adverse economic impact, manufacturers, distributors, and wholesalers continued to exist after the advent of strict products liability and, at the time of this article, appeared to be thriving. Thus, concerns over generalized economic

In addition to responding to the policy underlying tort law, the negligent employment referral theory also responds to tort doctrine.

2. The Affirmative Duty of Disclosure and Tort Doctrine

By imposing on employers a duty to disclose information that would make it reasonably foreseeable that an employee or former employee poses a risk of harm, the negligent employment referral theory will comport with tort doctrine while benefiting both employers and potential victims of employees' misconduct.

a. The Affirmative Duty of Disclosure and the Tarasoff *Rationale*

The *Muroc* court unlocked the door to an affirmative duty of disclosure by stating that "liability may not be imposed for mere nondisclosure or other failure to act, *at least in the absence of some special relationship not alleged here.*"[219] Plaintiffs can employ the California Supreme Court's rationale in *Tarasoff* to establish the special relationship required by the *Muroc* court.[220]

Admittedly, *Tarasoff* did not deal with an employment referral action and no court has yet applied *Tarasoff* in a negligent referral case.[221] However, commenting on the ubiquity of the *Tarasoff* rationale, Professor Lake described *Tarasoff* as the "*Palsgraf* of its generation, a case with meta-significance which endures beyond its jurisdiction, time, place, and perhaps its particular holding."[222] Professors Adler & Peirce write that

> Lake's conclusion stems, in part, from his sense that *Tarasoff* challenges the traditional approach of the Restatement (Second) of Torts that individuals generally owe no duty of aid or rescue to others.[223] As Lake sees it, the law is moving in the direction of requiring citizens to take reasonable efforts to aid or protect others when to do so would take little effort and would pose minimal risk.[224]

---

effects often ignore their counterexamples. The true question that the law must address is at what point society becomes willing to sacrifice the safety of innocent victims and the availability of remedies to injured plaintiffs for the economic good of harmful actors. As decisions like *Tarasoff* and *Muroc* suggest, no easy answer exists for that question. This Comment proposes one solution.

219. *Muroc*, 929 P.2d at 589 (emphasis added).

220. *See* Swerdlow, *supra* note 17, at 1660-63.

221. *See id.* at 1659.

222. Lake, *supra* note 146, at 98.

223. *Id.* at 100-01.

224. Adler & Pierce, *supra* note 68, at 1438.

Other commentators, as discussed earlier, feel strongly that *Tarasoff* provides an adequate basis for imposing an affirmative duty of disclosure in the employment reference context.[225]

Tarasoff set out a three-part test that courts should apply when faced with a claim alleging a failure to warn. The plaintiff in such a case must establish that (1) a special relationship existed between the defendant and either the potentially dangerous person or the third-party victim, (2) the defendant's conduct caused a foreseeable risk of harm to the victim, and (3) the potentially dangerous person harmed an identifiable victim.[226] Plaintiffs in a negligent employment referral case can satisfy each element of the *Tarasoff* test, beginning with the special relationship requirement.

i. Special Relationship

Under the *Tarasoff* interpretation of Section 315 of the Restatement (Second) of Torts, a special relationship between the defendant and either (1) the potentially dangerous person, or (2) the third-party victim will satisfy the special relationship requirement. The *Tarasoff* court noted that no special relationship existed initially between the psychotherapist and Tatiana Tarasoff.[227] Therefore, the court turned to consider the relationship between the psychotherapist and Poddar.[228] With little explanation, the court summarily found the psychotherapist-patient relationship sufficient to support a duty of disclosure.[229]

To understand the *Tarasoff* court's reasoning, and to convincingly analogize the employer-employee relationship to the psychotherapist-patient relationship, one must look beyond the *Tarasoff* court's summary conclusion that a special relationship exists between a therapist and his or her patient and inquire further into the character of the psychotherapist-patient relationship itself.

At the outset, the psychotherapist-patient relationship involves only two players: the therapist and the patient. The relationship exists for the purpose of treating the patient. Because the therapist both provides and controls the patient's treatment, he or she functions as the relationship's "master." To treat the patient, the therapist

---

225. *See* Swerdlow, *supra* note 17, at 1660-63. *See also* Saxton, *Flaws in the Laws*, *supra* note 7, at 91.

226. Swerdlow, *supra* note 17, at 1660.

227. *Tarasoff*, 551 P.2d at 343.

228. *Id.* at 343-44.

229. *Id.* at 345-46.

requires information about the patient. In all probability, the therapist acquires information from the patient that is irrelevant to either the patient's treatment or to the duty of disclosure established in *Tarasoff*. However, the therapist also acquires information crucial to both the patient's treatment and the *Tarasoff* duty of disclosure. For instance, the information in *Tarasoff* that Poddar intended to kill Tarasoff was crucial to Poddar's treatment. More importantly, that dangerous information triggered the therapist's duty to warn Tarasoff.

The therapist's role as master of the psychotherapist-patient relationship may lead to a better understanding of the *Tarasoff* court's reasoning. As stated above, the *Tarasoff* court did not inquire into the special nature of the psychotherapist-patient relationship. Rather, it merely stated that the relationship was special and moved on. However, because the master of the special relationship was also the master of dangerous information, the court imposed on the psychotherapist a duty of disclosing that information for the protection of the potential victim.[230] Under Restatement (Second) of Torts, Section 315, a duty to act for the protection of another presupposes a relationship with the other.[231] Therefore, by both the *Tarasoff* court's rules and by Section 315 of the Restatement (Second) of Torts, the master's duty to disclose dangerous information for the protection of a potential victim creates a relationship between the master and the potential victim. Both the duty and the relationship arise when the master acquires the dangerous information.

In *Tarasoff*, once the therapist acquired the dangerous information, the number of relationships doubled. Not only did the therapist have an ongoing relationship with his patient, but the therapist also had a relationship with the potential victim of Poddar's harmful conduct, Tarasoff. The second relationship arose from the fact that the therapist possessed dangerous information which, if disclosed, would have averted a risk of foreseeable harm to Tarasoff. Because the therapist possessed the dangerous information as the master of the relationship, the court imposed on him the duty to disclose.[232]

Although the *Tarasoff* court did not address the question of the terminated psychotherapist-patient relationship, it seems unlikely that it would relieve a therapist of the duty of disclosure after the relationship ends. When the relationship ends, the therapist admittedly no longer serves as master of the patient's treatment. However, the

230. *Id.*
231. RESTATEMENT (SECOND) OF TORTS § 315 (1965).
232. *Tarasoff*, 551 P.2d at 345-46.

therapist still serves as the master of the patient's dangerous information. The therapist's acquisition of that information gave rise to a duty to and relationship with the potential victim. Once a duty arises, the person under that duty must either act reasonably to discharge it or face liability for failure to do so. Thus, the termination of the therapist's relationship with the patient does not extinguish the therapist's relationship with the potential victim. Rather, the therapist-victim relationship and its duty of disclosure continue intact because the therapist continues as master of the dangerous information that gave rise to the relationship in the first instance.

At the outset, the employer-employee relationship, much like that between therapist and patient, involves only two players: the employer and the employee. The employer controls the employment relationship and directs the employee in his or her work. Therefore, although the employer-employee relationship does not exist for the purpose of treatment, the law recognizes the employer as the relationship's "master." During the course of the employment relationship, the employer, like the therapist, acquires a wealth of information about the employee. Some of the information is irrelevant to the employment relationship. However, much like the therapist, the employer also acquires information that could presumably trigger the *Tarasoff* duty of disclosure. For instance, the employer might learn that a particular employee is violent and assaultive after the employee threatens to assault or actually assaults a coworker.

The employer's role as master becomes critical in analogizing the employer-employee relationship to the psychotherapist-patient relationship. As stated above, the *Tarasoff* court did not inquire into the special nature of the psychotherapist-patient relationship. Rather, it summarily stated that the law recognizes the special nature of the relationship and gave no further information.[233] Just as the law recognizes the special nature of the psychotherapist-patient relationship, it confers a special status on the employer-employee relationship. Following *Tarasoff's* reasoning, the exact contours of the special relationship do not dictate the duty of disclosure. Rather, in imposing a duty of disclosure on the psychotherapist, the *Tarasoff* court implicitly emphasized the therapist's status as the master of the relationship. Under the *Tarasoff* rationale, the employer, much like the psychotherapist, is the master of the special employer-employee relationship. As the master of the relationship, the employer is also

233. *Id.* at 343.

the master of any dangerous information acquired during the relationship.

If one accepts the premise extracted from *Tarasoff* that the master of a special relationship is under a duty to disclose dangerous information for the protection of a potential victim, then the conclusion follows that an employer, as master of the employer-employee relationship, is under a duty to disclose dangerous information acquired during the employment relationship for the protection of a potential victim. As in *Tarasoff*, a duty to act for the benefit of another presupposes a relationship with the other. Therefore, by both the *Tarasoff* court's rules and by Section 315 of the Restatement (Second) of Torts, the employer's duty to disclose dangerous information for the protection of a potential victim would create a relationship between the employer and the potential victim. Both the duty and the relationship arise when the employer acquires the dangerous information.

In a case like *Muroc*, as in *Tarasoff*, once the employer acquires the dangerous information, the number of relationships doubles. Not only does the employer have an ongoing relationship with his or her employee, but the employer also has a relationship with the potential victim of the employee's harmful conduct. The second relationship arises from the fact that the employer possesses dangerous information which, if disclosed, would avert a risk of foreseeable harm to the potential victim. Because the employer possesses the dangerous information as the master of the relationship, the *Tarasoff* rationale imposes on him the duty to disclose.

If the law imposes an initial duty of disclosure on an employer, then it seems unlikely that it would relieve the employer of the duty of disclosure after the employer-employee relationship ends. When the relationship ends, the employer admittedly no longer serves as the master of the employment relationship. However, the employer still serves as the master of the employee's dangerous information. The employer's acquisition of that information gave rise to a duty to and relationship with the potential victim. Once a duty arises, the person under that duty must either act reasonably to discharge it or face liability for failure to do so. Thus, the termination of the employer's relationship with the employee does not extinguish the employer's relationship with the potential victim. Rather, the employer-victim relationship and its duty of disclosure continues intact because the employer continues as master of the dangerous information that gave rise to the relationship in the first instance.

ii. Foreseeable Risk of Harm

Foreseeability analogous to that in *Tarasoff* exists in the employment reference context as well. In *Tarasoff*, because Poddar told his psychotherapist that he intended to kill Tarasoff, the court did not address the issue of foreseeable harm.[234] Rather, the court merged the element of foreseeability into its analysis of the defendant psychotherapist's relationship to his patient.[235] Thus, the court provided little guidance as to how it would analyze foreseeability of harm established with less certainty.

Foreseeability of imminent harm such as that found in *Tarasoff* will rarely exist in the employment reference context. However, as Professor Lake argues, the court's "special relationship caveat" allowed it to unhook the foreseeability requirement from its analysis.[236] According to Lake, the result in *Tarasoff* "rest[ed] on a doctrinal acceptance of 'special relationship' rules."[237] The *Tarasoff* result implies that, because "special relationship rules permit liability based on a duty of reasonable care,"[238] foreseeability assumes secondary importance in the *Tarasoff* duty calculus. If, as Professor Lake reasons, the court's discussion of foreseeability was mere dicta,[239] then courts considering a negligent employment referral claim could follow the *Tarasoff* court and focus on the special relationship between the defendant and either the potentially dangerous person or the potential victim.

An argument based on Professor Lake's "unhooking forseeability into dicta" theory might appear fatuous until one looks closely at the rationale of the *Muroc* court. Although foreseeability like that in *Tarasoff* did not exist in *Muroc*, the *Muroc* court had little trouble finding it. The court stated that

> [a]lthough the chain of causation leading from defendants' statements and omissions to Gadams's alleged assault on plaintiff is somewhat attenuated, we think the assault was reasonably foreseeable. Based on the facts alleged in the complaint, defendants could foresee that Livingston's officers would read and rely on defendants' letters in deciding to hire Gadams. Likewise, defendants could foresee that, had they not unqualifiedly recommended Gadams,

234. *Id.*
235. *Id.*
236. Lake, *supra* note 146, at 109.
237. *Id.* at 123.
238. *Id.* at 124.
239. *Id.*

> Livingston would not have hired him. *And finally, defendants could foresee that Gadams, after being hired by Livingston, might molest or injure a Livingston student such as plaintiff.*[240]

If the defendants, who no longer employed Gadams, could foresee that he might molest or injure a student in the future, then they must have foreseen that conduct because they possessed dangerous information about Gadams that indicated his propensity to harm students. The defendants necessarily acquired that information during their employer-employee relationship with Gadams. By finding foreseeability in this manner, the court implicitly acknowledged the special relationship between the defendants and the potential victim, Randi W. Applying Professor Lake's "unhooking foreseeability into dicta" theory, the special relationship between employer and potential victim, much as the special relationship that this article postulates existed between the psychotherapist and Tatiana Tarasoff, leads to foreseeability in the employment reference context.

Undoubtedly, situations will arise in which the chain of causation between a former employer's failure to disclose reference information and a victim's physical harm will appear even more attenuated than that in *Muroc*. Such cases raise the troubling question of whether the negligent employment referral theory would allow the duty of disclosure and the former employer's potential liability to continue indefinitely.

The facts of *Cohen v. Wales*,[241] discussed earlier, raised the issue of indefinite liability. In *Cohen*, the defendant school district's former employee assaulted a student eleven years after the defendant provided a favorable recommendation.[242] The plaintiffs alleged that the defendant failed to disclose in the recommendation that they charged the employee with sexual misconduct during his employment with them.[243] Because the court relied on the "no duty to act" rule in reaching its decision,[244] it did not discuss the lapse of time between referral and assault.

However, the court in *Gutzan* specifically addressed the lapse of time between the defendant's recommendation of the employee and the employee's misconduct. In *Gutzan*, the employee raped his coworker approximately one year after the defendant employment agency

240. *Muroc*, 929 P.2d at 589 (emphasis added).
241. 518 N.Y.S.2d 633 (N.Y. App. Div. 1987).
242. *Id.* at 633-34.
243. *Id.* at 633.
244. *Id.* at 634.

recommended him to his employer.[245] Although the trial court had reasoned that the duty shifted from the defendant employment agency to the employer, the appellate court drew on Section 452 of the Restatement (Second) of Torts in finding that the duty did not shift.[246] Section 452 states:

> (1) Except as stated in Subsection (2), the failure of a third person to act to prevent harm to another threatened by the actor's negligent conduct is not a superseding cause of such harm.
> (2) Where, *because of lapse of time or otherwise*, the duty to prevent harm to another threatened by the actor's negligent conduct is found to have shifted from the actor to a third person, the failure of the third person to prevent such harm is a superseding cause.[247]

The *Gutzan* court reasoned that, under the circumstances of the case, a lapse of one year did not shift the duty to protect the plaintiff from the defendant employment agency to the employer.[248]

Although the *Gutzan* court found one year insufficient to shift the duty to the employer, Section 452 recognizes that a sufficient lapse of time would shift the duty of care from one party to another.[249] Comment F to Section 452 states that "when, by the interplay of such factors [as the third party's relationship with the plaintiff and the lapse of time] the court finds that full responsibility for control of the situation and prevention of the threatened harm has passed to the third person, his failure to act is then a superseding cause, which will relieve the original actor of liability."[250]

Under the theory of negligent employment referral, a sufficient lapse of time between a defendant employer's failure to disclose and the former employee's misconduct would likely relieve the former employer of liability. Such a decision would be highly fact-specific and would depend, as suggested by comment f of Section 452, on the relationship between the employer and the injured victim. Where the former employee harms a coworker, the employer-employee relationship between the coworker and the current employer, coupled with an appreciable lapse of time, would likely trigger Section 452 and shift the

245. *Gutzan*, 766 F.2d at 138.
246. *Id.* at 140.
247. RESTATEMENT (SECOND) OF TORTS § 452 (1965) (emphasis added).
248. *Gutzan*, 766 F.2d at 141.
249. RESTATEMENT (SECOND) OF TORTS § 452 (1965).
250. RESTATEMENT (SECOND) OF TORTS § 452 cmt. f (1965).

liability to the current employer.[251] The same would hold true where the former employee harms a customer of the current employer.[252]

Section 452 does not offer a mechanical formula for determining when the duty to protect a potential victim would shift from a former employer to a current employer. However, it does offer a defense to a former employer who recommended the dangerous former employee years prior to the misconduct at issue. Therefore, the duty imposed by the negligent employment referral theory would not allow the former employer's potential liability to continue indefinitely.

iii. Identifiable Victim

Finally, plaintiffs in a negligent employment referral case can satisfy the *Tarasoff* contextual identifiability requirement. In *Tarasoff*, the victim became readily identifiable once Poddar revealed his intention to kill her to the defendant psychotherapist. Thus, the court never applied its identifiability requirement. However, in *Thompson*, the same court applied the identifiability requirement, but with a result different than that in *Tarasoff*.

Plaintiffs injured by an employee's tortious conduct are readily identifiable victims under the *Thompson* application of the *Tarasoff* identifiability requirement. In *Thompson*, the court reasoned that the government must itself, or through the local police, warn each and every potential identifiable victim of a parolee's misconduct to discharge the proposed duty of disclosure.[253] Because an attempt to warn each and every potential victim in *Thompson* required too much effort in return for too little protection, the court reasoned that the plaintiff did not satisfy the *Tarasoff* identifiability requirement.[254]

Unlike the defendant in *Thompson*, a defendant in a negligent employment referral case may discharge the duty of disclosure by warning one person: the prospective employer or an intermediary.

---

251. The master-servant relationship imposes on an employer a duty of care for the safety of his or her employees. *See, e.g.*, Lillie v. Thompson, 332 U.S. 459, 461 (1947); Bartlett v. Hantover, 9 Wash. App. 614, 620-21, 513 P.2d 844, 849 (1973), *rev'd on other grounds*, 84 Wash. 2d 426, 526 P.2d 1217 (1974).

252. For example, a business owner owes a business invitee, such as a customer, a duty of reasonable care. *See, e.g.*, Graves v. Grady's Inc., 906 S.W.2d 463, 465 (Tenn. Ct. App. 1995) (holding that "a business owner has an obligation to exercise ordinary care and diligence in maintaining his premises in a safe condition for invitees, and is under an affirmation duty 'to protect invitees, among them business visitors, not only against dangers of which they know, but also against those which with reasonable care they might discover.'" (quoting McCormack v. Waters, 594 S.W.2d 388, 387 (Tenn. 1980)).

253. Thompson v. County of Alameda, 614 P.2d 728, 735 (Cal. 1980).

254. *Id.*

That single warning requires little effort in return for great protection. Armed with such knowledge, the prospective employer may choose not to hire the employee, thus denying the employee the chance to harm innocent victims. On the other hand, if the prospective employer hires the employee, she can take extra precautions to protect customers and other employees.[255] Most important for the defendant employer, once she discharges the duty of disclosure, the prospective employer will bear any future liability if she hires the employee and the employee harms an innocent victim.

Notwithstanding the *Thompson* application of the identifiability requirement, the *Muroc* rule does not require a plaintiff to establish a particular victim's identity. Rather, the *Muroc* court stated that "a court's task . . . is not to decide whether a *particular plaintiff's* injury was reasonably foreseeable."[256] Instead, the correct inquiry is whether a particular category of negligent conduct would likely result in the kind of harm of which the plaintiff complains.[257] If so, then the court may impose liability where the plaintiff establishes the other required elements of duty.[258] In other words, a particular victim's identity is irrelevant under *Muroc* so long as the victim falls within an identifiable *class* of potential victims.

---

255. A valid argument exists that employers may prefer to take no precautions and simply refuse to hire potentially dangerous employees, thus creating a class of "unhireables." However, tort law, like all law, represents society's attempt not only to provide remedies to aggrieved plaintiffs but also to shape human behavior. If potentially violent employees learn through painful experience that employers will not hire them, then the negligent employment referral theory may shape their behavior so that they no longer engage in violent or dangerous conduct in the workplace. Thus, to the extent that the negligent employment referral theory discourages an employee's violent or dangerous conduct, it will have surpassed its initial goals.

Of course, that rationale becomes less persuasive where employers overdisclose potentially defamatory reference information. Such overdisclosure could result in a class of unjustly accused unhireables. The negligent employment referral theory recognizes and addresses the danger of overdisclosure by imposing limits on the information which an employer may disclose. *See* discussion *infra* Part III.B.2.b.

256. *Muroc*, 929 P.2d at 588-89 (quoting Ballard v. Uribe, 715 P.2d 624, 628 n.6 (Cal. 1986)) (emphasis added).

257. *Id.*

258. *Id.* The *Muroc* court points to the court's rationale in *Rowland v. Christian* as an example of the additional elements that courts should consider when departing from a general rule in imposing a duty on a defendant: "'the major [considerations] are the *foreseeability of harm to the plaintiff*, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendants and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.'" *Muroc*, 929 P.2d at 588, (quoting Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968)) (emphasis added by the court). The *Muroc* court applied and analyzed each element of the *Rowland* duty formulation.

By amalgamating and applying the *Tarasoff* and *Muroc* rationales, the law can and should impose on employers an affirmative duty of disclosure. Tort doctrine, and *Tarasoff*, supports an affirmative duty of disclosure where a current employer-employee relationship exists. Additionally, the combined rationales of *Tarasoff* and *Muroc* will support an affirmative duty of disclosure after the employment relationship ends. First, the special relationship called for by the *Muroc* court exists under the *Tarasoff* test. Second, although the special relationship requirement in *Tarasoff* subsumed the court's foreseeability analysis, the *Muroc* court held that foreseeability of harm exists in the employment reference context. Finally, the potential victims of a former employee's tortious conduct fall within an identifiable class of victims under both the *Tarasoff/Thompson* and *Muroc* rationales.

b. The Affirmative Duty of Disclosure and the Defamation Claim

Although the proposed negligent employment referral claim imposes an affirmative duty of disclosure on employers, they may discharge that duty without increased exposure to defamation liability.

As discussed earlier, truth is an absolute defense to a defamation claim.[259] The proposed negligent employment referral claim will require disclosure only where the employer can reasonably foresee that an employee or former employee poses a risk of physical harm to a prospective employer or a third person. In most, if not all cases, reasonable foreseeability will follow from confirmed or documented instances of employee misconduct. Thus, in discharging his or her duty, the employer need only truthfully disclose information regarding verifiable and documented misconduct.

For example, the plaintiffs in *Muroc* alleged that the defendant school districts failed to disclose verifiable instances of Gadams's sexual misconduct to the placement office of Fresno Pacific College.[260] As an initial matter, a negligent employment reference claim would operate here because each school district provided information to Fresno Pacific on request. More importantly, the school districts could have disclosed information regarding Gadams's verifiable sexual misconduct to Fresno Pacific College without facing defamation liability under the negligent employment referral theory. Their truthful disclosure of Gadams's verifiable misconduct would have defeated a defamation claim.

---

259. RESTATEMENT (SECOND) OF TORTS § 581A (1965).

260. *Muroc*, 929 P.2d at 585.

Arguably, given the increasing number of employment-based defamation actions, the truth defense does little to discourage defamation actions against employers. However, such an argument misses the point of the truth defense. Truth serves as an absolute defense to a defamation *claim* and will defeat defamation *liability*.[261] Truth will never defeat a plaintiff's bare ability to bring a defamation *action*. The only thing that will defeat a plaintiff's ability to bring a defamation action is his or her inability to find counsel willing to take the case. While counsel might hesitate to take a plaintiff's defamation case for many reasons, key among those is the plaintiff's actual ability to prevail on the claim or to force a reasonable settlement. Under the negligent employment referral theory, the employer can foreclose the plaintiff's ability to prevail on his or her claim where the employer truthfully disclosed only verifiable and documented misconduct. If counsel thoroughly investigates the plaintiff's case before filing suit and learns that the employer truthfully disclosed only verifiable and documented misconduct, then the employer's ability to foreclose the plaintiff's ability to prevail might discourage reasonable counsel from filing the action. Thus, given broad applicability, the negligent employment referral theory could discourage filing of all but the most meritorious defamation actions.

Moreover, by encouraging employers to take special care when disclosing unfavorable reference information, the negligent employment referral theory would further discourage baseless defamation actions. Under the negligent employment referral theory, if the employer disclosed allegedly defamatory information beyond verifiable and documented misconduct, then the plaintiff may rightfully prevail in his or her defamation action. Thus, the theory would serve as an incentive for employers to tailor their reference practices to avoid disclosing unfavorable information beyond verifiable, documented misconduct.[262] Careful management of reference information disclosure will

---

261. RESTATEMENT (SECOND) OF TORTS § 581A (1965).

262. Difficulties may arise where an employee is the subject of an investigation based on allegations of misconduct by his or her current employer. The difficulty arises because, while the fact of the investigation itself is arguably verifiable and documented, the employer may conclude after the investigation that the employee did not engage in the alleged misconduct. In such a case, the "verifiable and documented" requirement contemplates misconduct which the employer concludes actually occurred. Therefore, an employer should not disclose the fact of an ongoing investigation if a prospective employer requests reference information on the employee.

Of course, an employer may best conclude that an employee engaged in misconduct by completing a formal investigation documenting allegations, findings, and conclusions. However, not all employers can or will perform such formal, quasi-adjudicatory investigations. In those cases, the "verifiable and documented" requirement contemplates at least a reasonable process for

better allow employers to foreclose a plaintiff's defamation claim. As stated above, the employer's ability to foreclose the plaintiff's defamation claim might discourage reasonable counsel from filing the plaintiff's defamation action.

c. *The Affirmative Duty of Disclosure and the Negligent Hiring Claim*

Placing an affirmative duty of disclosure on the community of employers as a whole will increase the likelihood of individual employers successfully defending against negligent hiring claims.

As discussed earlier, employers must adequately and reasonably investigate a prospective employee's background to avoid liability for negligent hiring.[263] Unless employers fully disclose reference information, prospective employers cannot adequately investigate a prospective employee's background. However, the negligent employment referral theory imposes an affirmative duty on employers to disclose information regarding verifiable instances of misconduct to prospective employers or intermediaries on request. Prospective employers armed with that information may avoid hiring potentially dangerous employees. By refusing to hire dangerous employees, employers not only will avoid liability for negligent hiring but will also protect innocent victims from potential harm.

For instance, defendants such as those in *Muroc* would respond differently if they knew that they faced possible liability for negligent employment referral. In *Muroc*, the referring school districts functioned under the "no duty to warn" presumption when they responded to Fresno Pacific's request for Gadams's recommendation. Unfortunately for both the plaintiff and the school district that hired Gadams, the school district's reliance on that presumption resulted in the sexual assault on the plaintiff. Had the referring school districts known that they faced possible liability for negligent employment referral, the duty of disclosure would have motivated them to disclose Gadams's misconduct. If the referring school districts had disclosed Gadams's misconduct, then the district that hired Gadams could have refused to

---

determining whether or not the employee actually engaged in the alleged misconduct. By requiring a reasonable investigation, the "verifiable and documented" requirement will protect both the employee from defamatory references and the employer from exposure to liability for disclosing potentially defamatory information. Moreover, because employers do not typically have the same insight into human behavior as did the psychotherapist in *Tarasoff*, the "verifiable and documented" requirement provides the employer with some objective method of assessing an employee's potential for harm.

263. *See* Adler & Peirce, *supra* note 68, at 1385.

hire him in the first instance. Randi W. would not have been injured, and no lawsuit would have followed.

IV. CONCLUSION

Existing theories of liability for negligent referral do little to encourage employers to disclose reference information that could prevent harm to potential victims. Even the controversial *Muroc* rule allows employers the option of disclosing only name, rank, and serial number information or of remaining silent altogether.

The law can best encourage the disclosure of reference information by imposing an affirmative duty of disclosure on employers. Under that duty, an employer should provide reference information to prospective employers or intermediaries *on request*. However, the duty would arise only when the employer possesses verifiable information that would make it reasonably foreseeable that an employee or former employee poses a risk of physical harm to a prospective employer or a third person.

In addition to comporting with tort policy and doctrine, such a duty will accomplish two important objectives. First, it will reduce the number of negligent hiring claims brought against employers. Second, and most important, it will protect innocent victims from potential harm. Moreover, the duty will accomplish both objectives without exposing employers to increased defamation liability. Thus, under the negligent employment referral theory's duty of disclosure, employers can have their cake and eat it, too.