

# Are Public Law Librarians Immune from Suit? Muddying the Already Murky Waters of Law Librarian Liability\*

John Cannan\*\*

*Public law librarians—academic law librarians at public universities and court and other government librarians—may enjoy public official immunities protecting them from lawsuits, but Mr. Cannan explains why librarian immunity is still of some concern. He analyzes several types of public official immunities available to law librarians.*

Thus does conscience make cowards of us all  
And enterprises of great pitch and moment  
Are with this current cast awry  
And lose the name of action.  
—*Hamlet*, Act III, Scene i  
William Shakespeare

¶1 The purpose of this article is to suggest that public law librarians—academic law librarians at public universities and court and other government librarians—may enjoy public official immunities that protect them from lawsuits. The reason for delving into this area is a concern that public law librarians’ anxiety over their potential liability for negligence can, in some small way, act the part of conscience in the quote from *Hamlet*. This anxiety could have a potentially chilling effect on the services public law librarians offer to their pro se clients.<sup>1</sup> And this has happened at a time when the number of pro se clients is perceived to be increasing along with their contact with public law librarians.<sup>2</sup>

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\*\* Assistant Law Librarian, Montgomery County Circuit Court Law Library, Rockville, Maryland. The author would like to extend great thanks to Susan McCarty and Janet Sinder, both of the University of Maryland School of Law, Thurgood Marshall Law Library, for their gracious help and suggestions in the writing of this paper.

1. Robert T. Begg, *The Reference Librarian and the Pro Se Patron*, 69 LAW LIBR. J. 26, 31–32 (1976). As John A. Gray pointed out in his article on librarian liability, a suit is likely to be brought in tort, which will be the primary focus of this article. John A. Gray, *Personal Malpractice Liability of Reference Librarians and Information Brokers*, J. LIBR. ADMIN., 1988, no. 2, at 71, 76.
2. Drew A. Swank, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 376 (2005); Kimberlianne Podlas, *Broadcast Litigiousness: Syndi-Court’s Construction Of Legal Consciousness*, 23 CARDOZO ARTS & ENT. L.J. 465, 497–98 (2005); Paul D. Healey, *In Search of the Delicate Balance: Legal and Ethical Questions in Assisting the Pro Se Patron*, 90 LAW LIBR. J. 129, 132 (1998). As Healey notes, statistics on pro se use of law libraries are hard to come by. Still, he cites a study from the 1970s that showed pro se’s turn to law libraries for their legal information needs, and it is reasonable to assume that this will bring them into contact with law librarians, particularly those in public institutions. *Id.* (citing Cameron Allen, *Whom We Shall Serve: Secondary Patrons of the University Law School Library*, 66 LAW LIBR. J. 160, 165 (1973)).

¶2 What is curious about this concern with liability is that, as of this writing, there is no extant case in which a law librarian, or any librarian for that matter, has been sued for breaching a duty to a patron and causing an injury. In fact, the most frequently quoted “case” is actually a hypothetical: Alan Angoff’s scenario in which a librarian supplied a book containing incorrect information for building a patio that subsequently led to personal injuries and property damage.<sup>3</sup> Even still, no little discussion has been generated over whether librarians might be liable for negligence and whether or not the profession is in danger of having its members taken to court.<sup>4</sup>

¶3 Perhaps more curious still is the fact that there has been no in-depth discussion as to whether the law librarians who are most likely to provide the pro se services that might lead to a lawsuit—public law librarians—could even be liable at all. As public employees, these librarians could claim the traditional immunities of public servants which, if allowed, would make them immune from certain suits in negligence.<sup>5</sup> If this is so, then these librarians need have little concern for liability dangers in providing services to the public, and the issue and its chilling effect should be put to rest for good. However, public official immunity is a matter in flux, made even more complicated by the different treatment accorded it by individual jurisdictions. The concern then in taking up the question of official immunity is that, in the attempt to end the liability debate, it threatens to make it more confusing. Even so, official immunity for public law librarians is an important topic to tackle because certain movements afoot in the community to expand law librarian services to the public, such as mandating lawyer-librarians to perform pro bono services,<sup>6</sup> may make such an immunity, if available, more important than ever.

¶4 This article will first show why librarian liability is still an issue that can cause some concern. Next, it will investigate various public official immunities that public law librarians might rely upon to avoid any lawsuits against them: discretionary immunity, misrepresentation immunity, and judicial immunity. It will also touch upon the impact of a malpractice claim upon these immunities if one

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3. See Allan Angoff, *Library Malpractice Suit: Could It Happen to You?* 7 AM. LIBR. 489 (1976). Actually, there are cases of librarians at correctional facilities being sued, usually on constitutional grounds. Since this article is primarily concerned with liability concerns raised by serving pro se patrons, it does not cover that segment of the law librarian community.
  4. For an annotated sampling of the literature discussing these issues, see Paul D. Healey, *Pro Se Users, Reference Liability, and the Unauthorized Practice of Law: Twenty-Five Selected Readings*, 94 LAW LIBR. J. 133, 2002 LAW LIBR. J. 8.
  5. *Kimps v. Hill*, 523 N.W.2d 281, 285 (Wis. Ct. App. 1994) (holding that a university professor is a public official and entitled to public officer immunity); *Via v. City of Richmond*, 543 F. Supp. 382, 385 (E.D. Va. 1982) (holding that public librarians are public officials and protected against frivolous lawsuits); 63C AM JUR 2D *Public Officers And Employees* § 8 (1997).
  6. Kathy Garner, *Lawyer-Librarians in Public Law Schools: The Ethical Conundrums of Pro Bono Activities*, 84 LAW LIBR. J. 31, 62 (1991) (suggesting that lawyer-librarians have a duty to perform pro bono service).

could be brought against a librarian. Finally, it concludes with observations on how the issue of public law librarian liability might finally be solved once and for all.

### **Why Another Article on Law Librarian Liability?**

¶5 Discussing librarian liability is a largely academic enterprise: there has never been a lawsuit against a librarian for negligence in the provision of information, and it has been argued that it is unlikely, perhaps even impossible, for one to ever be successfully made.<sup>7</sup> But legal possibilities have an unsettling way of suddenly becoming unpleasant legal realities. In particular, the Iowa case of *Sain v. Cedar Rapids Community School District*<sup>8</sup> hits uncomfortably close to the mark in establishing liability for those who give incorrect information to persons whom they know will rely upon it.

¶6 *Sain's* facts seem like a hypothetical concocted by a torts professor to alternately amuse and torture his or her students on the finer points of negligence. The plaintiff, Bruce Sain, was an aspiring basketball player at an Iowa high school who was taking courses required by the National Collegiate Athletic Association (NCAA) in order to play Division 1 sports. In his senior year, Sain was only one class away from meeting the NCAA's English course requirements. He signed up for a world literature course, which had been approved by the NCAA, but became dissatisfied with it and sought to transfer into another course. For assistance, he turned to his guidance counselor, Larry Bowen, in making the change. Bowen suggested a course entitled "Technical Communications," which was being offered for the first time that year. According to Sain, Bowen told him that the class would qualify for the NCAA's English course requirements, a claim Bowen later denied. Sain took the class and graduated from high school with high hopes and a full-paid basketball scholarship from Northern Illinois University, a Division 1 school. Fortune, however, proved unkind to Sain: the Technical Communications course Bowen had suggested was never submitted by the high school to the NCAA for approval. Consequently, the class did not qualify for the NCAA, leaving Sain one English class shy of those necessary to play Division 1 basketball. Suddenly, Sain's bright prospects collapsed like a house of cards; for want of the class, and a hard-hearted NCAA response to his request for a waiver, he was denied entry into Division 1 sports, his scholarship was canceled, and he was unable to attend Northern Illinois due to lack of funds.<sup>9</sup>

¶7 The disgruntled Sain brought suit against his former school district for negligence and negligent misrepresentation, alleging that Bowen had breached his duty to provide proper advice about the courses necessary to meet NCAA requirements

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7. Paul D. Healey, *Chicken Little at the Reference Desk: The Myth of Librarian Liability*, 87 LAW LIBR. J. 515, 533 (1995).

8. 626 N.W.2d 115 (Iowa 2001).

9. *Id.* at 118–20.

for playing Division 1 sports. The trial court dismissed both claims. It found the negligence argument to be a disguised tort of “educational malpractice,” discredited in Iowa, and that there was no duty between Sain and Bowen. As for the negligent misrepresentation claim, the trial court stated that it existed in the realm of commercial transactions and had no place in the field of education. Sain appealed, arguing that Bowen had a duty to provide proper information on courses meeting NCAA requirements and that a guidance counselor could be held liable for negligent misrepresentation.<sup>10</sup> The Iowa Supreme Court ruled for Sain,<sup>11</sup> surprising some, causing the guidance counselor community no little reason to panic, and providing what should be an unsettling opinion for librarians.

¶8 *Sain’s* reasoning has implications for all information professionals. To reach its holding, the court broadened the ambit of the tort of negligent misrepresentation from a liability in a commercial context to include all those “in the business or profession of supplying information for the guidance of others.” Such professionals had a duty of care to the person to whom they provided information. Two factors were crucial toward determining whether or not a profession was an activity covered by the tort. First, the person supplying the information for the guidance of someone else had to have known the uses to which it would be put and to have given it to meet those uses (because they could anticipate the consequences of applying that information and foresee possible harm). Second, the information had to be provided for monetary gain.<sup>12</sup> Applying these considerations to the facts in *Sain*, the Iowa Supreme Court found a guidance counselor could be liable for negligent misrepresentation because the two factors of a professional supplying information to others were met. Bowen acted in an advisory capacity to the student and thus would know why the student was relying on his advice and to what purposes it would be used. Finding the monetary gain element was more of a stretch, but the court argued that Bowen’s salary as a counselor gave him a financial interest in the transaction. Given Bowen’s status as a professional providing information for the guidance of others and the existence of the requisite duty of care between him and Sain, the court held that the unfortunate student had a cause of action for Bowen’s detrimental course suggestion.<sup>13</sup>

¶9 What makes *Sain* disconcerting to librarians is its impact on the critical issue of whether or not there is an actionable duty between librarians and their patrons. Every first-year law student knows that the ingredients of actionable negligence include duty, breach, causation, and injury. As Paul D. Healey, one of the leading writers on librarian liability, has noted, the causation link between librarian and patron is made tenuous by virtue of the fact that the librarian is the “information intermediary” rather than its creator.<sup>14</sup> For a librarian to be liable for negligence,

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10. *Id.* at 120.

11. *Id.* at 126.

12. *Id.* at 125–26.

13. *Id.* at 126.

14. Healey, *supra* note 7, at 530–31, 533.

there would have to be some reasonable causation of the injury. For that to happen, there would have to be a duty of care requiring him or her to be responsible for the information he or she disseminated when it caused harm.<sup>15</sup> *Sain's* analysis, however, manufactures the elusive duty of care.<sup>16</sup> The financial gain prong of *Sain* is easy enough to prove: law librarians draw salaries for their labors. The personal knowledge prong is more problematic: librarians provide information for the benefit of their patrons and act in an advisory capacity in matters within their ken, but are they aware of how the information will be used and that the client is relying upon that information? Admittedly, the relationship between guidance counselors and students is more personal than most librarian transactions with their patrons. Still, the potential for the existence of a duty of care under *Sain* is conceivable given the one-on-one nature of a reference interview:<sup>17</sup> the more a client reveals about his or her situation, the greater the chance for a more personal relationship and the greater the librarian's understanding of how the information will be used.

¶10 The good news is that the post-*Sain* world has not seen a legal assault on information professionals. In fact, the decision, while widely reported, has not been frequently utilized. Still, *Sain* does suggest that librarian liability is a possibility and that debate on the subject has utility and is not mere conjecture.

¶11 The problem posed by *Sain* is its potential to create, or fuel, a chilling effect on the provision of information by professionals such as librarians. Concerned about liability under a *Sain*-like case, they might be reluctant to provide guidance without being absolutely certain that information and sources of information are absolutely correct. The *Sain* court did acknowledge that its ruling could have just such a detrimental impact on the relationship between guidance counselors and students.<sup>18</sup> To allay this concern, the court explained that protections existed to shield counselors from suit. Some of its points were not particularly consoling: liability would only extend to the delivery of false information that was intended to influence someone to undertake an action, i.e., counselors had nothing to worry about as long as they did nothing wrong. The court also raised the fact that plaintiffs would have to prove reasonable reliance and proximate cause to establish liability, both of which may or may not be difficult to establish in a librarian-patron context.<sup>19</sup> But the court barely hinted at more effective protection that might be

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15. *Id.* at 530–31.

16. *Sain* can also be seen as dismissing the intermediary argument: the cause of the injury was as much, if not more, the school's failure to have the technical communication course recognized by the NCAA as it was Bowen's advice to take the course. *Sain*, 626 N.W.2d at 119–20.

17. *See, e.g.*, Mary Whisner, *Teaching the Art of the Reference Interview*, 94 LAW LIBR. J. 161, 164 & 165 app., 2002 LAW LIBR. J. 10, ¶ 11

18. *Sain*, 626 N.W.2d at 127.

19. Healey and Gray argue that both would be hard to prove. Healey, *supra* note 7, at 532; Gray, *supra* note 1, at 78. A recent case might bear them out. In *People v. Lander*, 831 N.E.2d 596, 602 (Ill. 2005), the Supreme Court of Illinois held that it was unreasonable to rely on a prison "law librarian's" advice regarding a post-conviction deadline where that person did not have any specialized knowledge on post-conviction procedure. The situation might be different for a librarian with a law degree who has a specialty in a certain area if that area is the subject of the suit.

available for counselors: immunity from suit for public officials.<sup>20</sup> Such protection may also be available to certain librarians who are publicly employed.

### Restrictions on Tort Suits against Public Officials

¶12 It is probable that many of the librarians who assist pro se patrons are publicly employed, either by state universities or by federal, state, or local governments.<sup>21</sup> It has always been fairly difficult to sue a public employee for negligence; throughout much of history, public officials were immune from suit.<sup>22</sup> There are a variety of arguments behind such protection, among them that the “public decision maker” should not be liable for choices made for public benefit,<sup>23</sup> the threat of suits against officials could be used to control state power,<sup>24</sup> and courts should not be asked to breach the separation of powers doctrine and interfere with the executive branch by making judgments on the decisions of government officials.<sup>25</sup> By far, the most common view was that public officers and employees would not perform their duties effectively and vigorously unless afforded some degree of immunity from liability.<sup>26</sup> This latter view was perhaps most eloquently stated by Judge Learned Hand:

It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from

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20. *Sain*, 626 N.W.2d at 127.

21. See sources cited *supra* note 2. Membership in the American Association of Law Libraries (AALL) gives some indication of the number of law librarians serving in a public capacity. In 2006, 12% of AALL's members were employed in state, court, or county government libraries, while 38% were in academic institutions. AM. ASS'N OF LAW LIBRARIES, AALL DIRECTORY AND HANDBOOK 2006–2007, at 520 (46th ed. 2006). While private academic law libraries have broad discretion in limiting their facilities to the public, it seems likely that law libraries at public institutions must offer some reasonable access to public patrons. James M. Murray, *Access Policy: Limiting Secondary Patrons' Use of Academic Law Libraries During Examination Periods*, 84 LAW LIBR. J. 365, 369 (1992).

22. See generally Louis Jaffe, *Suits Against Government and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963); RESTATEMENT (SECOND) OF TORTS § 895D (1997).

23. 63C AM. JUR. 2D *Public Officers and Employees* § 303 (2004).

24. *Id.* § 306

25. *Id.* § 303.

26. *Id.* § 302.

their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. Judged as *res nova*, we should not hesitate to follow the path laid down in the books.<sup>27</sup>

This immunity toward officials was not absolute: it existed for acts within the official's scope of authority.<sup>28</sup> Intentional or malicious conduct was excluded from protection.<sup>29</sup>

¶13 Just as the expansive power of sovereign immunity was reined in during the latter half of the twentieth century through limitations or outright waivers, so too was the complete immunity accorded public officials from suit. Federal, state, and local tort claims acts were instituted to set the conditions as to when and how public officials could be sued, balancing the right of the public to pursue claims for injuries at the hands of government employees with the protection of the public treasury from numerous and costly suits.<sup>30</sup> These acts contain many of the same features. There is usually a special time limit during which a plaintiff must bring notice of the action to the attention of the government.<sup>31</sup> Such notice must usually be made to a specific public office or official, in a specific form, sometimes requiring a waiting period until the suit can be brought in court. Failure to follow these requirements can result in the dismissal of the claim.<sup>32</sup> These acts also establish that the governmental entity will provide representation to employees and indemnify them for any judgments based on their negligence.<sup>33</sup> Employees are further protected by the fact that a suit against the employee through the tort claims act is the exclusive remedy of the injured party: thus the employee cannot be sued personally in the more traditional civil proceeding.<sup>34</sup> Limits on the amount of damages protect the public coffers from being exhausted by claims.<sup>35</sup>

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27. *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949).

28. 63C AM. JUR. 2D *Public Officers and Employees* § 304 (2004).

29. *Id.* § 301.

30. James L. Isham, Annotation, *Validity and Construction of Statute or Ordinance Limiting the Kinds or Amount of Actual Damages Recoverable in Tort Action Against Governmental Unit*, 43 A.L.R.4th 19, 24–25 § 2(a) (1986).

31. Phillip E. Hassman, Annotation, *Validity and Construction of Statute Authorizing or Requiring Governmental Unit to Indemnify Public Officer or Employee For Liability Arising Out of Performance of Public Duties*, 71 A.L.R.3d 90, 98 § 2(a) (1976).

32. James Fraiser III & Mike Moore, Annotation, *Complaint as Satisfying Requirement of Notice of Claim Upon States, Municipalities, and Other Political Subdivisions*, 45 A.L.R.5th 109, 126 § 2(a) (1997); R. P. Davis, Annotation, *Waiver of, or Estoppel to Assert, Failure to Give Required Notice of Claim of Injury to Municipality, County, or Other Governmental Agency or Body*, 65 A.L.R.2d 1278, 1280 § 2 (1959).

33. Hassman, *supra* note 31, § 2a, at 104. Apparently the Federal Tort Claims Act does not have any specific statement about indemnifying employees, but has attributes that make it operate like an indemnity statute. *Id.*

34. *Id.*; *Melo v. Hafer*, 13 F.3d 736, 739 (3d Cir. 1994).

35. Isham, *supra* note 30, at 24–25. For example, Maryland limits such claims to \$200,000 per incident. MD. CODE ANN., STATE GOV'T § 12-104(a)(2) (2004).

However, the applicability of these laws generally requires governmental officials or employees to have acted in the scope of their employment and without fraud, corruption, and malice.<sup>36</sup>

¶14 Librarians who are public employees are entitled to the protections and benefits that tort claims acts provide. Even so, immunities still exist that may protect librarians *entirely* from any suit stemming from their dealings with patrons. These immunities can terminate a suit after successfully being invoked by a defendant.<sup>37</sup>

### Discretionary Immunity

¶15 Of all the government immunities still available to public employees, discretionary immunity is probably of greatest interest to public law librarians. This is because it is fairly widespread and most applicable to the law library context. At common law, public officials enjoyed immunity for discretionary decisions. When governments began waiving sovereign immunity and instituting tort claims acts, they generally created exemptions from liability for discretionary decisions made by public officials within the scope of their employment.<sup>38</sup>

¶16 The basic question with this immunity is what constitutes discretion. The dictionary definition of the word is simple; for example, the *American Heritage Dictionary* states that discretion is “freedom to act or judge on one’s own.”<sup>39</sup> Based on this definition, discretionary immunity would seem to be of crucial importance to librarians since the typical activities of a reference interview (e.g., instructing in the use of materials, advising on “research strategies and sources,” and providing legal information<sup>40</sup>) are fueled by their discretionary judgment.

¶17 But it is notoriously difficult to translate ordinary words into legal dictates. Doing so with “discretion” has been an effort of near-Herculean proportions. This is no hyperbole. According to the commentators of the *Restatement on Torts*, courts have been unable to come up with any hard and fast rule as to what constitutes protected discretion:

The cases are legion and are in wide disarray, so that it may appear impossible to organize them into any consistent or coherent whole. The expression, discretionary function, is clearly a standard, requiring measured judgment in its application, and its meaning cannot be reduced to a set of specific rules. Instead, its application to particular facts must be determined by a consideration and evaluation of a number of competing factors.<sup>41</sup>

Even this description downplays the variety of interpretations that courts have developed to discern discretionary function, and those standards they have come

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36. Hassman, *supra* note 31, § 2a, at 98.

37. 63C AM. JUR. 2d *Public Officers and Employees* § 301 (2004).

38. *Id.* § 322.

39. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 533 (3d ed. 1992).

40. Whisner, *supra* note 17, at 162, ¶ 5.

41. RESTATEMENT (SECOND) OF TORTS § 895D cmt. d (1997).

up with can sometimes be subject to change. Interpretations of discretionary immunity cluster around two modes: what commentators have called the Semantic Standard and the Planning/Operational Standard.<sup>42</sup> The particular standard a jurisdiction adheres to will determine whether or not a public law librarian can rely on discretionary immunity's protections.

### *The Semantic Standard*

¶18 The Semantic Standard is perhaps the easiest to understand, has a more venerable reputation than its Planning/Operational Standard cousin, and offers the most protection for public law librarians because of its broad coverage.<sup>43</sup> It holds, in accordance with the dictionary definition, that a decision involving some exercise of judgment is worthy of immunity. A function performed in a specifically mandated manner is considered a ministerial decision, which does not enjoy immunity. A Missouri court explained the standard and the reasons behind it thusly:

Discretionary acts involve the exercise of reason in developing a means to an end, and discretion in determining how or whether an act should be done or a course pursued. In contrast, ministerial functions concern clerical duties to be performed upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to the public officer's own judgment or opinion on the propriety of the act.<sup>44</sup>

The operable analysis under the Semantic Standard then is whether or not a decision involved some exercise of judgment sufficient to make it immune from suit. Where there is judgment, the act is discretionary and there is immunity. Where there is no judgment or judgment is significantly restricted, the act is ministerial and there is no immunity.

¶19 A sample of cases from Connecticut, a Semantic Standard state, shows the broad range of action covered under such immunity and the limits to which a public law librarian could enjoy discretionary immunity protection. In a typical Semantic Standard case, city officials who were sued for negligent fire and housing code enforcement were entitled to discretionary immunity because an inspection as to whether a building met a certain standard was an exercise of judgment.<sup>45</sup> Even seemingly mundane acts can fall under discretionary immunity's protection. For example, a teacher's "negligent" swinging open a door that struck and injured a student in the face was a discretionary act. Poor judgment may have been exercised in opening the door, but it was judgment nonetheless and the act was immune.<sup>46</sup> But Connecticut courts have been loath to make every instance

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42. Mary F. Wyant, *The Discretionary Function Exception to Government Tort Liability*, 61 MARQ. L. REV. 163, 168 (1977); *Johnson v. State*, 447 P.2d 352, 356–57 (Cal. 1968).

43. *See, e.g., Adams v. Schneider*, 124 N.E. 718, 720 (Ind. Ct. App. 1919).

44. *Brummitt v. Springer*, 918 S.W.2d 909, 912 (Mo. Ct. App. 1996).

45. *Evon v. Andrews*, 559 A.2d 1131, 1134 (Conn. 1989).

46. *Colon v. City of New Haven*, 758 A.2d 900, 903 (Conn. App. Ct. 2000) (allowing the defendant to sue teacher for negligence under one of the state's exceptions to discretionary immunity).

of judgment worthy of immunity. Where an official body has decreed a policy, execution of it becomes a ministerial act, even if it requires some thought process to implement it. So where school custodians violated a bulletin requiring them to clear snow from walkways and to put down sand and ice in inclement weather, their acts became ministerial and their failure to implement the directive was not protected by immunity.<sup>47</sup> Judgment executed outside the bounds of official power is also not covered by immunity. A public official who misidentified a garage full of personal property as a part of a foreclosure sale, allowing foreclosure agents to enter and sell the items stored there, could not claim immunity when the disgruntled property owner sued him. The official had discretion on how to conduct the sale, but he had no power to identify property for sale that was not authorized to be sold.<sup>48</sup>

¶20 Public law librarians should enjoy significant protection under the Semantic Standard's definition. Unless they are under some rules to perform their tasks in a specific manner or their individual judgment is excessively constrained, they cannot be sued if an exercise of discretion in the performance of their tasks leads to some patron injury. Again, many librarian activities would appear to be discretionary tasks: providing instruction, giving advice on how to perform research and choose sources, and providing the particular information or direction to information necessary to answer a patron query.<sup>49</sup> That the information turns out to be wrong or the librarian's judgment is faulty is of little moment: sufficient judgment is exercised to invoke the immunity. To illustrate, consider the case of a patron wishing to represent himself in a divorce who asks a librarian for materials that would help him do so. A librarian's guidance as to which materials the patron should use in the divorce action requires an exercise of judgment as to the sources that will be most helpful for that purpose. Borrowing from the Angoff example, if one of those materials turns out to contain incorrect information, the librarian would be immune for suggesting it, as doing so was a protected discretionary decision.

¶21 But librarians also perform duties that could be considered ministerial: providing specific direction and information to meet a request for which there is no room for deviation. In these cases, the immunity would not attach. In another illustration, a patron requests the most current rules of court in order to determine a deadline for responding to a claim, and the law librarian hands her a superseded rule book containing a deadline that has since been changed. The librarian had no room to deviate from the terms of the request: the decision is ministerial and not protected by immunity if any injury results.

¶22 The major criticism with the Semantic Standard is that it threatens to become the exception that swallows a government's limitation or waiver of public official and sovereign immunities. Nearly every act, no matter how simple,

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47. *Kolaniak v. Bd. of Educ.*, 610 A.2d 193, 196 (Conn. App. Ct. 1992).

48. *Lombard v. Peters*, 749 A.2d 630, 635 (Conn. 2000).

49. *Whisner*, *supra* note 17, at 162, ¶ 5.

requires some element of thoughtful choice and hence has the potential of being a discretionary decision protected by immunity.<sup>50</sup> Taken to its extreme, the Semantic Standard would reestablish near total immunity protection for officials. As one early critic of the Semantic Standard described the situation: “This statement of the law obviously requires some modification, as it would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail.”<sup>51</sup> There has been substantial agreement with this view and, in fact, many states have abandoned the Semantic Standard to adopt the more restrictive Planning/Operational Standard approach. For these reasons, the Semantic Standard is only employed by a handful of states.<sup>52</sup>

### *The Planning/Operational Standard*

¶23 The more popular Planning/Operational Standard introduces no little ambiguity into the matter of whether or not public law librarians can enjoy discretionary immunity. Not only is it more restrictive than the Semantic Standard, but its history is more confused. Since the Planning/Operational Standard was invented and influenced by federal law and court decisions, one might think this parentage would yield a uniform means of easily determining what does and does not fall under the protection of discretionary immunity rule. Instead, it has resulted in two competing approaches—an older limited standard and a more recent liberal standard—to further complicate matters as to determining who could enjoy protection for discretionary decision making.

### *The Dalehite/Indian Towing Approach*

¶24 The Planning/Operational Standard developed out of the Federal Tort Claims Act (FTCA) passed in 1946. Created as a means to provide compensation to persons injured by the negligence of federal agencies, officials, and employees, it contained a specific exclusion for discretionary acts:

Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.<sup>53</sup>

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50. *Adriance v. Town of Standish*, 687 A.2d 238, 241 (Me. 1996).

51. *Ham v. County of Los Angeles*, 189 P. 462, 468 (Cal. Ct. App. 1920).

52. Alabama, Connecticut, Kentucky, Mississippi, Missouri, New York, Nevada, Rhode Island, South Carolina, and Wisconsin continue to use the Semantic Standard or a reasonable facsimile thereof. As will be discussed later, Minnesota employs the Semantic Standard for common law actions. *See infra* ¶ 35.

53. 28 U.S.C. § 2680(a) (2000).

Courts found themselves charged with the task of determining what constituted a discretionary function or duty worthy of immunity.

¶25 The first significant Supreme Court case to interpret the FTCA's discretionary exception was *Dalehite v. United States*,<sup>54</sup> which involved claims resulting from a massively destructive explosion of ammonium nitrate fertilizer manufactured and transported by the federal government. In *Dalehite*, the Supreme Court refused to lay out the discretionary exception's specific contours but did state that it was meant to protect those creating and implementing government policy:

It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of § 2680 (a) would fail at the time it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion.<sup>55</sup>

According to *Dalehite*, the planning of the manufacture and storage of fertilizer and the subsequent implementation of these policies fell under the discretionary exception.<sup>56</sup> The Court was more explicit in what the discretionary exemption did not cover: ordinary common law torts such as negligently driving a car.<sup>57</sup>

¶26 *Dalehite* was followed by *Indian Towing Co. v. United States*,<sup>58</sup> involving a claim against the government for damages arising when a tugboat ran aground due to the Coast Guard's negligent operation of a lighthouse. In a more abbreviated decision, the Court held that the Coast Guard made a discretionary decision to provide lighthouse service, but once that was done, it had a nondiscretionary, or operational (i.e., ministerial), duty to maintain it and provide notice when it was not functioning. Failure to do so did not fall under the discretionary exception and was actionable under the FTCA.<sup>59</sup>

¶27 The combined effect of these cases was to create the view that discretionary immunity only applied to higher level policy and planning, not to decisions made by lower level government functionaries and employees who engaged in unprotected operational conduct. As one commentator put it, "In general, broad policies formulated by government were protected, but applications of those policies were not."<sup>60</sup> In the law library context, *Dalehite/Indian Towing* could be

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54. 346 U.S. 15 (1953).

55. *Id.* at 35–36.

56. *Id.* at 42.

57. *Id.* at 30 n.19.

58. 350 U.S. 61 (1955).

59. *Id.* at 69.

60. Harold J. Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Governmental Liability In Tort*, 38 UCLA L. REV. 871, 880 (1991).

viewed as effectively removing discretionary immunity from the reference desk and locking it in the library director's office. This view of *Dalehite/Indian Towing* dominated federal courts for the next thirty years.<sup>61</sup>

¶28 *Dalehite/Indian Towing* had a significant impact on public official discretionary immunity as more and more states began to adopt tort claims acts of their own. Many of these acts were modeled after their federal predecessor and most included immunity for discretionary actions. Minnesota has a typical statement excluding discretionary acts from suit in its tort claims act:

Subd. 3. Exclusions. Without intent to preclude the courts from finding additional cases where the state and its employees should not, in equity and good conscience, pay compensation for personal injuries or property losses, the legislature declares that the state and its employees are not liable for the following losses:

...

(b) a loss caused by the performance or failure to perform a discretionary duty, whether or not the discretion is abused. . . .<sup>62</sup>

Many state courts took their cue from their federal counterparts, interpreting this legislation to mean that discretionary immunity applied to upper echelon policy and planning decision making and not to the activities of lower level employees implementing them.<sup>63</sup> Some courts that had followed the Semantic Standard for some time dispensed with it in favor of the new federal Planning/Operational Standard.<sup>64</sup> Thus the *Dalehite/Indian Towing* immunity regime became the standard under which many state and local public law librarians would labor.

¶29 The *Dalehite/Indian Towing* Planning/Operational Standard required states to come up with new rules for when a government actor's decisions were protected by immunity. These usually involved walking a tightrope between encroachments on executive decision making on the one hand and reverting back to the Semantic Standard's approach on the other. Several states have a four-prong approach:

(1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program or objective? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?<sup>65</sup>

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61. *Id.*

62. MINN. STAT. ANN. § 3.736 (West 2005).

63. The states adopting a Planning/Operational Standard approach are Alaska, Arizona, California, Colorado, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Louisiana, Maine, New Hampshire, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, Vermont, Washington, and Wyoming. Minnesota has a statutory Planning/Operational Standard immunity. The District of Columbia also employs the Planning/Operational Standard.

64. *Borne v. Nw. Allen County Sch. Corp.*, 532 N.E.2d 1196, 1201 (Ind. Ct. App., 1989).

65. *Darling v. Augusta Mental Health Inst.*, 535 A.2d 421, 426 (Me. 1987).

Hawaii's interpretation is far stricter, only allowing discretionary protection for decisions involving evaluation of "broad policy factors" such as "a consideration of the financial, political, economic, and social effects of a given plan or policy."<sup>66</sup> California's standard is fairly broad, defining protected policy decisions as ones "consciously balancing risks and advantages."<sup>67</sup>

¶30 The Planning/Operational Standard was supposed to be a relatively simplistic and effective means of granting discretionary immunity to activities truly worthy of it.<sup>68</sup> However, the surrender of the Semantic Standard's relative ease of administration and the requirement to determine whether the nature of an activity fell under the Planning/Operational Standard's aegis led to ad hoc implementation and inconsistent, even strange, results as courts struggled to determine what acts were or were not the creation of policy. In Maine, a court found that a prison guard's closing a door on an inmate's hand, severing a finger, was a protected discretionary decision,<sup>69</sup> while another held an attendant's failure to close a safety gate at a town's waste transfer station was not.<sup>70</sup> A California court declared placement of a child in a foster home was an unprotected operational decision,<sup>71</sup> a holding another court strained to avoid in making the approval of adoptive parents an action protected by discretionary immunity.<sup>72</sup> In Idaho, a case was remanded to determine if the conditions for discretionary immunity existed in a case where a young man hung himself in unsupervised police custody: if the lack of supervision was due to a policy of budget cuts, immunity attached; if it stemmed from negligence of the staff, immunity would not apply.<sup>73</sup> The situation was no better at the federal level. In the decades following *Dalehite/Indian Towing*, the federal bench also developed a variety of inconsistent approaches toward implementing the Planning/Operational Standard.<sup>74</sup>

¶31 Whether public law librarians can find protection under the *Dalehite/Indian Towing* Planning/Operational Standard's view of discretionary immunity depends on whether their activities rise to the level of a policy decision under the applicable standards of their jurisdiction. The provision of library services and, more specifically, legal reference services, would constitute a policy decision,

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66. *Julius Rothschild & Co. v. State*, 655 P.2d 877, 881 (Haw. 1982) (citation omitted).

67. *Johnson v. State*, 447 P.2d 352, 361 n.8 (Cal. 1968).

68. *Sterling v. Bloom*, 723 P.2d 755, 774 (Idaho 1986).

69. *Roberts v. State*, 731 A.2d 855, 858 (Me. 1999).

70. *Adriance v. Town of Standish*, 687 A.2d 238, 241 (Me. 1996).

71. *Elton v. County of Orange*, 84 Cal. Rptr. 27, 30 (Ct. App. 1971).

72. *Ronald S. v. County of San Diego*, 20 Cal. Rptr. 2d 418, 424 (Ct. App. 1993).

73. *Walker v. Shoshone County*, 739 P.2d 290, 295 (Idaho 1987).

74. *E.g.*, *Hernandez v. United States*, 112 F. Supp. 369, 370 (D. Haw. 1953) ("What the 'discretionary function' exception really means is not crystal clear."); *Dupree v. United States*, 247 F.2d 819, 825 (3d Cir. 1957) ("The discretionary function exception has been a confusing one in meaning and in application."); *Blessing v. United States*, 447 F. Supp. 1160, 1167 (E.D. Pa. 1978) ("Rather than a seamless web, however, we found the law in this area to be a patchwork quilt."); *United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 811 (1984).

much like the choice to operate a lighthouse in a certain location as in *Indian Towing*. But once the decision was made, librarian acts of judgment emerging out of the service would be viewed as operational actions not protected by discretionary immunity. The previous examples of directing a patron to materials and giving a patron a superseded rulebook would both not qualify for immunity. Fortunately for public law librarians, subsequent Supreme Court decisions undid some of the Planning/Operational Standard's restrictions.

### *The Gaubert Approach*

¶32 The discretionary immunity situation was further confused when the Supreme Court rebuked the limited Planning/Operational Standard approach and liberalized the conditions under which government agents could claim immunity.<sup>75</sup> In *United States v. Gaubert*, the Supreme Court expanded the availability of discretionary immunity, declaring that “[d]iscretionary conduct is not confined to the policy or planning level.”<sup>76</sup> Thus the conduct of agents could be protected by discretionary immunity where they were expressly or impliedly allowed to exercise their judgment under statute, regulation, or agency guidelines.<sup>77</sup>

¶33 Unfortunately, *Gaubert*'s looser standard is not available to all public law librarians. Unlike federal courts, state courts were free to decide whether to adopt the new liberal discretionary immunity doctrine. Iowa's Supreme Court followed the U.S. Supreme Court's lead, noting that “as *Gaubert* makes clear, we—like many other courts—have misinterpreted *Dalehite* as holding that the discretionary function exception does not reach any decisions made at the operational level.”<sup>78</sup> But other state courts adamantly refused to change course, adhering to the stricter *Dalehite/Indian Towing* doctrine. Hawaii's Supreme Court adopted this position in no uncertain terms: “This court has never adopted the reasoning in *Gaubert*, and it would be directly contrary to our previous holdings on the discretionary function exception under Hawai'i law to do so. Therefore, reliance on *Gaubert* is misplaced.”<sup>79</sup> Thus the *Dalehite/Indian Towing*'s stricter Planning/Operational Standard remains in place in some states.

¶34 For public law librarians, the *Gaubert* standard changes the discretionary immunity question for those states that adhere to the Planning/Operational Standard and are following the Supreme Court's lead. No longer is the issue whether a public law librarian's reference duties are policy actions covered by discretionary immunity; now it is whether librarians are granted discretion in conducting these activities. Therefore, where public law librarians are granted

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75. The liberalization of discretionary immunity by the Supreme Court was actually a trend that began with *Varig Airlines*, *supra* note 74, and *Berkovitz v. United States*, 486 U.S. 531 (1988).

76. 499 U.S. 315, 325 (1991).

77. *Id.* at 324.

78. *Goodman v. City of Le Claire*, 587 N.W.2d 232, 238 (Iowa 1998).

79. *Tseu ex rel. Hobbs v. Jeyte*, 962 P.2d 344, 348 (Haw. 1998).

broad flexibility in how they perform their reference duties, they should enjoy discretionary immunity. Only in those instances where their responsibilities are restricted, regulated, and otherwise spelled out would their activities be ministerial or operational and thus unprotected by discretionary immunity. The Southern District of Ohio applied *Gaubert* in a law library context in the case of *Knisley v. United States*, holding that the military's selection of law books for a library was a discretionary function protected under *Gaubert*: "Certainly the decision whether particular law books ought to be provided is a discretionary one, calling for a judgment much like the judgment found protected in *Gaubert*."<sup>80</sup> In our previous scenario of directing a patron to divorce materials, doing so would be discretionary because what materials to select to answer such a query would probably be left to a librarian's judgment. The superseded rulebook would likely still be considered ministerial and unprotected.

### Other Discretionary Distinctions

¶35 Some states have allowed an accretion of other factors to attach to their discretionary/ministerial jurisprudence. Texas and other courts maintain a distinction between activities of a governmental nature and those of a professional nature. Steering a course between the semantic/ministerial and policy/operational, a Texas court delineated a compromise in the context of state-employed medical professionals. Government employees should enjoy immunity when they were exercising governmental duties, laying out policies, or allocating resources. They ought not to be immune from professional negligence (e.g., a doctor giving improper treatment) merely by virtue of being a state employee.<sup>81</sup> Minnesota, on the other hand, has adopted a hybrid approach, employing both the semantic and policy standards. State employees can be immune under a common law immunity, which mirrors the traditional Semantic Standard, or a statutory immunity, which resembles the Planning/Operational Standard's protections.<sup>82</sup> These distinctions show how state specific issues of discretionary immunity can be. Thus, determining whether public law librarians enjoy discretionary immunity in a particular state will require some research in the statutory and case law of that state.

### Immunity for Misrepresentations

¶36 Tort claims acts can include other exemptions from tort liability. Oklahoma's Tort Claims Act, for example, has at least thirty-three such exemptions from liability.<sup>83</sup> Sometimes an exemption deals with a specific situation. The Kansas

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80. 817 F. Supp. 680, 694 (S.D. Ohio 1993).

81. *Kassen v. Hatley*, 887 S.W.2d 4, 9–11 (Tex. 1994).

82. *Anderson v. Anoka Hennepin Indep. Sch. Dist.* 11, 678 N.W.2d 651, 655 (Minn. 2004).

83. OKLA. STAT. tit 51, § 155 (West 2000).

Tort Claims Act, for example, includes an immunity, enacted in reaction to a court decision, from duties arising from government “internal guidelines or policies.”<sup>84</sup> Sometimes exemptions appear in other parts of the state code. The Texas education article, for example, includes an immunity provision for the discretionary activities of school district employees.<sup>85</sup> Occasionally, these exemptions can be of use in protecting public law librarians. Unfortunately, as with discretionary immunity, they are often not clear-cut.

¶37 An exemption of critical importance to law librarians is one immunizing government employees from misrepresentations. Generally, a misrepresentation is a communication of incorrect information that injures the recipient.<sup>86</sup> If a librarian has to worry about negligence at all, it is from the communication of information that is false. But more narrowly, misrepresentation can be the failure to supply correct information in a commercial context.<sup>87</sup> *American Jurisprudence* states that the elements to prove misrepresentation are:

[D]efendant made a representation as to a past or existing material fact; the representation was untrue; the defendant, regardless of his or her actual belief, made the representation without any reasonable ground for believing it to be true; the representation was made with the intent to induce the plaintiff to rely on it; the plaintiff was unaware of the falsity of the representation, acted in reliance on the truth of it, and was justified in that reliance; and, as a result of this reliance, the plaintiff sustained damage.<sup>88</sup>

The scope of the misrepresentation immunity’s full embrace, as we have seen with *Sain*, is open to debate and the interpretation of the appropriate tort claims act.

¶38 As with discretionary immunity, understanding misrepresentation immunity’s usefulness to public law librarians requires some understanding of the subject’s treatment by federal law and the Supreme Court. The FTCA has a misrepresentation exemption from liability, which reads:

Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso [enacted March 16, 1974], out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, “investigative or law enforcement officer” means any officer of the United

84. William E. Westerbeke, *The Immunity Provisions in the Kansas Tort Claims Act: The First Twenty-Five Years*, 52 KAN. L. REV. 939, 971 (2004).

85. TEX. EDUC. CODE ANN. § 22.0511 (Vernon 2006).

86. BLACK’S LAW DICTIONARY 1001 (6th ed. 1990) describes misrepresentation as “[a]ny manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts. An untrue statement of fact. An incorrect or false representation. That which, if accepted, leads the mind to an apprehension of a condition other and different than what exists. Colloquially it is understood to mean a statement made to deceive or mislead.”

87. RESTATEMENT (SECOND) OF TORTS § 552.

88. 37 AM. JUR. 2d *Fraud and Deceit* § 26 (2004).

States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.<sup>89</sup>

Like the FTCA's discretionary immunity, the Supreme Court's interpretation of this provision has implications for other jurisdictions that also include it in their tort claims legislation.

¶39 The first significant Supreme Court case to examine the exemption was *United States v. Neustadt*.<sup>90</sup> This case arose when property purchasers sued the Federal Housing Administration for an incorrect appraisal by one of its employees that induced them to purchase a property for more than its fair market value.<sup>91</sup> The plaintiffs alleged negligence while the government invoked the FTCA immunity for misrepresentations. The Court sided with the government and painted the misrepresentation immunity in broad strokes, holding that the exemption was intended to apply not only to intentional misrepresentations, such as deceit, but negligent misrepresentations as well. According to the Court, the traditional statement of misrepresentation was "the duty to use due care in obtaining and communicating information upon which that party may reasonably be expected to rely in the conduct of his economic affairs."<sup>92</sup> While a federal law may have mandated the appraisal value be provided to the buyers, that did not take the action outside the aegis of the FTCA and make the government liable for erroneous information it may have contained.

Congress has relegated to a governmental agency the duty either to disclose directly, or to require private persons to disclose, information for the assistance and guidance of other persons in the conduct of their economic and commercial affairs. In practically all such instances, it may be said that the Government owes a "specific duty" to obtain and communicate information carefully, less the intended recipient be misled to his financial harm. While we do not condone carelessness by government employees in gathering and promulgating such information, neither can we justifiably ignore the plain words Congress has used in limiting the scope of the Government's tort liability.<sup>93</sup>

Thus the Court allowed the FTCA's misrepresentation immunity broad coverage for public officials at around the same time it had limited their protection under discretionary immunity.

¶40 This interpretation by itself could be taken to extremes. In folding together intentional and unintentional misrepresentations, the tort had become excruciatingly difficult to define: nearly any negligent action could potentially be painted as a "misrepresentation" and therefore immune from suit under the FTCA. To counter this, the Supreme Court also laid out some parameters to distinguish mis-

89. 28 U.S.C.A. § 2680(h) (2000).

90. 366 U.S. 696 (1961).

91. *Id.* at 697-98.

92. *Id.* at 706 & n.16 (citing RESTATEMENT OF TORTS § 552 (1938); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 87 (1941)).

93. *Id.* at 710-11.

representation from negligence, in the process squaring it with its earlier decision in *Indian Towing*:

Our conclusion neither conflicts with nor impairs the authority of *Indian Towing Co. v. United States*, which held cognizable a Torts Act claim for property damages suffered when a vessel ran aground as a result of the Coast Guard's allegedly negligent failure to maintain the beacon lamp in a lighthouse. Such a claim does not "arise out of . . . misrepresentation," any more than does one based upon a motor vehicle operator's negligence in giving a misleading turn signal. As Dean Prosser has observed, many familiar forms of negligent conduct may be said to involve an element of "misrepresentation," in the generic sense of that word, but "[so] far as misrepresentation has been treated as giving rise in and of itself to a distinct cause of action in tort, it has been identified with the common law action of deceit," and has been confined "very largely to the invasion of interests of a financial or commercial character, in the course of business dealings."<sup>94</sup>

Of course, it would not be that simple. Just as federal courts landed all over the map in trying to figure out what was and was not a discretionary decision, so too did they diverge on just what was and was not a misrepresentation.

¶41 The lower federal courts found application of *Neustadt* problematic in two major ways. The first was whether or not the exemption applied to a commercial context. Taking *Neustadt*'s lead, some courts attempted to solidify the boundaries of the tort by requiring some sort of government injury to a plaintiff's financial or commercial interest.<sup>95</sup> But *Neustadt*, quoting Prosser, said that misrepresentation "very largely" dealt with financial or commercial injuries and this needle eye was big enough to allow through a camel of other claims, including those arising from personal injury.<sup>96</sup> The second problem was in figuring out when a tort was negligence and when it was misrepresentation. In this instance, courts sought to determine if misrepresentation represented the gravamen of the claim or something more incidental.<sup>97</sup>

¶42 The Supreme Court helped to clear up some of the confusion over the misrepresentation exemption when it revisited the subject in *Block v. Neal*.<sup>98</sup> *Block* involved a property owner's contractual and negligence claims over the failure of government officials to properly inspect for defects in her home. The Court stated more succinctly the grounds for misrepresentation: "the essence of an action for misrepresentation, whether negligent or intentional, is the communication of

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94. *Id.* at 711 n.26 (omission in original) (citing PROSSER, *supra* note 92, § 85, at 702–03; 2 FOWLER V. HARPER & FLEMING JAMES, *THE LAW OF TORTS* § 29.13, at 1655 (1956)).

95. Annotation, *Construction and Application of Federal Tort Claims Act Provision Excepting from Coverage Claims Arising out of Misrepresentation and Deceit* (28 U.S.C.A. § 2680(h)), 30 A.L.R. Fed. 421, 433 (1976) [hereinafter *Application of Federal Tort Claims Act Provision*]; *Kohn v. United States*, 680 F.2d 922, 926 (2d Cir. 1982).

96. LESTER S. JAYSON & ROBERT C. LONGSTRETH, 2 *HANDLING FEDERAL TORT CLAIMS* §§ 13.06(5)(a) & (c)(iv), at 13-151 (2001); *Washington v. U.S. Dep't of Hous. & Urban Dev.*, 953 F. Supp. 762, 778 (N.D. Tex. 1996).

97. *Application of Federal Tort Claims Act Provision*, *supra* note 95, at 431.

98. 460 U.S. 289 (1983).

misinformation on which the recipient relies.”<sup>99</sup> Determining when there was and was not misrepresentation as opposed to negligence required looking at the gravamen of the claim.<sup>100</sup> While reiterating that the misrepresentation exemption provided governments with broad protection from liability, particularly for financial injuries, it did not bar claims for breaches of duty other than “failure to use due care in communicating information. . . .”<sup>101</sup> If a plaintiff could find another ground for a suit, even if it involved elements mirroring those required for a misrepresentation case, the FTCA misrepresentation exemption did not foreclose bringing the action.<sup>102</sup> In *Block*, the plaintiff had made a distinct claim beyond the misrepresentation of government officials, arguing that there was liability under the “Good Samaritan Doctrine.” Since this was a distinct claim from misrepresentation, the Supreme Court held the FTCA did not bar the plaintiff’s claim.<sup>103</sup> Of course, federal decisions do not end the matter of whether public law librarians are protected under misrepresentation immunity; one must also look to the states and their handling of the issue.

¶43 Like discretionary immunity, the misrepresentation exemption is found in several state codes.<sup>104</sup> While the FTCA and its interpretation by the Supreme Court have some bearing on how state courts interpret this immunity, *Neustadt* and *Block* do not appear to have had as great an impact in these jurisdictions as *Dalehite*, *Indian Towing*, and *Gaubert* had in the discretionary immunity line of cases. This is not so much due to any disagreement with the Supreme Court but rather the dearth of misrepresentation exemption jurisprudence. Those states that do adopt the *Neustadt/Block* line of reasoning can have some interesting results. California follows the misrepresentation immunity requirement that injuries be of a commercial or financial nature.<sup>105</sup> However, in a case analogous to *Sain*, a counselor was immune for suggesting a course that turned out not to meet NCAA requirements and resulted in the revocation of the plaintiff’s sports scholarship.<sup>106</sup>

¶44 Some states have marked out their own position on the issue. In the case of New Jersey, its misrepresentation immunity protects the traditional concerns of public official immunity: guarding the public purse and ensuring the alacrity of public officials in the performance of their duties.<sup>107</sup> The Superior Court of New Jersey laid out the reasons behind the exemption in *Simon v. National Community*

99. *Id.* at 296.

100. *Id.*

101. *Id.* at 297.

102. *Id.*

103. *Id.* at 297–99.

104. *E.g.*, N.J. STAT. ANN. § 59:3-10 (West 1992); 51 OKLA. STAT. tit. 51, § 155 (2005); CAL. GOV’T CODE § 822.2 (West 1995).

105. CAL. GOV’T CODE § 822.2; *Michael J. v. Los Angeles County Dep’t of Adoptions*, 247 Cal. Rptr. 504, 508 (Ct. App. 1988).

106. *Brown v. Compton Unified School Dist.*, 80 Cal. Rptr. 2d 171, 173 (Ct. App. 1998).

107. N.J. STAT. ANN. § 59:3-10 comment; *Simon v. Nat’l Cmty. Bank*, 660 A.2d 558, 562 (N.J. Super. Ct. 1995).

*Bank*, accepting the view that making government employees liable for inevitable errors in the vast amounts of information they produced would expose the state treasury to a potentially catastrophic number of claims, way beyond the ability to forecast and insure against, and that the misrepresentation exemption was the legislature's answer for stemming this possible deluge.<sup>108</sup> In addition, the court took an expansive view of the activities covered by the misrepresentation exemption, holding that its protection applied to ministerial as well as discretionary activities.<sup>109</sup> As can be expected, this view of misrepresentation has a broad ambit. One of the primary cases discussing the New Jersey law held a medical examiner not liable for mistaking a cause of death from four bullets in the head as pneumonitis.<sup>110</sup> In *Simon*, the superior court held a township not liable when an unidentified clerical employee mistakenly gave the incorrect amount of tax liens on a property, which made a bank liable for the taxes.<sup>111</sup>

¶45 On its face, misrepresentation immunity appears to be the armor that makes public law librarians invulnerable to lawsuits. Since librarians are in the profession of gathering and disseminating information, it is hard to fathom any activity that might take them out of the realm of misrepresentation immunity's protection. Both examples used thus far, recommending materials that contain incorrect information and directing a patron to a superseded rulebook, could constitute misrepresentations as both involve the communication of erroneous information. The factor that might push such professionals out of the immunity's umbrella is the nature of the injury, i.e., whether it involves damage to a financial or commercial interest. Both *Neustadt* and *Block* declare that the distinguishing aspect of a misrepresentation claim is damages of a financial and commercial nature, but neither explicitly rules out other injuries.<sup>112</sup> The matter remains unsettled. Another way to draw librarians out of the misrepresentation immunity's shield might be to cast a claim in a different vein such as professional negligence. However, as will be discussed later, doing so would be problematic because of the ambiguous nature of a librarian's professional duty to patrons.<sup>113</sup>

¶46 It would appear that public law librarians in New Jersey, and any states that might follow the line of reasoning of that state's courts, apparently enjoy the broadest protection available for their information provision activities to the public. They cannot be liable for incorrect information unless it was given with some nefarious intent or the result of the most egregious wrongdoing.

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108. *Simon*, 660 A.2d at 562–63.

109. *Id.* at 563.

110. *Acevedo v. County of Essex*, 504 A.2d 813 (N.J. Super. Ct. 1985).

111. *Simon*, 660 A.2d at 559.

112. *United States v. Neustadt*, 366 U.S. 696, 711 n.26 (1961); *Block v. Neal*, 460 U.S. 289, 296 n.5 (1983).

113. See *infra* ¶ 49–53; Healey, *supra* note 7, at 525–26.

## Judicial Immunity

¶47 Another layer of immunity conceivably protects law librarians who work for courts: judicial immunity. Generally, under this immunity, judges cannot be held liable in damages for judicial acts made within their jurisdiction.<sup>114</sup> Like public official immunity, judicial immunity has deep roots in history and similar justifications. Courts have deemed judicial immunity necessary to maintain judicial independence and ensure finality in judicial decisions.<sup>115</sup> The Supreme Court has several times upheld its existence, and it has been articulated in courts at the state level.<sup>116</sup> However, judicial immunity provides no protection for the negligent performance of ministerial duties.<sup>117</sup> What constitutes a court's judicial and ministerial functions is determined through application of a test similar to the Semantic Standard: judicial acts involve some judgment or discretion; ministerial acts involve no judgment or discretion.<sup>118</sup>

¶48 Though primarily protecting judges, judicial immunity can also extend throughout the judicial community under certain circumstances. The Supreme Court has held that immunity attaches to officials, employees, and persons performing "functionally comparable" activities to a judge or duties "closely associated with the judicial process."<sup>119</sup> Other court decisions have extended immunity to administrative law judges, federal hearing examiners, law clerks, clerks of court, prosecutors, witnesses, grand jurors, coroners, court reporters, bailiffs, and arbitrators.<sup>120</sup> Though there is no case on point, court librarians might be considered immune if the library was considered integral to the judicial process.<sup>121</sup>

114. *Lowe v. Letsinger*, 772 F.2d 308, 311–12 (7th Cir. 1985).

115. Joseph Romagnoli, Note, *What Constitutes a Judicial Act for Purposes of Judicial Immunity?* 53 *FORDHAM L. REV.* 1503, 1503–04 (1985).

116. *See, e.g.*, *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872); *Stump v. Sparkman*, 435 U.S. 349 (1978); *Butz v. Economou*, 438 U.S. 478 (1978); *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429 (1993); *Calvin T. Wilson, Judicial Immunity—To Be or Not To Be*, 25 *How. L.J.* 809 (1982).

117. *Lowe*, 772 F.2d at 312.

118. Andrea G. Nadel, Annotation, *Applicability of Judicial Immunity to Acts of Clerk of Court Under State Law*, 34 *A.L.R.4th* 1186, 1188 § 2(a) (1984).

119. *Cleavinger v. Saxner*, 474 U.S. 193, 200 (1985).

120. *Id.*; *Bliven v. Hunt*, 418 F. Supp. 2d 135, 138 (E.D.N.Y. 2005); David R. Cohen, *Judicial Malpractice Insurance? The Judiciary Responds to the Loss of Absolute Judicial Immunity*, 41 *CASE W. RES. L. REV.* 267, 268–69 (1990).

121. *Smith v. Erickson*, 884 F.2d 1108, 1111 (8th Cir. 1989). Minnesota's rule on self-help programs suggests a program of pro-se assistance that could be considered such an integral judicial policy worthy of judicial immunity:

A District Court for any county may establish a Self-Help Program to facilitate access to the courts. The purpose of a Self-Help Program is to assist Self-Represented Litigants, within the bounds of this rule, to achieve fair and efficient resolution of their cases, and to minimize the delays and their cases, and to minimize the delays and inefficient use of court resources that result from misuse of the court system by litigants who are not represented by lawyers.

There is a compelling state interest in resolving cases efficiently and fairly, regardless of the financial resources of the parties.

*MINN. GEN. R. PRAC.* 110.01.

### **A Potential Complication: Malpractice**

¶49 Another question that is critical to whether public official immunities can provide effective protection to public law librarians is that of malpractice. As Healey describes the issue, the actionable duty of care in a malpractice action is reflected in “the standards of competence and due care of the profession involved.”<sup>122</sup> If a patron was injured by a librarian’s deviation from the competence and due care readily assumed by members of the profession, it is conceivable that the librarian could be subject to a malpractice claim. This could disturb the protections of the immunities already discussed.

¶50 Malpractice represents a claim that may evade discretionary immunity. Public official immunities arise from duties created by virtue of public employment.<sup>123</sup> However, not all actions by public officials can be so defined.<sup>124</sup> For example, the safe operation of an automobile is a duty that any driver owes to all other members of the public: it arises independently of public employment.<sup>125</sup> Therefore, it has been held that the negligent operation of an automobile by a public official is not protected by public official immunities.<sup>126</sup> In the same vein, professional duties can be discerned as distinguishable from those of public service. The public realm employs a variety of professionals whose brethren operate in private practice: doctors, lawyers, scientists, and, of course, librarians. It has been held that there is no public official immunity for professional malpractice because there should be no difference in the duty owed by a privately or publicly employed professional.<sup>127</sup> For example, a patient ought to expect the same standard of care, and be able to sue for a breach in providing it, whether he or she arrives at a hospital that is publicly or privately owned.<sup>128</sup> Not only could a professional lack public official immunities for malpractice, but it is even possible that he or she could be deprived of tort claims act protections and be held personally liable for professional negligence. Again, the action is not for breach of a public duty but for the one that exists between the professional and the person he or she serves.<sup>129</sup>

¶51 Malpractice also raises a claim distinct from misrepresentation so that that immunity would constitute no bar to bringing a malpractice action. But sifting a malpractice claim from misrepresentation may be extremely difficult to do. If the dividing line between negligence and misrepresentation is usually blurred, the border between malpractice and misrepresentation is nearly imperceptible: both would involve some failure in communicating correct information.<sup>130</sup>

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122. Healey, *supra* note 7, at 525 (citation omitted).

123. *Currie v. Lao*, 592 N.E.2d 977, 980 (Ill. 1992).

124. *Id.*

125. *Id.*

126. *Id.* at 982.

127. *Madden v. Kuehn*, 372 N.E.2d 1131, 1135 (Ill. App. Ct. 1978).

128. *Id.*

129. *Watson v. St. Annes Hosp.*, 386 N.E.2d 885, 889 (Ill. App. Ct. 1979).

130. It should also be noted that an action in misrepresentation requires a duty of care such as a contractual or fiduciary duty. 2 JAYSON & LONGSTRETH, *supra* note 96, § 13.06 n.5.

¶52 The extension of malpractice to public professionals can sometimes only go so far. For instance, the Supreme Court of Minnesota has held that public defenders cannot be sued for malpractice on public policy grounds. It reasoned that because the state office of the public defender was unduly burdened by a high crime rate, increased indigency, and reduced funding, subjecting it to malpractice claims could thwart its ability to provide constitutionally mandated legal representation.<sup>131</sup> It is also possible to foreclose such suits through a provision in the appropriate tort claims act. For instance, in the Illinois case of *Michigan Avenue National Bank v. County of Cook*, medical professional defendants were held to be immune from a malpractice suit by virtue of a tort claims act provision protecting local public entities from suits stemming from the failure to perform diagnoses.<sup>132</sup>

¶53 Whether or not public law librarians can be liable for malpractice is, like all other aspects of law librarian liability, problematic. As Healey noted in 1995, it is questionable whether librarianship constitutes a profession with the ever-elusive duty of care toward patrons. Those professions with such an actionable duty of care, according to Healey, usually have licensing boards with specific rules of conduct, the violation of which could lead to action against a member, or a body of case law defining when malpractice occurs.<sup>133</sup> Law librarians do not have the latter, but they do now have a set of professional standards, AALL's Competencies of Law Librarianship, which provides a standard of competent law librarianship.<sup>134</sup> It is possible, but relatively unclear, that these could be used as a standard, the breach of which could constitute malpractice. In the legal profession, courts are divided on how that profession's standards can be used as evidence of malpractice.<sup>135</sup> Moreover, legal professional standards lay a floor of minimum competence, the failure of which to uphold could constitute evidence of malpractice. The situation for law librarians is different. AALL states that its Competencies of Law Librarianship identify "the knowledge, skills, abilities and personal characteristics that help distinguish superior performance."<sup>136</sup> In any event, law librarians should be able to defend against malpractice liability on public policy grounds. As has been noted earlier, pro se litigation is increasing and these individuals rely on

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131. *Dziubak v. Mott*, 503 N.W.2d 771, 776 (Minn. 1993).

132. 732 N.E.2d 528, 544 (Ill. 2000).

133. Healey, *supra* note 7, at 526.

134. Am. Ass'n of Law Libraries, *Competencies of Law Librarianship* (2001), reprinted in AM. ASS'N OF LAW LIBRARIES, *AALL DIRECTORY AND HANDBOOK 2006–2007*, at 414 (46th ed. 2006) [hereinafter *AALL Competencies*], available at <http://www.aallnet.org/prodev/competencies.asp>; *Proceedings of the 95th Annual Meeting of the American Association of Law Libraries Held in Orlando, Florida: July 20–25, 2002*, 94 *LAW LIBR. J.* 691, 695, 2002 *LAW LIBR. J.* 43, ¶ 32 (remarks of President Barbara Bintliff, describing Competencies of Law Librarianship as "our statement of the skills, knowledge, and abilities of superior law librarians").

135. Note, *The Evidentiary Use of the Ethics Codes in Legal Malpractice: Erasing a Double Standard*, 109 *HARV. L. REV.* 1102, 1103 (1996).

136. *AALL Competencies*, *supra* note 134, at 414.

libraries and librarians to defend their interests. Law libraries are facing stagnant budgets,<sup>137</sup> and forcing them to endure liability for potential malpractice might reduce their ability to serve the needy public.

### Conclusion

¶54 So are public law librarians immune from suit? Under the first scenario described above, directing a patron to material that turns out to contain false information, the answer would be “probably” under the discretionary immunity’s Semantic Standard, “probably not” under the *Dalehite/Indian Towing* Planning/Operational Standard, “possibly” under the *Gaubert* approach, “probably” under the misrepresentation exemption, and “conceivably” under judicial immunity. As for the second scenario, the superseded rulebook, it is likely that the librarian would only be immune under the misrepresentation exemption. However, if law librarians can be sued for malpractice, all bets are off. This article seems to have fallen into the trap it set for itself, transforming the quagmire of public law librarian liability into quicksand.

¶55 At its core, the debate is not as convoluted as it seems. While it is important to understand the tangled threads that make up the Gordian knot of public official immunity, it is crucial to remember the fundamental purpose such immunities were created to serve: allowing public officials to perform their duties without fear of harassment from lawsuits. As noted earlier, more people are choosing to solve their legal issues on their own.<sup>138</sup> Given the significant increase in lawsuits against professions, law librarians could understandably be wary about assisting the increasing numbers of pro se patrons because of liability issues.<sup>139</sup> This is precisely the type of situation public official immunities were intended to address. It would seem unreasonable, therefore, to deny public law librarians their protections.

¶56 The added layers of complexity public official immunities create also serve a trenchant purpose: as hard as it is to make a claim in negligence against public law librarians, their potential public official immunities make the task all the harder. Other commentators have written about the difficulties in establishing the proximate cause and duty planks of negligence analysis.<sup>140</sup> The ability to invoke immunity, whether by claiming protected discretion, misrepresentation, or being an integral part of the judicial process, makes bringing a negligence claim extremely difficult. Again, official immunity, if successfully invoked, can terminate a suit.<sup>141</sup> The challenges of overcoming immunities and establishing a plausible negligence

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137. Carol A. Roehrenbeck, Introduction, *The Law School Library Director of the Twenty-first Century: What Deans Think*, 95 LAW LIBR. J. 419, 419, 2003 LAW LIBR. J. 29, ¶ 1.

138. See sources cited *supra* note 2.

139. Jerome Leone, *Malpractice Liability of a Law Librarian*, 73 LAW LIBR. J. 44, 48–49 (1980).

140. See sources cited *supra* notes 14 & 19.

141. See *supra* note 37 and accompanying text.

claim are so daunting—and needless to say requiring significant enough injuries to warrant such a suit—as to serve as a sufficient deterrent to taking public law librarians to court for all but the most egregious errors that they could possibly commit. At the very least, public law librarians concerned about liability should be aware of the respective tort claims act that protects their activities, limits claims against them, and guarantees them representation and indemnification.

¶57 Another important point to take from this discussion is that it contains a hint on how to put the librarian liability question in its grave for good (at least for public law librarians): have states, in their respective tort claims acts, create an immunity for law librarians providing services for pro se patrons. The exemption need not cover all conduct—malice, fraud, deceit, and other egregious wrongdoing could be left actionable—and it would only protect those activities within a law librarian’s scope of authority, i.e., not providing legal advice. Instead of making an expansive immunity, it could also be limited to specific activities.<sup>142</sup> This could even conceivably protect public law librarians from malpractice claims should they ever arise. Public law librarians would not be completely “off the hook” for negligence; presumably employers could reprimand employees who fail to maintain professional standards.

¶58 In the end, the immunities offered under tort claims acts may require excruciating study to fathom, but they are important to know to warm the chill in the legal reference room so that librarians can perform their duties and pro se clients can be directed to the information they need.

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142. For example, some state programs offering legal self-help assistance state what tasks program personnel can provide. CAL. FAM. CODE § 10004 (West 2004) (covering family law facilitator duties); OR. REV. STAT. § 3.428 (2005) (covering family law facilitation programs); MINN. GEN. R. PRAC. 110.04 (covering role of self-help personnel, including required acts, permitted acts, and prohibited acts).