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Doran E. Perdue

courts of sister states construing the charters of these companies.[48] No further use of this has been made since those cases, but the application is possible as the decision of a Court may be regarded as a public act of a state. If the Court were to extend the application of the clause this far, it will have reached the limit of possible control by the Constitution of conflict of laws situations.

Thus it is apparent that the *Hughes* case is significant, but the extent of its significance is at the present time impossible to predict. There is the possibility that the case will follow the pattern set by the earlier decisions and be limited in scope or applied only in isolated instances by the Supreme Court.[49] The fact that the *Hughes* case was a five-to-four decision is a circumstance tending to negative any expansion of its holding, at least at the present time. On the other hand, the majority opinion was carefully written and gives the impression that the Court took a conscious step toward broadening its former rulings. This was realized by the dissenting justices who argned strongly against any such expansion. The Court appeared to abandon its former approach requiring a need for a knowledge of rights between the parties in advance of their entering into contractual relations, and to adopt an approach based on the uniform enforcement of rights in general.[50] Because of this attitude the decision will most likely be broadened to include some if not all of the mentioned exceptions.

JAY ALAN HANOVER

LEGAL ASPECTS OF ALLERGY

I. INTRODUCTION

Discussions of allergy have appeared frequently in medical journals and treatises[1] but only rarely in legal periodicals and treatises.[2] In recent

48. See note 12 *supra*. See also Note, 13 ILL. L. REV. 43, 57 (1918) as to the use of the word "Records" in the clause in this connection.

49. There is some indication that may be gathered from past cases that the Supreme Court has been alert to invalidate categoric all-embracing state statutes or public policies in cases involving conflict of laws questions, but has at the same time been slow to interfere where the statute or public policy is limited in its scope or application. *Compare* Hartford Accident & Indemnity Co. v. Delta Pine & Land Co., 292 U.S. 143, 54 Sup. Ct. 634, 78 L. Ed. 1178 (1934), *with* Hoopeston Canning Co. v. Cullen, 318 U. S. 313, 63 Sup. Ct. 602, 87 L. Ed. 777 (1943) and American Fire Ins. Co. v. King Lumber & Mfg. Co., 250 U.S. 2, 39 Sup. Ct. 431, 63 L. Ed. 810 (1919).

50. See note 41 *supra*. The granting of certiorari by the Court in the *United Airlines* case may be additional evidence of this change of attitude.

1. Some of the better general treatises are: COOKE, ALLERGY IN THEORY AND PRACTICE (1947); FEINBERG, ALLERGY IN PRACTICE (2d ed. 1946); VAUGHAN, PRACTICE OF ALLERGY (1939). Perhaps the best treatment from a layman's viewpoint is VAUGHAN, ALLERGY AND APPLIED IMMUNOLOGY (1931).

2. DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER §§ 4.22 *et seq.* (1951); Barasch, *Allergies and the Law*, 10 BROOKLYN L. REV. 363 (1941); CULL, *Allergy and the Law*, 12 INS. COUNSEL J. 45 (1945); Horowitz, *Allergy of the Plaintiff as a*

years, however, allergy and problems of hypersensitivity have become increasingly important in law. Whether this is due to the fact that a greater number of persons today are actually allergic because of new products and processes,[3] or whether it is because there is today a better understanding of allergy cannot be categorically stated. Perhaps it would be safe to assume that the increased number of allergy cases is due in some measure to a combination of both causes.

It has been said that fully ten per cent of the people of this country suffer from some form of allergy.[4] While a simple definition which would be in any way helpful is difficult to formulate,[5] it may be said that allergy is a process of sensitization[6] by which a foreign substance introduced into the blood stream causes the body to create antibodies to combat that foreign element. In this respect it is similar to some of the processes of immunization to disease where a small amount of the infectious disease is introduced to form antibodies which then remain in the blood stream for varying periods of time. In allergy the reaction occurs when the same foreign substance is introduced into the blood stream at another later time—in some cases the second time. This reaction is one of a biochemical nature between the foreign substance called an allergen or antigen[7] and the antibodies, which manifests itself in the form of one of the allergic diseases. Allergy is thus the name given to a number of physiologically similar diseases which are evidenced in a number of ways. Among these diseases are asthma, hay fever, urticaria (hives or nettle rash), angioneurotic edema (intermittent swelling), and very often dermatitis;[8] it also plays an important part in migraine (sick

Defense in Actions Based Upon Breach of Implied Warranty of Quality, 24 So. CALIF. L. REV. 221 (1951); Notes, 121 A.L.R. 464 (1939), 131 A.L.R. 123 (1941), 49 MICH. L. REV. 253 (1950); see also 19 B.U.L. REV. 501 (1939); 24 IOWA L. REV. 792 (1939); 26 MINN. L. REV. 668 (1942).

3. Sulfonamides have become common producers of dermatitis, and contact reactions with penicillin have been reported frequently. FEINBERG, ALLERGY IN PRACTICE 669-97 (2d ed. 1946). See also Meltzer, *Sulfonamide 'Fixed Eruption',* 13 J. INVESTIGATIVE DERMATOLOGY 213 (1949); Simon, *Skin Sensitivity to Streptomycin,* 20 J. ALLERGY 56 (1949).

4. Up to two per cent suffer from hay fever alone. VAUGHAN, ALLERGY AND APPLIED IMMUNOLOGY 64 (1931).

5. Vaughan says the term literally means "altered energy or altered activity or altered reactivity." VAUGHAN, ALLERGY AND APPLIED IMMUNOLOGY 23 (1931). Other definitions are found in COOKE, ALLERGY IN THEORY AND PRACTICE 5 (1947; FEINBERG, ALLERGY IN PRACTICE 3 (2d ed. 1946); see Briggs v. National Industries, Inc., 92 Cal. App.2d 542, 207 P.2d. 110, 111 (1949); Barasch, *Allergies and the Law,* 10 BROOKLYN L. REV. 363 (1941).

6. There is a distinction to be drawn between a sensitizer and a direct irritant. "A cutaneous sensitizer is an agent which does not necessarily eause demonstrable changes on first contact but may effect such specific changes in the skin that, after five to seven days or more, further contact of the agent on the same or other parts of the body will cause dermatitis. . . . A primary cutaneous irritant is an agent which will cause dermatitis by direct action on the normal skin at the site of contact if it is permitted to act in sufficient intensity or quality for a sufficient length of time." SCHWARTZ AND PECK, COSMETICS AND DERMATITIS 36 (1946). A primary irritant may also be a sensitizer.

7. COOKE, ALLERGY IN THEORY AND PRACTICE, 3 (1947).

8. A complete list of the diseases in which allergy plays a part may be found in VAUGHAN, ALLERGY AND APPLIED IMMUNOLOGY 304-16 (1931).

headaches), colitis (colicky indigestion), constipation and numerous other disorders.[9]

The antigen or allergen may be almost any substance.[10] Among the common offenders are various foods,[11] drugs, [12] dyes,[13] cosmetics,[14] and numerous other stimuli.[15] An allergic disease, like an infectious disease, is composed of two basic elements: (1) there must be the tendency or sensitivity in the subject[16] and (2) there must be the antigen or allergen. An allergic

9. *Ibid.*

10. COOKE, ALLERGY IN THEORY AND PRACTICE, 3 (1947).

11. "Any food may be a cause of an allergic reaction. Eggs, milk, and wheat are generally considered as the most frequent and important. Banana, strawberry, cantaloupe, chocolate, celery, potato, tomato, liver, fish, and shellfish are not rare causes of allergy." COOKE, ALLERGY IN THEORY AND PRACTICE 21 (1947). See Livingood & Pillsbury, *Specific Sensitivity to Foods as a Factor in Various Types of Eczematous Dermatitis,* 60 ARCH. DERMAT. & SYPH. 1090 (1949). There have been surprisingly few cases of food allergy brought into the courts. See, *e.g.,* MacLehan v. Loft Candy Stores, Inc., 172 So. 367 (La. App. 1937). Perhaps the reason is that such cases are generally confused with reactions to other organic substances. DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER 227 (1951).

12. "Any organic drug and a few that are inorganic may act as allergens. . . ." COOKE, ALLERGY IN THEORY AND PRACTICE 21 (1947). See Machlitt v. Myers, 23 Ohio App. 160, 155 N.E. 248 (1926) (Arnica). And see note 3, *supra.*

13. Perhaps the most notorious are the coal tar dyes or aniline derivatives which are used in cosmetics. See Smith v. Burdine's Inc., 144 Fla. 500, 198 So. 223 (1940) (Meta-xylene-azo-betanaphthol); Zirpola v. Adam Hat Stores, Inc., 122 N.J.L. 21, 4A.2d 73 (1939) (paraphenylenediamine); Bianchi v. Denholm & McKay Co., 302 Mass. 469, 19 N.E. 2d 697, 121 A.L.R. 460 (1939) (aniline). Other cases where dyes seem to have been involved were Flynn v. Bedell Co. of Massachusetts, 242 Mass. 450, 136 N.E. 252 (1922) (fur dye); Gerkin v. Brown & Sehler Co., 177 Mich. 45, 143 N.W. 48 (1913) (fur dye); Walstrom Optical Co. v. Miller, 59 S.W.2d 895 (Tex. Civ. App. 1933) (eye glass frame lacquer). See also FEINBERG, ALLERGY IN PRACTICE 698 (2d ed. 1946); SCHWARTZ AND PECK, COSMETICS AND DERMATITIS 87 (1946); VAUGHAN, PRACTICE OF ALLERGY 870 (1939).

14. A chart of various cosmetics which have been offenders is found in COOKE, ALLERGY IN THEORY AND PRACTICE 283 (1947). See SCHWARTZ AND PECK, COSMETICS AND DERMATITIS 36 (1946); Briggs v. National Industries, Inc., 92 Cal. App.2d 542, 207 P.2d 110 (1949) (permanent wave); Zager v. F. W. Woolworth Co., 30 Cal. App.2d 324, 86 P.2d 389 (1939) (freckle cream); Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693 (1946) (perfume); Bianchi v. Denholm & McKay Co., 302 Mass. 469, 19 N.E.2d 697, 121 A.L.R. 460 (1939) (face poweder); Smith v. Denholm & McKay Co., 288 Mass. 234, 192 N.E. 631 (1934) (depilatory); Arnold v. May Department Stores Co., 337 Mo. 727, 85 S.W.2d 748 (1935) (hairdye); Reynolds v. Sun Ray Drug Co., 135 N.J.L. 475, 52 A.2d 666 (1947) (lipstick); Bundy v. Ey-Teb, Inc., 160 Misc. 325, 289 N.Y. Supp. 905 (N.Y. City Ct. 1935) (eye shadow); Bennett v. Pilot Products Co., Inc., 235 P.2d 525 (Utah 1951).

15. See Frankes, Inc. v. Bennett, 201 Ark. 649, 146 S.W.2d 163 (1941) (sea scallops); Order of United Commercial Travelers v. Shane 64 F.2d 55 (8th Cir. 1933) (butyn); Mutual Life Ins. Co. of New York v. Dodge, 11 F.2d 486, 59 A.L.R. 1290 (4th Cir. 1926), *cert. denied,* 271 U.S. 677 (1926) (novocaine); Ross v. Porteous, Mitchell and Braun Co. 136 Me. 118, 3 A.2d 650 (1939) (dress shields); Longo v. Touraine Stores, Inc. 319 Mass. 727, 66 N.E.2d 792 (1946) (kid gloves); Payne v. R. H. White Co., 314 Mass. 63, 49 N.E.2d 425 (1943) (dress); Wheeler v. Title, Guaranty & Casualty Co. of America, 265 Mich. 296, 251 N.W. 408 (1933) (nupercaine); Cleary v. John M. Marvis Co., 173 Misc. 954, 19 N.Y.S.2d 38 (Sup. Ct. 1940) (nipple shields); Hamilton v. Harris, 204 S.W. 450 (Tex. Civ. App. 1918) (X-ray). Other common products which are reported to have caused allergy are particular forms of denture cream, menthol shaving cream, carbon paper, newspaper, sanitary napkin, tulip bulbs, mentholated cold salve, hair tonic, contraceptive suppository, detergent shampoo, cigarettes and many others. VAUGHAN, PRACTICE OF ALLERGY 859 *et seq.* (1939).

16. There are many elements that go into this aspect of the disease. Some of them, such as dietary and nutritive factors and the role of internal secreting glands, are not yet fully understood. Horowitz. *Allergy of the Plaintiff as a Defense in Actions Based upon Breach of Implied Warranty of Quality,* 24 So. CALIF. L. REV. 221, 226 (1951).

disease is a disease to which a certain portion of the population is susceptible, just as a certain portion is suceptible to an infectious disease.[17]

II. Products Liability—Warranty

The *Uniform Sales Act* provides for two implied warranties on the part of the seller—the implied warranty of fitness[18] and implied warranty of the merchantability.[19] Do these implied warranties of quality extend to a buyer who is allergic to some substance in the article which is the subject of the transaction? The problem of how far these implied warranties should extend is not at all settled by the courts. It is clear that if a seller sells a product which will cause an epidemic of infectious disease, there is a breach of the implied warranty of fitness.[20] It is equally clear that if the disease is "peculiar to the buyer" and he is the only person in the world or the only person out of a large group who would be affected, then recovery will be precluded.[21] Somewhere between these two extremes there should be a line which separates liability from nonliability. The cases which have been decided thus far have done little to establish just where this line is.[22]

Perhaps because the greater number of the cases involving allergy have denied recovery, the rule has arisen that "allergy" of the plaintiff is a valid defense in a breach of warranty suit.[23] This idea is based on the theory that

17. *Ibid.* In the sense that allergy means "altered reactivity," practically all human beings are capable of becoming sensitized to certain antigenic substances under certain circumstances and special conditions. Cooke, Allergy in Theory and Practice 3 (1947). This is not what is meant by allergy. Likewise, allergy is not a mere variation in emphasis. For example morphine acts as a sedative to dogs and as a stimulant to cats. Either reaction is not an allergic one because both are normal. Vaughan, Allergy and Applied Immunology 173 (1931).

18. § 15(1) provides, "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill and judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

19. § 15(2) provides, "Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality."

20. A "warranty, express or implied, that rags sold are fit to be manufactured into paper, is broken, not only if they will not make good paper, but equally if they cannot be made into paper at all without killing or sickening those employed in the manufacture." Dushane v. Benedict, 120 U.S. 630, 646, 7 Sup. Ct. 696, 30 L.Ed. 810 (1887) (rags containing smallpox germs); *cf.* Zirpola v. Adam Hat Stores, Inc., 122 N.J.L. 21, 4 A.2d 73 (1939).

21. See, *e.g.*, Stanton v. Sears Roebuck & Co., 312 Ill. App. 496, 38 N.E.2d 801 (1942), where plaintiff was the only one out of a half million customers who suffered adverse effects from wearing a black rayon dress; *cf.* Singer v. Oken, 193 Misc. 1058, 87 N.Y.S.2d 686 (City Ct. of N.Y. 1949).

22. Conflicting language has sometimes appeared in the same jurisdiction. *Compare* Flynn v. Bedell Co. of Massachusetts, 242 Mass. 450, 136 N.E. 252, 27 A.L.R. 1504 (1922), *with* Bianchi v. Denholm & McKay Co., 302 Mass. 469, 19 N.E.2d 697, 121 A.L.R. 460 (1939), 19 B.U.L. Rev. 501, 24 Iowa L. Rev. 792.

23. *But cf.* Horowitz, *Allergy of the Plaintiff as a Defense in Actions Based upon Breach of Implied Warranty of Quality*, 24 So. Calif. L. Rev. 221, 223 (1951), where it is said that this result was based largely upon lack of medical data in consideration of the cases.

the "peculiarity" of the individual buyer rather than the deleterious quality of the product which produces the injury.[24] The case of *Barrett v. S. S. Kresge Company*[25] illustrates this view quite well. There the vendee of a cotton dress suffered an acute dermatitis which physicians testified was caused by a dye in the dress and the peculiar susceptibility of the plantiff. In refusing recovery the court stated, "It can hardly be said that a vendor . . . would be liable for a breach of an implied warranty solely because of the harmful effect due to a buyer's individual idiosyncrasy."[26] The reason given by the court to sustain its conclusion is that the opposite result "would mean that many merchants have a far reaching and possibly a ruinous liability, which they cannot anticipate or with reasonable precaution avoid."[27]

The opposing view is set forth in *Zirpola v. Adam Hat Stores*.[28] There the plaintiff bought a hat from defendant which contained paraphenylenediamine, an aniline derivative. Several days after wearing the hat, plaintiff's naturally black hair tuned a reddish-orange, and he mainifested symptoms of dermatitis. The defense was that the implied warranty of fitness should extend only to "average" or "normal" persons and not to those who are "abnormally sensitive." It was shown that four to five per cent of those persons coming into contact with the dye would be sensitive to it.[29] In sustaining the recovery, the court held that "The mere fact that only a small proportion of those who use a certain article would suffer injuries . . . does not absolve the vendor from liability under the implied warranty created by the statute;[30] otherwise, . . . it would be necessary to show that the article sold, . . . would be injurious to every user."[31]

Are the *Barnett and Zirpola* cases necessarily in conflict? At first impression, it would seem that one categeroically allows recovery by an allergic plaintiff while the other categorically denies such recovery. At least this is the

24. Zager v. F. W. Woolworth Co., 30 Cal. App.2d 324, 86 P.2d 389 (1939); Stanton v. Sears Roebuck & Co., 312 Ill. App.496, 38 N.E.2d 801 (1942); Ross v. Porteous, Mitchell & Braun Co., 136 Me. 118, 3 A.2d 650 (1939); Longo v. Touraine Stores, Inc. 319 Mass. 727, 66 N.E.2d 792 (1946); Flynn v. Bedell Co. of Massachusetts, 242 Mass. 450, 136 N.E. 252, 27 A.L.R. 1504 (1922); Barrett v. S. S. Kresge Co., 144 Pa. Super. 516, 19 A.2d 502 (1941); *cf.* Frankes, Inc. v. Bennett, 201 Ark. 649, 146 S.W.2d 163 (1941); McLachlan v. Wilmington Dry Goods Co., 41 Del. 378, 22 A.2d. 851 (Super. Ct. 1941), 26 MINN. L. REV. 668 (1942).

25. 144 Pa. Super. 516, 19 A.2d 502 (1941).

26. 19 A.2d at 503.

27. 19 *Id.* at 504.

28. 122 N.J.L. 21, 4 A.2d 73 (1939).

29. 4 A.2d at 74. This figure is substantiated by the authorities. See VAUGHAN, PRACTICE OF ALLERGY 870 (1939). Since the introduction of coal tar dyes, dermatitis has become much more frequent in occurrence. SCHWARTZ AND PECK, COSMETICS AND DERMATITIS 87 (1946). New York and other states have forbidden the use of paraphenylenediamine as a dye. 4 A.2d at 74; *cf.* Federal Food, Drug and Cosmetic Act, 52 STAT. 1049 (1938), 21 U.S.C.A. §§ 346, 351 (Supp. 1950).

30. UNIFORM SALES ACT § 15(1).

31. 4 A.2d at 75.

interpretation normally given to their holdings.[32] It would seem, however, that there is no inherent conflict. The dye in the *Zirpola* case was a fairly notorious one, [33] and the court likened the situation to the one which exists when a product containing infectious disease germs is sold.[34] Clearly a plaintiff ought not to have to show that every user of the product would be adversely affected by its use. By the same token, a plaintiff ought not to be able to recover if his malady is a case *sui generis*. This seems to be what the *Barnett* case and others are saying when they speak in such phrases as "constitutional inability of the buyer," "abnormality," "individual idiosyncrasy," "peculiarity of the buyer," etc.

The problem of what test should be applied is further complicated by the language in the case of *Bianchi v. Denholm & McKay Co.*[35] There plaintiff, having bought a face powder which contained an aniline dye,[36] suffered dermatitis. The evidence showed that aniline dyes do not affect "normal" persons, but "some" persons are sensitive to aniline because of their "allergic condition." The court said, "We do not think that a seller of a face powder containing a known irritant to 'some' persons' skins can be heard to say that he is not liable for a breach of an implied warranty of fitness . . ."[37] Thus the court allowed recovery to one of a class of "nonaverage" individuals and "allergic" persons without indicating the size of the class. It is language such as this that points up the problem involved.

It is evident that this is not a situation where there can be a precise, mathmatical test.[38] However, the cases have shown that certain things will be of some weight in making a decision. The following are some of the variables which may affect the result.

1. *Knowledge of the Seller.*—The cases speak of knowledge in various ways. It is generally held that knowledge of the intrinsic unfitness of the goods is not a prerequisite to liability.[39] However, some of the cases have

32. Barasch, *Allergies and the Law,* 10 BROOKLYN L. REV. 363; 365 (1941). *But cf.* Horowitz, *Allergy of the Plaintiff as a Defense to Action Based upon Breach of Implied Warranty of Quality,* 24 So. CALIF. L. REV. 221, 223 (1951).

33. See *supra,* note 29.

34. 4 A.2d 73. See *supra,* note 20.

35. 302 Mass. 469, 19 N.E.2d 697, 121 A.L.R. 460 (1939), 19 B.U.L. REV. 501, 24 IOWA L. REV. 792.

36. The cosmetic industry has taken stock of the dangerous effects of paraphenylenediamine and the other aniline dyes. *Cf.* SCHWARTZ AND PECK, COSMETICS AND DERMATITIS 87 (1946): "Dermatitis from hairdyes was of infrequent occurrence before the introduction of paraphenylenediamine and of similar oxidation hair dyes." This class of hair dyes is estimated by these authors to have caused nine times as much dermatitis as any other single cosmetic.

37. 19 N.E.2d at 699.

38. The seller's liability in these cases is a matter of degree. I WILLISTON, SALES § 243 (3d ed. 1948).

39. "[K]nowledge of unfitness on the part of the defendant need not be shown in an action for breach of an implied warranty of fitness." Bianchi v. Denholm & McKay Co., 302 Mass. 469, 19 N.E.2d 697, 699, 121 A.L.R. 460 (1939). See DICKERSON PRODUCTS LIABILITY AND THE FOOD CONSUMER 217 (1951).

asserted that there can be no recovery unless there is a showing that the seller knows that his vendee is allergic.[40] The argument for nonliablity is that the Uniform Sales Act requires that the buyer "make known to the seller the particular purpose for which the goods are required,"[41] but if the seller does not know of the plaintiff's allergy then he does not know "the particular purpose for which the goods are required"—*i.e.*, use by an allergic person—and the seller is thereby prevented from exercising his "skill and judgment."[42] It seems that this argument is much too strict and logical, and the seller should be charged with knowledge whenever the product contains a "known irritant"[43] or whenever it is a new process which adversely affects a substantial fragment of the purchasers.[44] By and large the seller should be charged with knowledge when he can reasonably anticipate that the product will be injurious to a purchaser, and the more common allergies should and may be reasonably anticipated.[45]

2. *Problems of Proof.*—In general there is no requirement that plaintiff in a lawsuit prove that he is or is not "normal."[46] However, the proof of this issue may be vitally important in a suit involving allergy. One court has said that a jury could "assume" that a plaintiff who contracted dermatitis after wearing a dress was normal.[47] The *Bianchi* case[48] indicates that the burden is on the seller to show that the injury was a result of plaintiff's peculiar idiosyncrasy when there is evidence that "some" persons would be adversely affected by the use of the product. Perhaps a majority of the cases say that where the issue of allergy is raised the burden is upon the plaintiff to show the deleterious nature of the product[49] or to show that the injury was not

40. "[A]n implied warranty of fitness does not extend to fitness in respect of matters wholly unknown to the dealer and peculiar to the individual buyer." Flynn v. Bedell Co. of Massachusetts, 242 Mass. 450, 136 N.E. 252, 253, 27 A.L.R. 1504 (1922). *But cf.* Gerkin v. Brown & Sehler Co., 177 Mich. 45, 143 N.W. 48, 48 L.R.A. (N.S.) 224 (1913).

41. UNIFORM SALES ACT § 15(1).

42. "It is only when he [the seller] has that knowledge [of plaintiff's allergy] that he is in position to exercise his skill and judgment. . . ." Griffiths v. Peter Conway, Ltd., [1939] 1 All E.R. 685, 691 (C.A.).

43. If the product contains an ingredient which is known in the trade to have allergenic qualities, then the seller should be charged with knowledge. The *Bianchi* and *Zirpola* cases, *supra* notes 35 and 28, dealt with such an irritant. See also Taylor v. Newcomb Baking Co., 317 Mass. 609, 59 N.E.2d 293 (1945) (recovery allowed in suit for negligence because soap powder was known in the trade as an irritant).

44. See Horowitz, *Allergy of the Plaintiff as a Defense in Actions Based upon Breach of Implied Warranty of Quality*, 24 So. CALIF. L. REV. 221, 228 (1951).

45. See 24 IOWA L. REV. 792, 794 (1939).

46. See Note, 29 B.U.L. REV. 393, 397 (1949).

47. Payne v. R. H. White Co., 314 Mass. 63, 49 N.E.2d 425 (1943).

48. Bianchi v. Denholm & McKay Co., 302 Mass. 469, 19 N.E.2d 697, 121 A.L.R. 460 (1939). See note 35, *supra.*

49. Stanton v. Sears Roebuck & Co., 312 Ill. App. 496, 38 N.E.2d 801 (1942); Ross v. Porteous, Mitchell & Braun Co., 136 Me. 118, 3 A.2d 650 (1939); Longo v. Touraine Stores, Inc., 319 Mass. 727, 66 N.E.2d 792 (1946); Barrett v. S. S. Kresge Co., 144 Pa. Super. 516, 19 A.2d 502 (1941); see Landers v. Safeway Stores, Inc., 172 Ore. 116, 139 P.2d 788 (1943).

due to his own "constitutional disability."[50] It would seem that the plaintiff ought not to be able to recover merely by showing that he used the product and then suffered an allergic attack.[51] However, the fact that the injury occurred soon after contact with defendant's product is some evidence that the article was deleterious.[52] Likewise, the fact that the injury did or did not occur to others and the number of others who suffered should be a highly material and effective kind of proof.[53] As a rule it would seem that the courts should not infer that the cause of a plaintiff's injury was some deleterious substance in defendant's product;[54] but, if the plaintiff can point to some particular substance in defendant's product which is a notorious allergen,[55] then it seems reasonable to say that plaintiff need only show that that his malady was of the type characteristically suffered from that substance. Of course in many instances the plaintiff will not know the single substance which led to his injury; it is here that proof of similar effects on others should be of great importance in arriving at a decision.[56]

The recent case of *Board v. Thomas Hedley & Co., Ltd.*,[57] illustrates the use of discovery procedures in enabling the plaintiff to prove the cause of his injury. There the plaintiff contracted dermatitis after using defendant's product, "Tide," for the purpose of washing clothes. The plaintiff sought by discovery to have the defendant reveal all complaints and congratulatory letters regarding the product. Defendant revealed only the letters which it had received prior to the time of plaintiff's injury. Plaintiff now seeks to have discovery of all correspondence subsequent to the time of the

50. See Graham v. Jordan Marsh Co., 319 Mass. 690, 67 N.E.2d, 404 (1946).

51. DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER § 4.23 (1951). See Griffiths v. Peter Conway, Ltd., [1939] 1 All E.R. 685 (C.A.), where plaintiff suffered dermatitis after wearing defendant's Harris Tweed coat. The court, after hearing evidence that no other complaint had been received out of the hundreds of thousands of coats sold, said that the possibility that the cause of the trouble was plaintiff's highly sensitive skin outweighed the possibility of a deleterious article in the coat. *Cf.* Payne v. R. H. White Co., 314 Mass. 63, 49 N.E.2d 425 (1943), where the court said that the jury could "assume" that the plaintiff was normal.

52. See Cahill v. Inecto, Inc., 208 App. Div. 191, 203 N.Y. Supp. 1 (1st Dep't 1924).

53. Indeed this consideration may cause the court to either label the cause of the injury as "plaintiff's peculiar susceptibility" or "constitutional disability," or on the other hand it may influence the court to decide that the product is deleterious. *Compare* Stanton v. Sears Roebuck & Co., 312 Ill. App. 496, 38 N.E.2d 801 (1942), *with* Bianchi v. Denholm & McKay Co., 302 Mass. 469, 19 N.E.2d 697, 121 A.L.R. 460 (1939), 19 B.U.L. REV. 501, 24 IOWA L. REV. 792. See Carter Products, Inc. v. Federal Trade Commission, 186 F.2d 821 (7th Cir. 1951), where the court held that testimony by a physician that he had treated fifty cases of dermatitis caused by "Arrid" in a ten year period was sufficient to sustain the commission's order requiring petitioner to cease and desist from representing 'Arrid" to be harmless. See also Board v. Thomas Hedley & Co., Ltd., [1951] 2 All E.R. 431 (C.A.).

54. *E.g.*, Stanton v. Sears Roebuck & Co., 312 Ill. App. 496, 38 N.E.2d 801 (1942); Griffiths v. Peter Conway, Ltd., [1939] 1 All E.R. 685 (C.A.).

55. DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER § 4.25 (1951).

56. The time and expense of proving that a particular element in the defendant's product caused the injury may prove insurmountable barriers to the plaintiff. If chemical analysis of the product does not reveal a known allergen, then this type of proof should be acceptable.

57. [1951] 2 All E.R. 431 (C.A.).

purchase. The master refused plaintiff's application and the Court of Appeal affirmed on the ground that the application was too broad. However, the court said that the ". . . important issue whether the product was dangerous should be fully investigated."[58] The court distinguished between the case where the issue is whether the defendant should have known the product is dangerous and the present case where the issue is whether the product is in fact dangerous. On this basis it concluded that the application was material and necessary to enable the plaintiff to gain witnesses and the plaintiff was not on a fishing expedition. The mere fact that the information may lead to other litigation against the defendant was not regarded by the court as sufficient reason for denying discovery, and it indicated that so long as the request is confined to "complaints of personal injuries" by persons "not altogether exceptional," the evidence is proper subject for discovery.

In *Drake v. Herrman*,[59] the plaintiff sought to examine the defendants before trial "as to chemicals, poisons, drugs and/or other ingredients used in the manufacture" of defendant's product and also as to the preparation and supervision over such preparation. Defendant objected to the discovery on the ground that its product was made by a secret process and that such disclosure would deprive it of property without due process of law and would compel it to reveal legitimate trade secrets. The court held that defendant's process was a property right and refused to allow the discovery on the ground that it might reveal only harmless ingredients which plaintiff could ascertain by chemical analysis. Even though the lower court order was framed so as to include only a disclosure of the ingredients of the product, the court felt that it might have a tendency to uncover valuable trade secrets of the defendant and for this reason it decided that the need for discovery was not sufficiently material or necessary.

It seems that the attitude of the English court is much more desirable than that of the court in the *Drake* case. While the former court was willing to allow discovery even though it might lead to more litigation against the defendant, the *Drake* case manifested a reluctance to allow the discovery even though it might have protected any of defendant's trade secrets by an appropriate order limiting the scope of the discovery. The allergy cases involve problems that more often than not are likely to be decided on information which is more readily available to one party than the other.[60] Thus it would seem that the courts should be especially liberal in allowing discovery procedures in these cases.

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58. *Id.* at 432.

59. 261 N.Y. 414, 185 N.E. 685 (1933).

60. Just as the manufacturer normally has the information relating to ingredients in his product, the plaintiff might have a past medical history which would be relevant to the case and which the defendant might want to obtain by discovery.

3. *Plaintiff's Injury.*—In general, the fact that the plaintiff suffered to a greater extent because of his susceptibility will not preclude or diminish recovery. Illustrative of this rule is the case of *Smith v. Denholm, McKay & Co.*,[61] where the plaintiff purchased a depilatory containing thallium. It was shown that thallium is injurious to certain people when used in the strength which defendant used in his product, but plaintiff suffered to a greater degree because of abnormal endocrine glands. The court held for the plaintiff and allowed recovery for the total injury. The rule is similar to that doctrine in the law of negligence which holds that a person owes a duty to those who are suffering from a disease or infirmity equally as much as he owes the duty to healthy and normal persons, and if the negligent act aggravates the pre-existing condition the defendant must respond in damages for the total injury.[62]

III. Products Liability—Negligence

While most of the allergy cases involving manufacturers and suppliers have arisen under the implied warranties of quality, there are a few cases that have dealt with the problem from the negligence aspect. Liability predicated on a negligence theory may be extremely important where no warranty may be found.[63] This is the case where the defendant is a remote vendor or manufacturer[64] or where he is a supplier of services rather than chattels, and the requirements of "privity" and "sale," respectively, militate against use of the warranty action.

In suits for negligence, the liability is based upon the duty of a manufacturer to use reasonable care in making his product.[65] Since the test of negligence is whether the defendant's conduct involves some unreasonable risk of harm to others,[66] the problem is then whether or not a defendant who sells or supplies chattels or services which result in allergy has created an "unreasonable risk of harm." Since the idea of risk involves some recognizable danger based upon knowledge of existing facts, the problem is what kind of knowledge on the part of the seller is required.

It is possible to argue in a warranty action that no knowledge on the part of the seller is required inasmuch as the obligation of a warranty is

61. 288 Mass. 234, 192 N.E. 631 (1934). See Delta Nehi Bottling Co. v. Lucas, 184 Miss. 693, 185 So. 561 (1939), 24 Iowa L. Rev. 790 (plaintiff's injury aggravated by pre-existing disease of pyelitis).

62. See Prosser, Torts 344 (1941); Am. Jur., *Negligence* § 82 (1941); Note, 121 A.L.R. 464 (1939).

63. Prosser, Torts 667 (1941).

64. See *id.* at 673.

65. The modern law on this subject starts with MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050, L.R.A. 1916F 696, Ann. Cas. 1916C 440 (1916).

66. Prosser, Torts 220 (1941).

imposed by operation of law;[67] but in a negligence action it would seem that knowledge of some kind is essential inasmuch as knowledge of existing facts is a prerequisite to establishing a duty and also a breach of the duty.[68]

In *Gerkin v. Brown & Sehler Co.*,[69] a plaintiff who contracted dermatitis from a dyed fur coat which defendant knew from experience would produce untoward results in 1 out of 100 people, was allowed to recover. The court said, "When the fact is once established and demonstrated by experience that a certain commodity apparently harmless contains concealed dangers, and when . . . some innocent purchaser, even though the percentage of those injured be not large, a duty arises . . . of warning the ignorant customer or user of the existence of the hidden danger. . . . That the great majority of persons are safe . . . or that few injuries in fact result from its use, does not militate against this principle when the certain fact of imminent danger to a percentage is established."[70] Thus it is quite obvious that the requirement of knowledge is sufficiently satisfied if the defendant actually knows that a "percentage" of allergic persons may be injured by his product.

In *Arnold v. May Department Stores Co.*, [71] plaintiff was allowed to recover for injuries sustained as a result of defendant's hair dresser's applying a dye called "Notox."[72] Plaintiff had previously suffered a skin eruption from a dye preparation and so advised the hair dresser. In spite of plaintiff's unwillingness to accept anything but henna, the clerk assured her that "Notox" was harmless and went on with the treatment. There was an express notice in the instruction to conduct a "predisposition test,"[73] which was completely ignored by the operator. Defendant introduced a large amount of testimony to the effect that "Notox" was harmless to normal persons. Relying on the *Gerkin* case, the court said that plaintiff "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."[74]

67. See DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER § 4.25 (1951); Barasch, *Allergies and the Law*, 10 BROOKLYN L. REV. 363, 368 (1941).

68. PROSSER, TORTS 232-38 (1941).

69. 177 Mich. 45, 143 N.W. 48, 48 L.R.A. (N.S.) 224 (1913).

70. 143 N.W. at 53.

71. 337 Mo. 727, 85 S.W.2d 748 (1935).

72. "Notox" was the succesor to the Inecto dye which precipitated several cases involving allergy. See Crean v. Inecto, Inc., 99 N.Y.L.J. 2283, 72 U.S.L. REV. 348 (1938) (otherwise unreported); Drake v. Herrman, 261 N.Y. 414, 185 N.E. 685 (1933); Karr v. Inecto, Inc., 247 N.Y. 360, 160 N.E. 398 (1928); Cahill v. Inecto, Inc., 208 App. Div. 191, 203 N.Y. Supp. 1 (1st Dep't 1924) .

73. The procedure is to apply a small application of the dye to a portion of the skin behind the ear and then to await results on the following day. See Barasch, *Allergies and the Law*, 10 BROOKLYN L. REV. 363, 375 n.93 (1941). It is similar to the prophetic patch test used by some of the cosmetic industry before putting a product on the market. See COOKE, ALLERGY IN THEORY AND PRACTICE 284 (1947).

74. 85 S.W.2d at 752; see Cleary v. John M. Maris Co., 173 Misc. 954, 19 N.Y.S.2d 38 (Sup. Ct. 1940).

Thus in one case sufficient knowledge is found if the defendant actually knows that some persons in a "group" will be injured and in the other case requisite knowledge is found where the defendant ought to have known that this plaintiff would suffer. It has also been suggested that the defendant should be held to that knowledge customarily possessed by persons in the defendant's trade.[75] Any of these grounds should constitute a sound basis for establishing a duty on the part of the defendant, and recovery is justified in any situation where there is an injury sustained and where defendant had or should have had any of the kinds of knowledge stated.

From the foregoing discussion it should be evident that the problem of liability can best be solved by determining whether or not the defendant's conduct was in fact negligent.[76] However, as in other fields of law, some courts have confused the issue of negligence with that of causation or assumption of risk. *Walstrom Optical Co. v. Miller*[77] was a case where the court seems to have made this error. There the plaintiff was shown to be allergic to a lacquer on eye glass frames. The court concluded that it would have been unreasonable to require the defendant to conduct a test taking from two to three days to determine if the plaintiff was sensitive to the lacquer. Had the court stopped here, it would have had the answer, but it went on further to say that the proximate cause of the injury was plaintiff's individual idiosyncrasy. It seems that the court erred by ascribing substantive reality to what is at most a predisposing tendency when it could have simply said that the acts of the defendant were not negligent under the circumstances.[78]

In *Antowill v. Friedmann*,[79] the court decided that idiosyncrasy to X-ray treatment was so rare that the plaintiff "assumed the risk" of her idiosyncratic condition. In essence then the court was saying that the defendant owed no duty to an idiosyncratic plaintiff.[80] Here again it would seem that a better manner of handling the case would have been to say that the acts of the defendant were not negligent under the circumstances. In both this and the *Walstrom* cases, it would seem that the court took an unnecessary and circuitous route of saying simply that there was no negligence.

In contrast to the *Gerkin* case,[81] where recovery was allowed simply by plaintiff's showing that some persons would be injured by the use of

75. Taylor v. Newcomb Baking Co., 317 Mass. 609, 59 N.E.2d 293 (1945); DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER 222 (1951).
76. See Note, 49 MICH. L. REV. 253, 256 (1950).
77. 59 S.W.2d 895 (Tex. Civ. App. 1933).
78. *Cf.* Mutual Life Ins. Co. of New York v. Dodge, 11 F.2d 486, 59 A.L.R. 1290, (4th Cir. 1926), *cert. denied*, 271 U.S. 677 (1926).
79. 197 App. Div. 230, 188 N.Y. Supp. 777 (2d Dep't 1921).
80. It was specifically so held in Levi v. Colgate-Palmolive Pty., Ltd., [1941] 41 S.R. (N.S.W.) 48, 58 W.N. 63.
81. *Supra*, note 69.

defendant's product, the majority of the cases have set up higher standards of proof on the part of the plaintiff. Many of the cases stem from the so-called tests outlined in *Karr v. Inecto, Inc.*:[82] (1) the injury resulted from contact with the chemical product manufactured by the defendant; (2) the chemical product was inherently dangerous and poisonous; (3) the defendant was negligent in putting upon the market a dangerous and poisonous product. While the expression "inherently dangerous and poisonous" would not seem to preclude recovery even to an allergic person if he can show negligence,[83] the interpretation placed upon the test has proved a major barrier to recovery in numerous instances. Illustrative is the case of *Drake v. Herrman*,[84] where the court seems to say that the plaintiff must prove the presence of inherently dangerous and poisonous *ingredients*. This has been interpreted to mean that the plaintiff must point to a specific element of the product as his allergen. It seems that the case proceeds on the invalid assumption that the plaintiff is allergic and if he is allergic then he cannot recover.

That the *Karr* case did not attempt to set up as severe a test as the *Drake* case indicates is shown by the decision of *Cahill v. Inecto, Inc.*[85] Here plaintiff was injured while using "Inecto" exactly as directed. In the suit by the plaintiff there was no attempt to point to the specific ingredient that caused the injury. The court said that the fact that the plaintiff was a perfectly healthy person who was using the defendant's product exactly as directed, and that such evidence places a burden upon the defendant of showing by chemical analysis or otherwise that the product did not contain harmful ingredients. There is no valid reason why the plaintiff should necessarily have to isolate the particular ingredient which is his allergen, inasmuch as this may be a very time-consuming and expensive task.[86] It should be sufficient that he is able to show that other people suffered or were likely to suffer from the use of the product or that the defendant has knowledge or means of knowing these facts.[87]

It is fairly obvious that the doctrine of *res ipsa loquitur* is not available as an aid to the plaintiff in proving his case because it is the allergy itself which prevents the application of this doctrine.[88]

As in warranty, knowledge by the plaintiff of his own predisposition may bar recovery. In warranty the theory is that plaintiff has not relied on the

82. 247 N.Y. 360, 160 N.E. 398 (1928).

83. Liability should depend on foreseeability of injury through knowledge of harm. See Barasch, *Allergies and the Law*, 10 BROOKLYN L. REV. 363, 371 (1941).

84. 261 N.Y. 414, 185 N.E. 685 (1933).

85. 208 App. Div. 191, 203 N.Y. Supp. 1 (1st Dep't 1924).

86. Often it takes weeks to conduct a clinical test to determine a specific element as an allergen. Also the costs of such experiments and chemical analyses may be prohibitive.

87. Note, 49 MICH. L. REV. 253, 258 (1950).

88. Barasch, *Allergies and the Law*, 10 BROOKLYN L. REV. 363, 373 (1941).

defendant; in negligence, it would seem that such knowledge by the plaintiff amounts to an assumption of the risk or contributory negligence.[89]

It has been suggested that the seller's obligation to the consumer is not necessarily that of removing the offending allergen, but may sometimes be only a duty of warning of the danger involved.[90] The desirability of such warnings has been discussed and different conclusions have been drawn.[91] One idea is that the warning, which would normally be a predisposition notice,[92] would serve to avoid injury by the consumer in only a few cases. This view is supported by the fact that it is only rarely that the consumer would know that he is allergic to the ingredients of the product.[93] Too, it might be argued that the imposition of such a duty would serve to create an absolute liability where the failure to post the warning might in no way be a part of the causation of the injury.[94] On the other hand the seller may know in advance that an ingredient is likely to cause harm to a substantial number of consumers,[95] or even if he does not know, he has greater means of knowing and should be charged with such knowledge as an incident of his business.[96] One writer has expressed this idea by saying, "The manufacturer . . . is in the *optimum* position to spread the risk of loss or injury consequent upon the use of his goods. Profit should not be counted before indemnity is computed. . . . Where the incidence . . . is predictable, an adequate basis for a reserve or for insurance exists."[97]

It would seem that a duty to warn is compatible with accepted principles of tort liability or liability for breach of warranty. In the former field the defendant's liability is theorized by saying that he has set in motion a force which may be expected to injure a class of people unless notice of the facts is given. In warranty it may be said that the goods are not fit for consumption

89. *Ibid. But cf.* Clifford v. Charles H. Challen & Son, Ltd., [1951] 1 All E.R. 72 (C.A.).

90. *See* Bennett v. Pilot Products Co., Inc., 235 P.2d 525, 528 (Utah 1951) (concurring opinion). See also Gerkin v. Brown & Sehler Co., 177 Mich. 45, 143 N.W. 48, 53 (1913); DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER § 4.28 (1951); *cf.* 19 B.U.L. REV. 501, 504 (1939) where it is suggested that a distinction should be drawn between products of nature and man-made products, and that there should be a duty to remove the allergen in latter but not in the former.

91. DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER § 4.28 (1951); Barasch, *Allergies and the Law,* 10 BROOKLYN L. REV. 363, 375 (1941); Note, 49 MICH. L. REV. 253, 259 (1950). See also Federal Food, Drug and Cosmetic Act, 52 STAT. 1040 (1938), 21 U.S.C.A. §§ 301-92 (1946).

92. See Barasch, *Allergies and the Law,* 10 BROOKLYN L. REV. 363, 375 (1941).

93. See Note, 49 MICH. L. REV. 253, 260 (1950).

94. *Ibid.*

95. DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER § 4.28 (1951); Such knowledge may generally be obtained by the prophetic patch test which is in fact used in many industries. A detailed report of the workings of this test is found in COOKE, ALLERGY IN THEORY AND PRACTICE 278 (1947).

96. See DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER § 4.28 (1951); Barasch, *Allergies and the Law,* 10 BROOKLYN L. REV. 363, 377 (1941).

97. Barasch, *Allergies and the Law,* 10 BROOKLYN L. REV. 363, 376 (1941).

in the absence of such a warning.[98] Of course it is possible that a conscientious manufacturer who displays such a warning might be placed at an advertising disadvantage by an unscrupulous competitor who does not,[99] but this is insufficient reason for failing to impose the duty to warn where the warning could be expected to avert injury.

IV. WORKMEN'S COMPENSATION

In general, the defense of "allergy" has been less successful in suits based upon a claim for workmen's compensation then it has in other fields of the law.[100] Doubtless, this is due to the spirit of the compensation laws, to provide compensation for one who is disabled and cannot work.[101] Traditionally, the acts provide for compensation for "accidental injury or death arising out of and in the course of employment."[102] The problem then is whether or not a worker who contracts an "allergic disease" has sustained an accidental injury arising out of his employment.

Most of the early acts failed to provide for compensation for industrial or occupational diseases,[103] and thus many of the early cases turned upon whether or not an allergic disease would be characterized as "occupational" or as an "accidental injury." To some extent the significance of these cases has been lost because today some 34 of the 53 American acts now provide compensation for some or all of the occupational diseases.[104] In general, it may be said that there are three kinds of legislative provisions for disability resulting from occupational diseases: (1) the all-inclusive or complete coverage law, which provides for the coverage of all occupational disease disability, (2) the schedule law, which names the kinds of occupational disease for which compensation may be allowed and, in some cases, the process or occupation involved, and (3) laws which make provisions for specific occupational diseases.[105] Inasmuch as a substantial number of the acts make no provision or only partial provision for compensation of disability resulting from occupational diseases, a discussion of the cases seems justified.

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98. DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER § 4.28 (1951).

99. See Note, 49 MICH. L. REV. 253, 261 n.43 (1950).

100. Such as the liability in warranty and for negilgence discussed above.

101. SAPPINGTON, MEDICOLEGAL PHASES OF OCCUPATIONAL DISEASE 163 (1939); 3 SCHNEIDER, WORKMEN'S COMPENSATION § 925 (3d ed. 1943); Angerstein, *Legal Aspects of Occupational Disease*, 18 ROCKY MT. L. REV. 240 (1946).

102. See HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS 5 (1944); 3 SCHNEIDER, WORKMEN'S COMPENSATION § 924 (3d ed. 1943).

103. See, *e.g.*, Ryan v. State Industrial Accident Commission of Oregon, 154 Ore. 563, 61 P.2d 426 (1936); 3 SCHNEIDER, WORKMEN'S COMPENSATION § 924 (3d ed. 1943).

104. 3 SCHNEIDER, WORKMEN'S COMPENSATION § 924 (3d ed. Supp. 1949). See 3 *id.* §§ 989 *et seq.* for a list of the states.

105. SAPPINGTON, MEDICOLEGAL PHASES OF OCCUPATIONAL DISEASES 91 (1939).

A leading case in the field is that of *Vogt v. Ford Motor Co.*[106] There the claimant was employed on the assembly line of an automobile factory and was required to work next to a huge suction fan. He was exposed to large quantities of cold air, dust, chemical vapors and fumes of paint which were pulled past him by the fan. The claimant contracted bronchial asthma and sustained a double hernia due to severe coughing spells occasioned by the asthma. It was shown that the claimant had never had such asthma but that he had a predisposition to asthma since childhood. The court said that the disease must have been contracted under one of three conditions: (1) without regard to the employment, (2) as an occupational disease connected with the employment or (3) from an accident connected with his employment. Under the applicable statute, claimant could recover under the last two. It was held that the disease was not an occupational disease because no one else in the factory was similarly affected but that the disease was an "accident" within the meaning of the statute.[107] The case illustrates the great latitude assumed by the courts in interpreting this language of the acts. In construing the statutory definition of "accident," the court says that "event" does not necessarily mean a single happening, nor does "sudden" necessarily mean "instantaneous."[108] The end result is that the court will normally allow recovery so long as the injury is unforeseen or unexpectedly received.[109]

The liberal interpretation of the *Vogt* case represents the approach advocated by most authorities.[110] The attitude has prevailed both in states with coverage for occupational diseases and in those without such coverage. Thus it is not surprising to note that many diseases construed as "accidents"

106. 138 S.W.2d 684 (Mo. App. 1940).

107. "[A]n accident is an unexpected or unforeseen event happening suddenly and violently . . . and producing at the time objective symptoms of an injury." 138 S.W.2d at 687.

108. 138 S.W.2d at 688. It seems that perhaps this construction borders upon legislation, but it is justified on the ground that any doubt is to be resolved in favor of the claimant. There is much authority to sutstain it. See, *e.g.,* Scobey v. Southern Lumber Co., 238 S.W.2d 640, 641 (Ark. 1951); Downey v. Kansas City Gas Co., 338 Mo. 803, 92 S.W.2d 580 (1936); Fenton v. Thorley, [1903] A.C. 443; Angerstein, *Legal Aspects of Occupational Disease,* 18 ROCKY MT. L. REV. 240, 252 (1946); Note, 41 A.L.R. 1124, 1128 (1926). *But see* 4 FORD L. REV. 147 (1935).

109. Victory Sparkler & Specialty Co. v. Francks, 147 Md. 368, 128 Atl. 635 (1935); DERBES AND ENGLEHARDT, THE TREATMENT OF BRONCHIAL ASTHMA 64 (1946). Another Missouri case, Joyce v. Luse-Stevenson Co., 346 Mo. 58, 139 S.W.2d 918 (1940), denied recovery to a plasterer who contracted pneumonia while working in a damp basement. The court there said that a distinction must be drawn between a single act which produces an injury and general working conditions. It would seem that this case seriously limits the *Vogt* doctrine in Missouri, but the court in the *Vogt* case distinguished the *Joyce* case. See State *ex rel.* Hussman-Ligonier Co. v. Hughes, 348 Mo. 319, 153 S.W.2d 40, 42 (1941), where it was said, "Nor does the injury itself constitute the 'event' or 'accident.' . . . To so hold would make the Act provide for insurance against disease and injury rather than accident." See also Sanford v. Valier-Spies Milling Co., 235 S.W.2d 92 (Mo. 1950).

110. See Scobey v. Southern Lumber Co., 238 S.W.2d 640 (Ark. 1951); DERBES AND ENGLEHARDT, THE TREATMENT OF BRONCHIAL ASTHMA 64 (1946); HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS 153 (1944). *But cf.* Ryan v. State Industrial Accident Commission of Oregon, 154 Ore. 563, 61 P.2d 426 (1936).

in a state without the occupational disease statute are denominated as compensable occupational diseases in states with such coverage.[111] Indeed, a case of bronchial asthma suffered by a claimant in a New York case was held to be a compensable occupational disease.[112]

To some extent the problem of the allergic workman is analogous to that of the workman who is suffering from a pre-existing disease.[113] Thus "where any *reasonable relation* to the employment exists, or the employment is a *contributory cause,* the court is justified in upholding the award. . . ."[114] This is illustrated by *McCormick Lumber Co. v. Department of Labor and Industries,*[115] where a logger who was suffering from a pre-existing heart disease dropped dead while sawing down a tree. The court allowed recovery even though the employee was making no extraordinary effort and even though the heart condition was induced by chronic alcoholism. It is quite probable that the liberality will continue and the courts will continue to compensate allergic workmen who are disabled just as much as normal persons would be compensated.[116]

V. INSURANCE CASES

Most insurance cases have arisen under accident policies and double indemnity clauses where the policy compensates for accident or death resulting "directly and independently of all other causes from bodily injuries effected solely through external, violent or accidental means" and not wholly or partly from disease or a physical or mental infirmity.[117] There is a clear split as to what is meant by "accidental means." One view proceeds on the

111. 3 SCHNEIDER, WORKMEN'S COMPENSATION § 926 (3d ed. 1943).

112. Condon v. National Aniline Division, Allied Chemical & Dye Corporation, 267 App. Div. 1020, 48 N.Y.S.2d 15 (3d Dep't 1944).

113. The rationale seems to be that the acts do not prescribe a particular standard of health for workmen. 4 SCHNEIDER, WORKMEN'S COMPENSATION § 1240(c) (1945). See Cooke v. Cooke & Cole Silk Co., Inc., 19 N.J. Misc. 581, 21 A.2d 853 (Dep't. of Labor 1941); Adamsbaum v. Broadway Health Club, 271 App. Div. 576, 67 N.Y.S.2d 254 (3d Dep't. 1946).

114. HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS 153 (1944).

115. 7 Wash.2d 40, 108 P.2d 807 (1941), 16 WASH. L. REV. 166.

116. See Lamar Bath House v. McCloud, 209 Ark. 1078, 193 S.W.2d 809 (1946) (masseur allergic to alcohol); Arkansas Nat. Bank of Hot Springs v. Colbert, 209 Ark. 1070, 193 S.W.2d 806 (1946) (bankteller allergic to money), 1 ARK. L. REV. 82; Le Lenko v. Wilson H. Lee Co., 128 Conn. 499, 24 A.2d 253 (1942) (linotype operator allergic to melting antimony fumes); Webb v. New Mexico Pub. Co., 47 N.M. 279, 141 P.2d 333 (1943) (printer allergic to soap); Horvath v. Wickwire Spencer Steel Co., 275 App. Div. 1014, 91 N.Y.S.2d 709 (3d Dep't. 1949) (jaintor allergic to dust); Adamsbaum v. Broadway Health Club, 271 App. Div. 576, 67 N.Y.S.2d 254 (3d Dep't. 1946) (masseur allergic to chemicals); Kroger Grocery & Baking Co. v. Industrial Commission, 239 Wis. 455, 1 N.W.2d 802 (1942) (employee allergic to soap); *accord,* Taylor v. Newcomb Baking Co., 317 Mass. 609, 59 N.E.2d 293 (1945) (dishwasher allergic to soap. *Contra:* Industrial Commission of Ohio v. Zelmanovitz, 53 Ohio App. 92, 4 N.E.2d 265 (1936) (employee allergic to peach juice); Kusevich v. H. J. Heinz Co., 144 Pa. Super 232, 27 A.2d 778 (1942) (employee allergic to soap).

117. Taylor v. New York Life Ins. Co., 176 Minn. 171, 222 N.W. 912 (1929).

theory that the event or act which produced the injury must have been unexpected or unanticipated before the result may be characterized as accidental.[118] The other view is that the term does not necessarily require a slip, mischance or anything out of the ordinary in the act by the insured that leads to the injury or the event that causes the injury, but that it is enough that the injury or death be an unusual, unexpected or unforeseen result.[119]

Typical of the first view is the leading case of *Landress v. Phoenix Mutual Life Insurance Co.*,[120] a suit on a policy having language similar to that above. The insured, suffering from a condition which rendered him more susceptible to sunstroke than the average person, died from sunstroke while playing golf. The court held that it was not enough to establish that the death occurred as a result of "accidental means" by merely showing that the result was unexpected, and the fact that the death would have been termed accidental by an average man is irrelevant.[121] While the *Landress* case is not, strickly speaking, an allergy case, it does represent the treatment that is afforded allergy cases.[122]

The second line of authority is exemplified by the case of *Mutual Life Ins. Co. of New York v. Dodge*.[123] There the insured was given novocaine as an anesthetic in a tonsillectomy. Because of an idiosyncrasy which could not be discovered by any test, the insured suffered paralysis of the respiratory system and died. The court held for the plaintiff-beneficiary, saying that the death was occasioned by "accidental means" and that it is sufficient that the result of an act is unusual and unforeseen. The court also held that the idiosyncrasy was not a "bodily infirmity" within any exclusion of the policy.

118. See, *e.g.*, Landress v. Phoenix Mutual Life Ins. Co., 291 U.S. 491, 54 Sup. Ct. 461, 78 L. Ed. 934, 90 A.L.R. 1382 (1934); Order of United Commercial Travelers v. Shane, 64 F.2d 55 (8th Cir. 1933); Metropolitan Life Ins. Co. v. Bukaty, 92 F.2d 1 (10th Cir. 1937); Caldwell v. Travelers' Ins. Co., 305 Mo. 619, 267 S.W. 907, 39 A.L.R. 56 (1924); Hesse v. Travelers' Ins. Co., 299 Pa. 125, 149 Atl. 96 (1930); Ramsey v. Fidelity & Casualty Co., 143 Tenn. 42, 223 S.W. 841, 13 A.L.R. 651 (1920); McMahan v. Mutual Benefit Health & Accident Ass'n, 33 Wash.2d 415, 206 P.2d 292 (1949); Otey v. John Hancock Mut. Life Ins. Co., 120 W. Va. 434, 199 S.E. 596 (1938). See also VANCE, INSURANCE 950 (3d ed., Anderson, 1951).

119. See, *e.g.*, Lang v. Metropolitan Life Ins. Co., 115 F.2d 621 (7th Cir. 1940); Mutual Life Ins. Co., of New York v. Dodge, 11 F.2d 486, 59 A.L.R. 1290 (4th Cir. 1926), *cert. denied*, 271 U.S. 677 (1926); Denton v. Travelers' Ins. Co., 25 F. Supp. 556 (D. Md. 1938); Collins v. Casualty Co. of America, 224 Mass. 327, 112 N.E. 634, L.R.A. 1916E 1203 (1916); Wheeler v. Title Guaranty & Casualty Co. of America, 265 Mich. 296, 251 N.W. 408 (1933); Taylor v. New York Life Ins. Co., 176 Mich. 171, 222 N.W. 912 (1929); Korfin v. Continental Casualty Co., 5 N.J. 154, 74 A.2d 312 (1950). See also VANCE, INSURANCE 948-50 (3d ed., Anderson, 1951).

120. 291 U.S. 491, 54 Sup. Ct. 461, 78 L. Ed. 934, 90 A.L.R. 1382 (1934).

121. But see 291 U.S. at 499, Cardozo, J., dissenting: "The attempted distinction between accidental results and accidental means will plunge this branch of the law into a Serbonian Bog." *Cf.* Preferred Accident Ins. Co. v. Clark, 144 F.2d 165 (10th Cir. 1944).

122. See, *e.g.*, Order of United Commercial Travelers v. Shane, 64 F.2d 55 (8th Cir. 1933).

123. 11 F.2d 486, 59 A.L.R. 1290 (4th Cir. 1926), *cert. denied*, 271 U.S. 677 (1926).

While the *Landress* and the *Mutual* cases were primarily concerned with the extent of the coverage of the policy, *i.e.*, whether the unexpected injury was an insured event, the same problem arises in trying to determine whether the allergy of hypersusceptibility is a "bodily infirmity" within an exclusion of the policy. Again there is a split of authority. Perhaps the weight of authority and the better view is represented by the case of *Silverstein v. Metropolitan Life Ins. Co.*[124] There the plaintiff, who was suffering from a duodenal ulcer the size of a pea, was struck a blow in the stomach. Death resulted when the contents of his stomach leaked into the peritoneum. In holding that the ulcer was not a "bodily infirmity or disease" within the meaning of the policy, Judge Cardozo said that, "A policy of insurance is not accepted with the thought that its coverage is to be restricted to an Apollo or a Hercules."[125] A distinction is to be drawn between a morbid condition of such quality that its natural development would result in mischief and a condition which could at most be called a predisposing tendency. Under this definition it would seem clear that an allergy should not be determined as a "disease or bodily infirmity" within the meaning of the exclusion.

Though as a practical matter the result will normally be the same irrespective of whether the effect of the allergy is considered under a "coverage" or "exclusion" clause it is possible that this circumstance will produce differing results. If the problem is one of coverage, the general rule is that the burden of proof is upon the insured or the beneficiary to show that his injury was covered by the policy.[126] However, if the question is whether the allergy or pre-existing condition is a "bodily infirmity," then the burden is upon the insurer to show that the plaintiff was unusually susceptible on the theory that exclusions are to be strictly construed against the insurer.[127] Despite these procedural refinements, it would seem that as a general rule any ambiguity should be resolved in favor of the insured and that the allergic person should be protected to the same extent as a normal person.[128]

VI. NUISANCE

It is well known to the thousands of sufferers of hay fever that certain pollens and airborne particles are the primary source of their annual misery.[129] Consider then the situation of *A* and *B*. *A* is allergic to pollens and

124. 254 N.Y. 81, 171 N.E. 914 (1930). *Contra:* Order of United Commerical Travelers of America v. Shane, 64 F.2d 55 (8th Cir. 1933).

125. 171 N.E. at 915.

126. 21 APPLEMAN, INSURANCE § 12141 (1947). See Rapp v. Metropolitan Accident & Health Ass'n, 143 Neb. 144, 8 N.W.2d 692 (1943).

127. 21 *id.* §§ 12171, 12173; VANCE, INSURANCE § 185 (3d ed., Anderson, 1951). See Standard Life Ins. Co. of the South v. Foster, 210 Miss. 242, 49 So. 2d 391 (1950).

128. Of course it is entirely possible that the contract is so strong that there is no room for construction. If such be the case, then the language of the contract must govern. See 1 APPLEMAN, INSURANCE §§ 401 *et seq.* (1941).

129. It is estimated that two per cent of the total population suffers from hayfever. VAUGHAN, ALLERGY AND APPLIED IMMUNOLOGY 64 (1931).

lives in constant fear of that time of the year when *B's* abundant crop of ragweed takes to the air. *A* goes to *B* and requests permission to dispose of the weeds growing in *B's* vacant field. *B* scornfully denies the request and *A* turns to the courts for relief. Is such relief available?

While there are no cases directly in point, it seems that the answer may be had by an application of the general rules of law regarding nuisance. It is generally said that the doctrine of private nuisance rests upon the ancient maxim, *sic utere tuo ut alienum non laedas.*[130] The test of the defendant's conduct is whether it causes injury to persons of "ordinary sensibilities."[131] The case of *Price v. Grantz*[132] bears some similarity to our hypothetical case. There the defendant, a lead foundry, was charged with emitting fumes from which the plaintiff suffered lead poisoning. It was shown that the plaintiff was unusually susceptible to the fumes and that no other person was similarly affected. The court held that "an injury to a single individual . . . because of a peculiar or exceptional susceptibility of such person, when the trace of arsenic or lead was so slight as not in any degree to affect other persons, would not be sufficient to make the lead-works a common or public nuisance."[133] Another analogous case is *Rogers v. Elliot.*[134] There the plaintiff had suffered sunstroke and was peculiarly affected by the ringing of defendant's church bell. Plaintiff went into convulsions every time this bell rang, although he was unaffected by any other sound. The court held that the defendant was not guilty of maintaining a nuisance, saying that defendant's right to ring the bell "must be determined by the effect of noise upon people generally, and not upon those . . . who are peculiarly susceptible to it. . . ."[135] "In the absence of evidence that he acted wantonly, or with express malice, this implication [of malice] could not come from his exercise of his legal rights."[136]

From these two cases it might be deduced that the test of defendant's conduct as reasonable is a purely objective one and that if the conduct would not injure a normal person then it does not constitute a nuisance. This would mean that the hypothetical plaintiff's injury is *damnum absque injuria.* It would seem, however, that this is a situation where the law might well afford the plaintiff a remedy. In spite of the two cases cited it is probably

130. See PROSSER, TORTS 549, 573 (1941); Wesson v. Washburn Iron Co., 95 Mass. (13 Allen) 95 (1866).

131. 39 AM. JUR., *Nuisances* § 31 (1942); see, *e.g.*, Stoddard v. Snodgrass, 117 Ore. 262, 241 Pac. 73 (1925), 43 A.L.R. 1160 (1926) (undertaking establishment); *accord*, Amphitheaters, Inc. v. Portland Meadows, 184 Ore. 336, 198 P.2d 847 (1948).

132. 118 Pa. 402, 11 Atl. 794, 4 Am. St. Rep. 601 (1888).

133. 11 Atl. at 795. See also Ladd v. Granite State Brick Co., 68 N.H. 185, 37 Atl. 1041 (1894) (plaintiff with predisposition to bronchial trouble and erysipelas complains of smoke).

134. 146 Mass. 349, 15 N.E. 768, 4 Am. St. Rep. 316 (1888).

135. 15 N.E. at 771.

136. *Id.* at 772.

possible to hold for the plaintiff since the rules of nuisance are not absolutes.[137] While the *Grantz* case seems to arrive at its decision on the ground that there was no substantial injury, it is distinguishable on the ground that the defendant is contributing to the public good, whereas in our ragweed case there is little utility, if any, in defendant's maintaining the condition. Also, hay fever is an ailment to which a substantial number of persons are likely to succumb.

It is submitted that as more is learned of allergy and control of allergens there may be situations where the plaintiff will be entitled to invoke the principles of nuisance to gain relief. Factors to be considered are the utility of the defendant's conduct, the risk to the plaintiff, the risk to society generally, the wilfulness of defendant's conduct and the expense and inconvenience required to control or abate the nuisance.[138] It would seem that an enlightened court might well grant our hypothetical *A* appropriate relief.[139]

VII. NEGLIGENCE OF PHYSICIANS AND DRUGGISTS

The great bulk of the cases under this heading have involved X-ray and drug idiosyncrasies.[140] As new drugs are placed on the market, it is likely that more and more allergy cases will arise in this field. For example, it is now quite generally known some persons cannot take penicillin or sulfa drugs or streptomycin without untoward results.

Most of the cases have refused to allow recovery if an idiosyncrasy is involved on the theory that the doctor could not anticipate the idiosyncrasy.[141] However, the rule is otherwise if the possibility of idiosyncrasy is removed.[142] The reasons for holding nonliability have varied. One court has said the plaintiff "assumes the risk" of his idiosyncrasy.[143] Another has indicated

137. See PROSSER, TORTS 671 (1941).

138. See PROSSER, TORTS c.13 (1941).

139. It may also be pointed out that municipal ordinances have been enacted to make the maintenance of such conditions a nuisance. See 6 McQuillen, MUNICIPAL CORPORATIONS § 24.90 (3d ed., Smith, 1949); NASHVILLE CITY CODE c. 15, §§ 16-18 (1947). These provisions have generally been upheld. See Bayside Land Co. v. Dolley, 103 Cal. App. 253, 284 Pac. 479 (1930); St. Louis v. Galt, 179 Mo. 8, 77 S.W. 876, 63 L.R.A. 778 (1904).

140. See, *e.g.*, Dorr, Gray, and Johnston v. Headstream, 173 Ark. 1104, 295 S.W. 16 (1927); Dorr v. Fike, 177 Ark. 907, 9 S.W.2d 318 (1928); Antowill v. Friedmann, 197 App. Div. 230, 188 N.Y. Supp. 777 (2d Dep't 1921); Bogle v. Winslow, 5 Phila. 136 (Pa. 1888); Lewis v. Casenburg, 157 Tenn. 187, 7 S.W.2d 808, 60 A.L.R. 254 (1928); Hamilton v. Harris, 204 S.W. 450 (Tex. Civ. App. 1918); Hoar v. Rasmusen, 229 Wis. 509, 282 N.W. 652 (1938).

141. See, *e.g.* Antowill v. Friedmann, 197 App. Div. 230, 188 N.Y. Supp. 777 (2d Dep't 1921) (X-ray); Bogle v. Winslow, 5 Phila. 136 (Pa. 1888) (administration of ether).

142. Lewis v. Casenburg, 157 Tenn. 187, 7 S.W.2d 808, 60 A.L.R. 254 (1928). Here the court held that plaintiff could employ the doctrine of res ipsa loquitur, it being established that she was not idosyncratic to X-ray treatments.

143. Antowill v. Friedmann, 197 App. Div. 230, 188 N.Y. Supp. 777 (2d Dep't 1921). *But cf.* Valmas Drug Co v. Smoots, 269 Fed. 356 (6th Cir. 1920).

that there should be no liability if the predisposition cannot be foretold by tests.[144] A third approach has been to require the plaintiff to possess normal physical qualities.[145] It seems that basically the three methods of treating the problem are the same. In essence they simply say that there was no negligence on the part of the physician.

But an unqualified statement that liability does not exist if the injury is occasioned by the allergy or predisposition of the patient seems entirely unjustified. In many cases the allergic reaction of the plaintiff should be the very event that the physician should anticipate. Thus if a physician is giving an anesthetic or making a blood transfusion or prescribing certain drugs, it would not be unreasonable to require that he be under a duty to make some inquiry or that he conduct predisposition tests wherever practical. Of course it may be that the treatment is of such an emergency nature that tests in advance are impossible and clearly no such duty would exist. Broadly speaking, the duty of a doctor to his patient is that degree of care that would be exercised by a reasonable doctor possessing that knowledge which is customarily held by members of his profession. As the knowledge of allergic reactions to certain drug and therapeutic stimuli increases, the standard of care will be modified. Thus it is quite likely that the knowledge required of an individual doctor in a malpractice suit will not necessarily be delimited to cases of actual knowledge of plaintiff's idiosyncrasy;[146] he should be required to know all of the technical developments in his field that are generally known by members of his profession, and he, of all persons, should anticipate the possibility of an allergic reaction.[147]

VIII. Fraud and Deceit

It is not likely that a separate action of deceit in allergy cases will arise. The idea has been discussed in connection with an action based upon fraudulent or negligent advertising.[148] It is true that one case,[149] although not itself an allergy case, indicated that such an action might exist. There the defendant advertised that his product was safe for hypodermic use. In fact defendant's product contained a base from mineral oil, rather than vege-

144. Hamilton v. Harris, 204 S.W. 450 (Tex. Civ. App. 1918); *accord,* Bogle v. Winslow, 5 Phila. 136 (Pa. 1888).

145. Bogle v. Winslow, 5 Phila. 136 (Pa. 1888).

146. See Arnold v. May Department Stores Co., 337 Mo. 727, 85 S.W.2d 748 (1935).

147. The basis of such liability arises from the nature of their business and the possibility of great public injury from negligent act. See Thomas v. Winchester, 6 N.Y. 397, 57 Am. Dec. 455 (1852); Hoar v. Rasmusen, 229 Wis. 509, 282 N.W. 652 (1938). Such a standard is not incompatible with that generally asserted as the standard of care of professionals. See Prosser, Torts 236 (1941).

148. Barasch, *Allergies and the Law,* 10 Brooklyn L. Rev. 363, 373 (1941).

149. Hruska v. Parke, Davis & Co., 6 F.2d 536 (8th Cir. 1925); see Valmas Drug Co. v. Smoots, 269 Fed. 356 (6th Cir. 1920); Bundy v. Ey-Teb, Inc., 160 Misc. 325, 289 N.Y. Supp. 905 (City Ct. N.Y. 1935).

table oil, and when plaintiff's doctor made the injection, the plaintiff suffered great injury because his skin could not absorb the mineral oil. The court held that the complaint stated a cause of action saying, ". . . the public relies on the truth of such statements employed in advertising by the defendant. . . . Health is too dear, and life too sweet, and consequences too great, to admit of either carelessness or mistake in manufacture or fraud in inducing the sale of the same."[150] In general, it would seem that an action on a warranty or for negligence would be a sufficient basis for liability if liability is to be imposed.[151] Even if the separate action for fraud is allowed it seems that the requirement of *scienter*[152] would make it a cumbersome tool in an allergy case.

IX. CONCLUSIONS

Medical knowledge of allergies has increased tremendously in recent years. This knowledge has been and will continue to be reflected in the decisions of courts who are faced with an increasing number of allergy problems. The fears expressed in some of the early decisions that recovery by a "peculiarly susceptible" plaintiff would lead to claims by all sorts of malingerers or that the burden upon tradesmen would be too great,[153] have

150. 6 F.2d at 538.

151. This seems to be the conclusion of Barasch, *Allergies and the Law,* 10 BROOKLYN L. REV. 363, 373(1941).

152. See PROSSER, TORTS 728 (1941).

153. *But see* Bennett v. Pilot Products Co., Inc., 235 P.2d 525 (Utah 1951). There the plaintiff, a beauty operator, complained of dermatitis caused by ammonium thioglycolate in the defendant's permanent wave lotion. The evidence showed that the lotion would cause an allergic reaction in one out of 1000 persons. It was held that neither was there a duty to warn nor was the manufacturer charged with knowledge that the injury was foreseeable. It was said that the fact that some six months after plaintiff's injury that the defendant added to instructions for use that rubber gloves should be employed did not tend to establish knowledge that at the time of the injury the lotion was harmful. It was said as a matter of law that there can be no recovery by an allergic plaintiff since such liability would be an "unreasonable burden on the channels of trade." It is interesting to note that thioglycolic acid and the thioglycolates used in permanent wave lotions have received the attention of the medical authorities as possible irritants and sensitizers. The general conclusion is that thioglycolic acid in sufficiently high concentrations may be a direct irritant as well as a sensitizer. See McCord, *The Physiologic Properties of Thioglycolic Acid and Thioglycolates,* 15 IND. MED. 669 (1946); Cotter, *Thioglycolic Acid Poisoning in Connection with the "Cold Wave" Process,* 131 A.M.A.J. 592 (1946). There is a division of authority as to whether the thioglycolates are primary irritants and also as to their allergic properties. However, all of the authorities seem to agree that a thorough examination of the problem is warranted. See Cappell & Cappell, *Cold Permanent Wave Solutions as an Irritant,* 48 AM. PERFUMER & ESSENTIAL OIL REV. 43 (1946); Cotter, *Thioglycolic Acid Poisoning in Connection with the "Cold Wave" Process,* 131 A.M.A.J. 592 (1946); Cotter, *Effects of the Cold Wave Process,* 131 A.M.A.J. 746 (1946); Goldman, Mason & McDaniel, *Permanent Wave Process,* 137 A.M.A.J. 354 (1948); McCord, *Toxicity of Thioglycolic Acid Used in Cold Permanent Wave Process,* 131 A.M.A.J. 776 (1946); McCord, *The Physiologic Properties of Thioglycolic Acid and Thioglycolates,* 15 IND. MED. 669 (1946); McGill & Ray, *Cold Wave Dermatitis,* 16 IND. MED. 238 (1947); McNally & Scull, *Thioglycolate Cold Wave Process,* 57 ARCH. DERMAT. AND SYPH. 275 (1948). See also Briggs v. National Industries, Inc., 92 Cal. App.2d 542, 207 P.2d 110 (1949), discussed in note, 49 MICH. L. REV. 253, 257 (1950) (thioglycolic acid in

been to some extent allayed. Courts now seem to be more willing to grant recovery if the injury is one of the more common allergies and if defendant's product contains a known allergen, assuming that the injury is otherwise compensable. It seems that the problem of allergy is simply another situation where the common law will have the opportunity to demonstrate its heralded flexibility and to mould itself so that solutions to some of these difficult problems become available.

DORAN E. PERDUE

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permanent wave lotion). One authority suggests, "Now that this product [ammonium thioglycolate] is being sold in the chain stores, its indiscriminate use will result in an increased incidence of poisonings, many of which are already finding their way to the courts. Adequate labeling and understanding of the dangers involved are imperative." Cotter, *Thioglycolic Acid Poisoning in Connection with the "Cold Wave" Process,* 131 A.M.A.J. 592, 593 (1946); *cf.* McCord, *The Physiologic Properties of Thioglycolic Acid and Thioglycolates,* 15 IND. MED. 669 (1946); McNally & Scull, *Thioglycolate Cold Wave Process,* 57 ARCH. DERMAT. AND SYPH. 275 (1948). It is possible that both the *Bennett* and the *Briggs* cases are among those of which Dr. Cotter warned. It is submitted that the Utah court might well have reached another conclusion had it had the benefit of the above cited medical data before it.