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TORTS — MISREPRESENTATION — LIABILITY OF CERTIFIERS OF QUALITY
TO ULTIMATE CONSUMERS

Introduction

The American economy is becoming more and more dependent upon advertising. For this reason, the legal problems concerning the liability of those who use advertising are increasingly complex. Assuming that this trend is not about to be reversed, and that advertising performs a useful function, an inquiry may be made as to the liability of members of the advertising industry to purchasers not privy to advertiser-seller contracts. More specifically, for present purposes, can the certifiers of the quality of a given product be held liable by the ultimate consumer for negligent misrepresentations relied upon by the consumer to his detriment?

There are many associations which encourage or allow the use of their names in advertising products which are said to meet their standards. Certifications of this type are used both in point-of-sale advertising and in representations made in mass media. Attempts are seldom made to explain to the public exactly what the standards met actually are, as the title or reputation of the association in itself usually suggests a degree of competence in the field sufficient to justify reliance on the representations made.

The elements of the case thus place the wrong complained of in one of the most confused areas of the law. Assuming, as this Note does, that the representations are in fact false in a given instance, and that the wrong complained of ought to be redressed, what remedy does the plaintiff have in deceit, negligence or breach of warranty, and against whom? The problem presented presumes that the person injured is not a party to a contract with either the manufacturer or the organization responsible for the representation relied upon, and further presumes that the manufacturer either cannot be reached or is judgement-proof. Can the injured party maintain an action against the association whose standards were represented as having been met?

Deceit

The modern law of deceit forms one of the three branches of the law of misrepresentation. Originally deceit was often confused with, and in fact closely related to, the action for breach of warranty, which was, at its inception, a tort.¹ The action on the case for deceit was not available to persons other than those parties to business transactions.² But in *Pasley v. Freeman*³ an action was held to lie against one who fraudulently induced another to extend credit to a person known to the inducer to be a poor credit risk. The tort of deceit was thus fairly clearly separated from the action for breach of warranty, since it would lie irrespective of the contractual relationship or lack of it between the parties. Thus was completed the evolution of the cause of action: from the 13th century writ of deceit, available against one who misused legal procedure to the economic detriment of another; through the later action on the case, available against one party to a business whose misrepresentations resulted in economic injury to the other; to the late 18th century rule that the action would lie against one who, through his misrepresentations, had induced the plaintiff to deal to his detriment with a third party.⁴

The additional problem of whether the action would lie in the absence of an intent to defraud was not resolved in England until *Derry v. Peek*.⁵ There the court finally decided that the misrepresentation would have to be shown to have

1 Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 118 (1943).

2 HARPER & JAMES, TORTS § 7.1 (1956 ed.).

3 3 Term Rep. 51, 100 Eng. Rep. 450 (1789).

4 PROSSER, TORTS § 86, p. 522 (2d ed. 1955).

5 14 App. Cas. 337 (1889).

been a conscious one. The law in most American jurisdictions adopts this view; it is expressed in the *Restatement of Torts*:

One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or refrain from acting in reliance thereon in a business transaction is liable to the other for the harm caused to him by his justifiable reliance upon the misrepresentation.⁶

It will be seen that, if the representation was false, and known to be so by the investigating organization, and the representation was made with the intention of having it communicated by the manufacturer to a class of persons of which the plaintiff is a member, in order to induce the plaintiff to purchase the manufacturer's goods in reliance thereon, then the plaintiff has an action in deceit against the association. The assumption here, however, is that such is not the case. In the problem posed, and in the typical transaction, the representations made will have been thought to be true.

Negligent Misrepresentation

Not all the American courts followed *Derry v. Peek*⁷ in denying liability for honest misrepresentations. Some have held that:

[A]n action of deceit is maintainable against a defendant who has honestly misstated a fact upon which he intends the plaintiff to act, in a matter which concerns the latter's financial or economic advantage, if he fails to exercise reasonable care in ascertaining the data upon which his statement is based, or if he fails to exercise the judgment of a reasonable man upon carefully collected data.⁸

This approach was the subject of extended analysis and criticism in an influential law review article by the Reporter for the *Restatement of Torts*⁹ which pointed to the confusion resulting from decisions which actually abandoned the basis of the action, *i.e.*, conscious misrepresentation, while claiming to be merely extending it.

Negligence

The requirement in a negligence action that a party injured by defective goods must have been in privity with the negligent manufacturer has been gradually changed. In *Winterbottom v. Wright*¹⁰ a coachman brought suit for breach of contract for injuries caused by the defendant's failure to keep the coach in good repair as his contract with the postmaster provided. The court held that where the wrong arises out of a breach of a contract, only a party to the contract can sue. Some ten years later a New York court carved out an exception to this rule holding that an action would lie where the article involved was one "imminently" dangerous to human safety.¹¹ Later, in a widely followed decision, the New York Court of Appeals, effectively making the exception the rule by extending the classification to include anything which would be dangerous if negligently made, reasoned that the manufacturer or supplier of goods assumed a duty of due care towards the ultimate consumer.¹² The duty, arguably, does not arise out of a contractual relationship, but in response to a public need to have the burdens of modern commercial transactions equitably distributed.

Privity has disappeared from consideration in negligence cases against manufacturers by ultimate purchasers in a manner similar to the way in which it is disappearing, in some jurisdictions, from the requirements for a breach of warranty action.

6 § 525. For an indication of the liberal construction given the term "justifiable reliance," see §§ 537-545.

7 14 App. Cas. 337 (1889).

8 Bohlen, *Misrepresentation as Deceit, Negligence or Warranty*, 42 HARV. L. REV. 733, 735 (1929), citing cases.

9 *Ibid.*

10 10 M. & W. 109, 152 Eng. Rep. 402 (Exch. 1842).

11 Thomas v. Winchester, 6 N.Y. 397 (1852).

12 MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

Breach of Warranty

As suggested above, breach of warranty was originally a tort action. "[A]ssumpsit was not allowed as a remedy for breach of warranty until near the close of the 18th Century. The law of warranty is older by a century than special assumpsit."¹³ The fact that the action came to be regarded as a matter of contract law was probably due to the fact that the cases in which the action was brought usually involved contracts.¹⁴

In an early case,¹⁵ the defendant sold to the plaintiff two oxen which, although he represented them to be his own, were the property of another. The rightful owner sued the plaintiff and recovered the oxen. It was not alleged that the defendant had knowingly made a false representation, and he argued that an action would not lie absent such a showing. The court held that an action in assumpsit would lie even upon a mere affirmation of title in the possessor, even if the affirmation was not in the form of an express promise or warranty. In *Stuart v. Wilkins*¹⁶ an express warranty was enforced in an action of assumpsit.

Typical of the later cases in which warranties arising out of contracts for the sale of goods were enforced is *Gardiner v. Gray*.¹⁷ The parties had contracted for the sale of 12 bags of waste silk after the defendant had shown the plaintiff a sample indicating the quality. Lord Ellenborough held:

[U]nder such circumstances, the purchaser has a right to expect a saleable article answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim *caveat emptor* does not apply. He cannot without a warranty insist that it shall be of any particular quality of fineness, but the intention of both parties must be taken to be, that it shall be saleable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill.¹⁸

It is not said that the defendant consciously misrepresented the quality of the goods offered for sale but merely that the parties contracted for the sale of one quality silk and the defendant delivered another. The intent of the parties that the silk be saleable is read into the contract. Later cases, in light of policy considerations making it desirable to place the burdens of commerce upon those best able to distribute the risk, have held that "warranties arose by implication 'of law' from what had been said and done, and were independent of any intent on the part of the seller to contract with regard to them, or to be bound by them."¹⁹

The difference between express warranties and warranties which arise from the intent of the parties or by implication of law is clearly set out in the Uniform Sales Act. Express warranties are defined in Section 12:

Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon.²⁰

There is an implied warranty that the goods are reasonably fit for the purpose for which they are sought by the buyer where he relies upon the seller's skill and judgement.²¹ Where goods are bought by description from one who deals in goods of that description there is an implied warranty of merchantability.²²

The Uniform Sales Act, however, speaks only of buyers and sellers and does

13 5 WILLISTON, CONTRACTS § 1505 (rev. ed. 1937).

14 Prosser, *op. cit. supra* note 4, at § 84, p. 507.

15 *Crasse v. Gardiner*, Carthew 90, 89 Eng. Rep. 453, 1 Show. 68, 90 Eng. Rep. 656 (1689).

16 1 Douglas 18, 99 Eng. Rep. 15 (1778).

17 4 Camp. 144, 171 Eng. Rep. 46 (1815).

18 *Id.* at 144, 171 Eng. Rep. 47 (1815).

19 Prosser, *op. cit. supra* note 1, at 121.

20 Uniform Sales Act § 12.

21 *Id.* at § 15(1).

22 *Id.* at § 15(2).

not consider the rights, if any, of third parties. While this does not mean that the adoption of the Act precludes recovery by third parties,²³ it gives them little express encouragement. Most jurisdictions still hold that "the rule is fundamental that no recovery may be had for breach of warranty in the absence of privity."²⁴

In *Shoopak*, the plaintiff, a gas station attendant, was injured when a tire manufactured by the defendant exploded when the plaintiff was inflating it. There was no more privity here than there was between Winterbottom and Wright.²⁵ The court held that a cause of action for negligence was stated, but not one for breach of warranty.

The plaintiff is thus not remediless. But it must be shown that the injury was caused by the negligence of the defendant and not by either the plaintiff or intermediaries. It has been suggested that "the practical difficulties of obtaining evidence as to the history of the product after it has left the maker's hands are sufficient to make recovery quite impossible in many cases."²⁶ The defendant can escape liability if he is able to show that he exercised all reasonable care, or if *res ipsa loquitur* is invoked against him, that it is as probable that he was not negligent as that he was.²⁷

Recognizing the possible injustice in cases of this nature, courts have tried to evade the rule in a manner reminiscent of some of the post-*Winterbottom* activity. Many jurisdictions have recognized an exception in the case of food products. Some have held that the third party is a beneficiary of the warranty contract,²⁸ others that the manufacturer represented the food to be suitable by offering it for sale.²⁹

In the *Ward* case, the court considered the manufacturer to be the real vendor and the retailer merely the medium.

The Baking Company, when it delivered the cake in question to the groceryman, to say the least, impliedly represented to the public who is the ultimate consumer, that this cake is free from injurious substances and fit for consumption as food . . . [W]e . . . hold that there is imposed the absolute liability of a warrantor on the manufacturers of articles of food in favor of the ultimate purchaser, even though there are no direct contractual relations between such ultimate purchaser and the manufacturer.³⁰

In *Mazetti*, the defendant had supplied defective food to the plaintiff, a restaurant owner. When the plaintiff served the food, which he did not know was spoiled, one of his customers became ill and thereafter spared no effort in seeking recovery from the restaurant. The court allowed recovery on a theory of warranty as an exception to the usual rule requiring privity. The exception was characterized as "not one arbitrarily worked by the courts, but arising . . . from the changing conditions of society."³¹

Not surprisingly, many of the cases involve sales of defective automobiles. In a recent case,³² where no prima facie showing of negligence could be made, the court allowed an exception to the rule. A double problem was presented in *Henningsen*. One of the plaintiffs bought a new car for his wife. Ten days later she was seriously injured in an accident apparently caused by a failure of the steering mechanism as she was driving. On the issue of negligence, her suit, in which her husband joined, against the retailer and the manufacturer, was dismissed.

23 *Klein v. Duchess Sandwich Co.*, 14 Cal. 2d 272, 93 P.2d 799 (1939).

24 *Shoopak v. United States Rubber Co.*, 17 Misc. 201, 183 N.Y.S.2d 112 (S. Ct. 1959), *aff'd* 10 App. Div. 2d 978, 202 N.Y.S.2d 250 (1960); *Roberts v. Anheuser-Busch*, 211 Mass. 449, 98 N.E. 95 (1912).

25 10 M. & W. 109, 152 Eng. Rep. 402 (Exch. 1842).

26 Prosser, *op. cit. supra* note 4, at 505.

27 *Micck v. Weaver-Jackson Co.*, 12 Cal. App. 2d 19, 54 P.2d 768 (1936).

28 *Ward Baking Co. v. Trizzino*, 27 Ohio App. 475, 161 N.E. 557 (1928) (*needle in cake*).

29 *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633. (1913).

30 *Ward Baking Co. v. Trizzino*, 27 Ohio App. 475, 161 N.E. 557, 559 (1928).

31 *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633, 636 (1913).

32 *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

Plaintiffs had a verdict in their favor on the issue of implied warranty of merchantability against both defendants.

The court found that the implied warranty accompanied the car from the time it was put into the stream of trade until it reached the ultimate consumer. The theory is not new, having been used before in food cases, among others,³³ but the real reason for employing what, it must be conceded, is a fiction, is candidly put:

In more recent times a noticeable disposition has appeared in a number of jurisdictions to break through the narrow barrier of privity when dealing with sales of goods in order to give realistic recognition to a universally accepted fact. The fact is that the dealer and the ordinary buyer do not . . . buy goods . . . exclusively for their own consumption or use.³⁴

In Pennsylvania, an action in assumpsit against the manufacturer of a truck was held to lie on a theory of implied warranty where the kingpin in the steering mechanism was defective even though the plaintiff had bought the truck from a retail dealer.³⁵ The warranty was as to the suitability of the truck for the uses for which it was designed, manufactured and sold. And, apparently, the implied warranty does not stop when the manufacturer sells the car to a distributor. Indeed it runs even to a donee or one who uses the car with the permission of its owner.³⁶

In addition to those jurisdictions which allow recovery even though there is no privity, some jurisdictions have found ways of calling the ultimate consumer and the manufacturer parties to a contract. Williston asks:

[M]ay not the original seller by means of labels, advertisements or otherwise bind himself by a warranty to anyone who thereafter buys his goods? Certainly manufacturers often make representations to the public, which if made directly to an immediate buyer would amount to warranties. . . . A warranty is in many cases imposed by law not in accord with the intention of the parties. . . . [M]ost courts might require the existence of a direct contractual relation. This relation, however, might under some circumstances exist between manufacturer and subpurchaser and conceivably even between the manufacturer and a consumer who is neither purchaser nor subpurchaser.³⁷

Cases following this theory have involved both advertising in mass media³⁸ and at point of sale.³⁹ In the *Rogers* case the court said that where they no longer have a basis in fact, the legal concepts of the past should be discarded in favor of new concepts better suited to the times. The situation which the court saw as justifying the change is one wherein widespread appeals are directed by the manufacturers to the ultimate consumers. The ultimate consumers in turn usually rely upon the representations made in advertising. The court held that plaintiff stated a cause of action for breach of an express warranty.

Henningsen,⁴⁰ although one of the first cases to allow recovery on an implied warranty theory against a car manufacturer, in the absence of privity, was preceded by several cases in which an express warranty was pleaded. In *Baxter v. Ford*,⁴¹ the plaintiff sued for damages caused when a pebble struck his car windshield and caused a piece of it to fly into his eye. The sales promotion pamphlets had rep-

33 *Coca-Cola Bottling Works v. Lyons*, 145 Miss. 876, 111 So. 305 (1927); *Simpson v. American Oil Co.*, 217 N.C. 542, 8 S.E.2d 813 (1940) (*insecticide*).

34 *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69, 80 (1960); see Recent Decision, 36 NOTRE DAME LAWYER 233 (1961), and Book Review, 36 NOTRE DAME LAWYER 103 (1960).

35 *Jarnot v. Ford Motor Co.*, 191 Pa. Super. 422, 156 A.2d 568 (1959).

36 Compare PA. STAT. ANN. tit. 12A, § 2-318 (1954), with CONN. GEN. STAT. § 2160c (Supp. 1953).

37 1 WILLISTON, SALES (Rev. ed. 1948) § 244a.

38 *Worley v. Procter & Gamble Mfg. Co.*, 241 Mo. App. 1114, 253 S.W.2d 532 (1952) ("*Tide is kind to hands*").

39 *Rogers v. Toni Home Permanent*, 167 Ohio St. 244, 147 N.E.2d 612 (1958) ("*Very Gentle*").

40 *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

41 168 Wash. 456, 12 P.2d 409 (1932); second opinion, 179 Wash. 123, 35 P.2d 1090 (1934).

resented that the car was equipped with "triplex shatter-proof glass," which was represented as being able to withstand the hardest impact without shattering. In the first opinion, the court said that the plaintiff "had the right to rely upon representations made by respondent Ford Motor Company relative to qualities possessed by its products, even though there was no privity of contract. . . ."⁴² The facts in *Chanin v. Chevrolet Motor Co.*⁴³ were essentially the same, but the court held that no warranty action would lie. The contention that large-scale advertising and the plaintiff's reliance thereon might have brought about a contractual relationship was dismissed by the court because it was insufficiently pleaded.

One of the most soundly reasoned decisions in the field is *Bahlman v. Hudson Motor Car Co.*⁴⁴ The plaintiff relied upon the defendant's representation that the Hudson had a seamless steel roof. He bought the car and in a subsequent accident was injured when his head struck the jagged seam in the roof of the car where two pieces of steel had, in fact, been welded together.⁴⁵ The court first quoted the discussion in *Baxter*,⁴⁶ respecting the changed nature of commercial transactions, then held that the principles of liability set forth were applicable to its case.

Whether the result reached is best justified by holding the privity concept inapplicable because of its historical origins . . . or that the requirements of privity are satisfied by the commercial advertising and merchandising methods of defendant . . . or by finding the dealer under the circumstances defendant's agent to warrant its products . . . or by holding that the express warranty is similar to a covenant running with the land and follows the product to the ultimate consumer . . . or by application of the third party beneficiary statute to the transaction between defendant and its retail dealer . . . we have no occasion to decide. It is sufficient to state that the liability . . . is imposed on the maker of false statements and may be enforced by the ultimate consumer of the product to whom the statements are directed.⁴⁷

Summary of Theories of Third Party Products Recovery

It has been seen that for an action to lie for deceit, the misrepresentation must have been fraudulently made for the purpose of inducing another to act or to fail to act in reliance thereon and it must have been justifiably relied upon. If an action in negligence is brought it must either be proved that the defendant was actually negligent, or, if *res ipsa loquitur* is relied upon, the defendant must be prevented from showing that it was as least as likely that he was not negligent as that he was.

Courts have used a wide variety of approaches to avoid the unjust results which would otherwise be caused by strictly following the rule requiring a showing of privity before recovery could be had on a theory of warranty. The common feature of all such efforts is their attempt to impose strict product liability upon those who profit most from the transactions and who are best able to distribute the cost of taking the risks. But it must be noted that this liability is imposed for the benefit of the innocent consumer.

The Theories Applied to Testing Organizations

For the purposes of this examination of theories of third party products liability, it has been assumed that the consumer has relied upon the representations of the manufacturer that the product in question has met the standards of an organization which is represented as being competent to make such judgment. If it is further assumed that the manufacturer himself either cannot be reached or is judgement-proof, can the consumer recover from the testing organization?

42 168 Wash. 459, 12 P.2d 409, 412. In the second opinion the court seemed more concerned with misrepresentation than with warranty. 179 Wash. 123, 35 P.2d 1090, 1092.

43 89 F.2d 889 (7th Cir. 1937).

44 290 Mich. 683, 288 N.W. 309 (1939).

45 288 N.W. 309, 310.

46 168 Wash. 459, 12 P.2d 409, 412.

47 290 Mich. 683, 288 N.W. 309, 313, 314 (1939).

The oft-quoted dicta in *Derry v. Peek*,⁴⁸ that deceit will lie where "a false representation has been made (1) knowingly, (2) without belief in its truth, or (3) recklessly, careless whether it be true or false"⁴⁹ is usually held to deny a cause of action for honest misrepresentation.⁵⁰ Many jurisdictions follow the "American rule"⁵¹ in allowing recovery where the defendant has failed to exercise reasonable care,⁵² or in treating the statement of fact of the defendant's knowledge as a warranty. Some have even found scienter.⁵³

It has been maintained that these courts have not merely extended the doctrine of conscious misrepresentation in deceit, but they have created or recognized as a basis for liability principles more closely analogous to other actions.⁵⁴ It has been further suggested that these cases should be treated as actions on the case for negligence.⁵⁵ The question would seem to be how far one person ought to be allowed to rely upon the statements of another, and whether the person giving the information has assumed a duty to speak truthfully when he speaks within the context of a relationship which invites reliance.

In *Cunningham v. Pease*,⁵⁶ the court held that one injured while applying stove blackening to a hot stove, in a manner advertised by the manufacturer and represented by the retailer to be proper, could recover if it could be shown that a reasonable man would not have made the representations made by the retailer. In a famous New York case,⁵⁷ an action was brought by the purchaser of a quantity of beans who paid by weight on the basis of a certificate furnished by a public weigher, pursuant to a contract with the seller. Chief Judge Cardozo said that the careless performance of an act which the defendants knew would be relied upon by the plaintiff gave rise to an action for failure to perform the duty carefully. The court distinguished this case from one where the defendant had only used careless words.⁵⁸ But five years later in *International Products Co. v. Erie*,⁵⁹ the same court, Cardozo concurring, allowed recovery for mere negligent misrepresentation. The plaintiff had been informed by the defendant that his goods were being stored in a particular warehouse. He then had the goods insured. In fact, his goods had not arrived at the dock and were later stored in another warehouse which burned down. The plaintiff was allowed to recover the insurance to which he would have been entitled had not the defendant misinformed him. The court interpreted *Glanzer* to have held not that there had been any negligence in the act of weighing but that the negligent act was the issuance of the false certificate, an act which the *International* court clearly did not think distinguishable from the act of orally giving a false representation as to the location of goods.⁶⁰ The court further noted that the fact that "the answer was not given to serve the purpose of the defendant itself . . . was immaterial."⁶¹

48 14 App. Cas. 337 (1889). See Smith, *Liability for Negligent Language*, 14 HARV. L. REV. 184 (1900).

49 *Id.* at 374.

50 HARPER & JAMES, TORTS § 7.3, p. 534 (1955).

51 *International Products Co., v. Erie*, 244 N.Y. 331, 155 N.E. 662, 663 (1927).

52 Bohlen, *op. cit. supra* note 8.

53 *Id.* at 737, n. 4.

54 *Chatham Furnace Co. v. Moffat*, 147 Mass. 403, 18 N.E. 168 (1888).

55 Bohlen, *op. cit. supra* note 8, at 737. But see Williston, *Liability for Honest Misrepresentation*, 24 HARV. L. REV. 415, 436 (1911).

56 *Cunningham v. Pease*, 74 N.H. 435, 69 Atl. 120 (1908).

57 *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922).

58 135 N.E. 275, 276.

59 244 N.Y. 331, 155 N.E. 662 (1927).

60 155 N.E. 662, 664. To be sure, the court cannot ignore the question of contractual relations. They distinguish between reliance upon the statement of a stranger and upon one with whom one is about to contract. Nonetheless, the potential contract is not set out as the basis of liability.

61 *Ibid.*

The line was drawn in a case⁶² where the plaintiff, a corporation, had made loans to another corporation upon the basis of a certification by the defendants, a firm of accountants, that the second corporation's balance sheet was accurate. The balance sheet showed capital and surplus where there was none. Cardozo, writing for a unanimous court, noted that the "assault upon the citadel of privity is proceeding in these days apace."⁶³ The decision emphasized the fact that the defendants had no way of knowing that their representations would be relied upon by anyone other than their clients, and that, if recovery could be had here, "the field of liability for negligent speech . . . [would be] nearly, if not quite, coterminous with that of liability for fraud."⁶⁴ This the court decided to leave to the legislature.

In a general discussion of the cases in *Dale System v. General Teleradios*,⁶⁵ the court noted that in each the situation was one where the defendant had supplied the information for a stated purpose, with knowledge that it would be relied upon, and that, if false, the plaintiff would be injured. Dicta in the opinion may be read to state that there is no duty in the absence of foreseeability of possible harm to one in a group of persons, but, it may be inferred, where the supplier of the information can in fact foresee such harm, recovery can be had for negligent misrepresentation.

It is submitted that recovery could therefore be had by a purchaser who relied to his detriment on representations as to quality made by a certifying or testing agency, where such representations are communicated through advertising to potential consumers. It is difficult to see how the indirectness of the communication could be held to limit liability, if foreseeability can be shown. Testing companies know that they are hired not only for whatever intrinsic merit the testing may have, but also with the expectation that a favorable report will be used to induce the purchase of the product. Indeed, this might be shown to be a term of the contract between the manufacturer and the testing organization.

This is not to say that reliance upon exotic terminology with arcane meanings, so prevalent in advertising today, is to be protected by the courts. The plaintiff must show reasonable reliance upon specific representations, which must be proved false. Let it be noted that the testing company should not be held liable for injuries caused by a quality, component or defect not present in the sample tested. There is no need to make the testing company the absolute insurer of the manufacturer's products. If the sample tested was in fact as the tester certified it to be, then he cannot be said to have been negligent in the representations made about it.

As has been suggested, some courts treat a statement as to the quality of particular merchandise as a warranty either running with the product, or as arising from the nature of the relationship between the advertiser and the ultimate purchaser. The first is a useful fiction if the court can find no other way to hold absolutely liable one who is most responsible for putting an article in the stream of commerce. Those who adopt the second theory sometimes hold that the advertisement is an offer to warrant the product upon the condition of the purchaser's payment for it. The contract is thought to be unilateral with the purchaser's act of acceptance. Although this affords relief to an ultimate purchaser, it does not help a consumer who was involved in no commercial transaction with respect thereto, as for example, a member of the purchaser's family, or a friend, unless the court or the legislature so extends the law of warranty.⁶⁶ This criticism cannot be made of the theory of negligent misrepresentation, for the theory is based upon a showing

62 *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931).

63 174 N.E. 441, 445.

64 174 N.E. 441, 447.

65 105 F. Supp. 745 (S.D.N.Y. 1952).

66 *Bohlen, op. cit. supra* note 8, at 743; see statutes cited *supra* note 36.

of foreseeability, and it is generally recognized that a purchaser as often as not buys goods for the use of others.⁶⁷

In addition, the considerations which have led courts to extend either the concept of warranty or of the requisite privity to include "contracts" between manufacturers and ultimate purchasers have been largely concerned with assigning liability, where no fault can be found, to those best able to distribute the risks of commercial transactions. The reasons for this policy are more closely analogous to those for which absolute liability is imposed in tort than any reasons underlying contract law. However, it is an approach which will afford relief for injured parties, and it does avoid the extension of a concept of negligent conduct to liability without fault.

The testing company can not be said to make any offer to contract, nor does it put products in the process which will carry them to consumers. Clearly negligent misrepresentation is the only traditional form of action available. Given a showing of damage, justifiable reliance and negligent misrepresentation, a court which allows exceptions to *Derry v. Peek* could properly hold such a certifier of quality or testing organization liable where the false representation has been made through advertising.

James J. Harrington

67 *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633 (1913).