NOTES

LIABILITY OF CERTIFIERS OF PRODUCTS FOR PERSONAL INJURIES TO THE USER OR CONSUMER

The certification of products by independent testing agencies has become an increasingly important element of modern advertising and marketing. Manufacturers employ certification to increase consumer demand for their products, and consumers rely on certification in choosing the products they buy. As concern for the safety and quality of products increases, the importance of certification for both the manufacturer and the consumer grows correspondingly.

1 "Independent testing agencies" may be defined as private organizations that autonomously test and certify products for consumer or manufacturer clients. The use of the term "certifier" in this note refers only to such testing agencies.

Groups other than independent testing agencies, such as trade associations, individual companies, government agencies, and trade unions, also engage in the business of testing and certifying products. Each tests and certifies in a different manner and for a different purpose. Taylor, Certification Marks—Success or Failure?, 23 J. MARKETING, July 1958, at 39. The methods and potential liability of such groups are beyond the scope of this discussion.


3 For most manufacturers, certification by an independent testing agency serves a dual purpose. First, testing operates to ensure the safety and quality of the manufacturer's product. At the same time, certification acts as a valuable tool in advertising. To the extent the certifier is both independent and impartial, therefore, both goals are served effectively. Id. at 40.

4 Many claim that certification—at least that done by testing agencies under contract with manufacturer clients—serves only incidentally as an aid to the consumer. One commentator has written that there is generally "little desire to aid the consumer directly in the buying process. In most instances, any benefit to the consumer is secondary and indirect." Taylor, supra note 1, at 46. Those testing agencies serving consumer clients, however, do not fit this description.

Regardless of the principal purpose of certification, there can be no doubt that many consumers rely on the certifier's representation of safety and quality in products. If they did not, there would be little market, if any, for the certifier's services. Although no statistics have been uncovered, both manufacturers and certifiers believe that consumer reliance is widespread. See, e.g., Hecht, Parents' Seal Is Still Assurance of Worthiness, 37 ADVERTISING AGE, Nov. 14, 1966, at 153; Magazine Puts Seal on Its Own Success, Bus. WEEK, March 19, 1966, at 190; The Public Gives UL Its Seal of Approval, Bus. WEEK, Sept. 18, 1965, at 92; Tools for Confidence Building, 80 SALES MANAGEMENT, Jan. 6, 1958, at 64.

5 Recognition of this expanding importance is illustrated by two recent investigations of independent testing agencies conducted by the House Committee on Government Operations and the National Commission on Product Safety. Bender, Is a So-Called 'Seal of Approval' What Consumers Think It Is?, N.Y. Times, March 22, 1969, at 22, col. 1. These
CERTIFIER LIABILITY

In view of this development, certifier liability for personal injuries to the user or consumer of goods has become a significant problem. Recent decisions expanding the liability of the manufacturer of goods\(^8\) suggest a similar expansion of the certifier's liability. At the same time, however, differences between manufacturers and certifiers and among certifiers themselves may warrant limitations on that liability.

I

NEGLECTFUL MISREPRESENTATION

Under traditional tort law, the certifier's liability for personal injuries to the user or consumer may be based on negligent misrepresentation.\(^7\) Certification clearly involves the representation that the product certified is safe for ordinary use;\(^8\) when the product proves unsafe, and investigations have focused primarily on the practices of Underwriters' Laboratories, Inc., the Good Housekeeping Institute (Good Housekeeping), and the Parents’ Magazine Consumer Service Bureau (Parents’ Magazine), and both have produced a series of charges and countercharges concerning certification practices. E.g., id., Feb. 15, 1969, at 15, col. 1; id., Oct. 1, 1969, at 43, col. 1; note 9 infra.

The findings and recommendations of the National Commission on Product Safety have recently been published as NATIONAL COMM’N ON PRODUCT SAFETY, FINAL REPORT (1970) [hereinafter cited as Comm’N REPORT].

6 Notes 24-28 & 33 infra.

7 For a discussion of the historical development of the tort of negligent misrepresentation, see W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 102 (3d ed. 1964). Prosser indicates that traditionally the theory of negligent misrepresentation has been applied almost exclusively to cases of economic loss. He argues, however, that many actions for personal injuries, although brought under the general theory of negligence, have actually involved negligent misrepresentation. Id. § 33.

8 Safety testing and certification are principal functions of all independent testing agencies, whether they deal with manufacturer or consumer clients. See Gregor, supra note 2, at 39-40. Underwriters' Laboratories, Inc., for example, tests products only for safety. One executive at Underwriters' has described its seal as follows:

Now, the public itself understands that the seal means something important—although they are a bit hazy as to what that something is. . . .

Underwriters' Laboratories itself has no doubt as to what its label means. When this non-profit organization puts its stamp on a product, it is saying just one thing. The product is safe. The label does not guarantee high quality.

The Public Gives UL Its Seal of Approval, supra note 4. Underwriters' now tests for all possible defects relating to safety. Comm’N REPORT 55.

Other certifiers, such as Parents' Magazine and Good Housekeeping, test and certify for both safety and quality. The Good Housekeeping Seal and the Parents’ Magazine Guaranteed Seal apply to any “defect” in the certified product. See Magazine Puts Seal on Its Own Success, supra note 4, at 191-92; Information on the Parents’ Magazine Guaranteed Seal 2 (undated pamphlet published by Parents' Magazine).

In testimony before the National Commission on Product Safety, however, representatives of both Good Housekeeping and Parents’ Magazine denied any representation of either safety or quality in their seals. Yet, under cross-examination, each admitted that
personal injuries result, negligence in the testing or certification of the product may be involved.9

Although recovery against the certifier has traditionally required privity of contract,10 this requirement does not apply to cases of personal injury arising from negligent certification.11 In Hempstead v. General Testing for safety and quality was an integral part of certification by both. N.Y. Times, Oct. 1, 1969, at 43, col. 1.

9 Allegations of widespread negligence in the testing and certification of products have been made in the recent federal investigations. In testimony before the National Commission on Product Safety, attorney Irving D. Gaines stated that any manufacturer could obtain the seal of either Good Housekeeping or Parents' Magazine simply by doing enough advertising. Bender, supra note 5. Previously, Congressman Benjamin S. Rosenthal had charged that three products seized by the Food and Drug Administration as unsafe continued to carry the Good Housekeeping Seal and continued to be advertised in Good Housekeeping magazine. N.Y. Times, Feb. 15, 1969, at 15, col. 2.

These charges, needless to say, have been denied. Id., Oct. 1, 1969, at 43, col. 1. For example, Good Housekeeping claims that the institute tests every product offered for sale in the magazine's advertising pages, and scrutinizes every line of ad copy .... No product is accepted for advertising until it is tested; no ad for that product is run until the copy claims are examined and, if necessary, altered .... Magazine Puts Seal on Its Own Success, supra note 4, at 192.

Parents' Magazine is somewhat more conservative in describing its operations: "In the statement describing the Guaranteed Seal there is no representation that products or services are tested or evaluated .... Nevertheless, we do testing and evaluation under the guarantee program." Information on the Parents' Magazine Guaranteed Seal, supra note 8, at 1.

10 The privity requirement in certification cases had its origin in National Iron & Steel Co. v. Hunt, 312 Ill. 245, 143 N.E. 833 (1924). There the defendants were employed by the seller to inspect, test, and certify certain re-laying rails. The plaintiff subsequently purchased the rails in reliance on the defendants' certificate of inspection. The court refused to impose liability for the purchase price of the rails, holding that the certifiers' "obligations ... extended only to persons who bought and paid for their services." Id. at 246, 143 N.E. at 834. Similarly, in related areas of the law, courts have imposed a requirement of privity of contract on recovery for negligent misrepresentation. W. Prosser, supra note 7, § 102, at 721-24.

An exception to the privity rule has arisen in certification cases in which the person making the representation has actual knowledge of reliance by a third party and acts primarily for his benefit. See Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922).

11 Most cases dealing with negligent misrepresentation have involved economic loss rather than personal injury. Note 7 supra. Although a requirement of privity of contract is appropriate in the former case, it is not appropriate in the latter. First, the basic reason for requiring privity in cases of economic loss has been the courts' fear of a potentially burdensome and unforeseeable liability—"a liability in an indeterminate amount for an indeterminate time to an indeterminate class." Ultramares Corp. v. Touche, 255 N.Y. 170, 179, 174 N.E. 441, 444 (1931). This reasoning does not apply to cases of personal injury, where the extent of liability is arguably more foreseeable. See Note, Economic Loss in Products Liability Jurisprudence, 66 Colum. L. Rev. 917, 953-58 (1966).

Moreover, courts have traditionally been more willing to compensate for personal injury than for economic loss. Id. at 928-29. Thus, following the landmark decision in MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), nearly every American jurisdiction abandoned the privity doctrine, allowing recovery by the remote user or
Fire Extinguisher Corp., a federal court refused to apply the privity doctrine and imposed liability on the certifier of a fire extinguisher that exploded, causing personal injury to the user. While the court framed the issue in terms of simple negligence, its reasoning applies equally to the theory of negligent misrepresentation.

Similarly, in Hanberry v. Hearst Corp., the court rejected the privity doctrine as inapplicable to cases of personal injury caused by the negligent misrepresentation of the certifier. There the purchaser of shoes carrying the Good Housekeeping Seal sustained personal injury when the shoes, unable to hold on vinyl flooring, proved to be defectively designed. Imposing liability on the certifier for negligent misrepresentation, the court argued that

[In voluntarily assuming this business relationship, . . . [the certifier] has placed itself in the position where public policy imposes upon it the duty to use ordinary care in the issuance of its seal and certification of quality so that members of the consuming public who rely on its endorsement are not unreasonably exposed to the risk of harm.]

consumer for personal injury caused by the negligence of the manufacturer of goods. Prosser, The Assault upon the Citadel (Strict Liability to the Consumer), 69 YALE L.J. 1099, 1100-03 (1960). At the same time, in the face of attempts to extend the MacPherson doctrine, "courts have almost unanimously denied claims for recovery in negligence for economic loss against the remote manufacturer of a defective product." Note, supra at 929 (footnote omitted).


13 Here the court relied upon RESTATEMENT (SECOND) OF TORTS § 324A(a) (1965): Liability to Third Person for Negligent Performance of Undertaking One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm ....
14 Of course, one major difference between liability for simple negligence (e.g., under § 324A(a) of the Restatement) and liability for negligent misrepresentation is that, in the former case, reliance by the third party need not be shown to sustain recovery. In view of the rationale behind imposing liability for negligence on the certifier, however, a requirement of reliance appears appropriate. Note 16 infra.
16 Id. at —, 81 Cal. Rptr. at 522.

Unlike the court in Hempstead, the California court cited RESTATEMENT (SECOND) OF TORTS § 511 (1965) as authority:

Negligent Misrepresentation Involving Risk of Physical Harm

(1) One who negligently gives false information to another is subject to liability
In applying the reasoning of Hempstead and Hanberry to certification, there is no reason to distinguish between certifiers serving manufacturer clients and certifiers serving consumer clients. Each makes the

for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results

(a) to the other, or

(b) to such third persons as the actor should expect to be put in peril by the action taken.

(2) Such negligence may consist of failure to exercise reasonable care

(a) in ascertaining the accuracy of the information, or

(b) in the manner in which it is communicated.

The ambiguity of this section is obvious. If the manufacturer is considered the person to whom the information is given, the section might be interpreted as requiring no reliance at all on the part of the user or consumer. Such an interpretation would produce inconsistent results. No reliance would have to be shown if the representation is made by a certifier serving manufacturer clients; at the same time, reliance would be necessary if the certifier serves only consumer clients.

A sounder view would require reliance on the part of the user or consumer for recovery for negligent misrepresentation. First, a requirement of reliance would eliminate the inconsistency that might arise under a literal application of § 311. The liability of certifiers for negligence would then be uniform. Moreover, the reliance requirement is in harmony with the basic reason for imposing negligence liability on the certifier. As the court stated in Hanberry, this liability is imposed because the certifier holds itself out to the consuming public as an expert "for the purpose of encouraging and inducing" the public to buy the product. 276 Cal. App. 2d at —, 81 Cal. Rptr. at 521. Where no reliance on the part of the consumer exists, this reasoning does not apply.

Finally—and most important—reliance serves as a liability-limiting factor. If recovery were not predicated on reliance, the liability of the certifier, which tests and certifies many lines of products, could be greater than that of the single manufacturer. See notes 44-49 and accompanying text infra. By imposing a reliance requirement—one not applicable to manufacturer negligence—the liability of the certifier would be consonant with that of the manufacturer whose product it certifies.

Thus, the court in Hanberry limited recovery to those "members of the consuming public who rely on [the certifier's] endorsement . . . ." 276 Cal. App. 2d at —, 81 Cal. Rptr. at 522.

17 Certifiers serving manufacturer clients include, among others, Good Housekeeping, Parents' Magazine, Underwriters' Laboratories, Inc., and United States Testing Co. Consumers' Research, Inc. and Consumers Union are examples of certifiers serving consumer clients. While the former test and certify under contract with the manufacturer, the latter operate completely independently, directing certification primarily towards the consumer.

In this regard, certain certifiers, such as Good Housekeeping and Parents' Magazine, claim to represent the interests of consumers as well as manufacturers. Thus, Good Housekeeping asserts that although "[t]he fact that advertisers use the Seal in merchandising" is basic to its certification program, "[t]he Guaranty's primary objective . . . has always been that of a consumer's guide." The Good Housekeeping Consumers' Guaranty . . . A Guide to Its History and Authorized Use 2 (undated pamphlet published by Good Housekeeping). Moreover, to the extent that the public subscribes to their publications, such certifiers are under contract with the consumer.

In reality, however, these certifiers primarily serve the interests of their manufacturer clients. The National Commission on Product Safety has concluded that consumer protection is "flawed by the laboratory's economic dependence on the goodwill of the manu-
same representation of product safety to the public and each expects
the same reliance on the part of the consumer. Considerations important for the purpose of imposing strict liability, moreover, do not apply to the more limited liability for negligent misrepresentation. Both types of certifiers, therefore, should share the same liability for negligence.

On the other hand, differences between types of product defects may be important under the theory of negligent misrepresentation. Generally speaking, the certifier will be liable only for class defects, as opposed to individual defects, in products. Since the certifier ordinarily tests only a small sample of the product, its representation may be viewed as limited to class defects; therefore, liability for an individual defect would not follow. Moreover, even if the certifier’s representation

facturer. . . .” COMM’N REPORT 2. As a result, the Commission has recommended regulation by the Federal Trade Commission to avoid consumer deception. Id. at 116.

More important, however, such certifiers are distinguishable from those serving only consumer clients by their control over production and distribution and by their greater ability to spread the cost of liability through the distributive chain. Notes 37-41 & 45-49 and accompanying text infra.

18 Given a requirement of reliance on the certification, liability should extend to all users and consumers who do so rely, whether or not purchasers of the product. The element of reliance, therefore, rather than the relationship between the parties in the chain of distribution, would be the basic liability-limiting factor. See note 16 supra.

19 There is a reason to distinguish between types of certifiers for the purpose of imposing strict liability based on the relative control exercised by each over production and distribution. See notes 37-41 and accompanying text infra. The distinction is not applicable to liability for negligent misrepresentation, which imposes a more limited duty on the certifier, whether serving manufacturer or consumer clients. Because of this limited duty—the exercise of reasonable care in the testing and certification of products—the control of the certifier over production and distribution becomes less important.

Similarly, considerations of risk-spreading are inapplicable to liability for negligent misrepresentation. Presumably, the strict liability of the certifier would be much greater than its liability for negligence. As a result, a reason appears to distinguish between types of certifiers based on their ability to pass the cost of liability to the public. See notes 45-49 and accompanying text infra. Where liability is more limited, however, this distinction becomes less of a factor in imposing liability.

20 The privity requirement would be less a barrier to recovery against a certifier with consumer clients. There a subscriber would ordinarily be in privity of contract with the certifier. Moreover, because many certifiers serving manufacturer clients publish their results for profit—e.g., Good Housekeeping and Parents’ Magazine—privity might exist between the certifier and the consumer. Where, however, the injured consumer merely relies on a seal or similar certification carried by a product, there would be no privity of contract.

21 Such a distinction is drawn in Note, Tort Liability of Independent Testing Agencies, 22 RUTGERS L. REV. 299, 317 (1968). A class defect would be one common to an entire line of products—for example, a defect of design—or one common to a large number of individual items in a particular product line. An individual defect would be one unique to the particular item causing the injury. The defect alleged in Hanberry was a class defect. 276 Cal. App. 2d at —, 81 Cal. Rptr. at 521.
were viewed as covering all product defects, injury from an individual defect would probably not be the consequence of negligence on the part of the certifier who tested only a sample.\textsuperscript{22}

II

STRICT LIABILITY

A. Theories of Strict Liability

The imposition of strict liability on certifiers of products for personal injuries to the user or consumer presents a more complex problem. Under modern products liability law, strict liability may be applied to the certifier under three basic theories—breach of express warranty, breach of implied warranty, and strict tort liability.\textsuperscript{23} Although differing in several important respects, each theory represents a liability without fault and without privity.

Courts have imposed strict liability on the manufacturer for breach of express warranty for representations made to the ultimate consumer in advertising,\textsuperscript{24} in sales literature,\textsuperscript{25} and on product labels.\textsuperscript{26} The man-

\textsuperscript{22} Even if negligence were involved in the certification of a product, such negligence might not be the cause in fact of a consumer injury. Where the certifier negligently tests only a sample, even due care cannot uncover a unique defect; the manufacturer would not be on notice that the defect existed and therefore could not eliminate it. It may be argued, however, that the certifier's negligence would be the cause of the consumer's reliance and hence the cause of the injury.

\textsuperscript{23} For a general discussion of the theories of strict liability, see Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. 791 (1966).


manufacturer's liability has been extended to include property damage\(^27\) and economic loss.\(^28\) Although likened to a contractual obligation,\(^29\) breach of express warranty has been considered principally a liability in tort by both courts and commentators.\(^30\) However, the consumer sustaining personal injuries must show reliance on the representation in order to recover.\(^31\)


\(^{29}\) The contractual warranty provisions of Uniform Commercial Code §§ 2-313 to -318 do not apply to the certifier. The certifier is a seller of services—the testing and certification of products—rather than a seller of "goods." As such, the certifier does not fall within the coverage of Article 2. See, e.g., Epstein v. Giannattasio, 25 Conn. Supp. 109, 197 A.2d 342 (Super. Ct. 1964); Aegis Prods., Inc. v. Arriflex Corp. of Am., 25 App. Div. 2d 639, 268 N.Y.S.2d 185 (1st Dep't 1966); Cheshire v. Southampton Hosp. Ass'n, 58 Misc. 2d 355, 278 N.Y.S.2d 531 (Sup. Ct. 1967).

Although courts have made a similar distinction between sellers of goods and sellers of services for the purposes of imposing common law strict liability, this distinction appears to be disappearing. See Jackson v. Muhlenberg Hosp., 53 N.J. 138, 249 A.2d 65 (1969); cf. Garcia v. Halset, 3 Cal. App. 3d 319, 82 Cal. Rptr. 420 (1970). Courts are thus free to extend the common law doctrine of strict liability to sellers of services whereas they are not free to extend the statutory strict liability of the UCC. If policy considerations dictate the imposition of strict liability on the certifier, this must be done through common law decision.

\(^{30}\) The theory finally adopted by most of the decisions . . . has been that of a non-contractual "express warranty" made to the consumer in the form of the representation to the public upon which he relies. . . . The liability . . . is liability in tort, and not in contract; and if it is to be called one of "warranty," it is at least a different kind of warranty from that involved in the ordinary sale of goods from the immediate seller to the immediate buyer, and is subject to different rules.


\(^{31}\) Restatement (Second) of Torts § 402B (1965):

Misrepresentation by Seller of Chattels to Consumer

One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the mis-representation, even though

(a) it is not made fraudulently or negligently, and

(b) the consumer has not bought the chattel from or entered into any contractual relation with the seller.

The comment makes it clear that reliance is required for recovery:

The rule here stated applies only where there is justifiable reliance upon the mis-representation of the seller, and physical harm results because of such reliance,
Closely related to liability for breach of express warranty are the theories of breach of implied warranty and strict tort liability. A majority of American jurisdictions now impose strict liability on the manufacturer, without regard to negligence or privity, for personal injuries to the user or consumer under one or the other theory. As with the manufacturer's liability for breach of express warranty, both theories represent obligations imposed by law rather than arising from contract. Unlike express warranty liability, no representation need be made by the manufacturer, nor is reliance by the user or consumer required.

and because of the fact which is misrepresented. It does not apply where the misrepresentation is not known, or there is indifference to it, and it does not influence the purchase or subsequent conduct.

Id., comment j at 362.

32 For a discussion of the similarities and differences between the theories of implied warranty and strict tort liability, see Prosser, supra note 23, at 800-05.


34 This is clearly the case with the manufacturer's liability in strict tort. As for breach of implied warranty, courts have often surrounded the theory with contractual doctrine. See Prosser, supra note 23, at 800-05. However, the better view is that the obligation is imposed by law and has nothing to do with any contract of sale. In Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942), the Supreme Court of Texas expressed this view with respect to strict liability in implied warranty for the sale of unwholesome food:

[F]ictions are indulged merely because it is thought necessary to do so in order to get away from the rule which requires privity of contract where recovery is sought on an implied warranty growing out of a contract. We believe the better and sounder rule places liability solidly on the ground of a warranty not in contract, but imposed by the law as a matter of public policy.

Id. at 618, 164 S.W.2d at 832.

35 RESTATMENT (SECOND) OF TORTS § 402A (1965):

Special Liability of Seller of Product for Physical Harm to User or Consumer
(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
(a) the seller is engaged in the business of selling such a product, and
(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
(2) The rule stated in Subsection (1) applies although
(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

The comment indicates that neither any representation nor any reliance is required for recovery:

The rule stated in this Section does not require any reliance on the part of
B. *Rationales of Strict Liability*

The strict liability applied to the manufacturer of goods may be extended to the certifier under any of the three theories. Given the certifier's representation that the product is safe for ordinary use, liability may be imposed for breach of express warranty to the consumer who sustains personal injuries through reliance on the representation. At the same time, in view of the certifier's participation in the process of production and distribution, the law may impose an obligation in implied warranty or strict tort similar to that of the manufacturer.

Although courts have increasingly imposed strict liability on manufacturers, application of strict liability to certifiers does not necessarily follow. The reasons for imposing strict liability on the manufacturer—particularly his control over the process of production and distribution and his ability to spread the risk of liability—may not apply to the certifier, or they may apply to certain certifiers and not to others. Moreover, differences between types of product defects assume particular importance.

1. *Control of Production and Distribution*

One reason advanced for the imposition of strict liability on the manufacturer arises from the control exercised by the manufacturer over the production and distribution of goods. Because the manufacturer is in a position to ensure protection from defects, whereas the consumer is not, strict liability is appropriate.\(^3\)

This reasoning does not apply to certifiers serving consumer clients. Such certifiers exercise no direct control over the production and distribution of goods; in this respect, their position differs little from that of the consumers they serve.\(^3\) In the typical case the certifier selects, the consumer upon the reputation, skill, or judgment of the seller who is to be held liable, nor any representation or undertaking on the part of that seller. The seller is strictly liable although, as is frequently the case, the consumer does not even know who he is at the time of consumption.

*Id.*, comment m at 355.

Similarly, liability for breach of implied warranty requires no reliance by the user or consumer. *See* Lonzrick v. Republic Steel Corp., 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966).

\(^3\) This argument is summarized by Prosser:

> The public interest in human life, health and safety demands the maximum possible protection that the law can give against dangerous defects in products which consumers must buy, and against which they are helpless to protect themselves; and it justifies the imposition, upon all suppliers of such products, of full responsibility for the harm they cause, even though the supplier has not been negligent.

Prosser, *supra* note 11, at 1122 (footnote omitted).

\(^3\) To be sure, the certifier possesses an advantage over his consumer clients in his superior knowledge of the particular product and his general expertise in testing.
CORNELL LAW REVIEW

tests, and certifies a product without any contact with the manufacturer.\textsuperscript{38} Moreover, the representation made by the certifier is directed primarily at the consumer; any impact on the manufacturer is indirect.\textsuperscript{39}

A different case is presented by certifiers serving manufacturer clients. Arguably, such certifiers do exercise an element of control over production and distribution. Because it is under contract with the manufacturer to test and certify the product, the certifier's representations may affect the actions of the manufacturer in a direct way.\textsuperscript{40} At the same time, however, this type of control over production and distribution is more limited than that exercised by the manufacturer. Generally speaking, the certifier handles only a small sample of the product, whereas the manufacturer is responsible for all individual items reaching the user or consumer. Therefore, the certifier should be, at most, responsible for class defects in products rather than for individual defects.\textsuperscript{41}

\begin{itemize}
\item For example, Consumers' Research, Inc., publisher of Consumer Bulletin, selects products to be tested on the basis of consumer rather than manufacturer request, and manufacturers exercise no influence, direct or indirect, on the testing and certification procedures. Furthermore, no use may be made of test results in the sale of certified products. An Introduction to Consumers' Research 5-6 (undated pamphlet published by Consumers' Research, Inc.).
\item Similarly, Consumers Union, publisher of Consumer Reports, describes its relationship with manufacturers as follows: CU accepts no advertising or product samples, and is not beholden in any way to any commercial interest. Its Ratings and product reports are solely for the use of readers of CONSUMER REPORTS. Neither the Ratings nor the reports may be used in advertising or for any commercial purpose.\textsuperscript{34}
\item This indirect impact is brought about when the representation of the certifier influences the consumer decision to buy or not buy a particular product. The actions of the manufacturer will ultimately be affected through the mechanism of the marketplace.
\item To be sure, the certifier serving consumer clients may have a more immediate impact on the manufacturer who reads the certifier's report or acts upon its representation. In this case, however, the certifier, looking primarily to the consumer and not being under contract with the manufacturer, remains only indirectly involved in production and distribution.
\item For example, one purpose of the manufacturer in employing certification may be to ensure the safety and quality of the product as well as to promote consumer demand. In such a case the adverse finding of the certifier might cause the manufacturer to redesign a product, or to withdraw it from the market.
\item The unfairness of imposing liability for individual defects on the certifier was the basic reason for the court's rejection of strict liability in Hanberry:
\begin{quotation}
Application of either warranty or strict liability in tort would subject respondent to liability even if the general design and material used in making this brand of shoe were good, but the particular pair became defective through some mishap in the manufacturing process. We believe this kind of liability for individually defective items should be limited to those directly involved in the manufacturing and supplying process, and should not be extended through warranty or strict liability to a general endorser who makes no representation that it has examined or tested each item marketed.
\end{quotation}
\textsuperscript{276} Cal. App. 2d at --, 81 Cal. Rptr. at 524.
\item There is no reason why strict liability could not be limited to class defects in products
\end{itemize}
2. "Risk-Spreading"

A second major reason for the imposition of strict liability on the manufacturer for personal injuries to the user of consumer is that of "risk-spreading." Under this theory, strict liability is imposed on the manufacturer because he is in the best position to insure against the loss and to pass the cost to the public by charging higher prices. The application of the "risk-spreading" doctrine to the certifier again depends on differences among certifiers and between types of product defects. It can be argued that the certifier serving manufacturer clients can pass on the cost of liability to the consuming public by charging higher prices for its services. Because certification is important to the manufacturer, and because the manufacturer will be able to pass the increased cost to others in the distributive chain, the manufacturer will accept higher prices for certification services. Similarly, it can be argued that the certifier serving consumer clients can distribute the cost of liability by charging higher prices to its subscribers.

The fundamental problem with this analysis lies in the extent of the certifier's potential liability, which would be many times greater than that of the single manufacturer. While the manufacturer would be liable for personal injuries caused by defects in its own line of products, the certifier would be liable for such injuries caused by defects in many lines of products. Assuming liability for individual product defects, the certifier's potential liability would be equal to the aggregate liability of all the manufacturers whose products are certified. Even where limited to class defects, the certifier's potential liability might be greater than that of any single manufacturer.

as opposed to individual defects. Under an express warranty theory, for example, the representation of the certifier might be interpreted as extending only to general defects of design and material. Text accompanying notes 53-54 infra. The absolute duty of the certifier in implied warranty or strict tort might similarly be restricted to class defects. The classic statement of this argument was made by Justice Traynor of the California Supreme Court:

Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.


See Note, supra note 21, at 306-09.

For example, the seal of Underwriters' Laboratories, Inc. appears on over 800,000 products manufactured by some 15,000 companies. COMM'N REPORT 56. The extent of possible strict liability for individual product defects would therefore be enormous. The certifier in this case could probably not obtain enough insurance to cover his potential liability; he would be forced to become a self-insurer, with all the hazards that that entails.

42 The classic statement of this argument was made by Justice Traynor of the California Supreme Court:

Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.


43 See Note, supra note 21, at 306-09.

44 For example, the seal of Underwriters' Laboratories, Inc. appears on over 800,000 products manufactured by some 15,000 companies. COMM'N REPORT 56. The extent of possible strict liability for individual product defects would therefore be enormous. The certifier in this case could probably not obtain enough insurance to cover his potential liability; he would be forced to become a self-insurer, with all the hazards that that entails.
The ability of the certifier serving consumer clients to spread the risk of strict liability is open to serious question.\textsuperscript{45} The certifier would be forced to pass the cost of liability directly to the consumer rather than through the manufacturer and other members of the distributive chain.\textsuperscript{46} Among such certifiers there would probably be little risk-spreading potential, either for individual or class defects.\textsuperscript{47}

A somewhat different problem arises with respect to a certifier serving manufacturer clients. Although, in theory, such a certifier may pass the cost of liability to several parties in the distributive chain, it might nevertheless be unable to obtain the insurance coverage required to meet potential liability for individual defects in many lines of products. Even if such insurance were available, manufacturers and others in the distributive chain might be unwilling to ultimately pay the cost of insuring a burdensome liability for individual defects; the cost of certification might outweigh its advantages.\textsuperscript{48} A different case might be presented, however, by liability for class defects. The cost of a more limited liability could probably be passed off to the certifier's manufacturer clients, who could in turn spread the risk to the consumer through the distributive chain.\textsuperscript{49} In this way, the certifier's ability to spread the risk of strict liability would reflect the extent of its control over the production and distribution of goods.

\textsuperscript{45} For example, both Consumers' Research, Inc. and Consumers Union are non-profit organizations. There may be less ability to spread the risk here than in the case, say, of Good Housekeeping, which garners great profits from its certification operations—profits out of which the cost of liability may ultimately be taken. \textit{See} note 49 \textit{infra}.

\textsuperscript{46} The certifier serving manufacturer clients may pass the cost of liability to several parties in the distributive chain—manufacturer, wholesaler, retailer, and consumer—each of whom may assume part of the cost. In contrast, the certifier serving consumer clients may only pass the cost to one party—the consumer—because he has no dealings, direct or indirect, with any other party in the distributive chain.

\textsuperscript{47} In answer to this, it might be argued that strict liability serves a beneficial purpose in eliminating from the marketplace the "inefficient" certifier—that is, the certifier who cannot spread the risk effectively. \textit{See} Note, \textit{supra} note 21, at 307.

The reply is twofold. First, the certifier serving consumer clients performs a valuable service to the public; it would be unnecessarily harsh to punish such a certifier by driving him out of business for essentially faultless conduct. Such a policy might, in fact, deter others from entering the field of consumer-oriented certification. Moreover, given this reasoning, only "efficient" certifiers—those serving manufacturer clients—would survive, a result contrary to the interests of the consuming public.

\textsuperscript{48} This would be the case with the manufacturer who produces a minimum of defective products. Such a manufacturer would be forced, in effect, to pay for the insurance of less skillful manufacturers, and certification might prove uneconomical. Ultimately, only the less skillful manufacturers would employ certification.

\textsuperscript{49} Good Housekeeping claims to expend over one million dollars a year on the certification of products. \textit{N.Y. Times}, March 6, 1969, at 88. At the same time, however, it garners over $36 million a year in advertising revenues. \textit{Bender, supra} note 5, at col. 4.
While courts have, in recent years, almost uniformly imposed strict liability on the manufacturer,\textsuperscript{50} the extension of recovery to the certifier presents more difficult problems. If some form of strict liability—for breach of express warranty, breach of implied warranty, or strict tort liability—is to be imposed on the certifier, certain limitations on that liability are suggested.

There is no sound reason for applying strict liability in any form to the certifier serving consumer clients. Although making the express representation that the product certified is safe for ordinary use, the rationales of strict liability are inapplicable to such a certifier. At most, this certifier exercises an indirect control over production and distribution, and its ability to spread the risk directly to the consumer is open to serious question. Moreover, some form of protection is provided the user or consumer by an action for negligent misrepresentation.

In the case of the certifier serving manufacturer clients, the rationales of strict liability pull both ways. On the one hand, such a certifier is directly involved in and exercises direct control over production and distribution; under contract with the manufacturer, his representations influence the actions of the manufacturer as well as those of the consumer. On the other, given a potentially burdensome liability for personal injuries, the certifier may be unable to spread the risk of liability, at least for individual defects, as effectively as the manufacturer. These considerations indicate that strict liability should be imposed, but that the responsibility of the certifier should be more limited than that of the manufacturer.

Such a limited liability would best be imposed for breach of express warranty. The representations of the certifier that the product is safe for ordinary use are no different from those representations made by manufacturers in advertising, in sales literature, or on labels, for which strict liability has been imposed. At the same time, express warranty liability offers certain limitations not present under the theories of implied warranty or strict tort liability. For example, "justifiable reliance" must be shown to sustain recovery for personal injuries.\textsuperscript{51}

\textsuperscript{50} Notes 24-28 & 33 supra.

\textsuperscript{51} RESTATEMENT (SECOND) OF TORTS § 402B (1965).

One student commentator has argued that, for the purposes of strict liability, consumer reliance should be "assumed." Note, supra note 21, at 306. At the same time, this writer points to reliance as a basic rationale of strict liability. Id. at 304-05. If reliance
thus limiting the class of persons who may recover. Similarly, section 402B of the Restatement, in contrast to section 402A, limits recovery to the “consumer.” Presumably, therefore, the certifier serving manufacturer clients would be liable for breach of express warranty only to the purchaser of the product and, perhaps, to persons in the household or employ of the purchaser.

A more important limitation would involve the extent of the certifier’s express warranty to the consumer. Liability should generally be confined to personal injuries caused by class defects in products. By so interpreting the certifier’s warranty, liability would bear some relation to the control exercised by the certifier over production and distribution and would more accurately reflect the certifier’s ability to spread the risk.

Where certification clearly extends to individual defects, however, courts may allow certifiers to limit liability for breach of express warranty, either by way of disclaimer or limitation of remedy. Although courts have been increasingly disposed to strike down such by the consumer is a major reason for imposing strict liability on the certifier, however, it should be shown to exist in fact.

The comment to § 402B defines “consumer” as “one who makes use of the chattel in the manner which a purchaser may be expected to use it.” This definition includes the employee or wife of the purchaser. RESTATEMENT (SECOND) OF TORTS § 402B, comment i at 362 (1965). In contrast, the term “user” in § 402A includes any person “passively enjoying the benefit of the product” and a person making repairs upon it. Id. § 402A, comment l at 354.

The certification of Good Housekeeping and Parents’ Magazine extends to all “defects” in the product, whether individual or class. This is so even though only a small sample of the product is tested. Courts may be unwilling to interpret such an express warranty as extending only to class defects.


Outright disclaimers would probably be unimportant in the field of product certification. Such disclaimers would considerably impair, if not destroy, the credibility of the certifier. Limitations on consumer remedies, though practically disclaimers, operate more subtly on the consumer and are more likely to be uncritically accepted.

Both Good Housekeeping and Parents’ Magazine limit their liability to refund or replacement of the defective product. The Good Housekeeping Consumers’ Guaranty . . . A Guide to Its History and Authorized Use, supra note 17, at 2-3; Information on the Parents’ Magazine Guaranteed Seal, supra note 8, at 1. In this way, Good Housekeeping limits its annual warranty losses to between $15,000 and $24,000. Bender, supra note 5, at col. 3.
limitations as contrary to public policy, the special problems of the certifier serving manufacturer clients may make such provisions valid, at least insofar as they relate to individual defects and the consumer is apprised of their meaning. Attempts to disclaim or limit liability for class defects should be invalid.

In addition to the remedy for negligent misrepresentation, therefore, by employing the theory of breach of express warranty, strict liability may be imposed on the certifier serving manufacturer clients. At the same time, the suggested liability would be more limited than that of the manufacturer, reflecting the unique position of the certifier in the economy and in the law.

Charles F. Rechlin