LIABILITY OF ADVERTISING ENDORSERS TO THIRD PARTIES FOR NEGLIGENT MISREPRESENTATION

A recurring problem throughout the law of both torts and contracts is the troublesome question of liability to third parties. The problem usually arises by the defendants having breached a duty of care toward the plaintiff, such duty often being implied either through contract or through a relationship voluntarily assumed by the defendant. One of the areas which has been the most perplexing to courts is the question of liability to third parties for negligent misrepresentation. Perhaps the most troublesome of the policy questions concerning the courts in this area is the fear of nearly unlimited liability to a potentially unlimited number of plaintiffs. In general, this fear has weighed heavily in favor of defendants when the misrepresentation was merely negligent and the plaintiff was a third party to whom the defendant did not know the information would be communicated.[1]

The leading case dealing with the problem is *Ultramares Corp. v. Touche*.[2] In this case the defendant accounting firm certified an erroneously audited balance sheet. Though the defendants had no knowledge that the sheet would be relied on by the plaintiff, they knew it was to be used generally as the basis for financial dealings.[3] The plaintiff relied on the inaccurate balance sheet to his detriment by making several loans and thereafter brought an action sounding in tort against the accounting firm. Because there had been no contemplation of reliance by the particular plaintiff, the court denied any recovery based on negligent misrepresentation.[4] Justice Cardozo, speaking for the court, expressed reluctance to render a decision which might expose defendants "to a liability in an indeterminate amount for an indeterminate time to an indeterminate class."[5] The court also felt that "[t]he 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 those consequences."[6] The defendants were held liable in deceit, however, since they were found to have acted "without information leading to a sincere or genuine belief . . . that the balance sheet faithfully reflected the condition of the business."[7]

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[1] *See* Rosenberg v. Cyrowski, 227 Mich. 508, 198 N.W. 905 (1924); Landell v. Lybrand, 264 Pa. 406, 107 A. 783 (1919); Howell v. Betts 211 Tenn. 134, 362 S.W. 2d 924 (1962).

[2] 255 N.Y. 170, 174 N.E. 441 (1931).

[3] *Id.* at 173, 174 N.E. at 442.

[4] *Id.* at 189, 174 N.E. at 448.

[5] *Id.* at 179, 174 N.E. at 444.

[6] *Id.* at 179-180, 174 N.E. at 444.

[7] *Id.* at 193, 174 N.E. at 449-50. W. PROSSER, THE LAW OF TORTS 714 (3d ed. 1964), quotes Lord Herschell, who says that for a successful deceit action, there must be proof "that

As is apparent from the *Ultramares* case, third party liability in deceit actions is somewhat broader than in negligent misrepresentation actions,[8] though in neither case is the law by any means settled.[9] Some of the older cases might have rejected the court's theory of liability for deceit in *Ultramares* by holding that a defendant is only liable to those whom he intends to influence and not to anyone who may subsequently rely on the deceitful misrepresentation.[10] The tendency in the more modern cases of deceit, however, is to extend liability to those persons whom the defendant had good reason to anticipate would be influenced or would rely on his misrepresentation.[11] As indicated in *Ultramares*, however, courts usually find no liability against defendants who were merely negligent and who had merely a reasonable anticipation that their misrepresentation would be used to influence third parties.[12] Generally, courts have required that the representation be made directly to the plaintiff or to someone who the defendant knows will use it to influence a particular person.[13] Though there are certainly policy questions about denying recovery to third parties for negligent misrepresentation, and though, as Prosser says, "there is a little that looks in the direction of a broader liability,"[14] courts have continued to be reluctant to extend liability to an unknown spectrum of plaintiffs for negligence alone.

Not all courts have been so reluctant, however. Recently, a court of appeals in California refused to follow the line of decisions resulting from *Ultramares* and in so doing, extended liability for negligent misrepresentation to perhaps its broadest reach yet. In *Hanberry v. Hearst Corporation*,[15] the plaintiff Hanberry had purchased a pair of shoes which had received the "Good Housekeeping Consumers' Guaranty Seal," the successor to Good Housekeeping Magazine's "Seal of Approval." The seal, which can only be applied to goods advertised in Good Housekeeping Magazine,[16] reads, "We satisfy ourselves that products advertised in Good Housekeeping are good ones and that the advertising claims made for

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a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false."

[8] *See* W. PROSSER, THE LAW OF TORTS 721 (3d ed. 1964).

[9] *See generally* W. PROSSER, THE LAW OF TORTS 713, Section 102 (3d ed. 1964).

[10] McCracken v. West, 17 Ohio 16 (1848); Greenville Nat. Bank v. National Hardwood Co., 241 Mich. 524, 217 N.W. 786 (1928).

[11] *See e.g.*, Southern States Fire & Casualty Ins. Co. v. Cromartie, 181 Ala. 295, 61 So. 907 (1913); Gulf Oil Corp. v. Newton, 130 Conn. 37, 31 A.2d 462 (1943).

[12] *See e.g.*, National Iron & Steel Co. v. Hunt, 312 Ill. 245, 143 N.E. 833 (1924); Thomas v. Guaranty Title & Trust Co., 81 Ohio St. 432, 91 N.E. 183 (1910).

[13] *See e.g.* International Products Co. v. Erie R. Co., 244 N.Y. 331, 155 N.E. 662 (1927); Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922).

[14] W. PROSSER, THE LAW OF TORTS 723 (3d ed. 1964).

[15] 276 A.C.A. 820, 81 Cal. Rptr. 519 (Ct. App. 1969).

[16] *Id.* at 824, 81 Cal. Rptr. at 522.

them are truthful,"[17] and "If the product or performance is defective, Good Housekeeping guarantees replacement or refund to consumer."[18] The seal appears on articles as advertised in the magazine and may also appear on the packaging and other advertising of the goods.[19]

The plaintiff alleged that she had read Good Housekeeping Magazine and "believed the products bearing the seal had been examined, tested, and inspected by [Good Housekeeping] and were good and safe for the use intended."[20] She also alleged that she had seen the shoes she purchased advertised with the Good Housekeeping seal and that she had relied upon the representation and purchased the shoes because of it.[21] She further alleged that the shoes were defective in design and manufacture, causing them to be slippery when worn on vinyl floor covering, as a result of which she slipped and fell on a vinyl floor and "sustained severe personal injuries."[22]

The plaintiff attempted to assert a cause of action against Hearst Corporation[23] (which publishes Good Housekeeping) on several theories,[24] one of which was negligent misrepresentation. She alleged that defendant Hearst either made no test of the shoes, or if it did, that the test was so negligently and carelessly carried out that the issuance of the seal was not warranted by the information which Hearst Corporation possessed.[25] The trial court sustained Hearst's demurrer that no cause of action existed, and dismissed the action as to Hearst. On appeal the judgment was reversed, the court holding that the facts pleaded stated a cause of action as to Hearst.[26] The court held that implicit in the seal was a representation by the defendant that it "has taken reasonable steps to make an independent examination of the product endorsed, with some degree of expertise and found it satisfactory."[27] Since the purpose of the seal was to make products more attractive to consumers, it was therefore forseeable by Hearst Corporation that certain consumers would rely on the representation.[28] In voluntarily lending its reputation to the products advertised,

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[17] *Id.* at 822, 81 Cal. Rptr. at 521.

[18] *Id.*

[19] *Id.* at 824, 81 Cal. Rptr. at 522.

[20] *Id.* at 823, 81 Cal. Rptr. at 521.

[21] *Id.*

[22] *Id.* at 822, 81 Cal. Rptr. at 521.

[23] The defendant also asserted a cause of action against both the importer-distributor and the retailer of the shoes. Both answered the complaint and were not parties to this appeal. *See* Hanberry v. Hearst Corp. 276 A.C.A. 820, 822, 81 Cal. Rptr. 519, 520-21 (1969).

[24] Appellant also attempted to recover on the basis of an alleged conspiracy between Hearst and the other named defendants and on the basis of express or implied warranty. Hanberry v. Hearst Corporation, 276 A.C.A. 820, 823, 81 Cal. Rptr. 519, 521 (Ct. App. 1969).

[25] Hanberry v. Hearst Corporation, 276 A.C.A. 820, 823, 81 Cal. Rptr. 519, 521 (Ct. App. 1969).

[26] *Id.*

[27] *Id.* at 824, 81 Cal. Rptr. at 522.

[28] *Id.*

> Hearst had placed itself in the position where public policy imposes upon it the duty to use ordinary care in the issuance of its seal . . . so that members of the consuming public who rely on its endorsement are not unreasonably exposed to the risk of harm.[29]

The court also held that the lack of privity between plaintiff and defendant was no defense to the action.[30] The court summarily denied any defenses based on the claims that the seal itself limited its liability to replacement or refund of the purchase price[31] and that the seal represented only an opinion of the defendant.[32] The former was dismissed by holding that while contractual obligations may be limited, tort liability cannot be so limited.[33] The latter defense was disposed of by saying that the defendant held itself out to have superior knowledge of the product and thus may be liable for negligent misrepresentation of either fact or opinion.[34]

In announcing its decision, the court admitted that it was "influenced more by public policy than by whether such cause of action can be comfortably fitted into one of the law's traditional categories of liability."[35] Such an approach was certainly necessary to support the court's holding since no similar case has apparently ever been reported. In addition, such a decision is obviously not in accord with the prevailing theory of denying recovery to an unidentified plaintiff or class of plaintiffs.[36] There are, however, at least some cases which approach the solution to the problem at issue in *Hanberry*. Two such cases are *Walter v. Ashton*[37] and *Edison v. Edison Polyform Mfg. Co.*[38] In the *Ashton* case, the defendant had advertised a bicycle, calling it "The Times Cycle." The advertising material was similar in form and appearance to that of products actually endorsed by The Times. The court granted an injunction because there was "a reasonable probability of The Times being exposed to litigation . . . had they not taken the steps to disconnect their names from the advertisements. . . ."[39] The *Edison* case turns on a quite similar fact pattern. The defendants had marketed a medicinal preparation carrying a fictitious endorsement by Thomas Edison. The court, after

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[29] *Id.*

[30] *Id.* at 824-825, 81 Cal. Rptr. at 522.

[31] *Id.* at 826, 81 Cal. Rptr. at 523.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.* at 823, 81 Cal. Rptr. at 521.

[36] *See* Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931) and discussion of third party liability *supra* at notes 2-7.

[37] [1902] 2 Ch. 282.

[38] 73 N.J. Eq. 136, 67 A. 392 (1907).

[39] Walter v. Ashton, [1902] 2 Ch. 282, 295.

discussing the *Ashton* case,[40] granted an injunction saying that Edison was

> clearly entitled to an injunction to restrain the unauthorized use of his name, his picture, and his certificate. The possibility of injury, because of their use without apparent objection on Mr. Edison's part, is quite as great as it would have been in the *'Times'* case had Mr. Walter stood by and allowed the advertisement of the bicycle with what seemed to be a 'Times' endorsement.[41]

There was, of course, no problem of present liability to third parties in either of these cases as there was in *Hanberry*. The important thing, however, is the court's apparent recognition of the existence of potential liability. By granting an injunction against the unauthorized use of an advertising endorsement, each court seems to have realized, as long as sixty years ago, that liability could be thrust upon an endorser who had lent his name to a defective product.

Except for the *Hanberry* case, however, little else appears to have happened in the development of liability against advertising endorsers in the sixty-odd years since the *Edison* and *Ashton* cases. Though some speculation as to the consequences of such an action has appeared,[42] *Hanberry* appears to be the first case expressly recognizing a cause of action for negligent misrepresentation against advertising endorsers. There have been many actions advanced on similar theories,[43] however, some of which have turned on the lack of privity between the parties. One such case in which a plaintiff unsuccessfully urged a misrepresentation cause of action against a defendant who had negligently published a false report is *Jaillet v. Cashman*,[44] the famous case in which Dow Jones erroneously published a report on its stock ticker that a Supreme Court decision had held stock dividends taxable. The plaintiff sold short because of the report and subsequently brought an action against the defendant for his damages. The lower court opinion,[45] subsequently affirmed by the court of appeals, sustained defendant's demurrer saying that:

> The relation of the defendant association to the public is the same as that of a publisher of a newspaper and its duties and obligations are to be measured by the same standards. . . . There is a moral obligation upon everyone to say nothing that is not true, but the law does not attempt to impose liability for a violation of that duty unless it constitutes a breach of contract obligation or trust, or amounts to a deceit, libel, or slander.[46]

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[40] Edison v. Edison Polyform and Mfg. Co., 73 N.J. Eq. 136, 140, 67 A. 392, 393-94 (1907).

[41] *Id.* at 143, 67 A. at 395.

[42] *See Liability of Advertising Endorsers*, 2 STAN. L. REV. 496 (1950).

[43] *See generally* Prosser, *Misrepresentation and Third Parties*, 19 VAND. L. REV. 231 (1966).

[44] Jaillet v. Cashman, 235 N.Y. 511, 139 N.E. 714 (1923).

[45] Jaillet v. Cashman, 115 Misc. 383, 189 N.Y.S. 743, (1921).

[46] *Id.* at 384, 189 N.Y.S. 743 at 744.

The court of appeals affirmed saying that there was no liability for an unintentional mistake in the absence of a contractual or fiduciary relationship.[47]

A case holding privity not necessary to the maintenance of an action is *Biakanja v. Irving*.[48] The defendant there was a notary who had negligently failed to have a will properly attested. The will then being ineffective, the sole beneficiary under it brought an action against the defendant claiming that she received only one-eighth of what she would have gotten had the will been valid. The court rejected defendant's lack of privity defense,[49] though it recognized that some prior cases had defeated actions on such a ground.[50] In rejecting defendant's appeal and allowing recovery despite a lack of privity, the court said that "defendant must have been aware from the terms of the will that, if faulty solemnization caused the will to be invalid, plaintiff would suffer the loss which occurred."[51] The crux of the decision, of course, is the court's holding that the defendant is under a duty to exercise due care toward a plaintiff regardless of a lack of contractual or fiduciary relationship with him.

The *Hanberry* decision relies, in part, on *Biakanja*,[52] though the problem is really quite different. In *Biakanja*, although the plaintiff had no contact with the defendant, the defendant could reasonably have anticipated harm to the plaintiff should he negligently prepare an invalid will. The probable person to suffer harm from defendant's negligent action can hardly be called indefinite since he was preparing a will naming plaintiff as sole beneficiary and could reasonably anticipate harm to her should he act negligently. The situation in *Hanberry* is different. There was no readily identifiable individual whom Hearst could anticipate would suffer harm by its negligence. Rather, if Hearst was negligent, the harm would fall upon what Justice Cardozo believed to be an "indeterminate class."[53] This being so, it would seem that the *Hanberry* case should be decided in accordance with *Jaillet* rather than *Biakanja*. Even though Hearst had a moral obligation to make truthful representation, it would not necessarily follow that liability would be thrust upon it for breach of that obligation.[54]

The easy explanation for the court's decision, of course, is that *Jailett* is a New York case which a California court of appeals has no obliga-

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47 Jaillet v. Cashman, 235 N.Y. 511, 139 N.E. 714 (1923).

48 49 Cal. 2d 647, 320 P.2d 16 (1968).

49 *Id.* at 651, 320 P.2d at 19.

50 *Id.* at 648-50, 320 P.2d at 18.

51 Biakanja v. Irving, 49 Cal. 2d 647, 650, 320 P.2d 16, 19 (1958).

52 *See* Hanberry v. Hearst, 276 A.C.A. 820, 825, 81 Cal. Rptr. at 519, 522-23 (1969).

53 *See* Ultramares v. Touche, *supra* note 5.

54 *See* Ultramares v. Touche, *supra* note 47.

tion to follow. Also, the lack of privity defense is crumbling considerably as noted in *Biakanja*.[55] The best answer, however, and the real reason for the decision is the court's willingness to extend the liability for negligent misrepresentation beyond traditional boundaries. Even in the absence of a case like *Biakanja* the court would have reached the same decision. This is obvious from the court's statement that the allowance of a cause of action is based more on grounds of public policy than upon traditional categories of liability.[56] Such a contention certainly has some merit. "Imposing a duty of care upon the endorser would simply be a recognition of the substantial part he plays in the producer-to-consumer chain where a duty of care already exists."[57] In certifying the product for its own economic gain, Hearst is certainly aware that at least some people will rely on its endorsement. It may well be that this realization, along with public policy considerations, implies a duty to use reasonable care toward the ultimate consumer regardless of his identity. Allowing such a cause of action probably will have the beneficial effect of encouraging advertising endorsers to take much greater care before giving a product a "Consumer's Guaranty Seal."

The decision, however, may raise more questions than it answers. It is admittedly advisable to impose liability with respect to third parties in some cases of negligent misrepresentation,[58] and in recognition of this, the doctrine of *Ultramares v. Touche*[59] has been gradually eroded by the courts for some time.[60] The *Hanberry* case, however, erodes away a significant chunk without indicating any limits of liability. Certainly the courts must draw the line somewhere. Justice Cardozo's fear of liability "in an indeterminate amount for an indeterminate time to an indeterminate class"[61] is also a significant policy consideration. The *Hanberry* case seems apt for a denial of liability on those grounds. The time during which Hearst could remain liable and the number of plaintiffs who

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[55] At 49 Cal. 2d 649, the court, after indicating the strict requirement of privity in earlier years says that "since that time the rule has been greatly liberalized, and the courts have permitted a plaintiff not in privity to recover damages in many situations for the negligent performance of a contract." At 49 Cal. 2d 650, the court, citing Prosser indicates the considerations present when deciding whether or not to find liability in the absence of privity:

> 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 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.

[56] *See* Ultramare v. Touche, *supra* note 36.

[57] *Liability of Advertising Endorsers*, 2 STAN. L. REV. 496, 508 (1950).

[58] *See generally* Prosser, *Misrepresentation and Third Parties*, 19 VAND. L. REV. 231 (1966).

[59] *See* Ultramares v. Touche, *supra* note 2.

[60] *See* W. PROSSER, THE LAW OF TORTS 723-24 (3d ed. 1964).

[61] *See* Ultramares v. Touche, *supra*, note 5.

might ultimately bring actions for one instance of negligent certification staggers the mind. Even granting the fact that Hearst certified the product for an economic consideration is not a sufficient basis for allowing an action against them. Were the action in deceit for an intentional misrepresentation the answer might be different,[62] but the *Hanberry* decision could subject Hearst to gigantic liability for a negligent but innocent misrepresentation. Allowance of such an action would leave Hearst with no better way to protect itself from almost unlimited liability than to discontinue making endorsements. Such a course of action is not a reasonable alternative. Endorsements in varying form are a very real part of advertising and it is certainly open to question whether anyone puts much faith in a movie star's assurance that Brand X Dog Food really tastes better.[63] One might effectively argue that such endorsements are merely attractive ways of marketing a product and that someone could not reasonably believe that the endorser knows anything at all about dog food. If this is true, the curtailment of such endorsements because of potential liability to one who claims to have relied on the endorser's knowledge seems to be a totally ineffective public policy argument. Even if plaintiffs could only seldom prove reliance, endorsers might be subjected to a barrage of lawsuits to protect an interest which simply does not exist. It is foolish to say that public policy should protect a plaintiff from a representation which he knows is merely an advertising "gimmick," tantamount to "puffing."

Some of these problems, of course, have never arisen and perhaps never will. Those that have, have generally been decided under some branch of the *Ultramares* rationale. As indicated above, the *Hanberry* case represents a radical departure from that doctrine. It should be pointed out, of course, that *Hanberry* may well be justified since Mrs. Hanberry is seeking to recover for a personal injury rather than an economic loss. Traditionally, courts have been more willing to find third party liability for misrepresentation in cases of personal rather than pecuniary loss.[64] The *Hanberry* court does not expressly indicate this as the basis for its decision, however. Conceivably, then, the court intends to hold that a cause of action accrues against an advertising endorser regardless of the kind of injury sustained. It is precisely this situation which courts have generally attempted to avoid. It remains to be seen whether this decision will encourage other courts to lower their boundaries on negligent misrepresentation actions. The public policy considerations may be sound, at

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[62] As indicated earlier in the *Ultramares* case, *supra*, note 2, a broader standard of liability has been found for intentional rather than negligent misrepresentation.

[63] This of course underlines the problem which Mrs. Hanberry may have in convincing a court that she bought the shoes because of the Good Housekeeping seal, as she alleged.

[64] *See* W. PROSSER, THE LAW OF TORTS, 721 (3d ed. 1964).

least from the standpoint of potential plaintiffs. One may well question, however, the advisability of opening the floodgates in all cases of negligent rather than intentional misrepresentation.

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