NOTES

LIABILITY OF A TESTING COMPANY TO THIRD PARTIES

I. INTRODUCTION

"WE CERTIFY THAT . . . ." Many products bear words similar to these to assure the consumer that the product he is buying has been tested, inspected and approved. The problem to be considered in this note is: If such words are negligently uttered by a testing company, can a consumer who has no privity of contract with the testing company hold it liable for any harm that follows? The answer lies in an examination of whether a testing company owes a duty to consumers when it makes a certification, and if so, its extent. The extent of duty, as applied to accountants, was stated by Judge Cardozo in *Ultramares Corp. v. Touche:*

> If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences.[1]

In the cases to be discussed, there is no privity of contract between the plaintiff and defendant, thus increasing the difficulty of establishing a duty.[2] Moreover, except for the express warranty cases, the tort involved is negligence and the actions are not based either on fraud or statutory liability.

The *Restatement of Torts* contains a carefully thought out rule with respect to those who negligently supply information for the guidance of others.[3]

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1. Ultramares Corp. v. Touche, 255 N.Y. 170, 179-80, 174 N.E. 441, 444 (1931).

2. PROSSER, TORTS § 84, at 497 (2d ed. 1955).

3. § 552 Information Negligently Supplied for the Guidance of Others.

One who in the course of his business or profession supplies information for the guidance of others in their business transactions is subject to liability for harm caused to them by their reliance upon the information if

(a) he fails to exercise that care and competence in obtaining and communicating the information which its recipient is justified in expecting, and

(b) the harm is suffered

(i) by the person or one of the class of persons for whose guidance the information was supplied, and

(ii) because of his justifiable reliance upon it in a transaction in which it was intended to influence his conduct or in a transaction substantially identical therewith. RESTATEMENT, TORTS § 552 (1938).

The rule is sound, but it leaves a major problem unanswered—where are the boundaries of the class of persons to whom a duty of due care is extended when information is supplied for their guidance?

II. Testing Companies

Testing companies play an important role in our economy,[4] certifying a wide range of products.[5] Manufacturing concerns utilize independent testing companies for a variety of reasons. Use of a testing company's name or tag in the manufacturer's advertising is a principal benefit gained from such testing.[6] "The consumer, both in the home and in the factory, demands and expects evidence of product testing."[7] *Independent* laboratories are used for this purpose because self-certification by a manufacturer is open to question.[8] Approval by a testing company may

> take many forms, . . . testing laboratory's official insignia, printed on the product . . . seal appearing in a corner of a newspaper advertisement . . . or a label. Whatever it is—and whether or not the consumer actually stops to read an entire tag or seal—its mere presence on a product is reassuring and influences the buyer. He feels secure in his purchase—and the manufacturer knows that the buyer will prefer an authorized product.[9]

"Today the manufacturer, by means of newspapers, television and other media of communication, extols his products in an effort to persuade the

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The comment to the section points out that to subject the person supplying the information to liability it is not enough that he realize that someone other than the person to whom he supplied the information *might* rely on it. The consumer fits into this Restatement section, as testing companies supply information for the guidance of consumers in their business transactions (their purchases of goods).

4. For instance, when the American Council of Independent Laboratories, Inc. was founded in 1937, only 18 of the members now listed were charter members. Today the organization has 79 members. American Council of Independent Laboratories, Inc., Directory of American Council of Independent Laboratories, Inc. vi-vii (1961). In fact, there are enough testing and standardization organizations in the United States that a book has been published giving a descriptive inventory of the work of about 350 American organizations involved in standardization activities. U.S. Dep't of Commerce, National Bureau of Standards, Standardization Activities in the United States (1960).

5. These companies test such things as abrasives, alcohols, bread, cement, cotton, enzymes, glass, jewelry, narcotics, paint, rope, soap, starch, tobacco and wool. American Council of Independent Laboratories, Inc., *op cit. supra* note 4, at 85-114.

6. Printer's Ink, Oct. 24, 1958, pp. 56-57.

7. Mandell, *Product Testing: Everybody's Doing It,* Dun's Rev. and Modern Industry, April 1958, p. 40.

8. Gregor, *Seal of Approval: The Role of Independent Testing Laboratories,* Management Rev., Jan. 1961, p. 38.

9. *Ibid.*

public to purchase them."[10] The unquestioned impact of advertising on the public, coupled with glowing representations of quality from testing companies has created a high degree of customer reliance.

To maintain this reliance the American Council of Independent Laboratories was formed. This organization, which promotes the professional integrity of testing companies,[11] seeks to maintain high standards by requiring each member to be in business at least five years and have a good standing in the business community.[12] Testing companies are keenly aware of public reaction[13] and because of possible liability suits some have attempted to limit their liability.[14] Understandably, therefore, some companies are re-

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10. Comment, 42 MARQ. L. REV. 521 (1959).

11. AMERICAN COUNCIL OF INDEPENDENT LABORATORIES, INC., *op. cit. supra* note 4, at iii.

12. Newsweek, Feb. 22, 1960, p. 84.

13. One company advertises that, "Quantometer pictures are available, if you wish to show in your own advertising, some of the Modern Equipment used by your testing specialists." Chicago Spectro Service Laboratory, Inc., advertising literature. (All advertising literature referred to in this note is on file in the *Washington University Law Quarterly* office and was obtained by request from the various companies.) Another company states that one of the special services it provides is to perform tests on products so that manufacturers can base advertising claims on such tests. Foster D. Snell, Inc., advertising literature (1959). However, one company states that its name may not be used for advertising purposes. Harris Laboratories, Inc., advertising literature. A third company takes the middle road and states that no report issued by them may be published without their written permission. United States Testing Co., Inc., adverising literature.

14. The opinions and findings of Underwriters' Laboratories, Inc. represents its judgment given with due consideration to the necessary limitations of a practical operation and in accordance with the objects and purposes as herein set forth. Underwriters' Laboratories, Inc., however, assumes no responsibility for the effect of its services, reports, listings, requirements, and labeling or for the observance or non-observance by the manufacturer of its Standards or requirements upon the relations between the manufacturer and any other party or parties arising out of the sale or use of listed products or otherwise. UNDERWRITERS' LABORATORIES, INC., TESTING FOR PUBLIC SAFETY 8 (1963).

It should, however, be noted that findings of Underwriters' Laboratories, Inc., in any case represent only its independent opinion arrived at in accordance with its aims and purposes. Underwriters' Laboratories, Inc. does not warrant or guarantee the correctness of this opinion, or that its findings will be recognized or accepted in any individual case. Final recognition or acceptance rests with the authority having jurisdiction.

It should be noted also that products Labeled or Listed are not necessarily equivalent in quality or merit. Id. at 12.

Another type of disclaimer clause is, "Our letters and reports apply only to the sample tested and are not necessarily indicative of the qualities of apparently identical or similar products." This statement is printed on the bottom of a letter from United States Testing Company, Inc., to author, Feb. 5, 1963 on file in *Washington University Law Quarterly* office. In slightly larger type, the printed disclaimer continues, "The reports and letters and the name of the United States Testing Company, Inc., or its seals or insignia, are not to be used under any circumstances in advertising to the general public."

It is pointed out by Dean Prosser that:

It is quite possible for the parties expressly to agree that the defendant is under no obligation of care for the benefit of the plaintiff, and shall not be liable for

luctant to discuss either their methods, insurance coverage or liability.[15]

One type of "seal of approval" that is issued by a magazine means only that if the consumer finds the product defective, the magazine guarantees its replacement or a refund of the purchase price.[16] This magazine is not a "testing organization" but merely assures itself that the product is satisfactory. However, most testing companies do make definite statements about the products they test,[17] and the question remains whether they should be responsible for negligent representations regardless of attempts to disclaim liability.

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the consequences of conduct which would otherwise be negligence. There is no public policy which prevents the parties from contracting as they see fit. PROSSER, TORTS § 55, at 305 (2d ed. 1955).

It was held in one case, C.I.T. Financial Corp. v. Glover, 224 F.2d 44 (2d Cir. 1955), that an accounting firm could disclaim liability to third parties for negligence by inserting in each audit report a disclaimer clause. The disclaimer stated the accounting firm did not feel that it was in its province to pass upon or assume responsibility for the valuation of either collateral or receivables.

However, in another case, Texas Tunneling Co. v. City of Chattanooga, 204 F. Supp. 821 (E.D. Tenn. 1962), a disclaimer clause was struck down. The city had hired an engineering firm to draw up plans for a sewer line, and the firm negligently left out certain test borings from its plans. These plans were submitted to contractors for bids on the sewer line. Because of the negligence, the costs on the sewer line ran higher than anticipated by the bidders. Recovery was allowed against the engineering firm by the contractors regardless of the disclaimer clause in the contract and the lack of privity between the parties.

One principal reason the court allowed recovery was that the engineering firm could reasonably foresee that the plans would be relied upon by the bidders in spite of the disclaimer. The court also stated, "The continued growth and expansion of industry, the growth of population, the urbanization of society, the growing complexity of business relations and the growing specialization of business functions all require more and more reliance in business transactions upon the representations of specialists." *Id.* at 833.

Some testing companies, however, have made no attempt to limit their liability. Letter from Foster D. Snell, Inc., to author, Feb. 25, 1963, on file in *Washington University Law Quarterly* office.

One reason why most testing companies are anxious to limit their liability may be the fact that there seems to be no generally available insurance coverage (i.e. service, as opposed to products, liability insurance) written for testing companies to cover this type of negligence, or if there is, none of the companies choose to carry it. See letters from Foster D. Snell, Inc., to author, Feb. 25, 1963, Detroit Testing Laboratory, Inc., to author, Feb. 20, 1963, National Bureau of Casualty Underwriters, to author, Feb. 19, 1963, and Underwriters' Laboratories, Inc., to author, Jan. 10, 1963, on file in *Washington University Law Quarterly* office.

15. Sometimes the reason given for refusal is phrased in terms of ethical standards or confidential relations. See letters from The Parents' Magazine Consumer Service Bureau, to author, Feb. 20, 1963, and United States Testing Company, Inc., to author, Feb. 5, 1963, on file in *Washington University Law Quarterly* office.

16. Letter from McCauley, Henry & Brennan, attorneys for Good Housekeeping Magazine, to author, Feb. 14, 1963, on file in *Washington University Law Quarterly* office.

17. Nevertheless, it has been pointed out that such statements or testing reports are not insurance against failure. All a test can do is certify the characteristics of the one

III. Testing Company Cases

The leading case concerning the liability of a testing company to third parties is *National Iron & Steel Co. v. Hunt.*[18] The defendant, engaged in the business of inspecting and testing construction and building materials for more than twenty-five years, was hired by the H. M. Foster Company to inspect secondhand re-laying rails purchased by Foster, subject to such inspection.[19] Later plaintiff, relying on defendant testing company's certification that the rails were first-class in kind and quality, purchased the rails from Foster; subsequently plaintiff discovered that the rails were not first-class[20] and was therefore unable to resell them. Plaintiff, thereupon, brought suit to recover his loss.

Recovery was granted by the intermediate appellate court.[21] The Supreme Court of Illinois, however, reversed the decision[22] and stated, "For an injury arising from mere negligence, however gross, there must exist between the party inflicting the injury and the one injured some privity, by contract or otherwise, by reason of which the former owes some legal duty to the latter."[23] The only duty imposed upon the defendant was owed to Foster by reason of their contract.

However, the opinion of the intermediate appellate court is worthy of consideration. While recognizing the fact that there was no privity of contract between the parties, the following exception to the general rule of "no privity—no duty" was stated:

> [T]hat where a person undertakes to do an act or discharge a duty by which the conduct of another may be properly regulated and governed,

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object being tested. Letter from Detroit Testing Laboratory, Inc., to author, Feb. 20, 1963, on file in *Washington University Law Quarterly* office. But such statements are considered to be very important by the buying public, and, in fact, as one company states, "One test is worth more than 1,000 expert opinions." Bowser-Morner Testing Laboratories, Inc., advertising literature.

18. 312 Ill. 245, 143 N.E. 833 (1924). This case was first tried before the Superior Court of Cook County where judgment was given for the defendant. It was appealed to the appellate court where the case was reversed and remanded, 192 Ill. App. 215 (1915). On retrial in the Superior Court of Cook County judgment was given for the plaintiff, and it was affirmed in 230 Ill. App. 654 (1923). On certiorari to the Supreme Court of Illinois, judgment for the plaintiff was reversed, 312 Ill. 245, 143 N.E. 833 (1924).

19. Defendant, in fact, inspected approximately 80% of the re-laying rails sold in this country.

20. When plaintiff could not make the sale, he hired defendant to inspect the rails again (since defendant was the recognized expert in this field), on his second inspection, defendant determined the rails were not first-class.

21. National Iron & Steel Co. v. Hunt, 192 Ill. App. 215 (1915).

22. National Iron & Steel Co. v. Hunt, 312 Ill. 245, 143 N.E. 833 (1924).

23. *Id.* at 247, 143 N.E. at 833.

> he is bound to perform it in such a manner that those who are rightfully led to a course of conduct or action on the faith that the act or duty will be duly and properly performed shall not suffer loss or injury by reason of his negligence.[24]

The court went on to point out that "the very purpose of such certificates when once issued would be to expedite sales by relieving dealers of the necessity of other inspection or tests."[25] The reasoning illustrates that "in these highly specialized times" the public should have a right to rely on the results of a tester's inspection and his duty to exercise due care should extend beyond the bounds of privity.[26]

These contrasting opinions clearly reveal the problem concerning the extent of duty. The upper court's decision expresses the generally accepted judicial attitude toward testing company liability.[27] Recognizing that a duty of due care is owed by each person to any member of the public who may be injured by his actions, the court still held that some plaintiffs are too remote to fall within this duty. However, it should be pointed out that the class which might have been injured by the certification was limited in this case to the subsequent buyers of the rails. The absence of privity was used as a factor in determining remoteness.

This remoteness or foreseeability reasoning appeared in an earlier testing case.[28] An independent grain inspector[29] negligently certified grain which was later purchased by the plaintiff. The injured plaintiff was denied recovery because there was no privity. The court reasoned that the inspector's liability could not be based on negligence alone and that in the absence of contract, no duty extended to persons as remote to the transaction as the plaintiff.

This rule, however, has not commanded universal acceptance; *Du Rite Laundry, Inc. v. Washington Elec. Co.* is illustrative.[30] The defendant sold

24. National Iron & Steel Co. v. Hunt, 192 Ill. App. 215, 219 (1915).

25. *Id.* at 221.

26. *Ibid.*

27. In the case of Albin v. Illinois Crop Improvement Ass'n, 30 Ill. App. 2d 283, 174 N.E.2d 697 (1961), the plaintiff had bought seed from Pell-Bari Farms, Inc. (now dissolved) in a bag with defendant's tag on it which stated "Certified Seed" and bore a description of the seed. The seed did not meet the standard stated on the tag and the plaintiff had a low crop yield. The court said, "It is apparent from the record that the complaint is based upon the misrepresentation arising from a so-called 'warranty,' and that the action is in the nature of a tort action based upon the implied warranty." *Id.* at 285, 174 N.E.2d at 699. The court ruled that in the absence of privity, the action would not lie.

28. Gordon v. Livingston, 12 Mo. App. 267 (1882).

29. The grain inspector was not a public official.

30. 263 App. Div. 396, 33 N.Y.S.2d 925 (1942). This case has received no major comment and has not been cited by any other court.

defective machinery to the plaintiff. Prior to purchase, the plaintiff had employed Hartford Steam Boiler Inspection and Insurance Company (hereinafter called the Inspection Company) to examine the machinery. It was approved by the Inspection Company while still in the possession of a third party. The defendant's purchase for resale to plaintiff was made in reliance on the inspection report. When the plaintiff sued the defendant on the contract for damages, the question arose whether defendant could implead the Inspection Company as a party defendant.[31] The appellate court allowed the Inspection Company to be impleaded, stating that it would be liable to the defendant (Electric Company) for damages upon a verdict for the plaintiff. It was reasoned that "while the contract for inspection was made between the plaintiff, Laundry Company, and the appellant, Inspection Company, the latter *would be liable* to the Electric Company which had relied upon the Inspection Company's representations."[32] The rule of this case is diametrically opposed to that enunciated by the *Hunt* case. In New York, at least, a testing company may be liable to third parties.[33] *Hunt,* however, is still the leading case in this area, and it imposes the privity requirement upon the liability of testing companies.

IV. Analogous Situations

Because few cases have considered the liability of testing companies to third parties, it is necessary to examine the duty concept in related areas of business to see what factors are used to limit liability.

A. *Bank and Trust Company Cases*

Two recent decisions have gone far to break down the rule of no privity—no duty.[34] In the Missouri case of *Motley v. Mercantile Trust Co.,* Division No. 1 of the Supreme Court of Missouri held that the plaintiffs had stated a cause of action in their petition and that the case should be allowed to go

31. *Id.* at 397, 33 N.Y.S.2d at 926. The lower court had allowed the Inspection Company to be impleaded, and the Inspection Company appealed.

32. *Id.* at 398, 33 N.Y.S.2d at 927. (Emphasis added.)

33. The *Du Rite* case never came to trial on the merits. After the court ruled that the liability of Hartford Steam Boiler Inspection and Insurance Company was a fact question for the jury, the case was settled out of court for a "nominal amount." Letter from Carter and Conboy, attorneys for Hartford Steam Boiler Inspection and Insurance Company, to author, March 13, 1963, on file in *Washington University Law Quarterly* office.

34. Motley v. Mercantile Trust Co., No. 49879 (Division No. 1 of the Supreme Court of Mo. 1963). (The case was *transferred to the Court en Banc* where, pursuant to stipulation, the opinion of Division No. 1 was *vacated* and the judgment of the trial court was *aff'd.*) Walker Bank & Trust Co. v. First Security Corp., 9 Utah 2d 215, 341 P.2d 944 (1959).

to trial.[35] Since the lower court had dismissed the case on the pleading for not stating a cause of action, the "facts" can only be derived from the plaintiffs' petition. In 1952 Alvina Frech came to defendant, who already controlled a large part of her estate in an inter vivos trust, and requested that a will be prepared. The defendant then either "prepared or procured the preparation of a will for her"[36] and such will was executed in July of 1952. The trust property was to pass, in large part, to persons other than those named in the will and the petition goes on to allege that defendant knew or should have known of this and should have advised Frech of these facts. Frech died in 1958 and the petition stated that because of defendant's negligence, there were no funds to pass to the plaintiffs under the terms of the will.

The obvious problem in the case is the lack of privity between the plaintiffs and the defendant. The Missouri court reviewed the decisions both of Missouri and of other states that rejected recovery in such a situation. Two principal reasons for such a result were given. First that if such a suit were allowed, excessive liability would result, and second that the right to contract would be restricted if it were burdened with obligations and liabilities that the parties had not contracted to undertake.[37] However, the court went on to point out that, "The privity rule has not been followed blindly and slavishly."[38]

Earlier Missouri decisions were distinguished on the basis that in those cases there was unlimited liability, but in this case the potential liability was limited to the beneficiaries named in the will.[39] It was chiefly because of this fact that the court was able to overcome the privity problem. The defendant argued that liability would be unlimited, saying that under a decision of this type an attorney or trust company might be liable to beneficiaries for any negligent advice that later reduced the client's estate. The court answered that the charge was not only giving negligent advice but also "failure 'to take the action necessary to accomplish her wishes and desires.' "[40]

> But the conclusive answer to the fears of the trust company is that a determination that the alleged facts make a case of liability against this trust company under these particular circumstances does not constitute a universal rule opening up unlimited liability in all kinds of cases involving the giving of opinions and advice in matters of business.

35. Motley v. Mercantile Trust Co., supra note 34 at 17.

36. *Id.* at 2.

37. *Id.* at 4.

38. *Ibid.*

39. *Id.* at 6.

40. *Id.* at 7.

> Liability would depend upon circumstances and would be circumscribed within carefully defined limits.[41]

After disposing of the second reason for restricting liability, the court stated:

> Since neither of the conventional supporting reasons exist, we have considered whether there are any other as yet unsuggested reasons why a contractual connection between these prospective beneficiaries and this trust company must be found before the latter may be held liable for its negligence. As a matter of logic and reason we are unable to perceive why any such nexus should be required, unless it be that the rule of privity is an ancient one. "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Holmes, The Path of the Law, 10 Harv. Law Review 457, 469.[42]

The court held that a duty arose to the plaintiffs that the trust company exercise ordinary care in advising Frech as to the necessity of revoking or modifying the trust. The privity requirement was broken here in an economic loss case, but the court did rule, in effect, that each future case would have to be decided on its own facts.

A similar result was reached in another case holding a bank liable to third parties with whom it was not in privity of contract.[43] However, earlier cases from other jurisdictions have reached an opposite result in the absence of a contract because of the supposed lack of duty.[44]

Thus it would appear that the "no duty to third parties" rule is breaking down in the case of banks, and that the reasoning of the modern cases might be applied to other situations in the future.

B. *Abstracter Cases*[45]

The problem typically arises when a vendor of land applies to an abstract company for an abstract on the property. The abstracter checks the land records, but one or more flaws appearing on the record are negligently overlooked. A title abstract is prepared and presented to the vendee, who customarily insists on seeing it before the closing. In reliance on the ab-

41. *Ibid.*

42. *Id.* at 10.

43. Walker Bank & Trust Co. v. First Security Corp., 9 Utah 2d 215, 341 P.2d 944 (1959).

44. Courteen Seed Co. v. Hong Kong & Shanghai Banking Corp., 245 N.Y. 377, 157 N.E. 272 (1927); Cohen v. Tradesmen's Nat'l Bank, 262 Pa. 76, 105 Atl. 43 (1918).

45. See Roady, *Professional Liability of Abstracters,* 12 VAND. L. REV. 783 (1959).

stract, the vendee completes the transaction. Subsequently the vendee must satisfy a claim negligently overlooked by the abstracter. The vendee then sues the abstracter for his negligence.

The problem of lack of privity faces the vendee in his suit. When the abstracter has *no knowledge* that the certificate will be used by a third party, courts hold that lack of privity between the vendee and the abstracter bars recovery and that the abstracter's duty does not extend to unknown third parties.[46]

National Sav. Bank v. Ward[47] is the leading case in this area. Defendant was hired to examine a title and the plaintiff, a third party to this contract, was financially injured by relying on the negligently prepared title. The Court said:

> [T]he difficulty in the way of the plaintiffs is that they never employed the defendant to search the records, examine the title, or make the report, and it clearly appears that he never performed any such service at their request or in their behalf, and that they never paid him anything for the service he did perform in respect to that transaction; nor is there any evidence tending to show any privity of contract between them and the defendant . . . .[48]

This is typical of cases in which the abstracter has no knowledge how the certificate will be used. However, Mr. Chief Justice Waite, joined by Mr. Justice Swayne and Mr. Justice Bradley, dissented and said:

> [If an abstracter] . . . gives his client a certificate which he knows or *ought to know* is to be used by the client in some business transaction with another person as evidence of the facts certified to, he is liable to such other person relying on his certificate for any loss resulting from his failure to find on record a conveyance affecting the title, which, by the use of ordinary professional care and skill, he might have found.[49]

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46. National Sav. Bank v. Ward, 100 U.S. 195 (1880); Abstract & Title Guar. Co. v. Kigin, 21 Ala. 397, 108 So. 626 (1926); Phoenix Title & Trust Co. v. Continental Oil Co., 43 Ariz. 219, 29 P.2d 1065 (1934); Talpey v. Wright, 61 Ark. 275, 32 S.W. 1072 (1895); Hawkins v. Oakland Title Ins. and Guar. Co., 165 Cal. App. 2d 116, 331 P.2d 742 (1958); Ohmart v. Citizens' Sav. & Trust Co., 82 Ind. App. 219, 145 N.E. 577 (1924); Day v. Reynolds, 23 Hun. 131 (N.Y. 1880); Thomas v. Guarantee Title & Trust Co., 81 Ohio St. 432, 91 N.E. 183 (1910); Equitable Bldg. & Loan Ass'n v. Bank of Commerce & Trust Co., 118 Tenn. 678, 102 S.W. 901 (1907); Peterson v. Gales, 191 Wis. 137, 210 N.W. 407 (1926). In the case of *Talpey v. Wright, supra*, the landowner had the abstract prepared so that he could obtain a mortgage on his property. It was held that the assignee of the mortgage could not maintain a suit against the abstracter because the abstracter did not prepare the abstract for the use or benefit of the assignee.

47. National Sav. Bank v. Ward, *supra* note 46.

48. *Id.* at 205.

49. *Id.* at 207. (Emphasis added.)

The dissenters would extend liability to third parties when the abstracter "ought to know." It is evident that when an owner of land asks for an abstract, the abstracter should realize that more than curiosity prompted the landowner's request. A third party to whom an abstract is shown should not be considered too remote to relieve the abstracter of his duty of due care. This is true for two reasons. First, the abstracter ought to know that others will rely, and second, since the class is limited to future buyers of that particular land, the abstracter will not be liable to the general public for any mistake he might make. The dissenters' logic has equal application to testing companies, who should know, as well as abstracters, that their opinions will be relied on by third parties.[50]

Where an abstracter *has knowledge* a third party will rely on the abstract, or actually delivers the abstract to a third party, he has been held liable for his negligence in a majority of states.[51] In *Brown v. Sims,* for instance, the court said, "If the abstracter in all cases be responsible *only* to the person under whose employment he performs the service, it is manifest that the loss occasioned thereby must in many cases, if not in most cases, be remediless."[52] Though the point has not been considered in Missouri, dictum indicates liability will be denied "even where the abstracter or examiner has knowledge that the certificate as to title is to be used in a sale or loan to advise the purchaser or loaner."[53]

Applying the majority rule of the abstracter-with-knowledge cases to the testing company cases, there would have been liability in the *Hunt* case upon a showing that Hunt knew National Iron & Steel Company would rely on his certification.[54] At least this one branch of the abstracter cases

50. In 1958, a California case pointed out, however, that even if *it was known* to the abstract company that it was the custom for third parties to rely on such abstracts, the abstract company would *still not be liable.* Hawkins v. Oakland Title Ins. & Guar. Co., 165 Cal. App. 2d 116, 331 P.2d 742 (1958).

51. Shine v. Nash Abstract & Inv. Co., 217 Ala. 498, 177 So. 47 (1928); Brown v. Sims, 22 Ind. App. 317, 53 N.E. 779 (1899); Western Loan Sav. Co. v. Silver Bow Abstract Co., 31 Mont. 448, 78 Pac. 774 (1904); Economy Bldg. & Loan Co. v. West Jersey Title & Guar. Co., 64 N.J.L. 27, 44 Atl. 854 (1899); Dickel v. Nashville Abstract Co., 89 Tenn. 431, 14 S.W. 896 (1890); Anderson v. Spriestersbach, 69 Wash. 393, 125 Pac. 166 (1912).

52. 22 Ind. App. 317, 325, 51 N.E. 779, 781 (1899).

53. Zweigardt v. Birdseye, 57 Mo. App. 462, 467 (1894). The abstracter, in this case, had no knowledge that the third party would rely.

54. As to the issue of knowledge in the *Hunt* case, the appellate court said, "Plaintiff relied upon such certificates in making the particular purchase in question, which *was known* to defendants." National Iron & Steel Co. v. Hunt, 192 Ill. App. 215, 221 (1915). (Emphasis added.) However, the supreme court said, "Plaintiffs in error [Hunt] did not deliver a certificate of inspection to defendant in error [National Iron & Steel Co.], nor were they advised by defendant in error that it was going to rely upon their inspection." National Iron & Steel Co. v. Hunt, 312 Ill. 245, 249-50, 143 N.E. 833, 834 (1924).

and the dissent in *Ward* form authority for a third party to maintain a suit against a testing company where the testing company either knows or should know that the third party will rely on its certificate.

C. *Dangerous Object Cases*

The leading case holding an elevator repair and inspection company liable to a third party is *Dahms v. General Elevator Co.*[55] The court recognized that the repair and inspection company was not an insurer, but said that the company should have realized that if the repair and inspection work was done negligently, third parties would be exposed to danger.[56] Even though the contract runs between the repair company and the building owner, the repair company owes a duty of due care to third parties regardless of privity. Liability has been found in numerous cases.[57] One principal feature of these cases is that elevators are inherently dangerous if negligently serviced[58] and it has been said:

> [I]t is the law which imposes the duty because of the nature of the undertaking in the contract. If a person undertakes by contract to make periodic examinations and inspections of equipment, such as elevators, he should reasonably foresee that a normal and natural result of his failure to properly perform such undertaking might result in injury not only to the owner of the equipment but also to third parties . . . .[59]

An analogy to profit-making testing companies can be drawn because often the products tested are inherently dangerous. An example of this is the following case involving a refrigeration repair company. The plaintiff was injured by sulphur dioxide fumes escaping from an icebox in her apartment that should have been repaired by the defendant under a contract with the apartment owner.[60] After pointing out that negligent conduct

55. 214 Cal. 733, 7 P.2d 1013 (1932).

56. *Ibid.*

57. Dickerson v. Shepard Warner Elevator Co., 287 F.2d 255 (6th Cir. 1961); Westinghouse Elec. Elevator Co. v. Hatcher, 133 F.2d 109 (5th Cir. 1943); Cowles v. Independent Elevator Co., 22 Cal. App. 2d 109, 70 P.2d 711 (1937); Higgins v. Otis Elevator Co., 69 Ga. App. 584, 26 S.E.2d 380 (1943); Banaghan v. Dewey, 340 Mass. 73, 162 N.E.2d 807 (1959); Wolfmeyer v. Otis Elevator Co., 262 S.W.2d 18 (Mo. 1953); Durham v. Warner Elevator Mfg. Co., 166 Ohio St. 31, 139 N.E.2d 10 (1956); Evans v. Otis Elevator Co., 403 Pa. 13, 168 A.2d 573 (1961).

58. Dahms v. General Elevator Co., 214 Cal. 733, 7 P.2d 1013 (1932).

59. Evans v. Otis Elevator Co., 403 Pa. 13, 18, 168 A.2d 573, 575-76 (1961). See also Banaghan v. Dewey, 340 Mass. 73, 162 N.E.2d 807 (1959).

60. Rosenbaum v. Branster Realty Corp., 276 App. Div. 167, 93 N.Y.S.2d 209 (1949). The plaintiff's suit was based on breach of contract and not on negligence as it should have been and hence the plaintiff lost.

only becomes actionable where there is a duty, the court said, "The duty of reasonable care in the performance of a contract is not always owed solely to the person with whom the contract is made or those claiming through him, it may inure to the benefit of others."[61] If this reasoning were applied, it would be more difficult for testing companies to escape liability for negligent endorsements of inherently dangerous products.

D. *Notary Public Cases*

When a person claiming to be "John Doe" appears before a notary to acknowledge the execution of a legal instrument, the notary is under a duty to find out if he is that person. If the notary negligently certifies the instrument with respect to "Doe's" identity and the same "John Doe" subsequently negotiates a business transaction with an innocent party who relies on the certification, the majority of states allow the third party to recover from the notary.[62] A notary is not absolutely liable in the absence of negligence,[63] but only "if he neglects to exercise such care as reasonably prudent and competent notaries would exercise in taking and certifying acknowledgments."[64]

It is difficult to draw an analogy between notaries and testing companies because notaries are "quasi-public officials." Nevertheless a majority of states extend the duty concept to them because the public is entitled to rely on their acts. As previously noted, the public relies on testing companies for a great deal of information on which to base purchasing decisions. It is clear that the same type of public reliance is placed on testing companies as is placed on notaries.

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61. *Id.* at 168, 93 N.Y.S.2d at 212 (dictum).

62. Bellport v. Harkins, 104 Kan. 543, 180 Pac. 220 (1919); Commonwealth *ex rel.* Green v. Johnson, 123 Ky. 437, 96 S.W. 801 (1906); Barnard v. Schuler, 100 Minn. 289, 110 N.W. 966 (1907); State *ex rel.* Park Nat'l Bank v. Globe Indem. Co., 332 Mo. 1089, 61 S.W.2d 733 (1933); Harrington v. Vogle, 103 Neb. 677, 173 N.W. 699 (1919); Peterson v. Mahon, 27 N.D. 92, 145 N.W. 596 (1914); Clapp v. Miller, 56 Okla. 29, 156 Pac. 210 (1916); Figuers v. Fly, 137 Tenn. 358, 193 S.W. 117 (1917); Lee James, Inc. v. Carr, 170 Wash. 29, 14 P.2d 1113 (1932). *Contra,* New England Bond & Mortgage Co. v. Brock, 270 Mass. 107, 169 N.E. 803 (1930). The fact that "John Doe" has usually disappeared by the time the forgery is discovered has influenced this rule. It is pointed out that the acts of a notary public are ministerial and not judicial. Commonwealth *ex rel.* Green v. Johnson, *supra.* "If they acted in a judicial capacity, of course, they would not be responsible for mere error of judgment, but acting in a ministerial capacity, they are responsible for their errors unless they can show that they occurred notwithstanding the use of reasonable care and diligence on their part to prevent same." *Id.* at 441, 96 S.W. at 802.

63. Barnard v. Schuler, *supra* note 62, at 292, 110 N.W. at 967.

64. *Ibid.*

E. *Accounting Firm Cases*

Accounting is another area in which there is third party reliance. An accounting firm audits the books of a corporation and a financial report based on this audit is issued. Third parties often rely on this report in making investment decisions. It has been held that a third party has no action against the accounting firm for mere negligence.[65] In *Landell v. Lybrand,* the court said that since the plaintiff had no contract with the defendant, he was a stranger to the transaction and hence not the recipient of a duty.[66] In the famous *Ultramares* case, Judge Cardozo pointed out that the accounting service rendered was primarily for the benefit of the other party to the contract and only incidentally for the use of others.[67] The cases of *Glanzer v. Shepard*[68] and *International Prods. Co. v. Erie R.R.*[69] were distinguished on the ground that so revolutionary a change in the law as to hold accounting firms liable for mere negligence should be made by the legislature.[70] It was said, however, that if the negligence of the defendants was gross, fraud could be inferred.[71]

The accounting cases may be distinguished from the testing company cases by applying the *Ultramares* test of for whom the service is primarily rendered. Although manufacturers do use the information obtained from independent testing companies to improve their products, this information is used primarily to influence customers. But the *Ultramares* doctrine denying liability because of possible unlimited liability to the public (anyone who might see the report) may prove to be an escape avenue for testing companies since the class of buyers of the products they test is usually unlimited.

F. *Attorney Cases*

Attorneys are not generally liable to third parties for negligent professional acts.[72] The courts indicate that if an attorney could be held liable to third

65. O'Connor v. Ludlam, 92 F.2d 50 (2d Cir.), *cert. denied,* 302 U.S. 758 (1937); State St. Trust Co. v. Ernst, 278 N.Y. 104, 15 N.E.2d 416 (1938); Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931); Duro Sportswear, Inc. v. Cogen, 131 N.Y.S.2d 20 (Sup. Ct. 1954), *aff'd mem.,* 285 App. Div. 867, 137 N.Y.S.2d 829 (1955); Landell v. Lybrand, 264 Pa. 406, 107 Atl. 783 (1919).

66. Landell v. Lybrand, *supra* note 65.

67. Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931). See also text accompanying note 1 *supra* concerning unlimited liability.

68. 233 N.Y. 236, 135 N.E. 275 (1922). See text accompanying notes 82-85 *infra.*

69. 244 N.Y. 331, 155 N.E. 662, *cert. denied,* 275 U.S. 527 (1927).

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

71. *Ibid.*

72. Dundee Mortgage & Trust Inv. Co. v. Hughes, 20 Fed. 39 (9th Cir. 1884); Lackey v. Vickery, 57 F. Supp. 791 (W.D. Mo. 1944); Dallas v. Fassnacht, 42 N.Y.S.2d

parties for every possible error, "the practice of law [would be] one of such financial hazard that few men would care to incur the risk of its practice."[73] This statement is perhaps too extreme since the practicing attorney is already under a "duty to use care and skill and to display a requisite legal knowledge."[74] Therefore, it might be possible to extend the burden of due care to third parties and have more than a "few men" remain in the legal profession.[75]

Two recent California cases, however, have cast doubt on the present rule.[76] In *Biakanja v. Irving*,[77] decided in 1958, the defendant, a layman, negligently drafted a will for the plaintiff's brother. The will, defective for want of attestation, was rejected by the court, and the plaintiff received a smaller intestate share than he would have taken under the will. The court held that the defendant was liable for any negligently caused injury sustained by plaintiff even though they were not in privity. It was stated that:

> The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent

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415 (Sup. Ct. 1943) (dictum); *In re* Cushman, 95 Misc. 9, 160 N.Y.S. 661 (Surr. Ct. 1916); Rose v. Davis, 288 Ky. 674, 157 S.W.2d 284 (1941). The rule is often stated that, "It is only in exceptional cases where attorneys are liable to third parties for their professional acts. . . . [A]n attorney is liable to a third party 'where the attorney has been guilty of fraud or collusion, or of a malicious or tortious act . . . .'" Lackey v. Vickery, *supra* at 792.

73. Rose v. Davis, 288 Ky. 674, 676, 157 S.W.2d 284, 285 (1941).

74. Wade, *The Attorney's Liability for Negligence*, 12 VAND. L. REV. 755, 757 (1959).

75. This assumes, of course, that courts would limit liability at *some* point (not allow liability to an unlimited class), but that this point would be far enough "down the chain" so as to allow third parties whom the transaction affected to recover for negligence. A good example of this problem appears in Howell v. Betts, 362 S.W.2d 924 (Tenn. 1962). The plaintiffs purchased land relying on a survey that the defendants had made for a former owner over 24 years before. The survey was inaccurate and the lot the plaintiffs purchased was less in area than was shown in the survey. The court pointed out that the old rule of no privity—no duty was quickly breaking down, citing such cases as Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958) (see text accompanying notes 76-78 *infra*) and Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922) (see text accompanying notes 83-86 *infra*). However, the court went on to say that:

> On principle and authority, we think the rule of liability cannot be extended to a case like that before us. If these surveyors could be held liable to such an unforseeable [sic] and remote purchaser 24 years after the survey, they might, with equal reason, be held liable to any and all purchasers to the end of time. We think no duty so broad and no liability so limitless should be imposed. *Id.* at 926.

Limiting factors of time and class were used to allow defendant to escape liability.

76. Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962); Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958).

77. Biakanja v. Irving, *supra* note 76.

> to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.[78]

This same reasoning was applied by the California courts in 1961 in *Lucas v. Hamm*,[79] which decided that lack of privity did not bar beneficiaries from maintaining an action against an attorney for negligently preparing a will.

If the reasoning in *Biakanja* and *Lucas* finds additional support,[80] it could serve as a foundation upon which the *Hunt* rule could be overturned and a duty of due care placed on testing companies in the absence of privity.

G. *Public Inspector Cases*

In the case of *Nickerson v. Thompson*,[81] the defendant, a public inspector of fish, certified their quality. The plaintiff purchased the fish and suffered economic loss because of reliance upon the inspection when the fish proved to be of a poor quality. The defendant was held liable for his negligent certification. Other cases have reached a similar result.[82] They are distinguishable from the testing company cases, however, because the defendant in each case was a "public inspector"—government inspector—and hence liable to all persons injured as a result of his negligence.

In *Glanzer v. Shepard*,[83] a seller of beans requested the defendant, a public weigher, to weigh a certain shipment of beans and send a copy of the report to the plaintiff buyer. The defendant did so, but negligently over-weighed the beans. The plaintiff then purchased the beans in reliance

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78. *Id.* at 650, 320 P.2d at 19. It was suggested that this case did not lay the foundation for liability of attorneys to third parties (since the defendant was not an attorney). 14 U. MIAMI L. REV. 124 (1959). *Contra*, 9 HASTINGS L.J. 330 (1958). However the court held that the case of Buckley v. Gray, 110 Cal. 339, 42 Pac. 900 (1895), is "disapproved in so far as . . . [it is] in conflict with this decision." Biakanja v. Irving, 49 Cal. 2d 647, 651, 320 P.2d 16, 19 (1958). The *Buckley* case had been accepted as California law until 1958; in it an attorney was exonerated from liability to a third party because of lack of privity.

79. 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962). In this case, however, the court ruled that the attorney was not negligent.

80. *But see* Maneri v. Amodeo, 38 Misc. 2d 190, 238 N.Y.S.2d 302 (Sup. Ct. 1963). Plaintiffs sued an attorney who had negligently prepared a will for their deceased mother. The court rejected the theory of the *Biakanja* and *Lucas* cases, stating that an attorney would not be held liable for mere negligence to a third party with whom he has no privity.

81. 33 Me. 433 (1851).

82. Tardos v. Bozant, 1 La. Ann. 199 (1846) (pork inspector); Pearson v. Purkett, 32 Mass. 264 (1834) (fish inspector).

83. 233 N.Y. 236, 135 N.E. 275 (1922).

on the report. Judge Cardozo, affirming a judgment for the plaintiff, said, "One who follows a common calling may come under a duty to another whom he serves, though a third may give the order or make the payment."[84] The judge then said that it is the law which imposed a duty[85] and that "we do not need to state the duty in terms of contract or privity."[86] This statement is salient for it illustrates the trend toward eliminating the privity requirement. It is important to note in this case that there was a limited class (the plaintiff) relying on the report.

H. *Miscellaneous Third Party Reliance Cases*

In one third party case a trustee of bonds certified their security knowing that the plaintiff would rely on such information.[87] The defendant was held liable for his negligent certification because he *knew* that plaintiff would rely. There are similar holdings on various fact patterns.[88]

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84. *Id.* at 239, 135 N.E. at 276. A "common calling" is difficult to define. Here the defendant, a "public weigher," engaged in a private profit-making business, and was not a government officer.

85. *Id.* at 238, 135 N.E. at 275.

86. *Id.* at 239, 135 N.E. at 276.

87. Doyle v. Chatham and Phenix Nat'l Bank, 253 N.Y. 369, 171 N.E. 574 (1930).

88. Texas Tunneling Co. v. City of Chattanooga, 204 F. Supp. 821 (E.D. Tenn. 1962) (see note 14 *supra*); Mulroy v. Wright, 185 Minn. 84, 240 N.W. 116 (1931); Pilinko v. Merlau, 10 Misc. 2d 63, 171 N.Y.S.2d 718 (Sup. Ct.), *rev'd on other grounds*, 7 App. Div. 2d 617, 179 N.Y.S.2d 136 (1958). In *Mulroy v. Wright, supra*, a *clerk* issued a certificate showing that there were no special assessments on a certain piece of property. The plaintiff, a third party, bought the property in reliance on the certificate. The clerk had no knowledge that this plaintiff would rely, but the court held him liable, saying "defendant, in making this certificate, knew that someone was expected to rely thereon." *Id.* at 86, 240 N.W. at 117. Here again there was a limited class to whom the defendant might be held liable.

In *Pilinko, supra,* defendant insurance company, undertook to inspect its client's property. The inspection was done negligently. The plaintiff, client's tenant, was injured because of a defect that the inspection should have uncovered. The court held the defendant liable without a privity relation existing, stating that once the defendant was under a contractual obligation to the client, the defendant owed a duty of due care to the plaintiff.

Contra, Bilich v. Barnett, 103 Cal. App. 2d 921, 229 P.2d 492 (1951); Jaillet v. Cashman, 115 Misc. 383, 189 N.Y.S. 743 (Sup. Ct. 1921), *aff'd per curiam*, 235 N.Y. 511, 139 N.E. 714 (1923); Howell v. Betts, 362 S.W.2d 924 (Tenn. 1962) (see note 75 *supra*). In *Bilich, supra,* the plaintiff was hired to install a sewer for Reliable Trucking Company. Reliable then hired the defendants to prepare a grade sheet so that the plaintiff would know how to lay the pipe. The defendant *knew* the plaintiff would rely on the grade sheet. The sheet was negligently prepared and the plaintiff incurred additional expense because of the mistake. The court ruled that in the absence of privity, no duty of due care existed. Perhaps *Bilich* should have been decided the other way on its facts.

In *Kahl v. Love*,[89] defendant tax collector negligently issued a tax receipt and the plaintiff, a third party, negotiated an ill advised transaction in reliance on the tax receipt. The court said that there was no duty and the defendant was not liable. The court summarized the duty problem in an oft-quoted statement:

> It is not every one who suffers a loss from the negligence of another that can maintain a suit on such ground. The limit of the doctrine relating to actionable negligence is, that the person occasioning the loss must owe a duty, arising from contract or otherwise, to the person sustaining such loss. Such a restriction on the right to sue for a want of care in the exercise of employment or the transaction of business, is plainly necessary to restrain the remedy from being pushed to an impracticable extreme. There would be no bounds to actions and litigious intricacies, if the ill effects of the negligencies of men could be followed down the chain of results to the final effect.[90]

It is difficult to draw from these cases any general rules, but it should be noted that an important factor in most cases is the size of the class to which liability will be extended.

I. *Express Warranty Cases*

A second theory on which testing companies could be held liable to the public is express warranty.[91] This theory has been chiefly applied to manufacturers.[92] An express warranty theory overcomes the negligence problem and, in some states, the privity requirement has been eliminated.[93]

The leading case on express warranty is *Baxter v. Ford Motor Co.*[94] Defendant's literature stated that its windshield was made of "shatterproof" glass. The plaintiff purchased a car from a dealer in reliance on this state-

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See Texas Tunneling Co. v. City of Chattanooga, 204 F. Supp. 821 (E.D. Tenn. 1962) (note 14 *supra*); M. Miller Co. v. Dames & Moore, 198 Cal. App. 2d 305, 18 Cal. Rptr. 13 (Dist. Ct. App. 1961).

In the *Jaillet* case, *supra*, the defendant furnished information to stock brokers over his ticker tape. Through negligence, a false report was put out over the tape, and the plaintiff, who happened to see the report, was injured by relying on it. The court said the defendant had no contract with the plaintiff and thus no duty relation existed; the defendant was not liable to the general public as this would lead to unlimited liability.

89. 37 N.J.L. 5 (1874).

90. *Id.* at 8.

91. See generally, Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

92. Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 TENN. L. REV. 963 (1957).

93. DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER 65 (1951).

94. 168 Wash. 456, 12 P.2d 409 (1932), *aff'd*, 179 Wash. 123, 35 P.2d 1090 (1934).

ment and was injured when a pebble shattered the windshield. The court recognized the general rule that requires privity before suit can be maintained for breach of warranty; recovery, however, was allowed because "the original act of delivering an article is wrong, when, because of the lack of those qualities which the manufacturer represented it as having, the absence of which could not be readily detected by the consumer, the article is not safe for the purposes for which the consumer would ordinarily use it."[95] The *Baxter* case has been followed by other jurisdictions.[96] Manufacturers have similarly been held liable for false statements in their advertising[97] and on the labels of the goods themselves.[98] Since the *Baxter* case there have been only a few express warranty decisions imposing the privity requirement.[99]

For the plaintiff to recover once the privity hurdle is overcome, he must prove the assertion of an actual fact concerning the particular defect causing his injury.[100] The express warranty must be intended for the plaintiff or the public[101] and must be made by the defendant.[102] Furthermore, the plaintiff must learn of the express warranty and be injured by his reliance upon it.[103]

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95. *Id.* at 462, 12 P.2d at 412.

96. Hansen v. Firestone Tire and Rubber Co., 276 F.2d 254 (6th Cir. 1960) (tires); Mannsz v. Macwhyte Co., 155 F.2d 445 (3d Cir. 1946) (dictum) (rope); Ein v. Goodyear Tire and Rubber Co., 173 F. Supp. 497 (N.D. Ind. 1959) (faulty tires); Studebaker Corp. v. Nail, 82 Ga. App. 779, 62 S.E.2d 198 (1950) (automobile); Bahlman v. Hudson Motor Car Co., 290 Mich. 683, 288 N.W. 309 (1939) (rough seam in automobile roof).

97. Maecherlein v. Sealy Mattress Co., 145 Cal. App. 2d 275, 302 P.2d 331 (1956) (mattress spring); Lane v. C. A. Swanson & Sons, 130 Cal. App. 2d 210, 278 P.2d 723 (1955) (boned chicken); Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958) (home permanent); Markovich v. McKesson & Robbins, Inc., 106 Ohio App. 265, 149 N.E.2d 181 (1958) (home permanent).

98. Bonker v. Ingersoll Prods. Corp., 132 F. Supp. 5 (D. Mass. 1955) (boned chicken); Free v. Sluss, 87 Cal. App. 2d 933, 197 P.2d 854 (1948) (soap); Simpson v. American Oil Co., 217 N.C. 542, 8 S.E.2d 813 (1940) (insecticide).

99. Rachlin v. Libby-Owens-Ford Glass Co., 96 F.2d 597 (2d Cir. 1938); Chanin v. Chevrolet Motor Co., 89 F.2d 889 (7th Cir. 1937).

100. Lambert v. Sistrunk, 58 So. 2d 434 (Fla. 1952) (only "sales talk"); Murphy v. Plymouth Motor Corp., 3 Wash. 2d 180, 100 P.2d 30 (1940).

101. Silverman v. Samuel Mallinger Co., 375 Pa. 422, 100 A.2d 715 (1953); Jeffery v. Hanson, 39 Wash. 2d 855, 239 P.2d 346 (1952).

102. Senter v. B.F. Goodrich Co., 127 F. Supp. 705 (D. Colo. 1954); Cochran v. McDonald, 23 Wash. 2d 348, 161 P.2d 305 (1945).

103. Dobbin v. Pacific Coast Coal Co., 25 Wash. 2d 190, 170 P.2d 642 (1946). In this case the court ruled that the action should be in fraud and not express warranty,

The logic of applying the express warranty liability criteria to the testing company cases is clearly illustrated in the following passage from *Rogers v. Toni Home Permanent Co.*:

> Occasions may arise when it is fitting and wholesome to discard legal concepts of the past to meet new conditions and practices of our changing and progressing civilization. Today, many manufacturers of merchandise . . . make extensive use of newspapers, periodicals, signboards, radio, and television to advertise their products. The worth, quality and benefits of these products are described in glowing terms and in considerable detail, and the appeal is almost universally directed to the ultimate consumer. . . . The consuming public ordinarily relies exclusively on the representations of the manufacturer in his advertisements. . . . The warranties made by the manufacturer in his advertisements and by the labels on his products are inducements to the ultimate consumers, and the manufacturer ought to be held to strict accountability to any consumer who buys the product in reliance on such representations and later suffers injury because the product proves to be defective or deleterious.[104]

Testing companies also make express statements about the quality of products, so the courts may find the express warranty reasoning applicable to testing company cases.

Conclusion

There are two theories upon which testing companies may be held liable to third parties for their statements—negligence or express warranty. Some courts have been willing to extend the duty concept to third persons regardless of privity. It is for the courts to decide if the public is so far "down the chain" from the testing companies as to be barred from suing for negligence. In reaching their final determination, the courts, it is submitted, should keep in mind the reliance placed on testing companies by the general public. The express warranty theory is still in the process of development. The rule allowing a suit in express warranty in the absence of privity has been adopted by many states; thus there is good reason to believe that testing companies may be held liable on this theory.

It must be realized, however, that excellent reasons exist why a testing company should not be held liable—chiefly the limiting factors of time[105] and the potential of unlimited liability.[106] In a majority of instances, testing

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apparently misreading the *Baxter* case where the Washington court had said that an action for breach of warranty would lie. Baxter v. Ford Motor Co., 179 Wash. 123, 35 P.2d 1090 (1934).

104. 167 Ohio St. 244, 248-49, 147 N.E.2d 612, 615-16 (1958).

105. See note 75 *supra.*

106. See text accompanying notes 34-42 *supra.*

companies only test samples of the product involved, and the fault may lie with the manufacturer. If the testing companies were to be held liable, their liability would be to an unlimited class of buyers. Thus in certain cases, these factors should continue to excuse testing companies from liability.

But if testing companies are going to allow their names to be used for advertising purposes, they should be prepared to accept the consequences. The testing company's role becomes more important every day in our economy. Since each consumer cannot hire a testing company, the court should reconsider the doctrines that immunize these companies from public claims while permitting them to make such statements as "WE CERTIFY THAT . . . ."