

# Cardozo Revisited: Liability to Third Parties; A Real Property Perspective

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## I. INTRODUCTION

After one has taught law for many years, one tends to become convinced that real property law is really a course quite different from that taught by those who are teaching contracts or torts. This, of course, is a serious misconception, reinforced periodically by the publishers of casebooks who scrupulously observe the rigorous distinctions in their product packaging.

One can begin the trip back to reality by noting one of Prosser's considerable contributions to our understanding of the law:

"Such is the unity of all history that anyone who endeavors to tell a piece of it must feel that his first sentence tears a seamless web." So said Maitland, speaking of the law, and his words have become trite with much repetition. Nevertheless, our law schools and our writers of texts continue to tear the web into courses and fields and compartments, which have in themselves no virtue other than mere convenience in organization, but tend to give the entirely misleading impression that east is east and west is west, and never the twain shall meet. Actually there are, of course, no such distinctly segregated compartments in the law. Everywhere the fields of liability and doctrine interlock; everywhere there are borderlands and penumbras, and cases which cut across the arbitrary lines of division, or straddle them in a manner utterly bewildering to the young lawyer whose education has led him to look for sharp division.<sup>1</sup>

One of the most outstanding jurists of our time, Justice Benjamin Cardozo, articulated a principle spanning the "seamless web" of the law which, unfortunately, has been obscured by the attempts of courts, casebook writers, and law professors to pigeonhole the principle into familiar categories. Justice Cardozo

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1. W. PROSSER, *SELECTED TOPICS ON THE LAW OF TORTS* 380 (1954).

established the principle that a person who undertakes a task is liable for injury to remote third parties, regardless of lack of privity, which arises from the person's negligent performance of the task. Cardozo also enunciated an exception to this rule which developed into a widely accepted opposing rule. This article will first trace the origin of Cardozo's principle and the opposing rule. Next, it will examine the attempts by courts and casebook writers to categorize those cases which are properly governed by Cardozo's principle under various familiar legal categories. This article will next conclude that these attempted classifications are erroneous and obscure the applicability of the principle in numerous areas of the law, and that arguments against applying the principle are unpersuasive. Finally, this article will demonstrate how Cardozo's principle has been applied in cases directly or indirectly within the real property law category and conclude that courts should continue to recognize and extend application of the principle to all areas of the law.

## II. THE CARDOZO DECISIONS

The Cardozo decisions that will be discussed under this heading were handed down before the multimillion dollar tort verdict became commonplace. Today, particularly in the airplane accident cases, the verdicts are enormous.<sup>2</sup> Cardozo was careful to frame his decisions so that the verdicts would not be excessive; his concepts of liability at times reveal this pinch-penny approach. Given this approach, it is somewhat surprising that he extended the limits of liability as far as he did.

### A. *Glanzer v. Shepard*

*Glanzer v. Shepard*<sup>3</sup> is one of the early Cardozo decisions resting basically on the authority of *MacPherson v. Buick Motor Co.*<sup>4</sup> A weigher hired by the seller of beans was held liable to the buyer for negligence in the weighing of the beans, although privity was obviously lacking between the buyer and the weigher.

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2. Modern tort lawyers reversed the trend in damage awards when they pointed out that insurance companies craftily appealed small verdicts (which became reported cases) and settled those involving serious disability or death. Belli, *The Adequate Award*, 39 CALIF. L. REV. 1, *passim* (1951).

3. 233 N.Y. 236, 135 N.E. 275 (1922).

4. 217 N.Y. 382, 111 N.E. 1050 (1916).

The rule that one who undertakes to perform a task is liable for his negligence came as no surprise. The importance of the case lies in its ruling that *the party performing the task is liable to a person who did not hire him*.<sup>5</sup> Cardozo, writing for the court, observed that all that was needed was to determine whether a duty existed on the part of the weigher to the buyer. The court found that such a duty was present. And the court deliberately chose not to place that duty within the confines of contract law. The court said:

We state the defendants' obligation, therefore, in terms, not of contract merely, but of duty. Other forms of statement are possible. They involve, at most, a change of emphasis. We may see here, if we please, a phase or an extension of the rule in *Lawrence v. Fox*, 20 N.Y. 268 . . . . If we fix our gaze upon that aspect, we shall stress the element of contract, and treat the defendants' promise as embracing the rendition of a service, which, though ordered and paid for by one, was either wholly or in part for the benefit of another. . . . These . . . methods of approach arrive at the same goal, though the paths may seem at times to be artificial or circuitous. We have preferred to reach the goal more simply. The defendants, acting, not casually nor as mere servants, but in the pursuit of an independent calling weighed and certified at the order of one with the very end and aim of shaping the conduct of another. Diligence was owing, not only to him who owed, but to him also who relied.<sup>6</sup>

Cardozo, however, reached a markedly different result in the case of *Ultramares Corp. v. Touche*.<sup>7</sup>

### B. *Ultramares Corp. v. Touche*

*Ultramares* involved a third-party claimant who brought an action against an accountant who, it was alleged, negligently prepared a financial statement for a firm which had employed him for that purpose. Cardozo wrote the court's opinion exonerating the accountant. Several excerpts from that opinion are worth repeating to illustrate Cardozo's fear of extending liability too far.

If liability for negligence [of an accountant to third parties]

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5. *Glanzer*, 233 N.Y. at 238-39, 135 N.E. at 276.

6. *Id.* at 239, 135 N.E. at 277 (citations omitted).

7. 255 N.Y. 170, 174 N.E. 441 (1931).

exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. *The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences.*<sup>8</sup>

Justice Cardozo, again fearful of overextending liability, remarked in another part of the opinion that extending liability in *Ultramares* would expose numerous other occupations to liability. Cardozo said:

Liability for negligence if adjudged in this case will extend to many callings other than an auditor's. Lawyers who certify their opinion as to the validity of municipal or corporate bonds, with knowledge that the opinion will be brought to the notice of the public, will become liable to the investors, if they have overlooked a statute or a decision, to the same extent as if the controversy were one between client and advisor. Title companies insuring titles to a tract of land, with knowledge that at an approaching auction the fact that they have insured will be stated to the bidders, will become liable to purchasers who may wish the benefit of a policy without payment of a premium. These illustrations may seem to be extreme, but they go little, if any, farther than we are invited to go now.<sup>9</sup>

Cardozo, of course, was compelled to distinguish *Glanzer*. He did so by observing that in *Glanzer*, the act deemed to be negligent had been performed for the very purpose of furnishing a weight certificate to the complaining party. It was "the end and aim of the transaction," and both principals to the transaction knew this.<sup>10</sup>

Prosser, having fallen prey to the compulsion to pigeonhole, puts both *Glanzer* and *Ultramares* in the misrepresentation category.<sup>11</sup> Misrepresentation or the action of deceit is a tort dealing with wrongful misrepresentation of facts. It has nothing to do with negligent performance of duties where negligence is likely to cause harm. Combining these concepts, as will be evi-

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8. *Id.* at 179-80, 174 N.E. at 444 (emphasis added).

9. *Id.* at 188, 174 N.E. at 448.

10. *Id.* at 183, 174 N.E. at 445.

11. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 107, at 705-08 (4th ed. 1971) [hereinafter cited as LAW OF TORTS]. Prosser, *Misrepresentation and Third Persons*, 19 VAND. L. REV. 231, 247 (1966).

dent from the discussion below, is obviously an error and will lead to confusion.

*Ultramares* has drawn considerable criticism.<sup>12</sup> Decisional law has also questioned *Ultramares*. This article will demonstrate that the reasoning of *Ultramares* is erroneous and should be buried for all time, and that the reasoning of *Glanzer* is wholly applicable in numerous fact situations involving negligent performance of duties. The error of *Ultramares* became evident in another Cardozo opinion, *H.R. Moch Co. v. Rensselaer Water Co.*<sup>13</sup>

*Moch* involved a contract between a private waterworks corporation and the City of Rochester for the supply of water. While the contract was in force a building was destroyed by fire. The building owner brought suit against the waterworks company, but the suit was dismissed. It was held that neither a contract action nor a tort action would lie. Cardozo reasoned that the failure to furnish water was at most the denial of a benefit, not commission of a wrong.

On facts identical to *Moch*, a contrary result was reached in *Doyle v. South Pittsburgh Water Co.*<sup>14</sup> In *Doyle*, Justice Musmanno, himself an eminent scholar, said of Cardozo that "Homer nodded."<sup>15</sup> Once Cardozo recognized that the water company was guilty of a negligent omission, he admitted that it had committed a breach of duty, since negligence is, by definition, a breach of duty. Musmanno, speaking of the *Moch* case, pointed out that Professor Seavey thought that Cardozo had failed to pursue his accustomed method of facing realities.<sup>16</sup>

Again, in both *Moch* and *Doyle*, there is the situation where a party to a contract, by the very nature of his contractual undertaking, places himself in such a position that the law should impose upon him a duty to perform his undertaking in

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12. E.g., Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 HARV. L. REV. 372, 398-404 (1952); Levitin, *Accountants' Liability for Defective Financial Reports*, 15 HASTINGS L.J. 436, 442-50 (1964) (praising *Glanzer* and criticizing *Ultramares*); Note, *Negligence—Public Accountants—Duty to Persons Lending Money in Reliance on False Financial Statements*, 30 COLUM. L. REV. 1066 (1950); Note, *The Accountants' Liability—For What and to Whom*, 35 IOWA L. REV. 319, 327 (1950). A particularly caustic criticism of *Ultramares* will be found in G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 132-36 (1980).

13. 247 N.Y. 160, 159 N.E. 896 (1928).

14. 414 Pa. 199, 199 A.2d 875 (1976).

15. *Id.* at 208, 199 A.2d at 882.

16. *Id.*

such a manner that third parties—strangers to the contract—will not be injured.<sup>17</sup> It is not the contract per se that creates the duty; it is the law which imposes the duty because of the undertaking in the contract. The only party charged with the duty of furnishing water in *Moch* was the water company. If it failed in this regard, the innocent landowner was left to suffer the damage with no remedy against anyone. This was a totally irrational result.

As Justice Musmanno observed, Cardozo had conceded that the water company owed a duty to the homeowners to furnish them water. Once Cardozo made this concession, the resulting liability on the water company's part was inevitable. If one has a duty to another, and failure to perform that duty foreseeably can cause harm, the failure to perform that duty with care, which in turn proximately causes harm, creates negligence liability. Again, Cardozo's pinch-penny dread of limitless liability, evidenced in *Ultramares*, led him into one of his few serious errors.

Clearly, Cardozo was wrong in *Ultramares*, at least by modern standards.<sup>18</sup> Modern decisions generally extend the boundaries of tort liability, for example, in the products liability field. Still, many courts tend to follow Cardozo's decision.<sup>19</sup> This is simply another instance where the prestige of this great judge carries the field. The courts would rather be wrong with Cardozo than right with the commentators.<sup>20</sup>

### III. *Glanzer Versus Ultramares*

As this article reveals, commentators have found a contradiction between *Glanzer* and *Ultramares*. Where *Glanzer* extends the boundaries of liability, *Ultramares* holds them in check for reasons that cannot withstand analysis. *Rusch Factors, Inc. v. Levin*<sup>21</sup> points up the glaring inconsistency between the two decisions. *Rusch* also rests on the premise that accounting firms like "the big eight" are so sound financially that the pinch-penny approach of *Ultramares* is no longer applicable.

*Rusch* involved an accountant's negligence liability to a

17. See LAW OF TORTS, *supra* note 11, § 104, at 676-82.

18. *Id.* § 94, at 625-26.

19. *Id.* at 626.

20. Kratovil, *Fixtures and the Real Estate Mortgagee*, 97 U. PA. L. REV. 180, 184 n.32 (1948).

21. 284 F. Supp. 85 (D. R.I. 1968).

third party. The court held the accountant liable, relying on *Glanzer* and rejecting *Ultramares*. The court asked:

Why should an innocent reliant party be forced to carry the weighty burden of an accountant's professional malpractice? Isn't the risk of loss more easily distributed and fairly spread by imposing it on the accounting profession, which can pass the cost of insuring against the risk onto its customers, who can in turn pass the cost onto the entire consuming public? Finally, wouldn't a rule of foreseeability elevate the cautionary techniques of the accounting profession? For these reasons it appears to this Court that the decision in *Ultramares* constitutes an unwarranted inroad upon the principle that "[t]he risk reasonably to be perceived defines the duty to be obeyed." *Palsgraf v. Long Island R.R.*, . . . .

. . . .  
The case at bar is, in fact, far more akin to the case of *Glanzer v. Shephard*, . . . another Cardozo opinion and the first case to extend to persons not in privity, liability for negligent misrepresentation causing pecuniary loss. . . . In fact, the *Glanzer* principle has been applied to accountants. . . . The *Glanzer* principle also formed the predicate for Lord Denning's dissent in *Candler v. Crane* . . . . In that case, the plaintiff responded to a company's effort to obtain financing and requested that he be supplied certified balance sheets. The defendant accountants, whose balance sheets the plaintiff relied on, actually knew the plaintiff and prepared the balance sheets for him, although they were compensated for their services by the company. The balance sheets showed solvency, when in fact there was insolvency. The plaintiff was denied recovery in a 2-1 decision by the English Court of Appeals. Lord Denning, dissenting, argued that the risk theory should be as applicable to cases of economic loss as to cases of property damage or personal injury, that the plaintiff's loss of his investment was the most probable event in light of the defendant's negligence, and that the balance sheet in *Candler* was, like the weight certificate in *Glanzer*, made for the very aim and purpose of influencing the reliant party's conduct.<sup>22</sup>

Many courts, however, have not been as successful as the *Rusch* court in perceiving and applying the *Glanzer* rule. This lack of success is attributable, at least in part, to the confusion of *Glanzer* with other theories of liability.

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22. *Id.* at 91-92 (citations omitted). Lord Denning is, of course, one of the great giants of the law.

#### IV. MISREPRESENTATION AS THE SOURCE OF THE CONFUSION CONCERNING TORT LIABILITY

To articulate the basis for liability to third parties, it is necessary to return to the confusion between liability for misrepresentation and liability for negligent performance (or nonperformance) of a duty. The concepts are in fact worlds apart. A party whose negligence has caused untold harm, moreover, may be found free from a taint of misrepresentation, with a resulting verdict for the defendant. This is an incredible miscarriage of justice. A case that points up the difference between the two concepts is *Hubbard v. State*.<sup>23</sup>

*Hubbard* involved a suit against a state veterinarian who negligently diagnosed a herd of cattle as being free of disease. When the diagnosis proved incorrect, the owner of the cattle sued the state. The majority opinion rested largely upon sovereign immunity and the strict construction given statutes waiving that immunity. One exception to state liability that was listed in the statute was a claim arising out of "misrepresentation." The court thought that the misrepresentation exception was applicable. However, Justice LeGrand dissented. This judge deserves to be remembered since he perceived the distinction between misrepresentation and the negligent performance of a duty that has eluded many celebrated judges and authorities. Justice LeGrand began his dissent by recognizing the exception under the Iowa statute for misrepresentation. Finding no definition of misrepresentation in the statute, Justice LeGrand turned to general principles of law to determine what was included under the term misrepresentation. He concluded:

There is abundant authority, both in our decisions and those of other jurisdictions, that plaintiff's petition here is bottomed, not on misrepresentation, but on negligence. There is nothing in the Act which changes this.

Here the conduct complained of is a faulty diagnosis of plaintiff's cattle followed by an erroneous report of their condition. The misrepresentation which the majority holds to be covered by the exception in the statute is the very report the veterinarian was required to furnish as soon as he undertook the testing of the cattle. The majority treats the duty to properly test as separable from the duty to accurately report the

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23. 163 N.W.2d 904 (Iowa 1969).



results of the test.<sup>24</sup>

Justice LeGrand then proceeded to discuss a number of decisions where negligence liability and misrepresentation liability had not been properly distinguished. He continued:

[T]hese cases [are] cited . . . only to demonstrate that such a claim as plaintiff asserts is not one which arises out of misrepresentation. Instead the misrepresentation has always been important only as bearing on the negligent conduct.

Any other result seems indefensible when it is pointed out that in most instances the services hired are worthless without the ultimate communication of results from the expert to the one who employed him. Usually that is the only purpose for engaging the expert in the first place. To draw a line on one side of which he is responsible for negligence in performing his investigative or diagnostic duties while on the other he is liable only because he told what he did is nothing less than casuistry.<sup>25</sup>

It is very much to Justice LeGrand's credit that he saw the *Glanzer* rationale as creating a duty in the *Hubbard* defendants, and that he saw *Glanzer* as making the defendants liable for negligent performance of that duty. The distinction Justice LeGrand saw is pointed up by termite inspector cases. If, in a termite case, the inspector negligently fails to detect termite infestation, it is *that* negligence that causes the loss, not the vacuous reporting of a nonexistent situation.

## V. THE FEDERAL DECISIONS

The federal decisions reveal the same confusion regarding

24. *Id.* at 912.

25. *Id.* at 913-14 (LeGrand, J., dissenting) (citations omitted) (emphasis added). The authorities on misrepresentation, particularly innocent misrepresentation, are numerous. See, e.g., Hill, *Damages for Innocent Misrepresentation*, 73 COLUM. L. REV. 679 (1973) (article is replete with citations, and gives historical background on the Restatements of Torts). However, the adoption of the unconscionability section of the UCC has introduced a new approach. See Kratovil, *The Restatement (Second) of Contracts and the UCC: A Real Property Law Perspective*, 16 J. MAR. L. REV. 287, 290-93 (1983); E. FARNSWORTH, *CONTRACTS* § 4.28 (1982). The doctrine of promissory estoppel now has numerous adherents, and has served to blur the line between contracts and torts. See *Hoffman v. Red Owl Stores, Inc.*, 26 Wis. 2d 683, 133 N.W.2d 267 (1965); see also E. FARNSWORTH, *supra*, § 3.26, at 191 (commenting on the *Red Owl* case). There is an overwhelming rush toward justice and fairness that calls in question many of the older precedents and articles. A like tendency is evident in England. Burrows, *Contract, Tort and Restitution—A Satisfactory Division or Not?*, 99 LAW Q. REV. 217, 256 (1983).

the difference between negligent misrepresentation and the negligent performance of an act that one has a duty to perform with care. Thus, in *U.S. v. Neustadt*,<sup>26</sup> the plaintiff purchaser sued the United States under the Federal Tort Claims Act, contending that the Federal Housing Authority had made a negligent appraisal of the property for the lender. The court held for the plaintiff, citing *Glanzer*.<sup>27</sup> The court held that the wrongful conduct consisted of the negligent appraisal, leading the plaintiffs to pay more for the property than it was worth.<sup>28</sup> The communication of the results of this negligent appraisal was merely incidental. There was an element of misrepresentation, but it was relatively unimportant.

The Supreme Court reversed,<sup>29</sup> stressing the misrepresentation factor for which the federal government was found not liable under the particular statute.<sup>30</sup> The same issue arose in *Block v. Neal*.<sup>31</sup>

*Block*, recently decided by the Supreme Court, differed factually from *Neustadt* only in that *Block* involved the Farmer's Home Administration ("FmHA") and a construction loan. However, the *Block* Court held the federal agency liable.<sup>32</sup> The *Block* Court pointed out the difference, maintained by this author, between misrepresentation liability and negligence liability.<sup>33</sup> The *Block* Court observed that the failure of FmHA to point out defects to the builder while construction was proceeding could hardly be regarded as misrepresentation.<sup>34</sup> It was negligence in supervision, for which the federal agency was liable under the Tort Claims Act.<sup>35</sup> The harm suffered by the purchaser of the building sprang from negligence, not misrepresentation. The Court conceded that misrepresentation liability and negligence liability could overlap.<sup>36</sup> Nevertheless, the Court reasoned that they represent distinct sources of liability. Thus the highest

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26. 281 F.2d 596 (4th Cir. 1960), *rev'd*, 366 U.S. 696 (1961).

27. *Id.* at 601.

28. *Id.*

29. *U.S. v. Neustadt*, 366 U.S. 696 (1961).

30. *Id.* at 706-11.

31. *Neal v. Bergland*, 646 F.2d 1178 (6th Cir. 1981), *aff'd sub. nom.*, *Block v. Neal*, 103 S. Ct. 1089 (1983).

32. *Block*, 103 S. Ct. at 1094-95.

33. *Id.* at 1094.

34. *Id.* at 1093-94.

35. *Id.* at 1094-95.

36. *Id.*

court in the land, by unanimous decision, has recognized the distinction between misrepresentation liability and negligence liability.

Another significant federal decision is *First Financial Savings & Loan Assn. v. Title Insurance Co. of Minnesota*.<sup>37</sup> In *First Financial*, a mortgage lender was guilty of negligence in closing a real estate sale, to the damage of third parties not in privity. The court held the lender liable, disregarding prior inconsistent Georgia cases, and relying chiefly on a Fifth Circuit decision, *North American Co. for Life and Health Insurance v. Berger*.<sup>38</sup> The *Berger* court had held a psychiatrist liable where he certified a negligent diagnosis upon which an insurance company relied. *Berger* contained a discussion of *Ultramares* and cited *Glanzer* for support.<sup>39</sup> Clearly, federal courts have come down on the side of *Glanzer* principles. Casebook authors have not been as successful in piercing the confusion as have the federal courts.

## VI. THE CASEBOOKS

The casebooks reveal conflicting views as to where *Glanzer* and *Ultramares* should be pigeonholed. These decisions are not mentioned in Closen, Fisher, Perlmutter, and Wittenberg, *Contracts: Cases and Materials* (1981) nor in Dawson and Harvey, *Contracts and Contract Remedies* (1967). *Ultramares* is dealt with in some detail in Kessler and Gilmore, *Contracts: Cases and Materials* at pages 1032, 1142, 1154, and 1155 (1970). *Ultramares* is not included in Keeton and Keeton, *Torts: Cases and Materials* (1977) but appears in Shulman, James, and Grey, *Torts* at page 809 (1976). *Glanzer* appears in Green, Pedrick, et al., *Torts: Cases and Materials* at page 797 (1977). Evidently, those who teach contracts and torts are divided in their thinking as to where these cases should be taught.

There is, of course, an explanation for the differing points of view on the scope of contracts law in a given situation. Thus, it has been said that types of transactions have marched in and out of the area of contracts.<sup>40</sup> Professor Gilmore describes contract law as a theoretical construct having little or nothing to do

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37. 557 F. Supp. 654 (D.N.D. Ga. 1982).

38. 648 F.2d 305 (5th Cir.), cert. denied, 454 U.S. 1084 (1981).

39. *Id.* at 306.

40. L. FRIEDMAN, *CONTRACT LAW IN AMERICA* 20-24 (1965).

with the real world.<sup>41</sup> He asserts that until the Industrial Revolution left its mark, the law of contracts did not exist as such.<sup>42</sup> But having come into existence, so-called contracts law, at least as reflected in the Restatements, developed schizophrenia as it was worked over through the opposing views of Williston and Corbin.<sup>43</sup> To complicate matters, Cardozo evolved his own brand of contracts law.<sup>44</sup> As a result, "contracts" is being "reabsorbed" into the mainstream of torts.<sup>45</sup> Amusingly, Gilmore suggests that a good first-year course would be "Contorts."<sup>46</sup> In Gilmore's view of civil liability, as conceived by the twentieth century mind, each of us is his brother's keeper.<sup>47</sup> Law is process, flux, change.<sup>48</sup> It should come as no surprise, therefore, to find current doctrine preferring *Glanzer* to *Ultramares*. Fortunately, this trend is appearing in decisional law with the rejection of a pigeonholing approach.

## VII. PIGEONHOLING AND PRIVACY

It is a characteristic of all decisional law to attempt to force the facts of a lawsuit into some pigeonhole that enables the court to decide the case by forcing the fact pattern into a familiar category and deciding the case by the rules of law of the pigeonhole. Many courts have welcomed an approach moving away from pigeonholing and combining tort and contracts concepts. Surprisingly, some courts, dismayed by the trend toward using both tort and contracts concepts freely, have recently begun a counterrevolution. *Moorman Manufacturing Co. v. National Tank Co.*<sup>49</sup> is a good example of this return to pigeonholing.

In *Moorman*, the plaintiff purchased a grain storage tank from defendant. The tank proved defective and the plaintiff sued, advancing theories of strict liability in tort, misrepresentation, and negligence. The court held that the plaintiff could not

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41. G. GILMORE, *THE DEATH OF CONTRACT* 7 (1974).

42. *Id.* at 8-9.

43. *Id.* at 60.

44. *Id.* at 57.

45. *Id.* at 87.

46. *Id.* at 90. The merger of contract law into tort law is also described in a recent English periodical. Bishop, *The Contract-Tort Boundary and the Economics of Insurance*, XII *THE JOURNAL OF LEGAL STUDIES* 241 (1983).

47. G. GILMORE, *supra* note 41, at 95.

48. *Id.* at 98.

49. 91 Ill. 2d 69, 435 N.E.2d 443 (1982).

recover on these theories.<sup>50</sup> In direct opposition to the views expressed by Gilmore, the court suggested that there was a distinct line of demarcation between contract and tort cases. The court found that the law of sales, as established in the Uniform Commercial Code, spelled out in detail the existing liabilities where a product fails to measure up to the normal buyer's expectations, and that for such normal economic loss the purchaser would have to sue in contract.<sup>51</sup> The court conceded that economic loss is recoverable where one intentionally makes false representations and where one who is in the business of supplying information for the guidance of others in their business transactions makes negligent representations.<sup>52</sup> As in *Rozny v. Marnul*,<sup>53</sup> the court also conceded that when a product is sold in a defective condition unreasonably dangerous to the user or consumer, strict liability in tort is applicable for personal injury to the plaintiff, as well as for physical injury of plaintiff's property.<sup>54</sup> However, except in these three instances—intentional misrepresentation, negligent misrepresentation by one in the business of supplying information, and strict liability—the court held that recovery in negligence should not be allowed for economic losses.<sup>55</sup> The *Moorman* court's discussion reveals that the authorities are divided on the issue of extending or constricting negligence liability in these situations, and the authorities are copiously cited by the court. *Ultramares* is mentioned only in passing.<sup>56</sup> *Glanzer* is ignored.

The *Moorman* majority opinion did not discuss privity, but privity is mentioned in a concurring opinion.<sup>57</sup> The concurring judge was concerned that allowing recovery for economic loss from negligence in contract actions might bring back privity.<sup>58</sup>

An excellent comment observes that *Moorman* leaves numerous and substantial questions unresolved.<sup>59</sup> The *Moorman* court failed to recognize that contract and tort law can overlap

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50. *Id.* at 73-74, 435 N.E.2d at 444-45.

51. *Id.* at 81-94, 435 N.E.2d at 448-54.

52. *Id.* at 88-89, 435 N.E.2d at 452.

53. 43 Ill. 2d 54, 250 N.E.2d 656 (1969).

54. *Moorman*, 91 Ill. 2d at 81, 435 N.E.2d at 448.

55. *Id.* at 87, 435 N.E.2d at 450.

56. *Id.* at 88, 435 N.E.2d at 452.

57. *Id.* at 99, 435 N.E.2d at 456 (Simon, J., concurring).

58. *Id.*

59. Bertschy, *The Economic Loss Doctrine in Illinois After Moorman*, 71 ILL. B.J. 346 (1983).

and that the boundaries of tort law expand and shrink, not based solely on the boundaries of contract law, but on an analysis of underlying tort principles.<sup>60</sup> If the distinction argued for in *Moorman* were allowed to stand it would undoubtedly stifle the growth of tort law.

Instances of gross injustice may occur if the *Moorman* distinctions are upheld. For example, suppose a testator wished to disinherit his heirs. He orders his lawyer to draw up a will leaving an enormous estate to strangers. The will is negligently drawn. The strangers' action against the lawyer, if there is one, would properly be a negligence action for economic harm; yet, *Moorman* would appear to preclude recovery.

It seems safe to assume that in one way or another the courts will reject a retreat to privity.<sup>61</sup> Furthermore, the three exceptions in which *Moorman* explicitly allows recovery for economic harm leave ample room for strangers to recover for negligence in many property law situations. In short, *Moorman* does not affect the discussion below outlining the liability of surveyors, architects, accountants, and others under the *Glanzer* principle.

As to privity of contract viewed from a policy standpoint, it would seem that it has been greatly weakened by section 402 A of the Restatement (Second) of Torts. Privity of contract has virtually expired as a twentieth-century legal concept in negligence cases.<sup>62</sup> The questions are really these:

(1) Has harm occurred to a person or property?

(2) As a matter of socio-economic policy, where should the loss be allocated?

A rubric like privity of contract offers no help whatever in a solution of these problems. Thus, a decision like *Ultramares* that seeks to hold liability within confines on the basis of the privity concept is hopelessly behind the times.

### VIII. THE PROPER APPROACH

If we are to talk about these problems in terms of duty, we inevitably come to the key question of the circumstances under which a duty arises. "No better general statement can be made,

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60. *Id.* at 350.

61. See *Redarowicz v. Ohlendorf*, 92 Ill. 2d 171, 187, 441 N.E.2d 324, 332 (1982) (Ryan, C.J., dissenting) (claims majority overrules *Moorman*).

62. *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 615-16, 210 N.E.2d 182, 185 (1965).

than that the courts will find a duty where, in general, reasonable men would recognize it and agree that it exists."<sup>63</sup> And, of course, changing social conditions constantly cause the recognition of new duties.<sup>64</sup> The question, then, is one of justice or social policy as perceived against the background of the times. The question is one involving the "weighing of interests."<sup>65</sup> This leads us back to another famous Cardozo decision, *Palsgraf*,<sup>66</sup> and the numerous commentaries following the decision.<sup>67</sup>

With customary candor, Prosser observes that the question of liability to the unforeseeable plaintiff must be regarded as an open one.<sup>68</sup> A much stronger case can be made, of course, for liability to the foreseeable plaintiff. Prosser, unfortunately, relegated his discussion of *Glanzer* and *Ultramares* to the chapter on misrepresentation.<sup>69</sup> Misrepresentation is just one of many tort topics.<sup>70</sup> It is not an important tort and is given short shrift in the casebooks. Negligence law is of enormous importance. This is where *Glanzer* and *Ultramares* belong. Perhaps, if Prosser had placed *Glanzer* and *Ultramares* in the negligence category, he would have expanded application of the *Glanzer* principle.

It is obvious that the concept of liability to unknown third parties is one likely to arise initially in a field other than real property law. Thus, the discussion here begins with a discussion of some famous decisions by Justice Cardozo in fields other than real property law. These decisions set the stage for a later discussion of real property law aspects of the rule.

The author wishes to point out that the battle to eliminate meaningless labels such as "privity of contract," "privity of estate," or just plain "privity," is not yet over. By way of example, consider the recent cases holding that a builder-seller of a home impliedly warrants that the construction is sound.<sup>71</sup> This doctrine of implied warranty, less than twenty years old, was greeted as a great leap forward into the twentieth century, and as a notable achievement in real property law. When, in the

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63. LAW OF TORTS, *supra* note 11, at 327.

64. *Id.*

65. L. GREEN, RATIONALE OF PROXIMATE CAUSE 128 (1927).

66. *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928).

67. LAW OF TORTS, *supra* note 11, at 254 n.50.

68. *Id.* at 258.

69. *Id.* at 707-08.

70. G. EDWARD WHITE, *supra* note 12, at 84.

71. *See infra* note 145.

same typical fact situation, the second purchaser of a home brought suit against the builder-seller for breach of his implied warranty of sound construction, the second purchaser was greeted by some decisions denying him relief on the ground of absence of privity, a giant leap back into the nineteenth century.<sup>72</sup> Recognition of the absurdity of these simultaneous leaps forward and backward finally prompted many courts to permit the second purchaser to sue and to hold that privity was unnecessary.<sup>73</sup> Still, it is disturbing to think that lawsuits can be won or lost depending on the presence or absence of privity. The author has characterized privity as a meaningless term because it has no sensible meaning in resolving the question of whether a duty exists, and how far liability should extend as a matter of policy. Privity offers no help in resolving the conflicting socio-economic values involved. It simply tells us who will win the lawsuit, a decision made by the court before it decides that privity is of importance. Were Cardozo writing today, he would not be in the forefront of those dealing with socio-economic problems conceptually by use of the privity rubric.

Some lawyers are troubled by the concept of tort liability arising out of nonperformance or negligent performance of a contract duty. Prosser explains how the duty arises. With respect to the duty of a seller of goods, the seller is under a duty to exercise the care of a reasonable man of ordinary prudence to see that the goods do no harm to the buyer. This duty, while it arises out of the relation created by the contract, is not identical with the contract obligation. It is merely a part of the general responsibility, sounding in tort, which is placed by the law upon anyone who stands in such a position that his affirmative conduct will affect the interests of others.<sup>74</sup>

In this area where tort liability has been derived from a failure to observe a contract duty, a bitter controversy is raging at present. Probably the first case of importance in this controversial area is *Gruenberg v. Aetna Insurance Co.*<sup>75</sup> In *Gruenberg*, the court held that where the obligation of good faith, which

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72. See, e.g., *Oliver v. City Builders, Inc.*, 303 So. 2d 466 (Miss. 1974) (the implied warranty extends only to the person buying from the builder—subsequent purchasers are excluded); see also *Redarowicz v. Ohlendorf*, 92 Ill. 2d 171, 441 N.E.2d 324 (1982).

73. See, e.g., *Redarowicz v. Ohlendorf*, 92 Ill. 2d 171, 183, 441 N.E.2d 324, 330 (1982).

74. LAW OF TORTS, *supra* note 11, at 632.

75. 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973).



inheres in all contracts, is not observed, a cause of action in tort arises. The authorities are sharply divided on the issue of whether a tort cause of action arises in such a situation.<sup>76</sup> It is noteworthy that in *Glanzer*, Cardozo specifically rejected an approach that would put the *Gruenberg* case in a pigeonhole. He spoke in terms of duty, based upon the economic background of the situation.<sup>77</sup>

The most illuminating decision this author has been able to find on the question of how tort liability arises out of a breach of contract is *Dean v. Hershowitz*.<sup>78</sup> In *Dean*, a landlord agreed with his tenant to repair a porch, but the landlord breached the agreement. The tenant was injured as a result of the breach and he brought a successful personal injury action. The court decided that the instance afforded by a landlord's breach of a covenant to repair is part of the question of when, and to what extent, a recovery for negligence may be based upon breach of a contract obligation. This latter problem is, the court said, just part of the larger problem of the relationship between contract and tort law. The court chose to view the problem in the same manner as did Professor Bohlen. The court said:

[W]e adopt Professor Bohlen's statement in his *Studies in the Law of Torts*, p. 87: "Modern tendency is to make the fundamental nature of the obligation the test as to whether the action is founded upon either tort or contract." As Bohlen points out, in many instances where parties through contract have entered into a definite relationship to each other, as in the instance of a physician and his patient, a lawyer and his client, or a bailor and bailee, the law imposes certain duties arising out of the relationship itself as to the use of care; these it regards as impliedly entering into the contract itself; but they are in fact more fundamental than the obligation of the contract. This appears very clearly with reference to the situation of the physician and his patient, because the duty to use reasonable care and skill arises where a physician undertakes to treat a patient, even in the absence of any contract. In such situations an action based upon the failure to use the required care and skill lies in tort and, if there is a contract, may also lie in contract.

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76. See *Spencer v. Aetna Life & Cas. Ins. Co.*, 227 Kan. 914, 611 P.2d 149 (1980) for the authorities on both sides of the issue. See also Bourhis, *Recognition and Recovery for Bad Faith Torts*, TRIAL, December 1982, at 46.

77. *Glanzer v. Shepard*, 233 N.Y. 236, 240-41, 135 N.E. 275, 276 (1922).

78. 119 Conn. 398, 177 A. 262 (1935).

Negligence occurs where one under a duty to exercise a certain degree of care to avoid injury to others fails to do so.

. . . [N]egligence may be the outgrowth of a precedent contractual relationship, but . . . it may also arise in situations where there is no thought of any such underlying relationship, as in the ordinary case where two automobiles meet in the highway. . . . [The opinion of Brett, M.R., in *Heaven v. Pender*, L.R. 11 Q.B.D. 503, 509, states the principle well:] "Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."<sup>79</sup>

Here again is revealed an understanding, as in *Glanzer*, that if there is a duty, however created, involving foreseeable harm to others if neglected, negligent performance of that duty causes liability. Does it matter that the duty happens to spring from a contract requirement? The *Glanzer* reasoning was that the source of the duty was of no consequence. This was correct, of course, because it is folly to argue that under one label a person is protected from harm, but under another label no such protection exists. With this understanding of the *Glanzer* principle, we are prepared to examine its role in real property law.

## IX. THE ROLE OF REAL PROPERTY LAW

Since it is obvious that contract law and tort law do indeed overlap, and are compartmentalized only for teaching purposes, the question arises as to the role of real property law. It is essential that modern real property principles be scrutinized to determine whether this separately taught area of the law does indeed belong logically in the general body of civil law that includes contracts and tort law. Perhaps, since all three branches of general civil law deal with liabilities to third parties, the *Glanzer* principle, properly applied to real property cases and to cases related to real property, might yield some consistent results.

### A. *Covenant Liability—Fee Title*

By the majority rule a running real covenant falls under the

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79. *Id.* at 405-08, 177 A. at 265-66 (citations omitted).

Statute of Frauds.<sup>80</sup> Thus, such a covenant must constitute an interest in land.<sup>81</sup> Surely a covenant that restricts a landowner's right to use his land in some way effects a subtraction from that landowner's bundle of rights; only an interest in land can accomplish such a result.<sup>82</sup> It is said that real covenants run along with estates "as a bird on a wagon."<sup>83</sup> Thus, a real covenant is an interest in land perched upon another interest in land.

That the running covenant has a contract aspect is clear. Indeed, it has been said that the covenants in a deed constitute no part of the conveyance, but are "separate contracts."<sup>84</sup> For example, assume *A* owns Blackacre. *A* executes a conveyance of Blackacre to *B*. The conveyance contains a running covenant binding on *A*. *B* may sue *A* if *A* breaches the covenant because "privity of contract" exists between them. If *B* conveys before *A* breaches, later owners deriving title from *B* may sue *A*, basing their claim on the fact that the covenant, perched on the estate like a bird on a wagon, was carried thereby into the hands of the party receiving the estate.

For our purposes, this example suffices to show that for a long time third parties have been allowed to sue under well-established principles of real property law. It is generally the third party who suffers the harm or damage and the third party who brings the action.

As to the parties in whose favor this liability extends, it runs, of course, in favor of remote grantees. If the benefitted land is divided by deeds, it runs in favor of each subdivision.<sup>85</sup> Each grantee of a portion of the burdened premises carries a portion of the burden.<sup>86</sup> Thus, as in *Glanzer*, liability to unknown third parties is recognized.

### *B. Landowner and Landlord Liability*

Under older decisions, a landowner's liability to those on his land without his permission often depended upon the archaic distinctions between licensees, invitees, and trespassers. The

80. Stoebeck, *Running Covenants: An Analytical Primer*, 52 WASH. L. REV. 861, 868 (1977).

81. *Id.*

82. *Id.*

83. R. POWELL & P. ROHAN, REAL PROPERTY § 671, at 705 (abr. ed. 1968).

84. *Bagley v. Fletcher*, 44 Ark. 153, 160 (1884).

85. 21 C.J.S. *Covenants* § 62a (1940); 20 AM. JUR. 2d *Covenants* § 29 (1965).

86. 2 AMERICAN LAW OF PROPERTY § 9.6 at 359 (1952); Annot., 12 A.L.R. 826 (1921).

modern cases reject these distinctions in favor of a single duty of reasonable care in all circumstances.<sup>87</sup> This rule originated in California in *Rowland v. Christian*,<sup>88</sup> and is also followed in Colorado, Louisiana, Mississippi, New Hampshire, and Rhode Island.<sup>89</sup>

The old law of landlord liability to a tenant was a morass.<sup>90</sup> An enormous breach in the general caveat emptor approach took place when the courts imposed an implied warranty of habitability on the landlord.<sup>91</sup> After that there was little point to the old rules, and so the Supreme Court of New Hampshire, in *Sargent v. Ross*,<sup>92</sup> proceeded to discard them. That court held that landlords, like other persons, must exercise reasonable care not to subject others to an unreasonable risk of harm.

The modern trend has been to hold that a breach of the landlord's covenant to repair in the lease is a ground for holding the landlord liable for injuries to his tenant if the failure to repair was a contributing cause of the injury.<sup>93</sup> Here is another instance where, over the years, the early rule denying recovery because of the absence of privity has been eroded. The present rule regarding landlord liability in tort has been broadened to include within its protection all those properly on the premises.<sup>94</sup>

Here again Prosser tells us that this landlord liability is a tort liability arising out of a contract relation.<sup>95</sup> Discussing the philosophy underlying the rule, Prosser concludes that the best explanation is the undeclared policy placing the responsibility for harm caused by disrepair upon the party best able to bear

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87. *Basso v. Miller*, 40 N.Y. 233, 241, 352 N.E.2d 868, 872, 386 N.Y.S.2d 564, 568 (1976).

88. 69 Cal. 2d 108, 118, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968). See Note, *Tort—Premises Liability—New York Joins Minority of States Abolishing Trespasser, Licensee, Invitee Distinctions*, 45 *FORDHAM L. REV.* 682, 682-83 (1976).

89. Annot., 32 A.L.R.3d 508, 520 (Supp. 1983).

90. *LAW OF TORTS*, supra note 11, § 63, at 399.

91. See, e.g., *Mease v. Fox*, 200 N.W.2d 791, 794 (Iowa 1972).

92. 113 N.H. 388, 397, 308 A.2d 528, 534 (1973).

93. Annot., 78 A.L.R.2d 1238, 1252 (1961).

94. *Lulay v. South Side Trust & Sav. Bank*, 4 Ill. App. 3d 483, 485-86, 280 N.E.2d 802, 804 (1971); *Putnam v. Stout*, 38 N.Y.2d 607, 616-18, 345 N.E.2d 319, 325-26, 381 N.Y.S.2d 848, 853-54 (1976); *Rampone v. Wanskuck Bldgs. Inc.*, 102 R.I. 30, 35-36, 227 A.2d 586, 589 (1967); see also Comment, *Landlord—Tenant—Repairs—Landlord Could be Liable Under Covenant to Repair for Injuries to Tenant's Invitees Caused by Breach of Such Agreement*, 5 *FORDHAM URB. L.J.* 165 (1976).

95. *LAW OF TORTS*, supra note 11, at 409.

it.<sup>96</sup> The broad rule of landlord tort liability is supported by the Restatement (Second) of Torts. A variety of reasons are given for this minority rule. Of interest is the statement that "[t]he lessor's duty . . . is not merely contractual, although it is founded upon a contract. It is a tort duty."<sup>97</sup>

### C. Surveyor Liability

The leading case on a surveyor's liability to a third party is *Rozny v. Marnul*.<sup>98</sup> In *Rozny*, a surveyor hired by the seller of a vacant lot negligently mislocated the corners. The purchaser, relying on the survey, located his building partly on adjoining property. The purchaser's suit against the surveyor was sustained. The defense of lack of privity was rejected. The court also rejected a third-party beneficiary theory, a theory that has figured in some cases involving faulty abstracts of title.<sup>99</sup> The court instead stated that the case was an instance of a tort liability arising out of a breach of contract.<sup>100</sup> The court felt that where a party to a contract is called upon to perform a task, and the result of that task will disclose information to a known third party who will rely on it, liability to the third party will arise if the task is performed negligently. The court leaned heavily on *Glanzer* and on Prosser to reach this conclusion.<sup>101</sup>

In *Rozny*, the court specifically declared that privity of contract had no place in deciding questions of tort liability.<sup>102</sup> Liability would be measured by the scope of the duty owed. The court agreed with Justice Cardozo in *Ultramares* that the threat of unlimited liability should not be disregarded; the court reasoned, however, like Justice Cardozo in *Glanzer*, that in cases involving negligence of surveyors the class of persons who could suffer injury would be limited to purchasers and lenders.<sup>103</sup> The court indicated that innocent parties should not suffer the burden of professional mistakes, and that an *Ultramares*-type rule might not cause an improvement in the quality of surveying in

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96. *Id.* at 410.

97. RESTATEMENT (SECOND) OF TORTS § 357 comment c (1975).

98. 43 Ill. 2d 54, 250 N.E.2d 656 (1969). See also Comment, *The Supervising Architect: His Liabilities and His Remedies When a Worker is Injured*, 64 N.W.U. L. Rev. 535 (1969).

99. *Rozny*, 43 Ill. 2d at 59, 250 N.E.2d at 659.

100. *Id.* at 60, 250 N.E.2d at 660.

101. *Id.* at 63-68, 250 N.E.2d at 661-63.

102. *Id.* at 60, 250 N.E.2d at 660.

103. *Id.* at 61, 250 N.E.2d at 661-62.

Illinois.<sup>104</sup> The great significance of *Rozny*, of course, lies in the holding that the negligent surveyor owed a duty to an unknown plaintiff.

The *Rozny* court stated that lack of direct contractual relationship between the parties is not a defense in a tort action.<sup>105</sup> Thus, liability would extend to a later purchaser who actually erects a building in reliance on the survey, not merely the purchaser contemplated at the time the survey was made. This is but a simple application of modern tort principles applied in products liability cases, and in the modern decisions rejecting privity as a meaningless criterion.<sup>106</sup> Lenders who rely on a survey are specifically mentioned as being protected under *Rozny*.<sup>107</sup> The *Rozny* court relied on *Glanzer* and distinguished *Ultramares*. Known reliance by third persons was said to be the key factor to finding the surveyor liable in *Rozny*.<sup>108</sup>

As has been stated, *Rozny* has incorrectly been thrown into the category of cases imposing liability for negligent misrepresentation.<sup>109</sup> Unfortunately, *Rozny* devotes much of the opinion

104. *Id.* at 63, 250 N.E.2d at 663.

105. *Id.* at 60, 250 N.E.2d at 660.

106. *See, e.g.*, *Redarowicz v. Ohlendorf*, 92 Ill. 2d 171, 441 N.E.2d 324 (1982).

107. *Rozny*, 43 Ill. 2d at 63, 250 N.E.2d at 661.

108. *Id.* at 67-68, 250 N.E.2d at 663.

109. *O'Brien v. Noble*, 106 Ill. App. 3d 126, 435 N.E.2d 554 (1982). Thus, in *O'Brien*, the court revealed its characterization of *Rozny*. Speaking of the claim before the court in *O'Brien*, the court said:

As to the doctrine of negligent misrepresentation, plaintiffs rely primarily on a British case decided by the House of Lords: *Hedley Byrne & Co. v. Heller & Partners, Ltd.* [1964] A.C. 465 and its Illinois progeny. In that case an advertising agency purchased advertisements for a business and assumed personal responsibility for the cost. The business subsequently became insolvent and the advertising agency sued the business's bank, alleging that the bank had been negligent in that it provided plaintiff's bank with erroneous financial data concerning the business. The House of Lords held that a negligent, though honest, *misrepresentation*, spoken or written, may give rise to a cause of action for damages for loss caused thereby, apart from any contract or fiduciary relationship, since law will imply a duty of care when a person seeking information from a party possessed of special skills trusts him to exercise due care, and that party knew or ought to have known that reliance was being placed on his skill and judgment. ([1964] A.C. 465, 486, 502, 514.) Since the bank, in providing the financial data, expressly disclaimed any responsibility therefor, this rule was held inapplicable to the defendant in the case, however.

The Illinois Supreme Court adopted the general rationale of *Hedley Byrne* in *Rozny v. Marnul* (1969), 43 Ill. 2d 54, 250 N.E. 2d 656.  
*O'Brien*, 106 Ill. App. 3d at 128-29, 435 N.E.2d at 556 (emphasis added).

Here again the emphasis of the court was placed on misrepresentation, whereas the cause of the loss was negligent performance. The incorrect reporting is but an incident to the main task. Of course, the action of deceit is an old, familiar one, and it is easier to

to the doctrine of misrepresentation, for it is evident that the fault of the surveyor lies in the incorrect location of the boundaries, not in incorrect depiction of the already incorrect boundaries. Most of an average surveyor's time is spent in the field determining boundaries. Drawing the picture is a minor activity of the surveyor. The point is that the reporting of the surveyor is irrelevant. Precisely the same result would be reached if either the contractor began work before the survey was prepared, going by the stakes found on the ground, or if the surveyor negligently did his surveying, correctly reported his work, and the contractor began his work based on the report. It is not the reporting of the negligent work which is significant, but rather the negligent work of the surveyor.

On facts identical with those in *Rozny*, a California court came to the same conclusion as the *Rozny* court. Referring to *Rozny*, the court in *Kent v. Bartlett*<sup>110</sup> said:

The [*Rozny*] court enumerated several factors which it considered relevant to its holding. Among these factors were the defendant's knowledge that the survey plat would be used and relied upon by others than the person ordering it, including the plaintiffs; the fact that potential liability would be restricted to a comparatively small group and that ordinarily, only one member of that group would suffer loss; the undesirability of requiring an innocent reliant party to carry the burden of a surveyor's professional mistake; and the fact that recovery by a reliant user whose ultimate use was foreseeable would promote cautionary techniques among surveyors.<sup>111</sup>

Of course, a case can be found that rejects the enlightened *Rozny* approach. For example, *Essex v. Ryan*<sup>112</sup> rejected the views expressed in Restatement (Second) of Torts.<sup>113</sup> Interestingly, the court perceived an analogy to the *Ultramares* situation and embraced *Ultramares* thinking, but the court cites in support the case of *Ryan v. Kanne*,<sup>114</sup> which followed *Glanzer*,

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place the desired result in a familiar framework. But the identical problem arises where no reporting is involved, as where a lawyer draws a faulty will and the intended devisee is deprived of a fortune. This is a civil wrong wholly outside the field of misrepresentation, and it is high time that the courts come to grips with the problem.

110. *Kent v. Bartlett*, 49 Cal. App. 3d 724, 122 Cal. Rptr. 615 (1975).

111. *Id.* at 730, 122 Cal. Rptr. at 618 (discussing *Rozny*, 43 Ill. 2d at 67-68, 250 N.E.2d at 663).

112. *Essex v. Ryan*, \_\_\_ Ill. App. \_\_\_, 446 N.E.2d 368 (1983).

113. RESTATEMENT (SECOND) OF TORTS § 552 (1976).

114. 170 N.W.2d 395 (Iowa 1969).

not *Ultramares. Essex* is decidedly lacking in scholarship.

#### D. Abstractor Liability

Obviously, no curious landowner ever orders an abstract made to determine whether he owns an unencumbered title to the land. An abstract is made only when a sale or mortgage (usually both) makes it necessary to produce evidence of title. In many sections of the Midwest it is the custom for the contract of sale to require the vendor to furnish the purchaser an abstract and to deliver it to the purchaser's attorney for examination. If the purchaser is obtaining a substantial loan, the contract may require the vendor to deliver the abstract to the lender's attorney. In the latter case it is perfectly obvious to the abstractor that the purchaser will rely on the abstract delivered to the lender.

This providing of an abstract during a real estate sale presents a typical situation calling for application of *Glanzer*. Nevertheless, there are many decisions holding that the abstractor is liable only to the hiring party, namely, the vendor. As to the others, privity is said to be lacking.<sup>115</sup> Sometimes the purchaser is sophisticated and requires that the abstract be "certified" to the purchaser. The sophisticated lender, of course, always insists that the abstract be "certified" to the lender.

A rule of law should not be permitted to exist that rests on this kind of technical nonsense. Surely, this rule of privity is doomed. In *Williams v. Polgar*,<sup>116</sup> the Michigan Supreme Court boldly set out on a *Glanzer* course and held the abstractor, hired by the vendor, liable to the purchaser for negligence.<sup>117</sup> The authorities were exhaustively explored. An appendix to the case gives the state of the law on a state-by-state basis. The court adopted in its reasoning much of the reasoning found in *Rozny*.<sup>118</sup>

In *Kovaleski v. Tallahassee Title Co.*,<sup>119</sup> the court followed *Polgar*. In *Kovaleski*, a purchaser at a tax sale relied upon an abstract furnished to the tax collector. The abstract negligently omitted some outstanding titles and the tax purchaser brought

115. Annot., 34 A.L.R.3d 1122, 1127 (1970).

116. 391 Mich. 6, 215 N.W.2d 149 (1974).

117. *Id.* at 17, 215 N.W.2d at 158.

118. *Id.* at 13-16, 215 N.W.2d at 154-57.

119. 363 So. 2d 1156 (Fla. Dist. Ct. App. 1978).



an action. The court held the abstractor liable based upon the principles in the Restatement (Second) of Torts<sup>120</sup> dealing with faulty information furnished by one who is in the business of furnishing information. This section represents basically a *Glanzer*-type approach to the problem. The court followed *Polgar* and observed that the requirement of privity was disappearing.

The *Kovaleski* court also cited with approval *A.R. Moyer, Inc. v. Graham*.<sup>121</sup> In *Moyer* the court sustained an action of a general contractor brought against the owner's architect for negligent supervision of construction. The *Moyer* court observed that privity was a theoretical device of the common law which "recognizes limitation of liability commensurate with the compensation for contractual acceptance of risk. The sharpness of its contours blurs when brought into contact with modern concepts of tort liability."<sup>122</sup> The *Moyer* court indicated that it was laying down a tort rule for imposing liability on those whose activities cause harm to persons who might foreseeably be injured.<sup>123</sup>

While the *Moyer* opinion is written in terms of the faulty information furnished, certainly in the case of the architect the basic complaint concerning him is the faulty performance of his job. The architect's job, when he is hired to supervise construction, is to detect faulty construction. Relaying information to the landowner or lender that the construction is faulty is an extremely minor aspect of his duties. To "supervise" means far more than the furnishing of information.

In many of the misrepresentation cases discussed by the courts, there is a job to do and a report to make. The job is done negligently but the report accurately depicts the results of the negligent job. The heart of the matter is faulty job performance, not misrepresentation. This is clearly evident from the misrepresentation cases where no report is contemplated, as where a faulty will is drafted and the expectations of the devisee are defeated. Faulty job performance is the heart of the matter in cases like *Moch*,<sup>124</sup> where a private water company negligently fails to maintain adequate water pressure and the plaintiff's

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120. RESTATEMENT (SECOND) OF TORTS § 552 (1976).

121. 285 So. 2d 397 (Fla. 1973).

122. *Id.* at 399.

123. *Id.* at 402.

124. See *supra* note 13 and accompanying text.

home is destroyed by fire. In these cases no report is contemplated, harm to specific individuals is clearly foreseeable, and the arguments against liability seem specious.<sup>125</sup>

The abstractor is invariably hired in a transfer or mortgage of real property. Courts have analyzed his liability either in contract or tort terms. But the issue remains, as a matter of general civil liability, who should bear the loss when the abstractor is negligent. As can be seen from *Polgar*, the court groped about before it fastened on the theory of negligent misrepresentation. The fault seems to be in the Restatement, which fails to distinguish between negligent performance and negligence in unearthing information.

### *E. Architect Liability*

In *Aetna Insurance Co. v. Hellmuth, Obata & Kassabaum, Inc.*,<sup>126</sup> a surety in a performance bond successfully sued the contractor's architect for negligent supervision. The court relied upon *Westerhold v. Carroll*,<sup>127</sup> and *Hall v. Union Indemnity Co.*<sup>128</sup> The *Kassabaum* court quoted from the Missouri Supreme Court's approval of the *Hall* decision. The Missouri Supreme Court had noted that in *Hall*, as in *Glanzer*:

[T]he person not in strict privity of contract who would be injured by defendant's negligence was known, and the "end and aim" of the provision of the contract with respect to payments, was the benefit of the surety, as well as the owner.<sup>129</sup>

The *Kassabaum* court also believed that eliminating the privity requirement would not lead to excessive liability, nor to liability exposure to an unlimited number and indeterminate class of people.<sup>130</sup>

The *Kassabaum* court referred to recent annotations which bear on the architect's liability to third parties for negligence in supervision, and which reveal a split of authority on this question.<sup>131</sup> To some extent, the annotations are outdated because

125. The general subject of abstractor liability is covered in Annot., 34 A.L.R.3d 1122 (1970), which is a singularly uninspired annotation on the subject.

126. 392 F.2d 472 (8th Cir. 1968).

127. 419 S.W.2d 73 (Mo. 1967).

128. 61 F.2d 85 (8th Cir. 1932).

129. *Aetna*, 392 F.2d at 475-76.

130. *Id.*

131. See Annot., 59 A.L.R.3d 869 (1974); Annot., 43 A.L.R.2d 1227 (1955). See also *Moloso v. State*, 644 P.2d 205, 216 (Alaska 1982); *Krieger v. J.E. Greiner Co.*, 282 Md.

the American Institute of Architects' ("AIA") documents have stricken the word "supervise" and merely require the architect to "observe." Besides the architect's liability for supervision, the architect's tort liability for economic damages suffered by the contractor has been recognized, as has the architect's liability for personal injuries caused by faulty plans.<sup>132</sup>

If we are to resolve the architect's liability in the usual torts manner, by seeking a duty, then it has been argued that the question of duty is a policy issue in which the burden on the supervising architect is outweighed by the need to protect the worker.<sup>133</sup> Again, the AIA documents attempt to exculpate the architect of liability.<sup>134</sup> Whether the AIA disclaimers will survive a legal challenge is still a matter for conjecture.<sup>135</sup>

Architects' attorneys argue in favor of *Ultramares* and, incidentally, in favor of the privity defense. They contend that the privity defense shields contracting parties from those to whom no duty was intended.<sup>136</sup> It has been argued that a party who has not paid for professional expertise should not have the privilege of relying upon it.<sup>137</sup> However, if an architect is negligent in drawing plans for structures in the public portions of a hotel, and members of the public using these public areas are injured or killed, a matter clearly foreseeable by the architect, does it matter that the persons so suffering paid no portion of the architect's fee? The arguments of architects' attorneys are plainly absurd.

The law is extremely difficult to state with respect to an architect. In the first place, the AIA dominates this field. Its elaborate documentation is the predominant form of architect and construction documentation today. Sophisticated developers rewrite this documentation because it is heavily loaded on the side of the architect.<sup>138</sup> How the heavily exculpatory language

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50, 57-58, 382 A.2d 1069, 1074 (1978).

132. Annot., 97 A.L.R.3d 455 (1980); Annot., 65 A.L.R.3d 249 (1975).

133. Miller, *The Liability of the Architect in his Supervisory Function*, FORUM, Jan. 1966, at 28.

134. R. KRATOVIL & R. WERNER, MODERN MORTGAGE LAW AND PRACTICE § 25.24 (2d ed. 1979).

135. See, e.g., Comment, *The Supervising Architect: His Liabilities and His Remedies When a Worker Is Injured*, 64 NW. U.L. REV. 535, 547 (1969).

136. Note, *Liability of Architects and Engineers to Third Parties: A New Approach*, 53 NOTRE DAME LAW. 306, 312 (1977).

137. *Id.*

138. Trapasso, *The Lawyer's Use of AIA Construction Contracts*, PRAC. LAW., May 1973, at 37.

and the plaintiff's efforts to void its effect will fare in court is an open question, and there is a vast volume of literature on this issue.<sup>139</sup>

Under some state statutes an architect may become liable to injured third parties where the architect is "in charge" of the work.<sup>140</sup> These statutes are, unfortunately, beyond the scope of this article. Imposition of liability on architects in recognition of the *Glanzer* principle is, of course, a speedy means to recognize realities; this imposition of liability is properly one for legislatures in light of the policy questions presented by the issue.

*F. Construction and Home Purchase Cases: Builder-Seller, Contractor, and Landowner Liability*

The leading and most publicized case assaulting the citadel of privity as it relates to builders and injured third parties is the New York case of *Inman v. Binghamton Housing Authority*.<sup>141</sup> In *Inman*, a child of a tenant in an apartment building was injured in a fall from a defectively constructed porch. The builder was held liable. The *Inman* court applied the reasoning of *MacPherson v. Buick Motor Co.*,<sup>142</sup> and cited many cases holding that one who erects a structure falls within the *MacPherson* rule.

In *Steinberg v. Coda Roberson Construction Co.*,<sup>143</sup> a builder sold a house to a couple, who later sold the house to the plaintiffs. The plaintiffs brought an action against the builder-seller for negligence in roof construction. The court rejected the defendant's plea of lack of privity. The court considered the development of a manufacturer's liability since *Winterbottom v. Wright*,<sup>144</sup> when tort and contract law became intermingled in that court's reasoning, and privity of contract became a factor in

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139. Carey, *Assessing Liability of Architects and Engineers for Construction Supervision*, 1979 INS. L.J. 147; Hoeverler, *Building Failure and the Respective Liabilities of the Architect and the Engineer*, 8 FORUM 481 (1973); Murphy, *The Impact of the 1976 Edition of AIA Document A201 on the Liability of Architects and Engineers to the Construction Surety for Negligent Certification of Payments*, 45 INS. COUNSEL J. 200 (1978); Comment, *The Supervising Architect: His Liabilities and His Remedies When a Worker Is Injured*, 64 NW. U.L. REV. 535 (1969).

140. See, e.g., *Robinson v. Greeley & Hanson*, 86 Ill. App. 3d 1082, 408 N.E.2d 723 (1980).

141. 3 N.Y.2d 137, 143 N.E.2d 895 (1957).

142. 217 N.Y. 382, 111 N.E. 1050 (1916).

143. 79 N.M. 123, 440 P.2d 798 (1968).

144. 10 M&W 109, 152 Eng. Rep. 402 (1842).

manufacturer's tort liability. The court noted:

Since that time, and as the dominance of the industrial complex in our society has created a need for an increase in the purview of manufacturers' responsibilities to the public, courts have noted various exceptions to the privity of contract requirement. . . . Under the present posture of the law, *the great weight of authority no longer recognizes privity of contract as having a place in tort law.*<sup>145</sup>

Furthermore, by the great weight of modern authority, a builder-seller is held to have given an implied warranty of sound construction.<sup>146</sup> This rule, derived by analogy to the Uniform Commercial Code, and originating in the last twenty years, has found favor in the legal periodicals.<sup>147</sup>

The question that has troubled the courts is whether liability is confined to the first purchaser, where privity of contract is present, or extends also to later purchasers. *Elden v. Simmons*<sup>148</sup> held that a builder-seller was liable to a *second purchaser* for home defects and rejected the defense of lack of privity. At least

145. *Steinberg*, 79 N.M. at 124, 440 P.2d at 799 (citations omitted) (emphasis added).

146. *Cochran v. Keeton*, 287 Ala. 439, 252 So. 2d 313 (1971); *Columbia Western Corp. v. Vela*, 122 Ariz. 28, 592 P.2d 1294 (Ariz. App. 1979); *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970); *Pollard v. Saxe & Yolles Dev. Co.*, 12 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974); *Carpenter v. Donohoe*, 154 Colo. 78, 388 P.2d 399 (1964); *Glisan v. Smolenske*, 153 Colo. 274, 387 P.2d 260 (1963); *Vernali v. Centrella*, 28 Conn. Supp. 476, 266 A.2d 200 (1970); *Berman v. Watergate West, Inc.*, 391 A.2d 1351 (D.C. 1978); *Gable v. Silver*, 258 So. 2d 11 (Fla. Dist. Ct. App. 1972), *cert. dismissed*, 264 So. 2d 418 (Fla. 1972); *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966); *Petersen v. Hubschman Constr. Co.*, 76 Ill. 2d 31, 389 N.E.2d 1154 (1979); *Weck v. A:M Sunrise Constr. Co.*, 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962); *Theis v. Heuer*, 264 Ind. 1, 280 N.E.2d 300 (1972).

147. *Haskell*, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 Geo. L.J. 633 (1965); *Jaeger*, *The Warranty of Habitability*, 47 CHI.-KENT L. REV. 1 (1970); *Nielsen*, *Caveat Emptor in Sales of Real Property—Time for a Reappraisal*, 10 ARIZ. L. REV. 484 (1968); *Valore*, *Products Liability for a Defective House*, 18 CLEV. ST. L. REV. 319 (1969); *Comment*, *Real Property—Implied Warranties—Sale of House by Builder-Vendor Creates an Implied Warranty of Fitness and Habitability*, 24 ALA. L. REV. 332 (1972); *Note*, *Contracts—Caveat Emptor—Implied Warranty of Habitability*, 12 DUQ. L. REV. 109 (1973); *Note*, *An Implied Warranty of Fitness and Suitability for Human Habitation as Applied to the Sales of New Homes in Texas*, 6 HOUS. L. REV. 176 (1968); *Note*, *Builder-Vendor Liability for Construction Defects in Houses*, 55 MARQ. L. REV. 369 (1972); *Note*, *Implied Warranties in the Sale of Real Estate*, 26 U. MIAMI L. REV. 838 (1972); *Note*, *Torts—Implied Warranty in Real Estate—Privity Requirement*, 44 N.C.L. REV. 236 (1965); *Note*, *Vendor & Purchaser, Abrogation of Caveat Emptor in New Homes Sales by Builder-Vendors*, 7 U. RICH. L. REV. 399 (1972).

148. 631 P.2d 739 (Okla. 1981). *See Comment*, *Implied Warranties of New Homes*, 17 TULSA L.J. 753 (1982).

four bases of liability are available in a case of builder-seller liability toward a purchaser, namely, negligence, implied warranty in tort, strict tort liability, and extension of implied warranties in contract. On one theory or another, many courts have allowed the second purchaser to sue the builder-seller for defects in construction.<sup>149</sup> Modern courts are, evidently, concerned with justice, not rules. Whether the concept is one of tort, contract, or property law, the result is the same. The loss is placed where it belongs—on the party who caused it and who should foresee the harm to third parties.

In *Gardenvillage Realty Corp. v. Russo*,<sup>150</sup> a tenant and her invitee were injured when a concrete slab collapsed. It had been supplied by the general contractor who had contracted with the owner. The contractor was held liable. The *Russo* court quoted Prosser from his Handbook on the Law of Torts.<sup>151</sup> In this quoted passage, Prosser refers to the direct warranty of the builder-seller of a new house to the initial buyer. Prosser then notes how the analogy of the manufacturer of chattels held liable to third persons injured by manufacture of a defective product led inevitably to the extension of builder-seller strict liability to third persons injured by the builder-seller's negligent performance. Prosser cited *Schipper v. Levitt & Sons, Inc.*<sup>152</sup> as the first significant case in this line of cases. The *Schipper* court held that the warranty of the builder-seller of a new house to the initial buyer also protected a child of the buyer injured by a defective water heating apparatus.<sup>153</sup> Prosser noted that this decision had been followed in three states and predicted that it would rapidly become the prevailing rule.<sup>154</sup>

*Schipper* has received comment in several articles.<sup>155</sup> This

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149. *Cosineau v. Walker*, 613 P.2d 608 (Alaska 1980); *Blagg v. Hunt Co.*, 272 Ark. 185, 612 S.W.2d 321 (1981); *Barnes v. Mac Brown & Co.*, 264 Ind. 227, 342 N.E.2d 611 (1976); *Hermes v. Staino*, 181 N.J. Super. 424, 437 A.2d 925 (1981); *Terlinde v. Neely*, 275 S.C. 395, 271 S.E.2d 768 (1980); *Moxley v. Laramie-Terlinde Builders Inc.*, 600 P.2d 733 (Wyo. 1979); see also Annot., 10 A.L.R.4th 385 (1981).

150. 34 Md. App. 25, 366 A.2d 101 (1976).

151. *Id.* at 37-38, 366 A.2d at 109 (quoting LAW OF TORTS, *supra* note 11, at 680-82).

152. 44 N.J. 70, 207 A.2d 314 (1965).

153. *Id.*

154. California, Florida and Mississippi have followed the *Schipper* decision. LAW OF TORTS, *supra* note 11, at 680-82 (quoted in *Russo*, 34 Md. App. at 38, 366 A.2d at 109).

155. Note, *Real Property: Builder-Vendors: Liability for Negligence and for Breach of Implied Warranty of Habitability: Schipper v. Levitt and Sons*, 44 N.J. 70, 207 A.2d 314 (1965), 51 CORNELL L.Q. 389 (1966); Note, *Torts: Liability of Building Contractors*

case involved the child of a tenant of a remote grantee who suffered injuries resulting from defective construction and was permitted to maintain an action against a builder-seller. Other cases along the same line followed the *Schipper* court.<sup>156</sup> In this line of cases privity was disregarded as it was in *Glanzer*, and the injured party was allowed to maintain the cause of action. Furthermore, not only the subsequent purchaser was permitted to sue; any injured member of his family was also permitted to maintain the action. Thus, both vertical and horizontal privity have been discarded as requirements in these builder-seller liability cases.

A general contractor may be liable to third parties if he fails to properly supervise a subcontractor's work.<sup>157</sup> The fact that the landowner has entrusted the construction job in a contractor does not relieve him of liability to third parties. If he retains some supervisory powers, this may be sufficient to create liability in him toward third parties.<sup>158</sup>

Application of *Glanzer* to construction cases can lead to liability being imposed upon other individuals as well. For instance, a landowner has been permitted to recover from the general contractor's roofing subcontractor for the subcontractor's negligence, despite the absence of privity.<sup>159</sup> And in *Stewart v. Cox*,<sup>160</sup> a subcontractor was held liable to the unknown third party buyers of a home being built. In *Laukkannen v. Jewel Tea Co.*,<sup>161</sup> a workman injured as a result of faulty plans or faulty working drawings by the defendant engineer was per-

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*for Defects in Construction*, 19 OKLA. L. REV. 469 (1966); Note, *Strict Liability in Tort—Builder—Vendor of Mass Produced House Strictly Liable for Injuries Caused by Construction Defects*, 41 WASH. L. REV. 166 (1966).

156. *Kriegler v. Eichler Homes, Inc.*, 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969); *Wright v. Crative Corp.*, 30 Colo. App. 575, 498 P.2d 1179 (1972); *Cooper v. Cordova Sand & Gravel, Inc.*, 485 S.W.2d 261 (Tenn. 1972). This was followed, as to the land itself, in *Avner v. Longridge Estates*, 272 Cal. App. 2d 695, 77 Cal. Rptr. 633 (1969); *Calvera v. Green Springs, Inc.*, 220 So. 2d 414 (Fla. Dist. Ct. App. 1969); *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113 (Miss. 1966), *cert. denied* 386 U.S. 912 (1966); See *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966); *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968).

157. *Chesin Const. Co. v. Epstein*, 8 Ariz. App. 312, 446 P.2d 11 (1968).

158. *Reber v. Chandler High School Dist.* 202, 13 Ariz. App. 133, 474 P.2d 852 (1970).

159. *Gilbert Fin. Corp. v. Steelform Const. Co.*, 82 Cal. App. 3d 65, 145 Cal. Rptr. 448 (1978).

160. 55 Cal. 2d 857, 362 P.2d 345, 13 Cal. Rptr. 521 (1961).

161. 78 Ill. App. 2d 153, 222 N.E.2d 584 (1966).

mitted to recover.<sup>162</sup> These cases represent application to construction fact situations of the principle of liability to unknown third parties whom the individual reasonably foresees will suffer by his negligent performance of his job.

The *Glanzer* principle has been applied to impose liability on individuals more remote to the construction process or home-purchase process, but in cases which, nevertheless, affect property law. For example, an informative case on soil tester liability is *M. Miller Co. v. Central Contra Costa Sanitary District*.<sup>163</sup> In *Miller*, a soil test was made negligently and a third-party contractor suffered harm because his bid for the construction job, based on the soil test, proved inadequate.<sup>164</sup> The court relied upon *Biakanja v. Irving*,<sup>165</sup> which involved a draftsman of a faulty will who was held liable to the intended devisee. Prosser approves *Miller*,<sup>166</sup> and of course, *Miller* presents a situation perfect for the application of *Glanzer*. Other examples of where *Glanzer* is applicable to an occupation incidentally related to real property cases are those cases holding that pest control companies are liable for negligent searches where the company was hired by one other than the injured party.<sup>167</sup> In these cases, harm to a particular purchaser or lender is plainly foreseeable; like *Glanzer*, information is sought from the pest controller because his expertise is needed to detect the defect. Again, a situation ripe for application of *Glanzer* is presented.

The termite cases clearly illustrate the misconception of courts that arises in many of the cases, although the courts quite properly impose liability on individuals toward third parties. The courts talk at length about the duty to convey information with care, but this reasoning misses the point. In the termite cases the defendant has no information to convey because he has not done his job carefully. Through negligence, he failed to detect the presence of termite infestation. His report in effect

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162. *Id.* at 156-57, 222 N.E.2d at 586. As to engineers, one must always be aware of the documentation prepared by the National Society of Professional Engineers (NSPE), which is quite similar to the AIA documents.

163. 198 Cal. App. 2d 305, 18 Cal. Rptr. 13 (1961).

164. *Id.* at 307, 18 Cal. Rptr. at 15.

165. 49 Cal. 2d 647, 320 P.2d 16 (1958).

166. Prosser, *Misrepresentation and Third Persons*, 19 VAND. L. REV. 231, 250 (1966).

167. *Williams v. Jackson*, 359 So. 2d 798 (Ala. Civ. App. 1978) (pest company hired by FHA and home buyer recovered, the court citing *Rozny*); *Johnson v. Walls*, 38 N.C. App. 406, 248 S.E.2d 571 (1978).



says, "There is nothing to report." Had he done his job carefully, he would have had something quite important to report. The discussion about the misinformation supplied by the pest controller misses the mark. It is failure to do the job with care that is at issue and the common sense recognition that failure to do the job with care would cause harm to a third party. Justice LeGrand's decision in *Hubbard v. State*<sup>168</sup> is so important because he grasps the significance of this distinction.

### G. Appraiser Liability

In *Stotlar v. Hester*,<sup>169</sup> the plaintiffs had purchased real estate in reliance upon an appraisal made by the sellers' appraiser. The court held the appraiser liable for negligence despite the absence of privity. The court referred to earlier authorities that relied upon *Ultramares* and rejected them. The court referred with approval to the Restatement (Second) of Torts and rejected the contract theory of third party beneficiary.<sup>170</sup> The question that is left in one's mind is why did the *Stotlar* court emphasize the imparting of erroneous information, rather than the duty to do a job with care.

The question of an appraiser's liability to a third party arose in *Larsen v. United Federal Savings & Loan Association*,<sup>171</sup> where the appraiser was hired by the lender. The appraiser's negligence in making the appraisal was conceded. The court held the appraiser liable to the third party home purchaser. The court observed that the *Ultramares* reasoning had been rejected in *Ryan v. Kanne*.<sup>172</sup> In a footnote, the court observed that the *Ultramares* rationale had been rejected by several modern courts and commentators.<sup>173</sup> In defining the parties to whom the duty of care was owed, the court said:

Nor is it necessary, under the *Ryan* analysis, that the party

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168. See *supra* note 23 and accompanying text.

169. 92 N.M. 26, 582 P.2d 403 (1978).

170. *Id.* at 29, 582 P.2d at 406; see also RESTATEMENT (SECOND) OF TORTS § 552 (1976).

171. 300 N.W.2d 281 (Iowa 1981) (citations omitted).

172. 170 N.W.2d 395 (Iowa 1969).

173. *Larsen*, 300 N.W.2d at 286. See also, Rhode Island Hosp. Trust Nat'l Bank v. Swartz, Bresenoff, Yavner & Jacobs, 455 F.2d 847, 851 & n.2 (4th Cir. 1972); Rusch Factors, Inc. v. Levin, 284 F. Supp. 85, 90-92 (D.R.I. 1968); Besser, *Privity?—An Obsolete Approach to the Liability of Accountants to Third Parties*, 7 SETON HALL 507, 541-42 (1976); Mess, *Accountants and the Common Law: Liability to Third Parties*, 52 NOTRE DAME LAW. 838, 850-57 (1977).

suing for negligence be the only party for whom the information was provided. It is enough that he or she be a third party whom the negligent provider of the information knew would utilize it. Even though the appraisal might be made primarily for the benefit of the lending institution, the appraiser should also reasonably expect the home purchaser, who pays for the appraisal and to whom the results are reported (and who has access to the written report on request), will rely on the appraisal to reaffirm his or her belief the home is worth the price he or she offered for it. The purchaser of the home should be among those entitled to rely on the accuracy of the report and therefore should be entitled to sue for damages resulting from a negligent appraisal.<sup>174</sup>

The *Larsen* court then proceeded to define duty. Quoting from Prosser, the court said:

In negligence cases the duty is always the same, to conform to the legal standard of reasonable conduct in the light of the apparent risk. . . .

. . . [I]t should be recognized that "duty" is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.<sup>175</sup>

Thus again, we come back to the question: Given the socio-economic background, where is it best to allocate the loss? The key question becomes an easy one. Could the appraiser foresee that the buyer would rely on the appraisal? In a recent article it is argued that, so far as appraisers are concerned, they are liable to persons with whom they have no contractual relationship, but who they know will rely on the appraisal.<sup>176</sup> In *Alva v. Cloninger*,<sup>177</sup> the court held that the purchaser of a home who relied upon an appraisal furnished to the lender could sue the appraiser for negligence. The court observed that the absence of contractual privity is not a bar to the plaintiff's recovery in tort.<sup>178</sup> This is clearly an effort by the courts to apply the *Glanzer* principle.

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174. *Larsen*, 300 N.W.2d at 287.

175. *Id.* at 285 (emphasis added).

176. Mastaglio, *Real Estate Appraisal Malpractice: Liability and Damages*, 54 N.Y. St. B.J. 6 (1982).

177. 51 N.C. App. 602, 277 S.E.2d 535 (1981).

178. *Id.* at 610, 277 S.E.2d at 540.

### H. Accountant's and Attorney's Liability

The principles of *Glanzer* have been applied to find accountants and attorneys liable in certain situations important for their implications in real property cases. In *Ryan v. Kan-ner*,<sup>179</sup> a party known to the accountant as one who would rely on the accounting statement recovered from the accountant for his negligence. The *Ryan* court discussed at length both *Ultramares* and *Glanzer* in order to uphold accountant liability. The court said:

The reluctance of the courts to hold the accounting profession to an obligation of care which extends to all reasonably foreseeable reliant parties is predicated upon the social utility rationale first articulated in [*Ultramares*]. There the defendants negligently overvalued the company's assets in the balance sheet upon which the plaintiff creditors of the company subsequently relied. *The wisdom of that decision has been doubted and criticized by law review writers . . . .* We are disposed to depart from that strict rule under the circumstance appearing therein. . . . When the accountant is aware that the balance sheet to be prepared is to be used by a certain party or parties who will rely thereon in extending credit or in assuming liability for obligations of the party audited, the lack of privity should be no valid defense to a claim for damages due to the accountant's negligence. We know of no good reason why accountants should not accept the legal responsibility to known third parties who reasonably rely upon financial statements prepared and submitted by them.<sup>180</sup>

The *Ryan* court went on to note the trend towards relaxing the privity requirement in tort cases where physical injury to third parties is reasonably foreseeable and the courts' simultaneous reluctance, on the other hand, to extend liability in the case of third party financial losses to defendants who might thereby be exposed to liability to a large unascertained class. The court concluded, however, that the test to be applied is the one enunciated by the *Glanzer* court, that is, whether the third party to whom the accountant owes a duty of care is actually foreseen and a member of a limited class of persons contemplated. The *Ryan* court recognized that this rule could very well be applied

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179. 170 N.W.2d 395 (Iowa 1969).

180. *Id.* at 401 (emphasis added).

to other professions as well.<sup>181</sup>

Of all the decisions on accountant liability decided since *Ultramares*, by far the most important is *Spherex, Inc. v. Alexander Grant & Co.*<sup>182</sup> In *Spherex*, the corporation involved hired an accounting firm to prepare an unaudited financial statement covering a twelve-month period. A copy of this statement was furnished to one of the corporation's suppliers, who extended credit and suffered a loss. The supplier successfully sued the accounting firm. The defense of lack of privity was rejected. After rejecting the privity defense summarily, the court observed that judges have not hesitated to permit recovery where the plaintiff's identity was known to the negligent defendant. But beyond that situation, the *Spherex* court said, is the question whether the defendant has some special reason to anticipate the reliance of the plaintiff. The *Spherex* court then observed that *Ultramares* is a relic of a bygone economic era. The role of the giant accounting firm in today's business transactions, the court said, is a far cry from the fledgling profession in need of judicial protection that existed at the time of *Ultramares*.<sup>183</sup> Finally, the *Spherex* court cited the Restatement (Second) of Torts.<sup>184</sup> While the court agreed that the determining factor of liability was the foreseeability of harm from negligence in performance of a duty, the court clung to an exception where there is a risk of limitless liability to a vast number of plaintiffs. The court concluded that:

[w]hile an accountant is to employ a sufficient degree of care in the performance of professional activities in order to protect himself from liability, the law must not arbitrarily extend that liability beyond his reasonable expectations as to whom the information will reach. "The risk reasonably to be perceived defines the duty to be obeyed . . . ."<sup>185</sup>

In *Escott v. BarChris Construction Corp.*,<sup>186</sup> the court found that an accountant's securities registration statement con-

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181. As to accountant's liability to third parties, see Wiener, *Common Law Liability of the Certified Public Accountant for Negligent Misrepresentation*, 20 SAN DIEGO L. REV. 233 (1983) (covering *Ultramares* and *Glanzer*); Note, *Accountants' Liability for Compilation and Review Engagements*, 60 TEX. L. REV. 759, 770 (1982) (discussing *Ultramares*).

182. 122 N.H. 898, 451 A.2d 1308 (1982).

183. See Note, *Accountant's Liability for Negligence—A Contemporary Approach for a Modern Profession*, 48 FORDHAM L. REV. 401, 402 (1979).

184. *Spherex*, 122 N.H. at 905, 451 A.2d at 1312.

185. *Id.* (citations omitted).

186. 283 F. Supp. 643, 683-98 (S.D.N.Y. 1968).

tained false and misleading information, resulting in liability to third parties. With respect to an accountant's liability, the accounting profession had felt that prior to the Securities Act the entire question of an accountant's liability to third parties had been left open by *Ultramares*.<sup>187</sup> The *BarChris* case reinforces this notion.<sup>188</sup> Where a statute plugs a gap left open by controversial case law, this is a tacit recognition that the case law was unsatisfactory. The *BarChris* court ended the unsatisfactory situation by rejecting *Ultramares* and finding accountants liable to third parties for negligence based on the Securities Act.

The accountant's role in real property transactions cannot be overestimated. In putting together any large-scale real estate transaction, the old bricks-and-mortar appraisal has disappeared. Financial statements, cash flow, triple-A credit, income tax consequences—this is the jargon of today's real estate transaction. Possible unknown plaintiffs are members of syndicates purchasing limited partnership interests. This sort of thing is not found in contracts or torts casebooks. But neither is it found in real property casebooks. This theory of liability to remote third parties in such a situation cuts across many fields and may emerge in a casebook on real estate planning that contains lengthy sections of income tax law.

The recent commentators reject *Ultramares* reasoning and argue for liability to third parties who rely on financial statements.<sup>189</sup> The "big eight" accounting firms represent huge aggregations of capital, with worldwide establishments that dwarf the legal profession. *Ultramares* has no application to such situations.

In *Biakanja v. Irving*,<sup>190</sup> a draftsman of a will was held liable to a legatee where the will was held void for the defendant's negligence. The court discussed *Ultramares* and then turned to a *Glanzer*-type analysis stating:

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187. See, e.g., *Shonts v. Hirlman*, 28 F. Supp. 478 (S.D. Cal. 1939).

188. See Comment, *BarChris: Due Diligence Defined*, 68 COLUM. L. REV. 1411, 1418-19 & n.45 (1968) (citing criticism by L. Loss of *Ultramares*).

189. Note, *Accountants' Liability for Compilation and Review Engagements*, 60 TEX. L. REV. 758, 773 (1982); Wiener, *Common Law Liability of the Certified Public Accountant for Negligent Misrepresentation*, 20 SAN DIEGO L. REV. 233 (1983) (article is of special interest because of its observations on the opaque, virtually incomprehensible language of Comment a to RESTATEMENT (SECOND) OF TORTS § 552. As in the present article, Wiener relies on cases like *Biakanja v. Irving*, 49 Cal. 2d 647, 320 P.2d 16 (1958)).

190. 49 Cal. 2d 647, 320 P.2d 16 (1958).

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. . . . Here, the "end and aim" of the transaction was to provide for the passing of Maroevich's estate to plaintiff. See *Glanzer v. Shepard* . . . . Defendant must have been aware from the terms of the will itself that, if faulty solemnization caused the will to be invalid, plaintiff would suffer the very loss which occurred. As Maroevich died without revoking his will, plaintiff, but for defendant's negligence, would have received all of the Maroevich estate, and the fact that she received only one-eighth [sic] of the estate was directly caused by defendant's conduct.<sup>191</sup>

As is evident, the court preferred a *Glanzer* result to an *Ultramares* result. A similar result was reached in *Licata v. Spector*.<sup>192</sup>

The *Biakanja* case precipitated a volume of California cases holding attorneys liable to third parties,<sup>193</sup> but the general run of decisions still protects an attorney from actions by third parties despite his negligence in examining title.<sup>194</sup> No sound reason has been advanced for this view. It seems like a case of the judges protecting their own. The proper ethical position is just the opposite.

A comprehensive note on the question of attorney's liability to third parties<sup>195</sup> discussed *Glanzer*, *Ultramares*, *Rozny*, and many other decisions. It concludes:

Extending the protection of the law to certain foreseeable third parties who have been harmed because they relied on the pro-

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191. *Id.* at 650-51, 320 P.2d at 19 (citations omitted).

192. 26 Conn. Supp. 378, 225 A.2d 28 (1966).

193. Annot., 45 A.L.R.3d 1181, 1191 (1972).

194. *Id.* at 1200.

195. Note, *Attorney Negligence in Real Estate Title Examination and Will Drafting: Elimination of the Privity Requirement as a Bar to Recovery by Foreseeable Third Parties*, 17 NEW ENG. 955 (1982). See also R. MALLIN & R. LEVIT, LEGAL MALPRACTICE § 78, at 150-52 (approving *Biakanja* and preferring *Glanzer* to *Ultramares*); see also *id.* § 80, at 158 n.94 (citing many cases holding the attorney liable to third parties).

fessional expertise of lawyers is a valid goal. In fairness to the great majority of capable and careful practitioners upon whom the carelessness of other attorneys reflect, this extension may be viewed as essential to continued confidence in the legal profession. Public policy considerations should weigh heavily against protecting attorneys from liability for negligence which directly causes loss to innocent third parties. The legal profession can ill afford the stigmatizing effect of appearing to shield its members at the expense of those who reasonably rely on their skills.<sup>196</sup>

Of course, where the duty is recognized by the courts, it extends to unknown third persons, as in a devise drafted by an attorney, for example, "to A (a stranger) for life, remainder to his surviving children." Such third persons would be reasonably foreseeable and within a limited class of persons to whom the attorney would owe a duty. *Glanzer* clearly is applicable to the situation of real property devises by will.

## X. CONCLUSION

In a world where population is growing rapidly, and contact and relationships between persons can lead to harm and injury, the philosophical inquiry is a relatively simple one. Am I my brother's keeper? Is it up to each of us to avoid causing foreseeable harm to others? The answer plainly is in the affirmative.

Next, is it important to affix some specific label to this duty? In some instances, where a plaintiff can waive the tort and sue in assumpsit, the plaintiff is at liberty to choose the label he will affix to his particular cause of action.<sup>197</sup> In the real world, as distinguished from law school, labels are not of earth-shaking importance.

It is not as important to avoid affixing an incorrect label on the particular cause of action as it is to recognize the underlying principle. In case after case, the courts have dealt with a harm in such terms as misrepresentation, constructive fraud, and negligent misrepresentation. The fact of the matter is that the great underlying duty is to use due care to avoid foreseeable harm, and the reporting aspect of the circumstances giving rise to the

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196. Note, 17 NEW ENG. 3 (1982); *accord.*, *Needham v. Hamilton*, 459 A.2d 1060 (D.C. 1983).

197. For example, failure to perform a contract with due care can be treated as a breach of contract or the tort of negligence. See *Wilson v. Palmer*, 452 N.E.2d 426 (Ind. 1983).

duty is of relatively minor importance.

It does not matter where, in the casebook or law course, this duty is found. Casebook writers disagree and will continue to disagree as to the proper pigeonhole for many of the matters discussed herein. Clearly, the duty can be found in a variety of fact situations spanning many artificial divisions within the law school curriculum.

Some problems have arisen out of pure and simple ownership of land, and courts have concluded that the duty to avoid foreseeable harm to others exists. In other land ownership cases the courts have applied contract principles, as in the building construction cases; yet the duty has remained the same. In still other areas, the courts, with equal logic, selected a contract theory (for instance, a third party beneficiary theory), or a tort theory, to deal with the situation wherein a seller was provided with a faulty abstract. Still, the duty remains unchanged despite whatever label is initially placed on the claim and without regard to the label a court attaches to its rationale.

Should limits be placed on the duty? Where limitless liability to others might result, most courts have been unwilling to impose limitless liability. This is an attitude left over from the days when verdicts were smaller. Today, when an airliner crashes and the resulting deaths are plainly due to negligence, the verdicts are destined to be huge. That this is proper is a lesson we have learned from the torts lawyers. We must consider whether it is more equitable for an accounting firm to go under, or for investors who relied on their statements to lose their investments.

Lastly, the privity notion is simply unsupportable. If the court is disposed to deny liability, it invokes the doctrine of privity. This rule is found in its most repulsive form where a lawyer draws a simple but faulty will and the stranger-devisee is told he cannot sue because privity is lacking. If the court chooses to affix liability, it decides that privity is unnecessary. This shell game belongs in a traveling circus, not in the courts.