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Negligent Misrepresentation: Can an Attorney Rely on What the Government Tells Him?

Martha M. Quinn

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dramatic technical change in the law, the application will not cause any unsettling effects in practice, as the defense had seldom been successfully invoked in Louisiana. However, if later jurisprudence adheres to Justice Dixon's misstatements of the *Loescher* rule as the present state of the law, great practical changes will have occurred as a result of *Arceneaux*: the traditional plaintiff's burden of proof will have been shifted to the defendant in automobile rear-end collision cases, and the concept of defect will have ceased to be a vital element of a plaintiff's case under Civil Code article 2317.

W. H. Parker, III

NEGLIGENT MISREPRESENTATION: CAN AN ATTORNEY RELY ON WHAT THE GOVERNMENT TELLS HIM?

The attorney representing a school lunchroom worker injured by an allegedly defective steam cooker wrote the school board and requested the name of the manufacturer of the equipment. The school board furnished him an incorrect name, information which he used in filing suit. After the one-year prescriptive period had run, the attorney discovered the mistake and amended the plaintiff's petition to sue the school board for its negligence in advising him. The trial court sustained an exception of no cause of action, and the court of appeal affirmed.[1] In affirming the lower court's decision, the Louisiana Supreme Court found that the plaintiff had failed to allege facts which would justify the imposition upon the school board of a duty to exercise care in supplying the information.[2] *Devore v. Hobart Manufacturing Co.*, 367 So. 2d 836 (La. 1979).

Courts in common law jurisdictions have established a general framework of facts necessary for a finding of negligent misrepresen-

1. 359 So. 2d 1108 (La. App. 3d Cir. 1978).

2. The majority cited as reasons for its holding the insufficiency of the defendant's knowledge of the extent to which the plaintiff and her attorney planned to rely on the information and the fact that neither was prevented from personally inspecting the equipment. The opinion implicitly adopted the conclusions of the appellate court, which relied heavily upon section 552 of the Restatement (Second) of Torts, defining the common law cause of action for negligent misrepresentation. The part of the Restatement test not met was the requirement that the defendant have a pecuniary interest in the transfer of the information. The majority's implicit approval of the intermediate court's holding and the dissent's protest of the use of the pecuniary interest test requirement indicate that this segment of the Restatement test was a major bar to the finding of a cause of action.

tation that causes economic harm. The relationship between the supplier and the recipient of the information must be one that gives rise to a duty on the part of the supplier to use due care in obtaining and transmitting the information. The supplier must have actual or constructive knowledge that the information is desired for a serious purpose and will be relied upon by the recipient. Finally, the harm suffered by the recipient must be attributed to his reliance on the false information.[3] The first major American case to recognize negligent misrepresentation and state the elements of the modern cause of action was *International Products Co. v. Erie Rail Co.*,[4] which established the basic requirements that the supplier have notice of the importance attached to his representations and that the recipient have a right to rely on the other's statements.

Negligent misrepresentation evolved from the action of deceit and has a complex history. For many years there was no "negligent" misrepresentation; plaintiffs were denied recovery if they did not prove fraud, a requirement established in *Derry v. Peek*,[5] which was decided by the House of Lords in 1889. The directors of a tramway company issued a prospectus stating the company had the right to use steam power. The Board of Trade refused to consent to the use of the new steam power method, and the company was dissolved. Investors sued the directors for deceit. The Court of Appeal in Chancery held the directors liable, announcing a rule, similar to the modern rule, that a person has a duty not to make "a statement to be acted upon by others which is false, and which is known by him to be false, or is made by him recklessly, or without care whether it is true or false—that is, without any reasonable ground for believing it to be true."[6] The House of Lords, however, reversed resoundingly, holding that fraud was necessary for a finding of liability.[7] This view prevailed in England until the 1963 decision of *Hedley Byrne & Co. v. Heller & Partners Ltd.*,[8] in which the House of Lords

3. Comment, *Negligent Misrepresentation: Fraud or Negligence*, 13 CLEV.-MAR. L. REV. 250, 259-60 (1976).

4. 244 N.Y. 331, 155 N.E. 662 (1927).

5. 14 App. Cas. 337 (H.L. 1889).

6. 37 Ch. D. 541, 566 (Ch. App. 1887).

7. 14 App. Cas. at 343.

8. [1964] A.C. 465 (H.L.). The justices of the Court of Appeal had followed the *Derry* precedent in *Le Lievre v. Gould*, [1893] 1 Q.B. 491 (C.A.), holding a surveyor who negligently certified certain stages of completion of a building was not liable to a mortgagee who, relying on the information, advanced money to the builder and incurred financial loss when the builder failed to complete construction. The court held the surveyor was not liable in the absence of proof of fraud. The House of Lords indicated it would deviate from the *Derry* rule in *Nocton v. Ashburton*, [1914] A.C. 932 (H.L.), finding liability where the negligent supplier of information owed a fiduciary duty to the plaintiff. In that case, a solicitor misadvised his client. The Lords distinguished

found a duty on the part of a bank to take care in giving financial information regarding its customers. Lord Reid, disposing of the troublesome precedent of *Derry*, discounted its influence on intervening decisions: "It must now be taken that *Derry v. Peek* did not establish any universal rule that in the absence of contract an innocent but negligent misrepresentation cannot give rise to an action."[9]

The scienter requirement carried over to American cases, and well into the twentieth century courts refused to find liability for mere negligent misrepresentation. In the 1902 case of *Warfield v. Clark*,[10] an Iowa court stated: "This action is founded on active and conscious misrepresentation as to the condition of the company, and can only be sustained by proof of intentional fraud. It cannot be predicated on negligence, however gross."[11] This position was solidified in (then) Judge Cardozo's opinion in *Ultramares Corp. v. Touche*,[12] a case against public accountants who negligently prepared and certified a balance sheet to be used by a client in procuring credit. Judge Cardozo said the accountants owed a duty to prospective lenders, who were not in privity of contract, to prepare the report without fraud, but could not be held responsible for negligent preparation. Although the courts eventually abandoned this scienter requirement, scholars debated the necessity for fraudulent intent as late as the 1930's.[13]

In keeping with the restrictive intent requirement, early twentieth century courts also required the injured party to show privity of contract with the representing party. In this area, too, the rule of *Ultramares* was the prevailing view for some time. Judge Cardozo's concern regarding "liability in an indeterminate amount for an in-

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Derry on the basis that only fraud, and not a fiduciary duty, was considered. The Court of Appeal again followed *Derry* in holding accountants for a company owed no duty of care to prospective investors who requested financial reports. Candler v. Crane, Christmas & Co., [1951] 2 K.B. 164 (C.A.). The one dissenting justice argued that "those persons such as accountants, surveyors, valuers and analysts, whose profession and occupation it is to examine books, accounts, and other things, and to make reports on which other people . . . rely in the ordinary course of business" should be held liable for their negligence. [1951] 2 K.B. at 179 (Denning, L.J., dissenting). It was not until the *Hedley* case some twelve years later that the controversy was finally laid to rest in England.

9. [1964] A.C. at 484.

10. 118 Iowa 69, 91 N.W. 833 (1902).

11. *Id.* at 75, 91 N.W. at 836.

12. 255 N.Y. 170, 174 N.E. 441 (1931). *But see* Dime Sav. Bank v. Fletcher, 158 Mich. 162, 122 N.W. 540 (1909); Houston v. Thornton, 122 N.C. 272, 29 S.E. 827 (1898).

13. *See, e.g.*, Bohlen, *Should Negligent Misrepresentations Be Treated as Negligence or Fraud?*, 18 VA. L. REV. 703 (1932); Green, *Deceit*, 16 VA. L. REV. 749 (1930).

determinate time to an indeterminate class"[14] was echoed in the judicial opinions and literature.[15] In early cases, liability was rejected for corporate directors who filed false information with state agencies, to the detriment of investors;[16] an attorney who misadvised a person who was not his client;[17] and a notary who signed a false mortgage cancellation used to obtain a second mortgage.[18] Soon, however, courts began to relax the privity requirement and, perhaps to Judge Cardozo's chagrin, his opinion in *Glanzer v. Shepard*,[19] rendered before the *Ultramares* decision, became the leading authority. In holding a public weigher liable to a produce buyer who relied on the weigher's figures, Cardozo had rejected the privity argument, writing, "Constantly the bounds of duty are enlarged by knowledge of a prospective use."[20] He was forced to distinguish *Glanzer* in order to reach the result in *Ultramares*; he did so on two bases: the relationship between the weigher and the produce buyer was closer than that of the accountant and the lender in *Ultramares* and the weight report was the "end and aim of the transaction" whereas the accountants' report in *Ultramares* was not expressly prepared for the benefit of the lender who relied upon it in making his business decision.[21] In recent years, the privity requirement has been rejected and liability has been founded on other factors which establish a duty to use care.[22]

Although one commentator recently wrote, "The common law . . . *was* unwilling to permit liability for a negligent, non-fraudulent misstatement which caused injury or damage to another, unless he had 'purchased' the benefit of a duty of care on the part of the other party,"[23] a strong vestige of privity, the requirement of a pecuniary

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14. 255 N.Y. at 179, 174 N.E. at 444.

15. *See, e.g.*, Ryan v. Kanne, 170 N.W.2d 395 (Iowa 1969); Candler v. Crane, Christmas & Co., [1951] 2 K.B. 164 (C.A.); Prosser, *Misrepresentation and Third Persons*, 19 VAND. L. REV. 231 (1966).

16. *E.g.*, Hunnewell v. Duxbury, 154 Mass. 286, 28 N.E. 267 (1891).

17. *E.g.*, Rosenberg v. Cyrowski, 227 Mich. 508, 198 N.W. 905 (1924).

18. *E.g.*, New England Bond & Mortgage Co. v. Brock, 270 Mass. 107, 169 N.E. 803 (1930).

19. 233 N.Y. 236, 135 N.E. 275 (1922).

20. *Id.* at 240, 135 N.E. at 276.

21. *Id.* at 238-39, 135 N.E. at 275.

22. Texas Tunneling Co. v. City of Chattanooga, 204 F. Supp. 821 (E.D. Tenn. 1962); Rozny v. Marnul, 43 Ill. 2d 54, 250 N.E.2d 656 (1969); Ryan v. Kanne, 170 N.W.2d 395 (Iowa 1969). The *Hedley* case had a decided influence on the fate of the privity requirement and was much noted in America. *See* Goodhart, *Liability for Innocent But Negligent Misrepresentations*, 74 YALE L.J. 286 (1964); Green, *The Duty to Give Accurate Information*, 12 U.C.L.A. L. REV. 464 (1965); Prosser, *supra* note 15, at 231.

23. Fridman, *Negligent Misrepresentation*, 22 MCGILL L.J. 1, 2 (1976) (emphasis added).

interest in the transaction, still exists. Dean Prosser noted, "[S]eparate recognition [of the negligent misrepresentation tort] has been confined in practice very largely to the invasion of interests of a financial or commercial character, in the course of business dealings."[24] As another writer commented, "It is therefore difficult to think of any misrepresentation which gives rise to financial injury which will not be concerned with a business or professional transaction."[25] Some scholars advocate a further relaxing of the interest requirement to some special relationship or a standard of foreseeability.[26] However, the more conservative position has been adopted in the Restatement (Second) of Torts.[27]

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24. W. PROSSER, LAW OF TORTS 684 (4th ed. 1971).

25. Goodhart, *supra* note 22, at 299-300.

26. Professor Fridman, writing in the *McGill Law Journal*, advocates the foreseeability standard:

> I find it hard to accept, therefore, that basing liability upon the test of foreseeability would inevitably result in an overlarge extension of the liability that unquestionably exists or can arise at the present time. . . . Only the difference between physical harm and economic loss, and the possibility of larger, more extensive, more costly liability, might justify a differentiation in the bases of liability. In the days when awards of damages for physical injuries suffered through negligence are mounting, it seems difficult to see any possible justification for a distinction between two varieties of negligence liability based upon the fear of exaggerated awards, or too extensive a liability.

Fridman, *Negligent Misrepresentation: A Postscript*, 22 MCGILL L.J. 649, 655 (1976). Another writer advocated the special relationship requirement:

> The modern trend, however, is to expand the ambit of responsibility to include those persons whose reliance on the misrepresentations could reasonably be foreseen. Thus the requirement of privity has been eliminated where reliance by plaintiff was contemplated and where the one making the negligent misrepresentation was in a situation of special trust, such as a certified public accountant, title abstractor, or notary.

Recent Decisions—Torts, 48 VA. L. REV. 1476, 1478 (1962). Professor Goodhart rejects the latter view and argues that debates on the scope of duty

> could be avoided if the concept of "special relationship," with all its ambiguities, were deleted from the law and in its place were substituted . . . a general duty to exercise reasonable care not to injure others by false statements, just as there is a duty not to injure them by harmful acts.

Goodhart, *supra* note 22, at 300. Leon Green appears to agree. Green, *supra* note 22.

27. RESTATEMENT (SECOND) OF TORTS § 552 (1976) provides:

> (1) One who, in the course of his business, profession or employment, or in any other transactions in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
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> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends

The unusual facts of the instant case, particularly the involvement of the attorney, complicated what would otherwise have been a typical negligent misrepresentation case easily resolved by application of the common law doctrine. The attorney's letter to the school board was referred to the director of school food service, who replied that the manufacturer of the steam cooker was Cleveland Manufacturing Company. The attorney discovered that the company was not listed with the Secretary of State as a foreign corporation, but found a company with a name similar to that, Cleveland Consolidated, Inc. Within the prescriptive period, suit was filed against both companies and Hobart Manufacturing Company, a name given the attorney by the plaintiff. The attorney subsequently discovered that the true manufacturer was Cleveland Range Company (also not listed with the Secretary of State) and added the company as a defendant by supplemental petition filed after the one-year anniversary date of the accident. The petition also named the school board and the director of school food services as alternative defendants, claiming they were negligent in conveying the name of the manufacturer. The trial court sustained the exception of prescription filed by Cleveland Range Company and the exception of no cause of action filed by the school board. Only the latter decision was appealed, and the third circuit affirmed the decision of the lower court.[28]

The supreme court majority opinion acknowledged that the Civil Code encompasses a cause of action for negligent misrepresentation,[29] but relied largely on the Restatement in declining to find a cause of action in the instant case. The threshold question for determining the existence of a duty under the Restatement test, whether the school board had a pecúniary interest in giving the name of the manufacturer, appeared to have been answered summarily. The court directed most of its discussion to the factual issues of whether the defendant knew of the plaintiff's reliance and had exclusive control of the information. Finding the plaintiff's allegations insufficient, the court determined the requirements of the Restatement test had not been met and the plaintiff had no cause of action.

In his dissenting opinion, Justice Tate rejected the application of

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to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

28. 359 So. 2d 1108 (La. App. 3d Cir. 1978).

29. 367 So. 2d at 839, *citing* LA. CIV. CODE arts. 2315-16.

the pecuniary interest test and would have found the existence of a duty based on the defendant's knowledge of the importance of the information to the plaintiff, the school board's exclusive control of the information, and the employer-employee relationship between the plaintiff and the defendant. He left unclear the standards by which the court would determine the liability of public agencies in future actions based on negligent misrepresentation in which this apparently essential employment relationship is not present. In order "to differentiate an actionable circumstance from one in which a purely gratuitous service is performed as a favor,"[30] Justice Tate would impose a substitute test to fulfill the purpose of the pecuniary interest requirement. However, broad language in his dissent indicates the test will be anything but onerous for the plaintiff to meet; the plaintiff need only show that the defendant supplied the information "in the course of the performance of its public function."[31]

The dissent introduced as a consideration, which also may have influenced the majority's opinion, the role of the attorney.[32] Upon closer reading, it appears that the majority may have felt that the attorney was remiss in his reliance on the school board's information and should bear the responsibility for the latter's error. The court considered the question of the defendant's duty to the *attorney* as well as to the plaintiff.[33] Language in the opinion exhibits a belief that the attorney did not use all the means available to him to prepare his client's case:

> It cannot be presumed that Jones or the School Board knew or should have known that plaintiff's attorney would rely entirely upon the information furnished, make no independent investigation, forego discovery, fail to timely file against the proper defendant, and let prescription run. . . . That risk was and should have been much more obvious to plaintiff and her attorney than to defendants.[34]

Justice Tate disagreed and found that "[t]he majority's implication imposes an unreasonable standard of duty upon an attorney . . . ."[35] He asserted that placing the burden of investigation on attorneys might waste their limited time and specialized talents and increase

30. 367 So. 2d at 843 (Tate, J., dissenting).

31. *Id.*

32. *Id.* at 842 n.1.

33. "There are no facts set forth which would in our view impose upon the employer-equipment custodian a duty to plaintiff or her attorney to exercise the care in supplying correct information which ultimately proved lacking." 367 So. 2d at 839.

34. *Id.*

35. 367 So. 2d at 842 n.1 (Tate, J., dissenting).

the cost of legal services. In taking exception to the majority's allusions to the attorney's handling of the case, he used negligence-oriented language to evaluate the attorney's conduct: "I am simply unable to percieve any reason why, *in the exercise of ordinary prudence*, the attorney should doubt the veracity of such information or be required to investigate its reliability."[36]

According to the Restatement test, once the defendant's knowledge of the plaintiff's reliance is established (a fact disputed in the instant case by the majority and the dissent), the plaintiff must show a pecuniary interest on the part of the defendant to justify the imposition of a duty. However, when the defendant is a governmental entity, how is that aspect of the test to be applied? In *Devore* the court routinely applied the pecuniary interest requirement of the Restatement test and did not discuss the identity of the defendant as a factor that might render the requirement inappropriate. But the Restatement test is designed to justify the imposition of a duty on *private* parties and it cannot adequately be extended to *public* entities, because such defendants can never satisfy the pecuniary interest requirement. In contrast, Justice Tate advocated an approach which replaces the pecuniary interest test with a test which will find the necessary reciprocity of interest in almost limitless circumstances. If the requirement is fulfilled merely by finding the performance of a public function, the court will have no substantial test for determining when a duty should be imposed on a defendant. The better solution is to substitute for the pecuniary interest test an inquiry which will allow a more individual evaluation of the mutuality of interest between the supplier and recipient of information.

Canadian courts have dealt with negligent misrepresentation by government agencies in several cases and tend to hold the defendants liable. A case strikingly similar to *Devore* involved a zoning department employee who incorrectly informed a restaurant owner that his business could be operated in a certain location without violating zoning laws. The plaintiff consulted a solicitor to draw up the lease, and the solicitor called the zoning department to verify the information but made no investigation of his own. The building permit was revoked upon discovery that the restaurant violated zoning regulations, and the restaurant owner filed suit against the city. In granting recovery to the plaintiff, the Ontario High Court held that the city owed a duty to give correct information regarding the zoning laws since responding to such inquiries was one of the purposes of the zoning department, and its employees knew of the

36. *Id.* (Emphasis added).

reliance that would be placed on their statements.[37] There are cases to the contrary, but those decisions appear to be based upon special facts, such as the exercise of legislative power, a discretionary governmental function removed from liability,[38] or a superior knowledge by the plaintiff of the information supplied.[39] None of the cases provide a clear test which can be substituted for the pecuniary interest element;[40] nevertheless, each case involved a service provided by the government agency to an individual, as opposed to a service for the benefit of the general populace. Such a difference in the nature of the act performed may provide the key element in formulating a proper test.

Louisiana courts have distinguished between a duty of care owed to an individual and a duty of care owed to the public at large in other tort actions against governmental defendants. In *Hester v. Sanderson*[41] and *Serpas v. Margiotta*,[42] appellate courts held that the public employee defendant owed a duty to the particular plaintiff and was liable for his negligence, although it appears these decisions were influenced by the presence of gross negligence on the part of the government agents.[43] In 1977, the fourth circuit maintained an exception of no cause of action in a suit against certain agencies responsible for building inspections, holding the duty to inspect was owed to the general public and not to plaintiffs injured in a fire caused by hazardous conditions.[44] A similar result was reached by the first circuit in *Peltier v. Department of Highways*,[45] in which the department was held not liable to farmers who could not transport their crops to market because of delay in repairing a bridge. It is noteworthy that both opinions admitted the difficulty in determining liability of the public agency,[46] which indicates that the individual interest test may be difficult to apply.

37. Gadutsis v. Milne, 34 D.L.R.3d 455 (1972) (Can.).

38. *See* Welbridge Holdings Ltd. v. The Metropolitan Corp. of Greater Winnipeg, [1971] 1 Can. S. Ct. 957.

39. *See* The Town of the Pas v. Porky Packers, Ltd., [1977] 1 Can. S. Ct. 51.

40. Of these Canadian cases, only the opinion in *Welbridge Holdings* contained a discussion of the nature of the governmental defendant as necessitating special consideration. [1971] 1 Can. S. Ct. at 968-69.

41. 172 So. 565 (La. App. 2d Cir. 1937). A federal inspector disregarded his superior's orders to burn tick-infested hay and sprayed it with arsenic instead. The plaintiff's cows ate the poisned hay and died.

42. 59 So. 2d 492 (La. App. Orl. App. 1952). An employee of the State Society for Prevention of Cruelty to Animals refused to capture a suspected rabid dog; as a consequence, a child was bitten and died of rabies.

43. Serpas v. Margiotta, 59 So. 2d at 496; Hester v. Sanderson, 172 So. at 567.

44. Dufrene v. Guarino, 343 So. 2d 1097 (La. App. 4th Cir. 1977).

45. 357 So. 2d 897 (La. App. 1st Cir. 1978).

46. 343 So. 2d at 1098. Judge Ponder, writing in *Peltier*, said, "Admittedly, there is considerable range of judgment in the determination of the scope of protection from

Some jurisdictions use a test based on the activity of the governmental defendant, rather than the duty owed to the plaintiff. This test, referred to as the governmental/proprietary test, distinguishes between the state's activities in its peculiarly governmental capacity and its activities which are common to the private sector.[47] The state is immune from liability in governmental functions but is treated as a private defendant when proprietary activities are involved.[48] However, this approach has been criticized as being subjective and for leading to unpredictable decisions.[49]

The above-outlined tests are designed to insulate government from liability in areas in which a fear of liability would unduly restrict the government's ability to deal with problems; the test in a negligent misrepresentation action would serve to determine when the government agency and the individual have interests so closely connected as to justify the imposition upon the government of a duty to use care in conveying information. Although the inquiries are different, the tests used in other tort actions against governmental defendants could be applied in claims based on negligent misrepresentation. However, both the duty and function classifications are highly subjective and likely to obscure the underlying analysis of the competing interests. Nevertheless, the tests are advantageous in that they offer the courts a means of limiting the government's liability.

A better solution may be the enactment of a tort claims act,[50] theoretically a reasoned legislative judgment reached after full consideration of the competing interests of plaintiffs and public defen-

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loss resulting from a breach of duty in cases such as this. Admittedly, there will be frequent differences of opinion in the courts and in the legislature." 357 So. 2d at 899.

47. Courts have held the following activities to be governmental in nature: guarding of school zone crossings, Sarmiento v. City of Corpus Christi, 465 S.W.2d 813 (Tex. Civ. App. 1971); operation of a zoo, Grover v. City of Manhattan, 198 Kan. 307, 424 P.2d 256 (1967); operation of a sewerage system, People v. Mission Brook Sanitary Dist., 76 Ill. App. 2d 423, 222 N.E.2d 8 (1966).

Activities held to be proprietary in nature include: the installation of a sewerage line, Hatten v. Mason Realty Co., 148 W. Va. 380, 135 S.E.2d 236 (1964); the operation of a recreation program, Morris v. Mount Lebanon Township School Dist., 393 Pa. 633, 144 A.2d 737 (1958).

48. F. STONE, TORT DOCTRINE § 106, in 12 LOUISIANA CIVIL LAW TREATISE 144 (1977).

49. Fordham & Pegues, *Local Government Responsibility in Tort in Louisiana*, 3 LA. L. REV. 720 (1941).

50. Such a solution would also be consistent with the preeminence of legislation in a civilian system. The Louisiana legislature has twice considered bills to enact tort claims acts for local governments, but neither was passed. La. S.B. 553, 4th Reg. Sess. (1978); La. H.B. 648, 3d Reg. Sess. (1977).

dants.[51] Some states have enacted tort claims acts, and most exclude misrepresentation from actionable torts.[52] The federal statutes also exempt misrepresentation from negligent acts for which federal agencies and employees are liable.[53] While such an act would provide a consistent standard for determining liability, it would necessarily be absolute in foreclosing any consideration on a case by case basis.

If a cause of action for negligent misrepresentation is applied to government agencies in Louisiana, should there not be an exception, similar to contributory negligence, which holds plaintiffs to a higher standard of care if they are able to protect themselves?[54] The peculiar fact situation of *Devore* provides a specific context for posing the question: should a plaintiff relying on a representation be held to a higher standard of care because he is assisted by a knowledgeable attorney who can confirm the accuracy of the information? Statements in both the majority and the dissenting opinions of the court indicate that the role of the attorney was an important consideration.[55] Apparently, the court determined that the attorney was remiss in his investigation of the facts; it then, in some manner, "imputed" that failing to the plaintiff, or at least imputed the attorney's superior skill and knowledge of the law to the plaintiff and reached the conclusion that the plaintiff did not have the right to rely on the information furnished by the school board.

Assuming that plaintiffs represented by knowledgeable counsel are held to a higher standard of care, the decision raises a second

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51. Because of the wide range of activities in which governments become involved, their agencies become repositories of vast amounts of information. As such, they would be exposed to almost unlimited liability if the negligent misrepresentation cause of action were to be applied in all cases where these agencies had a duty to provide this information. A tort claims act might exempt from liability any agency that dispenses information to the public as its primary function.

52. ALASKA STAT. § 09.50.250 (1965); ARK. STAT. ANN. § 12-2901 (1969); CAL. GOV'T CODE § 818.8 (West 1963); COLO. REV. STAT. § 24-10-106 (1963); DEL. CODE ANN. tit. 10, § 4001 (1978); FLA. STAT. ANN. § 768.28 (West 1977); HAWAII REV. STAT. § 662-15 (1972); IDAHO CODE § 6-904 (1978); ILL. ANN. STAT. ch. 85, § 2-106 (Smith-Hurd 1965); IND. CODE ANN. § 34-4-16.5-3 (Burns 1977); IOWA CODE ANN. § 25A.14 (West 1971); KAN. STAT. ANN. §§ 46-901 to -902a (1978); ME. REV. STAT. ANN. tit. 14, § 8101 (1972); MASS. GEN. LAWS ANN. ch. 258, § 10 (West 1978); MICH. STAT. ANN. § 691.1407 (1970); MINN. STAT. ANN. §§ 466.01 to .15 (West 1963); MO. REV. STAT. § 537.600 (1978); MONT. REV. CODES ANN. § 2-9-101 to 114 (1977); NEB. REV. STAT. §§ 23-2401 to -2420 (1969); N.J. STAT. ANN. §§ 59:1-1 to 12-3 (West 1972); N.M. STAT. ANN. §§ 41-4-1 to -25 (1978); N.Y. GEN. MUN. LAW § 50.502 (McKinney 1936); OKLA. STAT. ANN. tit. 51, § 155 (West 1979); WASH. REV. CODE ANN. §§ 4.92.010 to .170 (1969).

53. Federal Tort Claims Act, 28 U.S.C. § 2680(h) (1974).

54. For a suggestion that the plaintiff's ability to protect himself be a criterion in determining liability in products liability cases, *see* Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 837-38 (1973).

55. See text at notes 32-36, *supra*.

question: what is the extent of the diligence and care required of the attorney? Unfortunately, the only Louisiana decisions providing any indication of the extent of the duty of attorneys are largely malpractice cases. A 1973 first circuit decision awarded a plaintiff damages for the loss of his claim when his attorney failed to check the date of the accident and allowed prescription to run before filing suit.[56] The court said the plaintiff's uncertainty as to the date imposed upon the attorney a duty to investigate and ascertain the correct date.[57] An early Louisiana malpractice case held an attorney liable for damages resulting from the preparation of an incorrect tableau of the effects of a succession because he failed to use all available records.[58] Another case denied the plaintiff a jury trial because his attorney failed to timely post a jury cost bond.[59]

Members of the legal profession may infer from *Devore* that their own errors may be considered by the court in determining the rights of their clients, at least in cases in which the complaint arises after the plaintiff has retained counsel. Unfortunately, the implications in the opinion provide little clarification.

The issue of negligent misrepresentation by a public body was considered by a Louisiana court for the first time in *Devore;* the court indicated that it would use the Restatement test, despite the difficulty in applying that test to a public agency and despite the inconsistency with the analysis of duty under the Civil Code. The court declined to scrutinize the inconsistencies and chose to treat the school board as a private litigant. The majority also failed to discuss the duty of an attorney to investigate his client's case, although that appears to be a central factor in the deliberations. Thus, public agencies are not provided with a certain standard of care to which they will be held, and neither are attorneys apprised of the extent to which they may rely on information provided by others.

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56. Watkins v. Sheppard, 278 So. 2d 890 (La. App. 1st Cir. 1973).

57. *Id.* at 892.

58. Thompson v. Lobdell, 7 Rob. 369 (La. 1844).

59. Langston's Furniture & Appliance, Inc. v. Frigidaire Sales Corp., 313 So. 2d 273 (La. App. 4th Cir.), *cert. denied,* 318 So. 2d 42 (La. 1975). *But see* Smith v. Rosson, 233 Ala. 219, 171 So. 375 (1936); Kizer v. Martin, 132 So. 2d 14 (Fla. Dist. Ct. App. 1961) (in both cases the court excused the attorney's failures to discover certain necessary information).