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waiver, the lower courts have, in fact, consistently avoided the effects of the Wade-Gilbert rules by the use of these avoidance mechanisms. These courts have proved through their decisions that the possibilities for avoidance have tended to render the Wade-Gilbert rules totally ineffective. Since the decision in Wade shows a belief on the part of the Supreme Court for the necessity of maintaining the right to counsel at any critical stage, the only way to insure that right will be to eliminate these mechanisms of avoidance. At this point in the application of the Wade-Gilbert rules it is significant to recall the words of the Supreme Court in Escobedo: There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advice. Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer.82

**TORTS—NEGLIGENCE- MISREPRESENTATION—
DOWNFALL OF PRIVITY**

On March 30, 1966, appellant purchased a pair of shoes at a retail store. While wearing the shoes on the day of purchase she stepped on to the vinyl floor of her kitchen and sustained severe injuries after slipping and falling. Appellant subsequently brought suit against the retailer, the importer, and respondent Hearst Corporation; the complaint averred conspiracy, warranty, and negligent misrepresentation. Appellant alleged that respondent Hearst publishes Good Housekeeping magazine, in which products are advertised as conforming to the “Good Housekeeping’s Consumer’s Guaranty Seal.”1 Regarding the seal, Good Housekeeping stated: “[W]e satisfy ourselves that products advertised in Good Housekeeping are good ones and that the advertising claims made for them in our magazine are truthful.”2 The Seal itself promised: “If the product or performance is defective, Good Housekeeping guarantees replacement or refund to consumer.”3 Appellant further alleged that the shoes she purchased had received the aforementioned Good Housekeeping endorsement, that the Good Housekeeping Seal was affixed both to the shoes and to the shoes’ container with respondent Hearst’s consent, and that she relied upon respondent’s representation and seal in purchasing the shoes. The trial court sustained a general demurrer by respondent and entered its judgment of dismissal. The court of appeals affirmed the dismissal as to the causes of action dealing with conspiracy and warranty, and re-

82. Escobedo v. Illinois, supra note 10, at 488.

2. Id. at 521.
3. Id.
versed as to the cause of action for negligent misrepresentation. The court held that appellant had, for purposes of pleading, asserted facts sufficient to state a cause of action for negligent misrepresentation by the publisher. *Hanberry v. Hearst Corporation*, 81 Cal. Rptr. 519 (1969).

This decision is significant because it is a final step, the culmination of a series of cases which have, for all practical purposes, eliminated privity of contract as a requirement in California to recover in a tort action against one who endorses a product manufactured by another. The purpose of this casenote is twofold: 1. to discuss the origin of the requirement of privity and, using relevant case law, to show the step-by-step process by which it was eliminated; and 2. to evaluate the case and describe the extension of previous case law that it represents.

The doctrine of privity originated in England with the landmark case of *Winterbottom v. Wright*. In this case, the defendant had contracted with the Postmaster-General to keep certain mailcoaches in a safe state of repair. Plaintiff was employed as a coachman by others who had contracted to drive the mailcoach along its route. Defendant negligently permitted the coaches to fall into a state of disrepair and, as a result, plaintiff was permanently injured when one of the coaches broke down. The court, seeing defendant's duty as contractual, entered judgment for defendant. Plaintiff could not assert a cause of action in tort for injury caused by the defendant's breach of contract, for he was not privy to the contract.

In making its decision, the court expressed a fear that has been oftentimes repeated and still exists today. The court, through Lord Abinger,
C. B., said: "We ought not to permit a doubt to rest on this subject, for our doing so might be the means of letting in upon us an infinity of actions." He further stated:

There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit would ensue.

Alderson, B., concurred by enunciating his belief that:

If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract: if we go one step beyond that, there is no reason why we should not go fifty.

Although the decision held that no action could be maintained on the contract, a general rule developed that a contracting party was not liable to one with whom he was not in privity.

The rule, according to Dean Prosser, is the result of an erroneous interpretation of the dictum of Lord Abinger. Whatever the reason for the rule's beginning, it prevailed into the twentieth century. The legal justifications for the rule varied, but as the social and legal philosophy of the times changed, various exceptions to the rule developed. Probably the most important exception, enunciated a decade after Winterbottom, held a seller liable to a third person for the sale of a product "inherently dangerous to life or health."

In 1916, the definition of "inherently dangerous" was broadened in the landmark case of Mac Pherson v. Buick Motor Company. Mac Pherson held that a manufacturer was liable to third parties not in privity of con-

9. Supra note 5, at 404.
10. Supra note 5, at 405.
11. Supra note 5, at 405.
13. Id. at 658.
14. Id. at 659.
15. Id. Prosser gives two reasons. In the first place it was believed that the seller's misconduct was not the legal cause of the injury to the ultimate consumer, because the injury was not foreseeable and there was an intervening sale by the retailer-purchaser which "insulated" the negligence of the manufacturer. Secondly, it was believed that to hold manufacturers liable to a great number of unidentified plaintiffs would be too great a burden.
16. Id. at 659-60. The first exception was if the seller knew that the product was dangerous and failed to make a disclosure to the purchaser, he was liable to third parties. The second was where the goods were furnished for use on his premises, because the user was an invitee.
17. Thomas v. Winchester, 6 N.Y. 397 (1852).
tract where the product, if negligently constructed, is likely to be dangerous and it is foreseeable that the product will be used by persons other than the purchaser. In so holding the New York court stated that:

If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.10

The significance of Mac Pherson lies in the fact that it extended the manufacturer’s common law duty of care to foreseeable users, regardless of their privity to the initial contract. This duty arose if he could foresee that his product would be come a “thing of danger” if defectively made. The phrase “inherently dangerous” thus included products which, if negligently made, would be dangerous to life and limb.

Because Mac Pherson has been accepted throughout the United States20 as an exception to the general rule of nonliability in the absence of privity, the strict rule, for all practical purposes, has been swallowed by this one exception. In spite of this, there are a certain number of limited situations in which courts have been reluctant to impose liability in the absence of privity.

Such a situation involves abstracts of title. The leading case in this area is Savings Bank v. Ward,21 decided by the United States Supreme Court in 1879. In this case, defendant attorney had furnished a certificate of title to the vendee of a parcel of land. On the strength of the certificate, the vendee obtained a loan from plaintiff, Savings Bank. The certificate proved to be incorrect, for the vendor had previously conveyed the land to another by a duly executed and recorded deed. Plaintiff contended that defendant attorney was liable to him notwithstanding the fact that defendant had had no knowledge of the eventual use that was to be made of the certificate, or to whom it was to be presented. Defendant, on the other hand, contended that there must be privity of contract between the parties for liability to arise. Agreeing with defendant, the Supreme Court stated that the situation was one which demanded application of the general rule:

The obligation of an attorney is to his client and not to a third party, and unless there something in the circumstances of this case to take it out of the general rule it seems clear that the proposition of the defendant must be sustained.22

19. Id. at 389, 111 N.E. at 1053.
20. Supra note 12, at 661.
21. 100 U.S. 195 (1879).
22. Id. at 200.
Although the court spoke of an attorney's liability, the primary issue was the absence of privity between plaintiff and defendant. Subsequent cases involving abstracts of title have reached the same result as *Savings Bank*, although no attorney-client relationship was involved.23

For example, in *Talpey v. Wright*,24 plaintiff was the assignee of Topeka Investment and Loan Company, who had loaned money to a vendee of realty. Plaintiff requested an abstract of title, and Topeka furnished the one provided by defendants for the vendee. When the abstract proved faulty, plaintiff sought relief against defendant abstractors. In holding that plaintiff had no cause of action against these defendants, the court stressed the fact that defendants did not contract to furnish the abstracts to plaintiff nor to any one for the use and benefit of plaintiff. Therefore, lack of privity prevented the plaintiff from ever having a cause of action. This can be summarized by the general rule stated in *Thomas v. Guarantee Title and Trust Company*:25 that the liability of an abstractor for damages does not sound in tort, but must be founded in contract, and so an abstractor can be held liable only by those who employed him.

The rules in these first abstractor cases did not change after the *MacPherson* exception deleted the requirement of privity from products cases. In 1926, in *Peterson v. Gales*26 the Wisconsin Supreme Court stated:

By the great, if not universal, authority, the liability of an abstractor for damages resulting from his mistakes is based on contract, and does not rest upon principles of negligence. He therefore is not liable to persons who may be misled to their damage by reason of his negligence, unless some privity of contract exist between them . . . . He who claims damages by reason of the negligence of an abstractor must trace his right thereto to some contractual relations existing between him and the abstractor.27

Also in 1926, *Abstract & Title Guaranty Company v. Kigin*28 held that the nature and scope of the liability assumed by an abstractor is purely contractual and consequently must be measured by the nature and terms of the employment. In so holding, the Alabama court cited *Savings Bank*, and the court in *Phoenix Title and Trust Company v. Continental Oil Company*29 followed suit. By 1940, the Florida case of *Sickler v. Indi-

25. 81 Ohio St. 432, 91 N.E. 183 (1910).
27. *id.* at 412-43, 210 N.W. at 409.
Ana River Abstract and Guarantee Company\textsuperscript{30} stated a general rule of abstractor liability in almost the same terms as the Ohio Court had in \textit{Thomas}, a pre-MacPherson case. Thus it was clear that in one limited situation, at least, the requirement of privity had not been removed, and that the trend started in \textit{Mac Pherson} had not completely erased the rule that had developed out of Winterbottom.

In spite of the apparent clarity and definiteness of the general rule of abstractors' liability, some courts recognized the possibility that in certain instances an abstractor might be liable to a plaintiff not in privity of contract with him.\textsuperscript{31} This view was supported even by some of the jurisdictions which had upheld the general requirement of privity in order for one to recover from an abstractor of title.\textsuperscript{32} Although the Supreme Court of Arizona in \textit{Phoenix Title and Trust} had denied recovery against defendant abstractor, it did recognize four exceptions to the privity requirement in such cases. The most important exception involved a situation where the abstract was made for the benefit of a third person known to the abstractor. Plaintiff urged that where the abstractor knows or has reason to know that the abstract is to be used for the benefit of some indefinite and unknown person, the exception should be applied. The court held that line of reasoning to be erroneous, because in all the cases cited by plaintiff, the abstractor knew who the eventual plaintiff was. Quoting extensively from Justice Cardozo's opinion in \textit{Ultramares v. Touche, Niven, & Co.},\textsuperscript{33} the court came to the conclusion that one not in privity with an abstractor would have a cause of action only if his identity was specifically known to the abstractor. Specifically, the court concluded that:

\begin{quote}
So long as it is held that the liability of an abstractor is in contract and not in tort . . . , a third party, whose very existence is unknown to the abstractor at the time he issues his abstract may not sue for the negligence of the latter in preparing it.\textsuperscript{34}
\end{quote}

The reasoning thus grants abstractors a protected position by analogy to the \textit{Ultramares} case, with a requirement of actual knowledge of the third-party beneficiary. In this way, contract theory is superimposed upon an action sounding in tort.

Public accountants, like abstractors, have enjoyed a protected position

\begin{footnotes}
\item[30] 142 Fla. 528, 195 So. 195 (1940).
\item[31] Brown v. Simms, \textit{supra} note 23; Western Loan & Savings Co. v. Silver Bow, 31 Mont. 448, 78 P. 774 (1904); Economy Building & Loan Association v. West Jersey Title & Guarantee Co., 64 N.J.L. 27, 44 A. 854 (1899); Dickel v. Nashville Abstract Co., 89 Tenn. 431, 14 S.W. 896 (1890).
\item[32] Phoenix Title & Trust Co. v. Continental Oil Co., \textit{supra} note 23.
\item[33] \textit{Supra} note 8.
\item[34] Phoenix Title & Trust Co. v. Continental Oil Co., \textit{supra} note 23, at 235, 29 P.2d at 1071.
\end{footnotes}
with regard to the privity requirement. The leading case is Ultramares. Defendants, a firm of public accountants, were employed to prepare and certify a balance sheet exhibiting the financial condition of Fred Stern and Company. Defendants knew this and also that the certified balance sheet would be exhibited to banks, creditors, stockholders, purchasers, and sellers in the course of the financial dealings of Stern. Defendants supplied thirty-two copies of the balance sheet, but the identity of the other persons to whom these copies would be shown remained unknown. The balance sheet incorrectly represented the corporation as solvent and plaintiff, a factor, made several loans to Stern in reliance upon the balance sheet.

The plaintiff's cause of action for negligence is primary to the discussion at hand, although the question of defendants' negligence was not seriously in dispute in the court of appeals. The primary issue was whether defendants owed plaintiff a duty to prepare the balance sheet without negligence. Justice Cardozo concluded that previous decisions did not compel the existence of such a duty and that the creation of a duty would be an unwarranted extension of the principles of previous decisions. This conclusion was reached because Justice Cardozo felt it would "so expand the field of liability for negligent speech as to make it nearly, if not quite, coterminous with that of liability for fraud." Therefore, he was of the opinion that such a revolutionary change was the province of the legislature, and not the judiciary.

In writing the opinion, Justice Cardozo also felt the need to distinguish the decision he had rendered nine years earlier in Glanzer v. Shepard. As in Ultramares, the issue there was one of duty, but Justice Cardozo found that defendants' obligation was not one merely of contract.

In Glanzer, defendants were employed to make up a weight sheet representing the total weight of beans sold by the employer to plaintiffs, and the weight sheet was prepared and delivered both to the employer and to plaintiffs. Because the weight was incorrect as exhibited on the weight sheets, plaintiffs brought suit, and recovered the amount of the overpayment from defendants.

But the weight sheet in Blanzer was "the end and aim of the transaction" and was prepared primarily for the benefit of (and was actually delivered to) plaintiffs. In Ultramares, however, the work was done by defendants primarily for their employer. The statements which were the

35. Supra note 8.
36. Supra note 8, at 185, 174 N.E. at 447.
38. Supra note 8, at 182, 174 N.E. at 445.
result of that work were "... only incidentally or collaterally for the use of those to whom [the employer] and his associates might exhibit it thereafter."39

The foregoing manner of distinguishing the two cases masks his real reason for reaching a contrary result. In Glanzer, plaintiffs' identity was known to defendants, while in Ultramares, plaintiff was unknown to defendants. It is this distinction that is material, because of Justice Cardozo's fear of unlimited liability should public accountants be held liable to all those not in privity who may be injured by negligent preparation of a balance sheet.40

In a 1963 case, American Casualty v. Memorial Hospital,41 the court said that the cases following Glanzer have not extended the holding therein. Rather, the majority of cases support the rule that there is no liability for negligent misrepresentation to one not specifically known to defendant. Reasonable anticipation that the representations will be communicated to unknown parties to induce action is likewise insufficient to impose a duty upon defendant to exercise care with respect to the unknown parties.

The courts' reluctance to impose liability for negligent misrepresentation in the absence of privity has been stubborn. A recent Illinois case, Rozny v. Marnul,42 however, was an important first step toward the imposition of such liability. In this case, one Nash purchased realty from the S & S Builders and used the plat of an inaccurate survey, prepared by defendant for S & S Builders, to obtain a loan commitment. Plaintiffs purchased the house from Nash in January, 1956. In September of that same year, plaintiffs extended their driveway and built a garage. Since the survey was inaccurate, both the house and garage extended onto the adjoining realty. Because the plat expressly provided an absolute guarantee of accuracy, plaintiffs sought to recover the cost of moving the house and garage on the grounds of defendant's misrepresentation.

In giving judgment to plaintiffs, the court specifically declared that lack of privity of contract was no longer a defense to a tort action in Illinois. Liability, instead of being determined by the concepts of privity, would be measured by the scope of the duty owed.

The court agreed with Justice Cardozo: In measuring the duty, the threat of unlimited liability43 should not be discounted. However, the court felt

39. Supra note 8, at 183, 174 N.E. at 446.
40. Supra note 8.
43. Supra note 8.
that this fear could be minimized in the case at bar, due to the fact that
the liability was not *potentially* unlimited, because the class of persons who
might have foreseeably used the plat was limited to those who dealt with
the surveyed property as purchasers or lenders. Injury would ordinarily
occur only to the one then owning the property. Unfortunately, the court
did not delimit objective standards for measuring the duty owed; however,
it did list the several factors it considered relevant to its decision. The first
was the express, unrestricted, and wholly voluntary absolute guarantee for
accuracy stated in the plat; secondly, the fact that potential liability was
restricted to a comparatively small group and that ordinarily only one
member of that group would be injured; thirdly, the undesirability of re-
quiring an innocent party to suffer the burden of defendant's professional
mistakes; fourth the defendant's knowledge that the plat would be used and
relied on by others; lastly, the probability that recovery would promote
cautions among surveyors.

*Rozny* was very significant, because it specifically overruled two prior
Illinois decisions44 which had denied relief because plaintiffs were not in
privity of contract with the defendants, whose representations they relied
on. In both cases, as in *Rozny*, the plaintiffs were unknown and unidenti-
fied to the defendants. Although the defendant in *Rozny* was found liable
to an unknown plaintiff, it was only the first step, because the spectre of
unlimited liability was not present, as it is in the usual cases involving ab-
stractors and accountants. Nevertheless, it was important because there
was a possibility that the precedent cited in *National Iron and Steel Com-
may no longer be used as authority in Illinois. It will be interesting to see
whether Illinois will extend the holding by eliminating privity in cases of
negligent misrepresentation where there is a distinct possibility of un-
limited liability.

California, unlike Illinois, has already taken the next step. To un-
derstand its significance, it is essential to trace a series of cases. Once the
seed of privity was planted in *Winterbottom*, it was nurtured and grew in
many jurisdictions, California among them. In 1895, the California Su-
preme Court decided *Buckley*.47 This case involved an attorney who so
negligently drafted and directed the execution of a will that the plaintiff-

44. National Iron and Steel Co. v. Hunt, 312 Ill. 425, 143 N.E. 833 (1924);
Albin v. Crop Improvement Association, Inc., 30 Ill. App. 2d 383, 174 N.E.2d
697 (1961).
47. *Id.*
beneficiary was precluded from taking under the instrument. Plaintiff
was denied recovery because the court ruled that his complaint failed to
state a cause of action.\footnote{48} The court noted in its opinion that:

It is a general doctrine, sustained by an overwhelming weight of authority, that an
attorney is liable for negligence in the conduct of his professional duties \ldots to his
client alone—that is, to the one between whom and the attorney the contract of em-
ployment and service existed—and not to third parties.\footnote{49}

Since there was no privity of contract between plaintiff-beneficiary and
defendant-attorney, the latter owed no duty to the beneficiary. As in
\textit{Winterbottom}, the court expressed trepidation at the extent of the litigation
which might arise should a remedy be allowed: “There would be no
bounds to actions and litigious intricacies if the ill effects of the negligence
of men may be followed down the chain of results to the final effect.”\footnote{50}

In effect, the court in \textit{Buckley} gave credence to the doctrine set forth in
\textit{Winterbottom} that privity of contract is necessary to the creation of a duty,
which in turn is a prerequisite liability. \textit{Buckley}, however, would not
be the last time a California court would rely on the doctrine of privity to
deny a plaintiff a remedy.

As late as 1957, the California District Court of Appeals, in \textit{Mickel v.
Murphy},\footnote{51} held that a notary public was not liable to a beneficiary of a will
which the notary prepared but failed to have properly executed. Under
the terms of the will, plaintiff was the sole beneficiary. By reason of the
fact that the will was not properly attested to, it was void, and plaintiff
was limited to an intestate share of one-half the estate. The court, relying
on \textit{Buckley}, said that “[t]he defendant, if liable at all, was liable to Henry
Mickel, alone, for negligence. Plaintiff, not being a party to the transac-
tion, cannot sue for the carelessness or negligence of defendant in failing
to prepare a valid will \ldots \ldots”\footnote{52} As in \textit{Winterbottom} and \textit{Buckley}, one
who had been wronged was denied a remedy; but that situation was shortly
to change.

One year later, \textit{Biakanja v. Irving}\footnote{53} was appealed to the California Su-
preme Court. The facts were substantially identical to those in \textit{Mickel}.
Here, however, the court stated the issue in terms of duty: “The principal
question is whether defendant was under a duty to exercise due care to
protect plaintiff from injury and was liable for damage caused plaintiff by

\footnotesize{48. \textit{Id.} at 347, 42 P. at 902.}
\footnotesize{49. \textit{Id.} at 345, 42 P. at 901.}
\footnotesize{50. \textit{Id.} at 344, 42 P. at 901.}
\footnotesize{51. \textit{Mickel v. Murphy}, 147 Cal. App. 2d 718, 305 P.2d 993 (1957).}
\footnotesize{52. \textit{Id.} at 721, 305 P.2d at 995.}
\footnotesize{53. \textit{Biakanja v. Irving}, 49 Cal. 2d 647, 320 P.2d 16 (1958).}
his negligence even though they were not in privity of contract.\textsuperscript{54}

The court overruled \textit{Buckley} and \textit{Mickel} on the ground that the rules of nonliability in the absence of privity had been greatly relaxed. Having set the stage for the relaxation of the privity requirement in California, the court proceeded to establish guidelines to determine when a defendant would be liable to a plaintiff not in 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.\textsuperscript{55}

The court concluded that in light of the six factors set forth, plaintiff should be allowed to recover in spite of the fact that he was not in privity of contract with defendant.

\textit{Biakanja} unquestionably removed the requirement of privity as a prerequisite to the imposition of a duty under the facts in that case. But, it is obvious that the defendant was aware that the instrument he was drawing was intended to benefit only the plaintiff, and, therefore, the plaintiff was known and identified to the defendant. The threat of unlimited liability was not present.

\textit{Biakanja} is the first step in California, just as \textit{Rozny} was in Illinois. In both cases the court emphasized that liability would depend upon the duty owed rather than the concepts of privity. The primary difference is that, in \textit{Biakanja}, the court established six objective standards\textsuperscript{56} to determine whether or not a duty exists. In one respect, \textit{Biakanja} did not go as far as \textit{Rozny}. In neither case was the possibility of unlimited liability present, but in \textit{Rozny}, plaintiff was unknown to defendant, while in \textit{Biakanja}, defendant was aware of the plaintiff's identity. This knowledge of the plaintiff's identity, important in determining liability as far as abstractors and accountants were concerned, does not appear to be as important in these cases because of the fact that the extent of liability is limited.

In 1961, the holding in \textit{Biakanja} received two tests. The first, \textit{Lucas v. Hamm},\textsuperscript{57} did no more than simply reaffirm \textit{Biakanja} under a set of facts substantially the same as those in \textit{Buckley}. The second case extended \textit{Biakanja} to a point coterminous with the \textit{Rozny} decision.

\textsuperscript{54} Id. at 650, 320 P.2d at 18.
\textsuperscript{55} Id. at 651, 320 P.2d at 19.
\textsuperscript{56} Id.
\textsuperscript{57} 57 Cal. 2d 821, 15 Cal. Rptr. 821, 364 P.2d 685 (1961).
Stewart v. Cox \(^{58}\) involved a defendant-subcontractor who negligently constructed a swimming pool. The pool cracked, and escaping water damaged the house and yard of plaintiffs. The issue again was whether or not defendant-subcontractor was liable for negligence to plaintiffs, with whom he was not in privity of contract. The court answered the issue in the affirmative, citing Biakanja, and concluded that liability for negligence may exist without privity of contract, the determination being a matter of policy involving the six factors set forth in Biakanja.\(^{59}\) Stewart extended Biakanja because plaintiffs were the unknown buyers of a home for which defendant-subcontractor was building a swimming pool. It became clear that the holding in Biakanja was not to be restricted to apply only to plaintiffs whose identity was known to defendant. Thus California reached a point in 1961 that Illinois was not to reach until Rozny in 1969.

The court in Biakanja said that the question of whether a defendant will be held liable to a third person not in privity of contract is a matter of policy involving the balancing of the six factors enunciated by the court.\(^{60}\) Stewart reaffirmed this policy concept with respect to plaintiffs whose identity is unknown to defendant. It appears that the court's premise is that in redressing a wrong, there should not be a distinction made between a plaintiff known to defendant and one whose identity is not known, provided that harm is foreseeable in each case. The court's refusal to make such a distinction seems wise in light of the nature of the six factors set forth in Biakanja.\(^{61}\) For example, the first factor was the extent to which the transaction was intended to benefit the plaintiff. If, on the one hand, the transaction was intended for plaintiff's benefit, then there is no logical reason for distinguishing between a plaintiff whose identity was known to defendant and one whose identity was unknown. If, on the other hand, the transaction is found not to be for plaintiff's benefit, then defendant would not be liable, regardless of whether or not he was aware of plaintiff's identity. This same line of reasoning can be applied to each of the six factors logically to justify the extension of Biakanja that was made in Stewart.

In 1962, Merrill v. Buck\(^{62}\) was decided by the California Supreme Court. Here defendant realtor showed a house to plaintiff, a prospective lessee. After leasing the house, plaintiff was injured due to a latent defect of which he was unaware but of which defendant knew. Defendant


\(^{59}\) Supra note 53 at 650, 320 P.2d at 19.

\(^{60}\) Supra note 53.

\(^{61}\) Supra note 53.

realtor contended that, because he was not in privity with plaintiff, he was under no duty to warn plaintiff of the latent defect.

In assessing defendant's contention, the court felt it necessary to consider the relationship between the parties. The court stressed defendant's motivation in showing the home to plaintiff: "These defendants were not motivated by altruism but by the hope of business profit." The court proceeded to discuss the reason defendant realtors were under a duty to exercise care. Sounding very much like it did in Biakanja, the court said: "Privity of contract is not necessary to establish the existence of a duty to exercise ordinary care not to injure another, but such duty may arise out of a voluntarily assumed relationship if public policy dictates the existence of such a duty." When does public policy dictate that such a duty exits? The court answered that the six factors enunciated in Biakanja are the test. Here the transaction was intended to affect plaintiff by creating the relationship of landlord and tenant. The fact that the jury rendered a verdict against defendant established that the harm to plaintiff was foreseeable, the certainty that plaintiff suffered injury, and the closeness of the connection between defendant's conduct and plaintiff's injury. Also, moral blame attached to defendant's conduct by reason of defendant's failure to warn plaintiff of the hazard to which he would be exposed. Liability imposed on defendant would serve the policy of preventing future harm.

In 1962, M. Miller Company v. Central Contra Costa Sanitary District was decided by California's First District Court of Appeal. It involved a plaintiff who contracted with the sanitary district to construct a portion of a sewer. The district also employed defendants to conduct soil tests in the area proposed for construction. Defendants performed the tests negligently, with the result that their report failed to disclose unstable material. Plaintiff had made its bid in reliance on defendants' soil report and was injured when its costs were much greater due to the presence of the unstable material. In reversing a summary judgment for defendants,

63. Id. at 558, 375 P.2d at 310.
64. Id.
65. Supra note 53.
66. Supra note 53.
67. Supra note 53.
68. Supra note 53.
69. Supra note 53.
70. Supra note 53.
71. Supra note 53.
the appellate court rejected defendants' contention that there was no liability to plaintiff because they were not in privity of contract.\textsuperscript{73} The court stressed that since the transaction between defendants and the sanitary district was intended to affect plaintiff—as one of the bidders for whom the soil test was made—the harm to plaintiff was foreseeable, and defendants' negligence was the direct cause of plaintiff's injury.\textsuperscript{74}

Once again a California court had reaffirmed that a defendant may owe a duty to a plaintiff not in privity of contract where public policy so dictates, regardless of whether plaintiff's identity is known or unknown to defendant. The existence of the duty would depend, not on defendant's knowledge of plaintiff's identity, but on the six factors set forth in Biakanja.\textsuperscript{75} Thus the court had made the same extension of Biakanja as was made in Stewart. It is possible, however, that the court made the extension because, as in both Stewart and Miller, the injury would normally occur only once, and that liability would definitely be limited.

In the event any doubt existed as to the extension, the California Supreme Court dispelled it in 1968 when it decided Connor v. Great Western Savings and Loan Association.\textsuperscript{76} In holding the defendant Savings and Loan Association, which financed a housing development, liable to the unknown purchasers of homes, the court quoted from Merrill to the effect that the fact that defendant was not in privity of contract with plaintiff did not absolve it of liability for its own negligence. The court then quoted the standards established in Biakanja\textsuperscript{77} to determine the existence of a duty, and concluded that the duty existed, notwithstanding the fact that plaintiffs were unknown to defendant. The extent of liability was potentially much greater in Connor than in Stewart and Miller, and still the court made the extension of liability to an unknown and unidentified plaintiff. To this extent California has gone further than Illinois\textsuperscript{78} or any previous case in California.

In 1969, the California Court of Appeal, Fourth District, was faced with a more extreme situation than the previous cases in which a duty had been found owing from defendant to plaintiff. In Hanberry,\textsuperscript{79} the court was faced with a plaintiff whose identity was not only unknown to defendant, but belonged to a virtually limitless class, the public at large.

\textsuperscript{73} Id. at 311, 18 Cal. Rptr. at 17.
\textsuperscript{74} Id. at 308, 18 Cal. Rptr. at 15.
\textsuperscript{75} Supra note 53.
\textsuperscript{76} 69 Cal. 2d 850, 73 Cal. Rptr. 369, 447 P.2d 609 (1968).
\textsuperscript{77} Supra note 53.
\textsuperscript{78} Supra note 42.
\textsuperscript{79} Supra note 1.
The court first stated the issue:
The basic question presented in this appeal is whether one who endorses a product for his own economic gain, and for the purpose of encouraging and inducing the public to buy it, may be liable to a purchaser who, relying on the endorsement, buys the product and is injured because it is defective and not as represented in the endorsement.\(^8^0\)

The court then proceeded to follow the line of cases which preceded the one at bar. Citing Merrill, the court stated that privity of contract was not necessary to establish a duty; rather, a duty might arise out of a voluntarily assumed relationship, such as the business relationship in the case at bar. After quoting the Biakanja standards,\(^8^1\) the court concluded that such a duty existed: "We believe appellant has set forth sufficient facts to meet the foregoing test and to establish . . . [that] respondent Hearst had a duty to exercise ordinary care in issuing its seal and its certification it had satisfied itself the shoes were 'good ones.'"\(^8^2\) The court, in effect, stated the law as established in previous cases, and came to a legal conclusion without any reasoning whatsoever. It is unfortunate the court was so remiss in not indicating how the Biakanja standards\(^8^3\) applied to create the duty. Had this been a case with facts identical, or substantially similar to a previous case, this laxity might have passed unnoticed; however, here the judgment was in favor of a very remote plaintiff.

In spite of the paucity of reasoning, it can be inferred what must have been the court's reasoning from its conclusion. Even though plaintiff was neither identified to the defendant nor a member of a limited, identifiable class, the court still concluded that a duty existed. Therefore, the court must have felt that, to an extent sufficient to impose a duty of care upon defendant, 1. The transaction was intended to affect plaintiff; 2. the harm to plaintiff was foreseeable in the event the shoes were negligently constructed; 3. plaintiff suffered injury; 4. the connection between defendant's conduct and the injury suffered was sufficiently proximate; 5. moral blame attached to defendant's conduct; and 6. the imposition of liability would further the public policy of preventing future harm.

Earlier it was said that Hanberry was the culmination of a series of cases which, in California, have eliminated the requirement of privity of contract to recover in a tort action against one who endorses another's product. How is this so? The law cited does not differ materially from the previ-

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\(^{80}\) Supra note 1, at 521.
\(^{81}\) Supra note 53.
\(^{82}\) Supra note 1, at 523.
\(^{83}\) Supra note 53.
ous California cases. However, here the representations were made in magazines to the public at large. The remoteness of the plaintiff in Hanberry is conspicuously obvious when compared to the relationships of the plaintiffs to the defendants in the previous cases. The court is applying the same law to a much broader situation, thereby extending liability in the absence of privity to such an extent that it is virtually eliminated. In effect, anyone could recover from defendant upon a showing of reliance upon defendant's misrepresentations.

Although the factual situation in Hanberry differs from the cases involving abstractors, accountants, and attorneys, the situations are analogous in that a defendant has made representations which have resulted in injury to a plaintiff who, though he is not in privity with defendant, has relied upon the representations to his detriment. It would seem that a plaintiff in any of the above situations could recover in California. The duty would be found from Biakanja, and the fear of extended liability to unknown plaintiffs would no longer be a consideration since Hanberry.

This fear, first expressed in Winterbottom, and so often separated, was not even a factor in the court's decision in Hanberry. The omission from consideration of this fear is one of the primary reasons that this case virtually eliminates privity. Because this fear is so deeply rooted in legal thinking, the court was remiss in dismissing it without so much as a mention of it. Was it because the court could find no argument to counter its effect? I think not. There are several countervailing arguments of considerable weight. In the first place, defendant has committed a wrong and plaintiff has suffered. A duty has been imposed on defendant and he has violated it. It is not in the nature of the law to withhold a remedy where such a duty has been imposed. Should the law now withhold the remedy because defendants liability may be great? Again the answer must be in the negative, especially in light of the other arguments available to counterbalance the fear of such liability.

84. Biakanja v. Irving, supra note 53; Merrill v. Buck, supra note 62; M. Miller Co. v. Central Costa Sanitary District, supra note 72; Connor v. Great Western, supra note 76.

85. In Hanberry the plaintiff suffered personal injuries while the plaintiffs in abstractor and accountant cases normally suffer economic injury. The courts have been more reluctant to redress the latter type injury, although logically there is no basis for such reluctance. Personal injuries are compensated by money damages just as are economic injuries.


Secondly, defendant is engaging in a business for profit. It is much more able than the “average” individual plaintiff to bear the costly results of its own breach of duty. Should it not do so? In addition, defendant has other means at its disposal. It is able, by the rates it charges, to spread the risk of injury among a great many of its clients, virtually eliminating the burden on a single individual. Furthermore, through the use of liability insurance, defendant could avoid the dangers of extended liability.

It would not be for the courts to require insurance or that an amount be set aside from defendant’s fees. Such requirements would be in the province of the legislature. These methods, however, suggest that the fear of unlimited liability should not be used to deny a plaintiff relief. By imposing liability in such cases, the courts will be furthering the policy of preventing future harm. Finally, in the event liability threatens to become too extreme, the courts could eliminate the threat by a proximate cause argument. This essentially is a question of whether the law, under current public policy concepts, will expand liability to the defendant's conduct for the injury which has resulted to plaintiff. This can be stated in terms of whether the duty imposed on defendant includes responsibility for such injury. If defendant's negligent conduct was not the proximate cause of plaintiff's injury, no liability would attach.

What can the practical effects of a decision like Hanberry be? The answers to a question like this must be speculative because they will necessarily involve prediction of the future judicial trends that will be taken by the court. Nevertheless, speculation in this area might be quite interesting. Today, independent testing agencies play a much more expanded role in our society than ever before. Manufacturers throughout the United States rely on such agencies as a means of advertising and selling their products. The American consumer, more and more, has come to rely upon these certifications of quality from agencies having no financial interest in the success of the products they test.

Because of the great reliance placed on the certifications of these agencies by the public at large and because of the possibility of injury should the tests be performed negligently, these independent testing agencies should owe a duty to consumers. Unfortunately, precedent has generally

88. Supra note 53.
not supported this view. But the outlook has become more optimistic for several reasons. In the first place, the decisions holding that testing agencies are not liable to consumers in the absence of privity have not been unanimous. For example, in Du Rite Laundry, Inc. v. Washington Elec. Co., the New York Appellate Court held that if plaintiff recovered from defendant for defective machinery, the testing company would be liable to defendant. Although it appears that this case has not been used as precedent by another court, it does indicate that, in New York, an independent testing agency may be liable to third parties not in privity of contract. Secondly, the leading case involving the liability of these testing agencies is National Iron. As previously discussed, this case has just recently been overruled by Rozny. Lastly, in Hanberry, California already has held one of these independent testing agencies liable to a plaintiff not in privity of contract. Because of the foregoing reasons, it seems likely that other courts may start to review their decisions in this area. If testing agencies are going to continue to allow their tests and certifications to be used in advertising in exchange for financial remuneration, they should be held accountable for a negligent performance of their undertaking.

Jack J. Leon

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