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NEGLIGENCE-LIABILITY OF MANUFACTURER OR VENDOR TO AN ALLERGIC CONSUMER

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NEGLIGENCE—LIABILITY OF MANUFACTURER OR VENDOR TO AN ALLERGIC[1] CONSUMER—The study of allergies is relatively new to the medical profession. It is not surprising, therefore, that only a few courts have dealt with the problem of the liability of the manufacturer or vendor to the consumer who is allergic to an ingredient in the defendant's product. Many dyes, cosmetics, drugs and health and beauty aids in universal use, however, contain known allergenic ingredients.[2] Medical authorities estimate the incidence of well-defined allergies at between five to ten per cent of the total population[3] and one authority suggests that allergies are actually increasing in frequency.[4] When we add to this parade of horrors the fact that medical knowledge of allergies has increased tremendously in recent years, we may well expect many appellate courts to be called upon to define the scope of the manufacturer's or vendor's liability in this field. The purpose of this comment is to examine briefly the reported cases and to evaluate the various approaches to the problem.[5]

[1] "Allergy, in its broad implication, designates hypersensitiveness in man and evidences itself by abnormal responses of tissues to physical or chemical stimuli." FEINBERG, ALLERGY IN PRACTICE, 2d ed., 3 (1946). Although this definition is too broad for medical accuracy, it is sufficient for our purposes. It is the "abnormal" feature of the reaction, whether caused by a primary irritant or by an allergen, that presents the legal problem. For a medically accurate definition of "allergy," see COOKE, ALLERGY IN THEORY AND PRACTICE 263-4 (1947); FEINBERG, ALLERGY IN PRACTICE, 2d ed., 687 (1946).

[2] COOKE, ALLERGY IN THEORY AND PRACTICE 272-288 (1947). Most cosmetic dermatitus is due to allergy. Id. at 282.

[3] COOKE, ALLERGY IN THEORY AND PRACTICE 3 (1947); FEINBERG, ALLERGY IN PRACTICE, 2d ed., 83 (1946).

[4] VAUGHAN, PRACTICE OF ALLERGY, rev. by Black, 3-6 (1948).

[5] The scope of this comment is limited to a discussion of liability for negligence. Several cases involve a warranty action against the plaintiff's immediate vendor. Since the question of liability usually depends upon the court's interpretation of section 15(1) of

Let us assume a "typical" situation. *D* manufactures lipstick which is sold by retailers in its original, metal tubes. The product is entirely safe to the vast majority of consumers, but a small fraction are allergic to one of its ingredients. The label on the tube does not list the ingredients, nor does it display a warning that some persons can not safely use the product. *P* purchases *D*'s product, uses it, and as a result suffers a severe dermatitis of the lips. In a negligence action by *P* against *D*, what is the real issue? Undoubtedly, most first year law students would reply that the question is one of duty. Does *D* have a duty to warn the public that its product contains an ingredient that is harmful to a few people? To answer this question, our student would ask for additional facts—did *D know* that a certain class of consumers were allergic to his product?[6] If not, *should D*, in the exercise of reasonable care, have known?[7] Only if the student were able to pass the "duty" obstacle would he deal with the question of whether *D*'s breach of duty was the cause of *P*'s injury.

A. *The Proximate Cause Approach*

But several appellate courts would not agree with our student's characterization of the problem. Instead, they have apparently assumed defendant's negligence but have been troubled by the question of causation.[8] If there is no evidence that the defendant's assumed negligence was the cause in fact of the plaintiff's injury, this causal approach may be justifiable simply because it avoids the difficult and unnecessary de-

the Uniform Sales Act, no persuasive analogy can be drawn between the warranty and the negligence cases. However, for those readers who may be interested in comparing the different approaches to the problem of the allergic consumer, the following warranty cases are instructive. *Vendor held liable:* Flynn v. Bedell Co. of Mass., 242 Mass. 450, 136 N.E. 252 (1922); Smith v. Denholm & McKay Co., 288 Mass. 234, 192 N.E. 631 (1934); Bianchi v. Denholm & McKay Co., 302 Mass. 469, 19 N.E. (2d) 697 (1939); noted in 19 BOST. UNIV. L. REV. 501 (1939); Zerpola v. Adam Hat Stores, Inc., 122 N.J.L. 21, 4 A. (2d) 73 (1939); Reynolds v. Sun Ray Drug Co., 135 N.J.L. 475, 52 A. (2d) 666 (1947). *Liability denied:* Zager v. F. W. Woolworth Co., 30 Cal. App. (2d) 324, 86 P. (2d) 389 (1939); Ross v. Porteous, Mitchell & Braun Co., 136 Me. 118, 3 A. (2d) 650 (1939).

[6] Essentially, then, the problem is similar to the one presented in the famous case of Huset v. J. I. Case Threshing Machine Co., (8th Cir. 1903) 120 F. 865, holding that a manufacturer of a threshing machine must warn the public of hidden dangers known to the manufacturer.

[7] MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916); Donoghue v. Stevenson, [1932] A.C. (H.L.) 562.

[8] Wilson v. Goldman, 133 Minn. 281, 158 N.W. 332 (1916); Hamilton v. Harris, (Tex. Civ. App., 1918) 204 S.W. 450; Karr v. Inecto, Inc., 247 N.Y. 360, 160 N.E. 398 (1928); Walstrom Optical Co. v. Miller, (Tex. Civ. App., 1933) 59 S.W. (2d) 895; Zager v. F. W. Woolworth Co., 30 Cal. App. (2d) 324, 86 P. (2d) 389 (1939) (breach of warranty action).

termination of negligence.[9] But at least two courts have held that the plaintiff's allergy, as a matter of law, breaks the causal chain. In *Walstrom Optical Co. v. Miller,*[10] the plaintiff purchased eyeglasses from the defendant and suffered injury from contact with the dye on the frames. Expert witnesses for the plaintiff and the defendant agreed that the plaintiff was allergic to the dye and that such allergy was very rare. In reversing a judgment for the plaintiff, the court first posed several questions relevant to the determination of negligence. It answered these questions by saying that negligence, to be actionable, must be the proximate cause of the injury and the test of causation is: ". . . whether in the light of all attendant circumstances, the injury was such as ought reasonably to have been anticipated as a consequence of the act."[11] The same court, in an earlier case, said: "We think the jury should have been told in appropriate language that, if they believe the proximate cause of the injuries to appellee was his abnormal hypersensitiveness, but for which the injury would not have occurred, a verdict should be returned for defendant."[12]

The confusion between negligence and causation did not begin with allergy cases.[13] It is difficult, however, to find a more obvious misapplication of proximate cause principles than in these allergy cases. If the defendant was in fact negligent, the type of injury (usually dermatitis) is the very one that should have been anticipated.[14] Nor can it be said that the plaintiff's allergy is an intervening causal factor.[15] There is simply no room for the application of such proximate cause

[9] This is, apparently, the rationale of Karr v. Inecto, Inc., 247 N.Y. 360, 160 N.E. 398 (1928), which held that the lapse of twelve hours between the contact with the defendant's product and the plaintiff's injury raised no inference of causation since the product was not shown to be inherently dangerous and poisonous. But in Cahill v. Inecto, Inc., 208 App. Div. 191, 203 N.Y.S. 1 (1924), involving the same product, the lapse of seven hours between contact and injury supported an inference of causation. Other New York cases simply add to the confusion: Bundy v. Ey-Teb, Inc., 160 Misc. 325, 289 N.Y.S. 905 (1935); Cleary v. John M. Maris Co., 173 Misc. 954, 19 N.Y.S. (2d) 38 (1940); Pratt v. E. W. Edwards & Son, 227 App. Div. 210, 237 N.Y.S. 372 (1929); Petzold v. Roux Laboratories, Inc., 256 App. Div. 1096, 11 N.Y.S. (2d) 565 (1939); Maher v. Clairol, Inc., 263 App. Div. 848, 31 N.Y.S. (2d) 751 (1941).

In Wilson v. Goldman, 133 Minn. 281, 158 N.W. 332 (1916), the court, in finding causation, *relied* on the probability that the plaintiff was allergic to the defendant's product!

[10] (Tex. Civ. App., 1933) 59 S.W. (2d) 895.

[11] Id. at 897.

[12] Hamilton v. Harris, (Tex. Civ. App., 1918) 204 S.W. 450 at 451. See, also, Zager v. F. W. Woolworth Co., 30 Cal. App. (2d) 324 at 333, 86 P. (2d) 389 (1939).

[13] For a well-annotated discussion, see PROSSER, TORTS 311-320 (1941).

[14] Even if the injury could be said to be extraordinary, the causal chain would not be broken. In re Polemis, [1921] 3 K.B. 560.

[15] 22 R.C.L., Proximate Cause, §135 (1912); 48 L.R.A. (n.s.) 119 (1914); PROSSER, TORTS 340-352 (1941).

limitations in the allergy cases. It would be just as fair to say: "But for the plaintiff's presence under the wheels of the negligently operated automobile the injury would not have occurred."

B. *The Negligence Approach*

It is unfortunate that the difficult yet interesting question of negligence has so often been avoided. Of the few cases which have defined the extent of the manufacturer's or vendor's duty to the allergic plaintiff, two have produced well-considered opinions.[16] In the *Gerkin* case,[17] the purchaser of a coat brought suit against the wholesaler for injuries attributed to contact with the dyed fur collar. The plaintiff had worn the coat for about three months, unaware that his discomfort was due to contact with the dyed fur. The president of the defendant corporation admitted that about one out of one hundred purchasers of dyed fur complain of bad effects; that in the preceding ten years he had received about twenty complaints; and that, on investigation, all he had discovered was that some people could not wear dyed fur. The court held that the defendant's failure to warn the plaintiff of the existence of the hidden danger was negligence. "That the great majority of persons are safe from the particular danger concealed in the article sold, or that few injuries in fact result from its use, does not militate against this principle [duty to warn] when the *certain fact of imminent danger to a percentage is established.*"[18] It is important to note that the defendant here had actual knowledge that some people could not safely wear dyed fur.[19]

In *Arnold v. May Department Stores Co.*,[20] the defendant's beauty operator recommended to the plaintiff a hair dye called Notox. The plaintiff informed the operator that she had suffered a skin eruption ten years ago from a hair dye and, consequently, was afraid of anything but henna. The operator reassured her and applied no test beforehand, despite the fact that the manufacturer's instructions in the box of Notox contained a warning that persons with a pronounced idiosyncrasy to skin or scalp diseases should not use any hair coloring.[21] As a result

[16] Gerkin v. Brown & Sehler Co., 177 Mich. 45, 143 N.W. 48 (1913); Arnold v. May Dept. Stores Co., 337 Mo. 727, 85 S.W. (2d) 748 (1935).

[17] 177 Mich. 45, 143 N.W. 48 (1913).

[18] Id. at 61. Italics added.

[19] In accord: Taylor v. Newcomb Baking Co., 317 Mass. 609, 59 N.E. (2d) 293 (1945). Cf. Gould v. Slater Woolen Co., 147 Mass. 315, 17 N.E. 531 (1888).

[20] 337 Mo. 727, 85 S.W. (2d) 748 (1935).

[21] This same product was involved in Cahill v. Inecto, Inc., 208 App. Div. 191, 203 N.Y.S. 1 (1924) and Karr v. Inecto, Inc., 247 N.Y. 360, 160 N.E. 398 (1928). See note 8 supra. One wonders if the warning was a result of that litigation.

of the application of the dye, the plaintiff suffered severe injuries. Disinterested hairdressers testified that in thousands of applications of Notox they had received no complaint. Although the plaintiff was admittedly allergic to one of the ingredients of the dye, the Missouri court, in a well-reasoned opinion, affirmed a judgment for the plaintiff. Although the court relied heavily on the *Gerkin* case, it went on to say: ". . . plaintiff recovered . . . on the theory that plaintiff was sensitized, or possessed an idiosyncrasy to the dye, which caused her to suffer the injuries complained of, and that defendant knew, *or should have known,* that plaintiff was so sensitized."[22]

In the *Gerkin* case, the defendant had actual knowledge of danger to some consumers of his product; in the *Arnold* case, the defendant knew only that this plaintiff had suffered injuries from the use of a hair dye ten years before. Nor was there any evidence that the defendant was aware of the manufacturer's warning.[23] The meager knowledge which the defendant did possess, however, was sufficient to put the defendant on notice that the plaintiff was allergic to this product. Knowing that the plaintiff was allergic, the application of the dye without taking some sort of precaution was negligence.[24] To the extent that the defendant was not required to have actual knowledge of the allergenic effect of the hair dye, the *Arnold* case extends liability beyond the holding of the *Gerkin* case.

The fact situation in a recent California case[25] was similar to the hypothetical "lipstick case" posed at the beginning of this comment. The plaintiff obtained a "Helene Curtis" cold wave in a beauty shop. The solution was 6.28% thioglycollate acid. Three days after the beauty treatment, the plaintiff suffered a severe dermatitis which required medical treatment for about six months. She brought suit against the manufacturer, alleging that the defendant negligently failed to warn the public that the solution contained thioglycollate acid and that many persons were susceptible to damage through its use. A skin specialist testified that thioglycollate acid is a direct irritant if used in a concentration of over 7 or 8 per cent, and admitted that the plaintiff was allergic. The record contained no evidence that this product had ever caused skin irritation prior to this case or that "many persons" were

[22] Arnold v. May Dept. Stores Co., 337 Mo. 727 at 735, 85 S.W. (2d) 748 (1935). Italics added.

[23] The court's opinion does not state whether the defendant's duty to use due care would have been satisfied by acquainting the plaintiff with the manufacturer's warning or whether it necessitated the application of a preliminary patch test.

[24] See note 22 supra.

[25] Briggs v. National Industries, Inc., (Cal. App., 1949) 207 P. (2d) 110.

allergic to it. The trial court entered judgment for defendant notwithstanding the verdict. In affirming the trial court, the appellate court said: "One of the essential elements of liability is knowledge on the part of the manufacturer of the dangerous character of the product. There is no substantial evidence that the defendant corporation had any such knowledge."[26]

In view of the lack of evidence of previous injuries from a similar solution of thioglycollate acid or of medical knowledge that thioglycollate acid was a potent allergen, the court's decision is undoubtedly correct. But if the court meant that actual knowledge of the dangerous character of the product is an essential element of liability, its opinion is extremely doubtful. Suppose, for example, that the defendant in the *Briggs* case had actual knowledge of one previous injury from contact with a 6.28% solution of thioglycollate acid but had been assured by reliable medical experts that the chance of anyone else's suffering injury was extremely remote. Suppose, on the other hand, that skin specialists knew that 2% of the total population were allergic to the solution but the defendant was not aware of this.[27] Is it likely that a court would hold the defendant liable in the first case and not in the second? "The risk reasonably to be perceived defines the duty to be obeyed. . . ."[28] What the defendant *ought* to know is as important as what he does know.[29]

The fact that the defendant in the *Briggs* case was the manufacturer and not the plaintiff's immediate vendor should be no obstacle to imposing liability. The law has long recognized the duty of a manufacturer to warn the ultimate consumer of any known dangers.[30] And if the manufacturer, in the exercise of reasonable care, *should* know of some latent danger, the rule of the *MacPherson* case[31] would seem to dictate liability for failure to warn.[32]

[26] Id. at 112.

[27] Medical articles published since the date of the plaintiff's injury in the Briggs case show that her injury was not an isolated one. 131 J. AM. MED. ASSN. 592 (1946); 137 J. AM. MED. ASSN. 354 (1948); 57 ARCH. DERMAT. & SYPH. 275 (1948); 15 IND. MED. 669 (1946); 16 IND. MED. 238 (1947). It would be interesting to see what effect this literature would have on a similar fact situation today.

[28] Cardozo, C. J., in Palsgraf v. Long Island R.R. Co., 248 N.Y. 339 at 344, 162 N.E. 99 (1928).

[29] See Donoghue v. Stevenson, [1932] A.C. (H.L.) 562 at 605.

[30] Huset v. J. I. Case Threshing Machine Co., (8th Cir. 1903) 120 F. 865.

[31] MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

[32] Carter v. Yardley & Co., 319 Mass. 92, 64 N.E. (2d) 693 (1946), adopting the MacPherson rule in Massachusetts, contains statements relevant to the allergy cases, but the decision is based on the inference that the plaintiff was normal. Also, Grant v. Australian Knitting Mills, Ltd., [1936] A.C. (H.L.) 85.

C. *Should There Be Liability?*

In a discussion of negligence, however, it is not enough to conclude that there are sufficient legal rules available to impose liability on a manufacturer or vendor for failing to warn the public that a small minority of consumers cannot safely use the product. The more fundamental question is: *should* this burden be imposed on the manufacturer or vendor? To require the ordinary retailer of clothing, cosmetics, and drugs to know the allergenic effect of his merchandise would be a fantastic burden.[33] The responsibility for reducing the incidence of injury to the allergic consumer properly rests on the manufacturer.[34] To require the manufacturer to keep abreast of the most advanced medical knowledge would seem most reasonable. So, also, would the requirement that a manufacturer make elaborate prophetic patch tests before marketing a new product.[35] The argument that every consumer should know the substances to which he is allergic should carry little weight in an age when new drugs and chemicals are constantly being marketed. If a manufacturer knows or should know, after making proper tests, that a percentage of persons are allergic to an ingredient in his product, it would seem reasonable to require that he place a conspicuous warning on the label.[36]

On the other hand, a well-reasoned decision should consider the effect of the Federal Food, Drug, and Cosmetic Act[37] if the product is one that is covered by the act. The FDCA sets up elaborate safeguards in the manufacture and marketing of foods, drugs, and cosmetics and provides for condemnation of products that do not meet the prescribed standards of safety. Although section 502(e) of the statute requires certain drugs to bear the name of each active ingredient, in part to enable persons to avoid those drugs to which they are allergic,[38] it is

[33] Yet liability of retailers for breach of implied warranty is held more uniformly than liability of manufacturers and wholesalers for negligence. See note 5 supra.

[34] "The reduction of the incidence of dermatitis among the users of furs is in the hands of the dyers. In recent years they have been aware of this fact and have processed the furs with greater care so that now we rarely see reports of cases." COOKE, ALLERGY IN THEORY AND PRACTICE 281 (1947).

"While cosmetics as a class rank among the safest of substances . . . there are occasional outbreaks of dermatitis . . . from new and untried cosmetics. The cosmetic industry owes it to the public and to itself to spare no effort in order to place only safe cosmetics on sale." Id. at 282-3.

[35] The prophetic patch test is described in COOKE, ALLERGY IN THEORY AND PRACTICE 278-9 (1947).

[36] See note in 121 A.L.R. 947 (1939), citing the Gerkin case with approval. Also, 86 A.L.R. 947 (1933); 10 BROOKLYN L. REV. 363 (1941).

[37] 52 Stat. L. 1040, §§201-901 (1938), 21 U.S.C. (1946) §§ 301-392.

[38] See S. Rep. No. 646 on S. 5, 74th Cong., 1st sess., pp. 7-8 (1935).

clear that the act was not designed to condemn products to which a few people may be allergic.[39] Since the FDCA provides extensive safeguards for the general public, however, a court might reasonably conclude that there is no need to provide a damage remedy for the unfortunate few who are allergic.[40] This result would, of course, be unconvincing to the allergic plaintiff who can reasonably say that the manufacturer, with actual or imputed knowledge of a danger, who fails to warn the consumer is more at fault than the consumer. And the FDCA does not cover items such as clothing, dyes (other than cosmetics) and jewelry.

Perhaps a more fundamental objection to imposing a duty to warn on manufacturers or vendors is simply that it would be a rare case in which the failure to warn would be the cause in fact of the plaintiff's injury.[41] Even if the plaintiff were to read the warning, it is unlikely that he would refrain from using the product unless he knew that he was allergic to one of its ingredients. And if he has that knowledge, it is not likely that he will use a new product, even if it displays no warning, without first obtaining a physician's advice. To answer that causation is simply a question of evidence does not solve the whole problem, because the plaintiff could always testify, with no fear of being prosecuted for perjury, that he would not have used the product if it had displayed a warning. He might, of course, be telling the truth,[42] but it is quite likely that the plaintiff would recover even though a causal relation would be lacking. And although the failure to warn would be negligence, the probable absence of a causal relation would often make the manufacturer an insurer of his product. That possibility might not be an absolute deterrent; it should, however, be considered.

[39] S. Rep. No. 646 on S. 5, 74th Cong., 1st sess., p. 3 (1935); the court's charge to the jury in United States v. 8 Packages (etc.) of Roux Lash and Brow Tint, (D.C.N.J. 1942), NOTICES OF JUDGMENTS UNDER THE FEDERAL FOOD, DRUG, & COSMETIC ACT, No. 76, p. 41.

[40] See, generally, United States v. 62 Packages, More or Less, of Marmola Prescription Tablets, (D.C. Wis. 1943) 48 F. Supp. 878, affd. in (7th Cir. 1944) 142 F. (2d) 107; 26 VA. L. REV. 100 (1939); 3 FOOD, DRUG, COSMETIC L.Q. 189 (1948). If a sufficient number of persons are susceptible to a substance, it could be "adulterated" or "poisonous" and within the ban of the FDCA. Since the same kind of quantitative distinction should be drawn in imposing a duty to warn in a negligence action, *all* persons would not be protected under either remedy.

[41] In some cases, this objection would not be present. For example, in the Gerkin case, had the plaintiff been warned he would not have worn the coat for some three months after the first sign of discomfort and would have avoided a serious dermatitis. In the usual case, however, the allergic consumer suffers a relatively severe injury from a momentary contact with the allergen.

[42] See note 43 infra.

Conclusion

The recent growth of medical knowledge of allergies will probably have its repercussions in the courts. Several of the few cases available as a guide to courts and the legal profession have taken a doubtful approach to the problem. Only one of the cases that take a more convincing approach has dealt with the problem of the manufacturer having no actual knowledge of the danger inherent in his product to a small minority of consumers.[43] Utilizing the doctrine of the *MacPherson* case, however, it is not unlikely that courts will impose a duty on the manufacturer to use due care in ascertaining the allergenic effect of his product and to warn the consumer of any discovered danger. Although the imposition of that duty might result in a kind of strict liability, it would have the beneficial effect of hastening the elimination of potent allergens from many products.[44]

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[43] Briggs v. National Industries, Inc., (Cal. App., 1949) 207 P. (2d) 110.

[44] It might also have the following detrimental effect: one manufacturer lives up to his duty by placing an omnious warning on the label of his product. Another manufacturer of a similar product decides to risk liability rather than take the chance of scaring away customers, and therefore does not place a warning on the label. The integrity of the first manufacturer might place him at a serious advertising disadvantage.