Washington Law Review

Volume 42 | Number 4

6-1-1967

Physical Injury and the Misrepresentation Exception of the Federal Tort Claim Act § 2680(h)

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Even if the courts apply a discriminating set of standards in 10(j) injunction cases, there is no assurance that the Board will seek those injunctions.[64] Though more have been granted than have been denied, it is difficult to argue on such evidence alone that too many have issued because compared with the total number of eligible violations so few have been sought. The infrequency of use of section 10(j) is no reason to sanction the existence of arbitrary power whether or not it is exercised, nor is it an adequate excuse for the lack of predictability which plagues this section of the Act. Although the Board is held only to a loose standard of prosecutorial discretion in whether to take any action, that standard excludes the unreasonable and the arbitrary.[65] It is the office of a legal system to make it ostensibly, as well as factually certain that governmental power is properly exercised.

PHYSICAL INJURY AND THE MISREPRESENTATION EXCEPTION OF THE FEDERAL TORT CLAIMS ACT, § 2680(h)

Plaintiff, operating a dragline[1] while improving the channel of a small creek, struck and detonated a natural gas pipeline which was shown on Government site plans[2] to be located outside the work area.

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involves the shutdown of important business operations which, because of their special nature, would have an extraordinary impact on the public interest; (3) whether the alleged unfair labor practices involve an unusually wide geographic area, thus creating special problems of public concern; (4) whether the unfair labor practices create special remedy problems so that it would probably be impossible either to restore the *status quo* or effectively to dissipate the consequences of the unfair labor practices through resort solely to the regular procedures provided in the Act for Board order and subsequent enforcement proceedings; (5) whether the unfair labor practices involve interference with the conduct of an election or constitute a flagrant disregard of a Board certification of a bargaining representative or other Board procedures; (6) whether the continuation of the alleged unfair labor practice will result in exceptional hardship to the charging party; (7) whether the current unfair labor practice is of a continuing or repetitious pattern; (8) whether, if violence is involved, the violence is of such a nature as to be out of control of local authorities or otherwise widespread and susceptible of control by 10(j) relief.

There is no reason why standards used in 10(*l*) cases to date could not be applied to the 10(j) situation if the relationship is kept clear.

[64] *See, e.g.*, Bandlow v. Rothman, 278 F.2d 866 (D.D.C. 1960); Hourihan v. NLRB, 201 F.2d 187 (D.D.C.), *cert. denied* 345 U.S. 930 (1953).

[65] Office Employee's International Union v. Labor Board, 353 U.S. 313 (1957); Joliet Contractors Ass'n v. NLRB, 193 F.2d 833 (7th Cir. 1952).

[1] "An excavating machine in which the bucket is attached only by cables and is drawn toward the machine during the filling operation...." WEBSTER, THIRD NEW INT'L DICTIONARY (1961).

[2] Plans were furnished by the United States Department of Agriculture, Soil Conservation Service.

Plaintiff sued the United States under the Federal Tort Claims Act[3] to recover for his personal injuries. Defendant moved to dismiss for failure to state a claim upon which relief could be granted, contending that the case was bottomed on misrepresentation and therefore excluded from the Federal Tort Claims Act, 28 U.S.C. section 2680(h).[4] The United States District Court for the Northern District of Mississippi granted Defendant's motion to dismiss. *Held:* the action for personal injury was one "arising out of misrepresentation" within the Federal Tort Claims Act exclusion, 28 U.S.C. section 2680(h). *Vaughn v. United States,* 259 F. Supp. 286 (N.D. Miss. 1966).

The Federal Tort Claims Act of 1946 was enacted to waive federal tort immunity.[5] The Government is made liable to an individual for tortious conduct of its employees while acting within the scope of their employment.[6] The waiver of immunity is subject to several express exceptions including "any claim arising out of . . . misrepresentation [and] deceit . . . ."[7] While the scheme of the statute and its legislative history seem to indicate that only intentional torts were to be excepted, a number of cases have held that the exception must include *negligent* as well as *willful* misrepresentation if both terms are to be given meaning.[8] If a negligent act is accompanied by misrepresentation upon which plaintiff has relied, courts disallow recovery on the theory that without misrepresentation there would be no loss from the negligent act.[9] The principal case mechanically applies this theory to a suit

[3] 28 U.S.C. §§ 1346(b), 2671-80 (1964).

[4] 28 U.S.C. § 2680. "Exceptions. The provisions of this chapter and section 1346(b) of this title shall not apply to . . . (h) 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." (Emphasis added.)

[5] *See* Dalehite v. United States, 346 U.S. 15, 17, 24-25 (1953). *See also* Gilroy v. United States, 112 F. Supp. 664, 665-66 (D.D.C. 1953) in which the court said:

> The purpose of the Federal Tort Claims Act was to abrogate the immunity of the United States against suit in tort. Its purpose was to make the United States liable to suit in tort in the same manner as anyone else.

For a survey of the Act, see generally Gottlieb, *Federal Tort Claims Act—A Statutory Interpretation,* 35 GEO. L.J. 1 (1946); 14 VAND. L. REV. 653 (1961); Annot., 1 A.L.R.2d 222 (1948).

[6] 28 U.S.C. §§ 2672, 2674 (1964).

[7] 28 U.S.C. § 2680(h) (1964).

[8] A long line of cases has affirmed the reasoning which was first expressed in Jones v. United States, 207 F.2d 563 (2d Cir. 1953), *cert. denied,* 347 U.S. 921 (1954). *See, e.g.,* United States v. Neustadt, 366 U.S. 696 (1961); Hall v. United States, 274 F.2d 69 (10th Cir. 1959); Miller Harness Co. v. United States, 241 F.2d 781 (2d Cir. 1957); Anglo-American & Overseas Corp. v. United States, 144 F. Supp. 635 (S.D. N.Y. 1956), *aff'd,* 242 F.2d 236 (2d Cir. 1957); National Mfg. Co. v. United States, 210 F.2d 263 (8th Cir.), *cert. denied,* 347 U.S. 967 (1954); Clark v. United States, 218 F.2d 446 (9th Cir. 1954).

[9] *See* cases cited in notes 10 and 11 *infra.*

involving physical injuries in a manner which could severely limit the scope of the Federal Tort Claims Act.

The court in the principal case reviewed and adopted the rationale of an unbroken line of decisions which held that "misrepresentation" within the meaning of section 2680(h) encompasses negligent misrepresentation. The theory of the complaint was negligent misrepresentation. Since the exception for misrepresentation was not limited to commercial or financial transactions, but had been extended to property destruction[10] and wrongful death actions,[11] the complaint was dismissed.

Courts have uniformly held that the misrepresentation exception of section 2680(h) includes willful and negligent misrepresentation in cases involving economic loss.[12] The exception was first construed in *Jones v. United States*,[13] in which plaintiff was denied recovery for lost profits. The court held that since " 'deceit' means fraudulent misrepresentation, 'misrepresentation' must have been meant to include negligent misrepresentation, since otherwise the word 'misrepresentation' would be duplicative."[14]

The reasoning of *Jones*, holding misrepresentation to comprehend negligent misrepresentation, is questionable. Legislative history indicates only intentional torts were to be excepted.[15] The wisdom of

[10] Clark v. United States, 218 F.2d 446 (9th Cir. 1954); National Mfg. Co. v. United States, 210 F.2d 263 (8th Cir.), *cert. denied*, 347 U.S. 967 (1954). *See* notes 36 and 37 *infra* and accompanying text.

[11] Bartie v. United States, 216 F. Supp. 10 (W.D. La. 1963), *aff'd*, 326 F.2d 754 (5th Cir.), *cert. denied*, 379 U.S. 852 (1964).

[12] *See, e.g.*, United States v. Neustadt, 366 U.S. 696 (1961); Jones v. United States, 207 F.2d 563 (2d Cir. 1953), *cert. denied*, 347 U.S. 921 (1954); Bartie v. United States, 216 F. Supp. 10 (W.D. La. 1963), *aff'd*, 326 F.2d 754 (5th Cir.), *cert. denied*, 379 U.S. 852 (1964).

[13] 207 F.2d 563 (2d Cir. 1953), *cert. denied*, 347 U.S. 921 (1954). Plaintiff was denied recovery for lost profit on the sale of securities because of alleged negligent misrepresentation by the government as to the estimated oil producing capacity of realty.

[14] *Id.* at 564 (footnote omitted).

[15] S. REP. No. 1400, 79th Cong., 2d Sess. 33 (1946):

> This section (2680) specifies types of claims which would not be covered by the title... claims which relate to certain governmental activities which should be free from the threat of damage suit, or for which adequate remedies are already available. These exemptions cover claims arising out of... deliberate torts such as assault and battery....

The House Report concerning a nearly identical bill contains similar language. H.R. REP. No. 1287, 79th Cong., 1st Sess. 6 (1945).

The torts excluded in § 2680(h) have been described as "deliberate torts, well-established in the common law." Gottlieb, *supra* note 5, at 49.

The limits and exceptions of the Federal Tort Claims Act have been fully explored. *See generally* Gottlieb, *supra* note 5; Gellhorn & Schenk, *Tort Actions Against the Federal Government*, 47 COLUM. L. REV. 722 (1947); Gellhorn & Lauer, *Federal Liability for Personal and Property Damage*, 29 N.Y.U.L. REV. 1325 (1954); Note, *The Federal Tort Claims Act*, 56 YALE L.J. 534 (1947).

excluding liability for deliberate torts is suspect.[16] The statutory scheme allows recovery for negligent torts,[17] and the ten other exceptions in section 2680(h) are typically characterized as intentional torts.[18] Since section 1346 (b) requires application of state law to determine liability and since the definitions of misrepresentation and deceit are not uniform,[19] both terms may have been used to prevent loopholes.[20]

The Supreme Court, in *United States v. Neustadt*,[21] approved the line of cases which held that the misrepresentation exception of 2680(h) disallows actions based upon negligent misrepresentation where economic or property losses are alleged.[22] In footnote 26 of its opinion the Court indicated that not every act or omission is misrepresentation within section 2680(h). In its generic sense, misrepresentation is confined "very largely to the invasion of *interests of a financial or commercial character* in the course of business dealings."[23] (Em-

[16] The concept of *respondeat superior* outside the governmental field generally holds the master liable for the willful acts of his employees. No sound reason has been advanced to limit it in the governmental sphere. James, *Vicarious Liability*, 28 TUL. L. REV. 161, 187 (1954); Lambert & Rheingold, *Comments on Recent Important Personal Injury (Tort) Cases*, 28 NACCA L.J. 62, 77 (1962); 2 F. HARPER & F. JAMES, TORTS § 29.13 (1956).

[17] 28 U.S.C. §§ 1346(b), 2674 (1964).

[18] A list of the excepted torts appears at note 4 *supra*. But for misrepresentation the above listed exceptions are generally recognized as intentional torts.

[19] The definitions of misrepresentation and deceit vary with the jurisdiction. *See generally* 50 KY. L.J. 244 (1961); 75 HARV. L. REV. 216-17 (1961).

The confusion as to the distinctions and meanings of deceit and misrepresentation are brought to focus in the heated debate of Professors Bohlen and Green. Bohlen, *Misrepresentation as Deceit, Negligence, or Warranty*, 42 HARV. L. REV. 733 (1929); Green, *Deceit*, 16 VA. L. REV. 749 (1930); Bohlen, *Should Negligent Misrepresentations Be Treated as Negligence or Fraud?*, 18 VA. L. REV. 703 (1932); Green, *Innocent Misrepresentation*, 19 VA. L. REV. 242 (1933).

[20] In § 2680(h), quoted in note 4 *supra*, besides misrepresentation and deceit, the terms false arrest and false imprisonment, malicious prosecution and abuse of process appear. The use of such similar terms is often a legislative device to prevent loopholes in a statute because of variations in the meaning of legal phrases in different jurisdictions. This is particularly compelling here since § 2674 of the act requires application of state law to determine liability for torts actionable under the act.

[21] 366 U.S. 696 (1961). In reversing United States v. Neustadt, 281 F.2d 596 (4th Cir. 1960), which had allowed recovery under the Federal Tort Claims Act to a purchaser of a home who had been furnished a statement, made at the request of the seller, reporting the results of a negligently inaccurate appraisal by the Federal Housing Administration, the Court held the claim was one "arising out of . . . misrepresentation."

[22] The *Neustadt* opinion has been widely criticized. Sound alternative reasoning has been suggested. *See, e.g.*, 75 HARV. L. REV. 216 (1961); 50 KY. L. J. 244 (1961); 47 VA. L. REV. 139 (1961); 14 VAND. L. REV. 653 (1961).

This note attempts to establish that, regardless of the validity of *Neustadt* as a general rule in commercial misrepresentation, its rationale is inappropriate when dealing with personal injury actions.

[23] In its entirety note 26 at 711 reads as follows:

> Our conclusion neither conflicts with nor impairs the authority of Indian Towing Co. v. United States, 350 U.S. 61 (1955) which held cognizable a Torts Act

phasis added.) Some courts in apparent disregard of this limitation have applied *Neustadt* to every situation where any form of misrepresentation appears.

The Fourth Circuit in *Neustadt* had allowed recovery on the theory that where the government is to perform acts and provide information it has two duties: (1) a duty to perform the act with care, and (2) a duty to communicate correctly the results of that act. The fundamental cause of Neustadt's loss was breach of the duty to perform the act with care, not negligence in transmission of the information. The Supreme Court rejected this analysis:[24]

> To say ... that a claim arises out of "negligence," rather than "misrepresentation," when the loss suffered by the injured party is caused by the breach of a "specific duty" owed by the Government to him, *i.e.*, 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,* is only to state the traditional and commonly understood legal definition of the tort of "negligent misrepresentation,".... (Emphasis added.)

Cases which have arisen under the Federal Tort Claims Act since *Neustadt,* in which elements of misrepresentation and negligence were present, fall into three categories.

Cases alleging economic or financial loss have been uniformly dismissed[25] as outside the scope of the Act as interpreted by *Neustadt.* The rational is that if an act of negligence is coupled with misrepresentation upon which plaintiff relies, the resulting loss is caused by misrepresentation within section 2680(h).

Cases alleging property losses are not uniform. In *Indian Towing*

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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 "[s]o 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." (Citation omitted.)

[24] *Id.* at 706.

[25] *See, e.g.,* United States v. Croft-Mullins Elec. Co., 333 F.2d 772 (5th Cir. 1964), *cert. denied,* 379 U.S. 968 (1965) (action by a government contractor for misrepresentation as to the delivery dates of materials); Smith v. United States, 333 F.2d 70 (10th Cir. 1964) (financial losses sustained where circulars induced plaintiffs to enter reclamation project land); Goddard v. District of Columbia Redev. Land Agency, 287 F.2d 343 (D.C. Cir.), *cert. denied,* 366 U.S. 910 (1961) (losses by prop-

Co. v. United States,[26] decided before *Neustadt*, recovery was allowed for damage to a ship and its cargo because of an inoperative lighthouse. Although the misrepresentation exception was not discussed in the *Indian Towing* case, the Court noted that its opinion in *Neustadt* did not conflict with or impair *Indian Towing*.[27] Similarly, a plaintiff recovered when his ship was damaged by a lost maritime aid which the Coast Guard had assured mariners was not a danger to navigation.[28] The court held that "since his defense [misrepresentation], though valid and successful in part, does not pierce the negligent acts complained of, said defense is ineffective as a bar to recovery."[29]

Cases in which the alleged negligent act led to personal injury and in which misrepresentation was present are far from uniform in decision or analysis. Some recent cases allow recovery if misrepresentation does not constitute the gist of the case, since section 2680(h) requires that the claim "arise out of . . . misrepresentation." *United Air Lines, Inc. v. Wiener*[30] involved the midair collision of a military aircraft and a commercial airliner, which was flying within a regularly traveled air route. The Government's defense under section 2680(h) was denied because,[31]

> [T]his section applies to claims *arising out of* misrepresentation. [citation to Neustadt] Here, the gravament of the action is not misrepresentation but the *negligent performance* of operational tasks, although such negligence consisted partly of a failure of a duty to warn. (Emphasis added.)

In *Wenninger v. United States*,[32] it was alleged that decedent was

erty owners when government carried out condemnation proceeding in negligent manner); United States v. Lawrence Towers, Inc., 236 F. Supp. 208 (E.D. N.Y. 1964) (losses by mechanic's lien holder against government where it insured the loan); Steinmasel v. United States, 202 F. Supp. 335 (D.S.D. 1962) (veteran barred where there was negligent dissemination of information as to educational benefits); O'Donnell v. United States, 166 Ct. Cl. 107 (1964) (losses when plaintiff was asured that a shipment of potatoes would meet Sweden's import standards); Feffer & Sons v. United States, 166 Ct. Cl. 506 (1964) (losses caused by incorrect information as to amount of heat cottonseed could withstand); McCreery v. United States, 161 Ct. Cl. 484 (1963) (erroneous information given plaintiff as to time within which he could file for pension).

[26] 350 U.S. 61 (1955).

[27] *See* note 23 *supra* where the passage is quoted.

[28] Otness v. United States, 178 F. Supp. 647 (D. Alaska 1959).

[29] *Id.* at 652.

[30] 335 F.2d 379 (9th Cir.), *cert. denied*, 379 U.S. 951 (1964). Among the plaintiff's allegations was that the Government was negligent in failing in its duty to warn of unauthorized aircraft in the air corridor.

[31] *Id.* at 398.

[32] 234 F. Supp. 499 (D. Del. 1964), *aff'd per curiam*, 352 F.2d 523 (3d Cir. 1965). The case, dismissed for plaintiff's failure to establish proximate cause, involved a flying accident when plaintiff's plane exploded due to vortex turbulence of a military

killed and his plane destroyed when the government negligently failed to warn private pilots of Air Force activity around an airport. The Government's defense based upon section 2680(h) was denied.

In cases involving negligent medical diagnoses, courts appear to follow the distinction drawn by *Neustadt* between economic loss and physical injury. Recovery is allowed for the latter notwithstanding the element of misrepresentation.[33] In these cases, a breach of duty is implicit in the nature of the action.

The court in the principal case should have denied the motion to dismiss. *Neustadt,* impliedly, if not explicitly, limits the misrepresentation exception "to invasions of an economicor financial nature." *Wiener* and *Wenninger* are consistent with footnote 26 of *Neustadt.* Both state that failure to warn of an existing danger is not the type of misrepresentation section 2680(h) is intended to cover. The malpractice cases cited are consistent with this analysis.

The court in the principal case reasoned that *Neustadt* foreclosed any use of duty analysis. The *Neustadt* exception in its view was extended to losses other than those of a commercial or financial nature. The court relied on *National Mfg. Co. v. United States,*[34] *Clark v.*

transport. In rejecting the Government's assertion of § 2680(h) as a defense, the court stated at 505,

> A failure to warn . . . is in a sense an implicit assertion that there is no danger. For some purposes, at least, this may be properly characterized as a misrepresentation. This is not the type of misrepresentation, however, that § 2680(h) was intended to cover. This is made clear by the comments in United States v. Neustadt, 366 U.S. 696, 711 n.26....

[33] Prior to *Neustadt,* if an allegedly negligent medical diagnosis led to an aggravated condition, the courts upheld a defense under § 2680(h) on the theory that the misrepresentation caused the damage. In Kilduff v. United States, 248 F. Supp. 310 (E.D. Va. 1960) (suit by an ex-serviceman for damages for failure of the government to disclose the results of his physical examination barred by § 2680(h)). The court stated, *id.* at 314: "The very spirit and intent of these exceptive provisions . . . are violated if the maintenance of an action is in any degree whatsoever dependent upon the assertion of fraud." Hungerford v. United States, 192 F. Supp. 581 (N.D. Cal. 1961) (claim against government for unnecessary continuation of "blackouts" (general effects of brain injury) as result of negligent diagnosis arose out of negligent misrepresentation).

In Beech v. United States, 345 F.2d 872 (5th Cir. 1965), decided after *Neustadt,* recovery was allowed for a negligent diagnosis. Plaintiff had slipped on a freshly waxed hospital floor and was released after diagnosis incorrectly revealed no injury. The court held that the misrepresentation exception was not a bar to recovery since the government was liable to render proper care for plaintiff's treatment and this was not covered by § 2680(h).

Significantly, two other cases allow recovery for an incorrect diagnosis without a discussion of the possible limitation imposed by § 2680(h). Jackson v. United States, 182 F. Supp. 907 (D. Md. 1960) (§ 2680(h) could have been asserted as a defense when surgical needle left in plaintiff's abdomen during surgery was discovered but plaintiff not informed). United States v. Reid, 251 F.2d 691 (5th Cir. 1958) (§ 2680(h) not asserted where physician's diagnosis failed to reveal tuberculosis).

[34] 210 F.2d 263 (8th Cir.), *cert. denied,* 347 U.S. 967 (1954). Plaintiff's business premises were inundated by flood water when Government employees disseminated

United States,[35] and *Bartie v. United States*.[36] *National Manufacturing* and *Clark* involved broadcast warnings of flood conditions.[37] There is an established prohibition of federal liability for damage by flood or flood water.[38] The losses in each case were to commercial property. Although both cases are cited in *Neustadt* to support the proposition that misrepresentation includes negligent misrepresentation, the decisions appear inconsistent with the latter portions of *Neustadt* and particularly footnote 26. *Bartie v. United States*[39] involved death by flood. A recent case has indicated that reliance on section 2680(h) in *Bartie* was inconsistent with *Neustadt*.[40]

In the principal case the court applied the rule of *Neustadt* and the cases it affirmed to demonstrate that framing the complaint in terms of "the negligent breach of a duty to warn of the existence of a dangerous condition"[41] would not take it out of the misrepresentation exception. This construction totally ignores portions of *Neustadt*[42] and later

misinformation as to flooding on the Kansas River. The court found this to be negligent misrepresentation within § 2680(h).

[35] 218 F.2d 446 (9th Cir. 1954). Plaintiffs sued to recover for damage to personality as a result of the Columbia River breaking through an embankment protecting the city of Vanport. The court held that the assurances, although possibly negligent, were within the misrepresentation exception of the Federal Tort Claims Act.

[36] 216 F. Supp. 10 (W.D. La. 1963), *aff'd per curiam*, 326 F.2d 754 (5th Cir.), *cert. denied*, 379 U.S. 852 (1964). Plaintiff sued for the wrongful death of his wife and children as a result of alleged negligent dissemination of information as to an approaching hurricane. The court stated, 216 F. Supp. at 21: "The jurisprudence is uniform that a complaint pegged on negligent misrepresentation does not state a cause of action under the Federal Tort Claims Act."

[37] These cases involve either the failure to warn or an incorrect warning as to weather conditions over which the Government neither exercises control nor could control. These were warnings about dangers created not by the United States but by nature.

Considerations of unlimited numbers of claimants, large dollar recoveries, and responsibility where only a general warning was issued do not confront a court in the *Vaughn* situation where a contract and a single injured plaintiff is involved.

[38] Flood Control Act § 3, 45 Stat. 535 (1928), 33 U.S.C. § 702(c) (1964).

[39] In a *per curiam* decision affirming 216 F. Supp. 10 (W.D. La. 1963), the circuit court, 326 F.2d 754 (5th Cir. 1964), stated:

> Findings that the defendant was not negligent, and that the deaths of plaintiff's wife and children were not proximately caused by the conduct of defendant's employees, are not clearly erroneous...
>
> It is unnecessary to pass on the *other grounds* given by the trial court in support of his judgment. (Emphasis added.)

[40] Wenninger v. United States, 234 F. Supp. 499, 505 (D. Del. 1964), *aff'd per curiam*, 352 F.2d 523 (3d Cir. 1965).

[41] Vaughn v. United States, 259 F. Supp. 286, 287 (N.D. Miss. 1966). Plaintiff appears to have framed his complaint in light of United Air Lines v. Weiner, 335 F.2d 379 (9th Cir.), *cert. denied*, 379 U.S. 951 (1964), Wenninger v. United States, 234 F. Supp. 499 (D. Del. 1964), *aff'd per curiam*, 352 F.2d 523 (3d Cir. 1965), and Brown v. United States, 193 F. Supp. 692 (N.D. Fla. 1961). This was an attempt to withstand the Government's motion to dismiss for failure to state a claim upon which relief could be granted under the line of cases beginning with Jones v. United States, 207 F.2d 563 (2d Cir. 1953), *cert. denied*, 347 U.S. 921 (1954), and affirmed by the Supreme Court in United States v. Neustadt, 366 U.S. 696 (1961).

[42] The court seems to have overlooked the latter portions of *Neustadt* and note 26

cases.[43] Cases cited to support the principal decision involve warnings to the populace about phenomenon over which the government has no control[44] or damages for loss of profit.[45] *Vaughn*, however, involves bodily injury as a result of information provided pursuant to a contract. The Government should not be able to relieve itself of duty owed to a plaintiff by negligently misrepresenting that the duty has been accurately performed.

If the *Vaughn* case is considered as within the footnote 26 exception to *Neustadt*, the duty analysis in *Wiener* and *Wenninger* becomes an appropriate ground for affording relief to the plaintiff. The existence of a duty to warn of a condition of danger must be determined on the *Vaughn* facts. In such a determination, the social cost[46] of allowing

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of that opinion which limits the application of the misrepresentation exception to cases involving "economic affairs." *See* note 21 *supra* and accompanying text.

[43] United Air Lines v. Weiner, 335 F.2d 379 (9th Cir.), *cert. denied*, 379 U.S. 951 (1964); Wenninger v. United States, 234 F. Supp. 499 (D. Del. 1964), *aff'd per curiam*, 352 F.2d 523 (3d Cir. 1965).

In Brown v. United States, 193 F. Supp. 692 (N.D. Fla. 1961), the court denied a motion to dismiss based upon misrepresentation where a junk yards employee's claim for injuries was sustained because of the Government's negligence in failing to remove explosives from bomb casings or failing to warn the employer or plaintiff that the casings were not deactivated. The court said, *id.* at 693: "Here plaintiff's cause of action is based on negligence. He was not a party to any contract entered into with the United States. There was no representation made to plaintiff by the United States as to deactivation of the bomb casings."

The *Brown* opinion relied heavily on United States v. Neustadt, 281 F.2d 598 (4th Cir. 1960), which was reversed by United States v. Neustadt, 366 U.S. 696 (1961). Nevertheless, the reasoning of the opinion remains valid in light of note 26 of the latter *Neustadt* case.

[44] Flood and weather prediction is an imprecise science. *See* note 36 *supra*. Locating the exact position of a pipeline is a task the Government can perform accurately. While placing the cost of negligence on the Government in the former case may not improve predictability it should be effective in the latter case to insure accuracy. These considerations distinguish the social cost issue of weather warnings and inaccurate information regarding the location of pipelines. *See* note 46 *infra* and accompanying text as to allocation of social costs.

[45] The cases cited by the court to support its decision involve: (1) improper weather warnings with losses of property and life, Bartie v. United State, 216 F. Supp. 10 (W.D. La. 1963), *aff'd per curiam*, 326 F.2d 754 (5th Cir.), *cert. denied*, 379 U.S. 852 (1964), National Mfg. Co. v. United States, 210 F.2d 263 (8th Cir.), *cert.* 347 U.S. 967 (1954), Clark v. United States, 218 F.2d 446 (9th Cir. 1954); (2) reliance on statements made to the general public, Smith v. United States, 333 F.2d 70 (10th Cir. 1964); (3) contract between plaintiff and the United States and plaintiff sued for economic loss, Miller Harness Co. v. United States, 241 F.2d 781 (2d Cir. 1957); (4) tests negligently performed for individuals which lead to economic loss, United States v. Neustadt, 366 U.S. 696 (1961), Hall v. United States, 274 F.2d 69 (10th Cir. 1959), Jones v. United States, 207 F.2d 563 (2d Cir. 1953), *cert. denied*, 347 U.S. 921 (1954), Anglo-American & Overseas Corp. v. United States, 144 F. Supp. 635 (S.D.N.Y. 1956), *aff'd*, 242 F.2d 236 (2d Cir. 1957); (5) statements made to individuals regarding financial matters, Steinmasel v. United States, 202 F. Supp. 335 (D.S.D. 1962).

[46] Where the ultimate cost of such accidents will lie depends in part on the local workman's compensation statutory system, and on whether the state could subrogate itself against the government if the main action were allowed.

In Mississippi an injured employee may seek recovery under the act and con-

the government to negligently cause foreseeable personal injury must be a factor given great weight. The duty analysis allows conscious evaluation of issues which the court in the principal case could not reach. It is therefore superior to an uncritical application of *Neustadt* to personal injury case far removed from the facts of *Neustadt*.

Misrepresentation cuts across the entire field of torts.[47] In nearly every negligence action an element of misrepresentation is present. The essential element is still negligence, not misrepresentation.[48] Acceptance of *Vaughn* would necessitate Congressional redefinition of "misrepresentation" under section 2680(h) of the Act. If *Vaughn* stands the Government can defeat at will most claims based on negligence.

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currently proceed against a third party tortfeasor. M.C.A. § 6998-05 (1952) provides that recourse to the Act is the exclusive remedy for the employee against an employer who meets the requirements of the act. However, § 6998-36 (1952) provides that "acceptance of compensation benefits from or the making of a claim... against an employer or insurer... shall not affect the right of the employee... to sue any other party...."

The insurer remains liable for any amount by which a recovery against a third person falls short of the prescribed compensation, but double recovery is not permitted. M.C.A. § 6998-36 (1952) provides when a beneficiary of the Act brings an action against a third party for his injuries and the insurer joins in, (1) the amount recovered from the third party shall be applied to costs of collection of the judgment as approved by the courts, (2) the remainder shall be used to discharge the legal liability of the employer or insurer, and (3) any excess shall belong to the injured employee or his dependents. *See* Powe v. Jackson, 236 Miss. 11, 109 So. 2d 546, 551 (1959); Richardson v. United States Fidelity Guar. Co., 233 Miss. 375, 102 So. 2d 368 (1958).

Most jurisdictions allow the injured employee and the insurer to sue a third party tortfeasor other than the employer, in order to reach the ultimate wrongdoer. Similarly amounts paid to the injured party by the insurer are recoverable if successful against a third wrongdoer in order to avoid a windfall to the injured in the form of a double recovery. *See* 2 A. LARSON, THE LAW OF WORKMAN'S COMPENSATION § 71 (1961).

Allocation of these social costs should attempt to assign the cost to those in whose power the prevention of injuries lies.

[47] Misrepresentation, although giving rise to a cause of action itself, more often appears as an element of battery, false imprisonment, intentional infliction of emotional injuries, defamation or any of the numerous other categories of tortious acts. *See generally* W. PROSSER, LAW OF TORTS § 100 (3d ed. 1964); 48 GEO. L. J. 778, 780 (1960).

[48] *See, e.g.*, Bohlen, *Misrepresentation as Deceit, Negligence, or Warranty*, 42 HARV. L. REV. 773 (1929).

Recent commentators have generally been of the view that where a specific duty is owed to the plaintiff, recovery should not be denied because of the existence of an element of misrepresentation. 50 KY. L.J. 244 (1961); 48 GEO. L.J. 778 (1960); 7 VAND. L. REV. 283 (1954).