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NEGLIGENCE-DUTY OF CARE-MANUFACTURER'S AND SUPPLIER'S LIABILITY TO ALLERGIC USER OF BEAUTY PREPARATION

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NEGLIGENCE—DUTY OF CARE—MANUFACTURER'S AND SUPPLIER'S LIABILITY TO ALLERGIC USER OF BEAUTY PREPARATION—Plaintiff contracted dermatitis from the use of a mixture of ammonium thioglycolate and potassium bromate which she had purchased from defendant manufacturer as a permanent wave lotion and fixative. The lower court held that since the injury was due to her allergy, the plaintiff did not have a cause of action. On appeal, *held*, affirmed. The manufacturer could not reasonably foresee the injurious effects of a combination of the chemicals. Although the evidence showed that one out of one thousand persons was allergic to ammonium thioglycolate, the plaintiff was injured only by the use of a combination of the two chemicals, the dangerous character of which the manufacturer had had no previous knowledge. *Bennett v. Pilot Products Co.*, (Utah 1951) 235 P. (2d) 525.

The authorities are not in agreement as to the manufacturer's liability for injury arising from the injured person's allergy to the manufacturer's product.¹

¹ 49 MICH. L. REV. 253 (1950); 10 BROOKLYN L. REV. 363 (1941); SALMOND, LAW OF TORTS, 10th ed., 435 (1945); PROSSER, HANDBOOK OF THE LAW OF TORTS 679 (1941). Many of these actions are brought on the theory of warranty. For example, see *Zirpola v. Adam Hat Stores, Inc.*, 122 N.J.L. 21, 4 A. (2d) 73 (1939); *Stanton v. Sears, Roebuck & Co.*, 312 Ill. App. 496, 38 N.E. (2d) 801 (1942).

One factor complicating these cases is a formerly accepted rule that the original vendor of goods is not liable for an injury caused by a defect in his goods to anyone beyond his immediate vendee.² This rule was modified by some courts to make the manufacturer liable for a danger of which he knows and about which he does not warn the injured person. No contractual relationship is deemed necessary. On this theory some courts hold that a manufacturer is responsible for an injury if he knows that some persons are allergic to his product and fails to warn them against it.³ Other courts further modified the general rule in favor of the ultimate consumer by imposing liability on the manufacturer of "inherently dangerous" articles, those which are intended to preserve, destroy or affect human life. On this theory, some courts have held such products as soap, hair dye, and other beauty preparations to be "inherently dangerous" articles when sold without warning of possible allergic effects to a third person into whose hands the manufacturer might expect them to come.⁴ This would seem to be an extreme extension of the original rule, which was limited to articles in the categories of food, drugs, or explosives. The extension is, however, in line with the modern usage of the rule.⁵ A third group of courts, accepting the philosophy of the *MacPherson* case,⁶ find that a manufacturer or supplier of goods is liable for injuries from the use of his product if he could reasonably foresee probable injury to the plaintiff, arising from his failure to use due care, and regardless of the absence of contractual relationship. Thus, the manufacturer is liable to the allergic consumer if he could reasonably foresee danger to persons of this class.⁷ However, except as to food and drugs,⁸ most courts require that the manufacturer or supplier have knowledge that some persons had previously suffered from the use of his product, because of an allergy to it, before liability on any theory will be imposed.⁹ The manufacturer fulfills his duty to the user of his product by placing a warning on the container of his product, even though, as when the product is used by a beauty operator, the ultimate consumer would not be warned.¹⁰ The facts of the principal case did not warrant any duty being placed on the manufacturer. However, as the concurring opinion warns, if

² PROSSER, TORTS 674-675 (1941).

³ *Parker v. Oloxo, Ltd.*, [1937] 3 All E.R. 524; *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); *Stanton v. Sears, Roebuck & Co.*, supra note 1.

⁴ *Parker v. Oloxo, Ltd.*, supra note 3; *Holmes v. Ashford*, [1950] 2 All E.R. 76. For a leading case on the rule of "inherently dangerous" articles, see *Huset v. J. I. Case Threshing Machine Co.*, (8th Cir. 1903) 120 F. 865. The "imminently dangerous" article rule amounts to the same thing as the "inherently dangerous" article rule.

⁵ PROSSER, TORTS 676-679 (1941).

⁶ *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

⁷ *James M. Taylor v. Newcomb Baking Co.*, 317 Mass. 609, 59 N.E. (2d) 293 (1945).

⁸ PROSSER, TORTS 690 (1941). For an example of statutory liability, see *Willson v. Faxon, Williams and Faxon*, 208 N.Y. 108, 101 N.E. 799 (1913).

⁹ Research discloses just one case to the contrary, *James M. Taylor v. Newcomb Baking Co.*, supra note 7, and even this case does not squarely support the contrary view.

¹⁰ *Holmes v. Ashford*, supra note 4.

the manufacturer does know that some users of his product are allergic to it, then the injury can reasonably be foreseen, and a duty to warn users is created. By denying this, the dictum of the majority opinion places an unreasonable risk on the consumer, although some authorities do seem to sustain this position.¹¹ Judicial recognition that injury due to allergy is foreseeable seems to be hampered both by the unfortunate tendency of the courts to cast the question in terms of "individual peculiarities" and by the failure of legal bibliography to place the allergy cases in a special category.¹² It seems reasonable that liability should be extended further. New beauty preparations have come on the market in increasingly large quantities. The only person who might reasonably be expected to test these products is the manufacturer. Although he should not be held to absolute liability, he should be required to test his product on a sufficiently large number of persons so that he will know its effects. And if injury is foreseeable to any of the users, then he should be held to have a duty to warn them against it.

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¹¹ PROSSER, TORTS 679 (1941).

¹² Improper classification of these cases renders it extremely difficult to ascertain the exact shape of the law in this field.