Torts--Products Liability: Duty to Warn

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TORTS—Products Liability: Duty to Warn

A person who may be hypersensitive to an ingredient in a product generally has no action against a manufacturer for failure to warn of the possible dangers in the use of his product. However, in Sterling Drug, Inc. v. Cornish, it was held that a manufacturer of prescription drugs was liable for an injury to a hypersensitive arthritic patient. The manufacturer's liability was based on the failure to warn the plaintiff's doctor of the drug's rare side effects on hypersensitive or idiosyncratic patients. The manufacturer argued that the duty to warn did not extend to those few individuals who are injured because of their own unusual hypersensitivity to a product. It was asserted that the unforeseeability of the injury and the futility of a warning should deny any relief to the injured party. The manufacturer considered it unreasonable to expect him to foresee that some few persons among his many customers would suffer an allergic reaction to an ingredient in his product.

"In an action by the buyer or user of a product, based on negligence, against the manufacturer, jobber, or seller, for damages resulting after the use of the product, it has been held that there is no liability upon the manufacturer, jobber, or seller, where the buyer was allergic or unusually susceptible to injury from the product." Consequently, the manufacturer considered the allergy or the unusual susceptibility of the person to be the cause of the injury. In addition, it was urged that a warning given on a retail package would be effective only if the purchaser knew in advance of his allergy.

The court readily distinguished the facts of the Sterling Drug case from the non-prescriptive retail product cases cited by the manufacturer. The court believed that there was suf-
ficient evidence for the jury to find that the manufacturer knew that some persons could be injured by the drug's side effect. The court pointed out that the case concerned a prescription drug rather than a commercial product. If the doctor had been properly warned of the possibility of a side effect in some patients and advised of the symptoms normally accompanying the side effect, there would be an excellent chance that injury to the patient could have been avoided. The plaintiff's doctor would have been a knowledgeable intermediary between the patient and the manufacturer.

Following the 1842 English case of Winterbottom v. Wright, there developed a general rule of non-liability to consumers or users of a product where they were not in contractual privity with the manufacturer. Although various reasons were given in support of the rule requiring privity, the main reason was that a manufacturer ordinarily could not foresee or anticipate injury to anyone other than his immediate purchaser.

By 1903, the courts had developed at least three exceptions to the rule of non-liability of manufacturers to third persons. These exceptions were set out in the leading case of Huset v. J. I. Case Threshing Machine Co. as follows:

1. defendant was liable where the product was known to be imminently dangerous and he failed to disclose that fact to the buyer;
2. where, irrespective of contract, defendant furnished a defective product on his premises for plaintiff-invitee's use; and
3. where defendant was negligent in the manufacture or sale of an imminently dangerous product intended to preserve, destroy, or affect human life.

Generally, food products, beverages, drugs, firearms and explosives fall within the last and most important category. Since the Huset case, the law has recognized the duty of

6 120 F. 865, 870-71 (8th Cir. 1903).
the manufacturer to warn the ultimate consumer of any dangers known to him in the normal use of the product.

If a manufacturer in the exercise of reasonable care ought to have known of a hidden danger, *MacPherson v. Buick Motor Co.* would dictate liability for a failure to warn. However, when only those with personal idiosyncrasies suffer harm, the liability of the manufacturer is not always susceptible to easy determination.

The paramount question is whether the cause of the injury was due to an allergy of the consumer or to a defect in the product. A minority of the jurisdictions have held that the allergy itself is the proximate cause of the plaintiff's injury. This is a superficial approach. It determines liability on the basis of a mathematical computation derived from clinical studies of the allergy instead of an inquiry into duty, knowledge, and foreseeability.

In allergy cases, as in other actions by an ultimate consumer against the manufacturer, the plaintiff may seek recovery either for breach of an implied warranty or for negligence. A majority of the courts hold that an implied warranty extends only to an anticipated use by a normal consumer and deny that a manufacturer is liable to a hyperallergic consumer. Should the percentage of users suffer-

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7 217 N.Y. 382, 111 N.E. 1050 (1916); See Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693 (1946) which specifically adopted the *MacPherson* rule to allergy cases but is based on the inference that the plaintiff is normal.

8 "...[T]he cause of appellee's injury was the idiosyncracy of her skin...", Walstron Optical Co. v. Miller, 59 S.W.2d 895, 897 (Tex. Civ. App. 1933); Merrill v. Beaute Vues Corp., 235 F.2d 893 (10th Cir. 1956) (dictum); accord, Hamilton v. Harris, 204 S.W. 450 (Tex. Civ. App. 1918).


ing an adverse reaction to the product become substantial, an implied warranty of fitness has been held to protect them.\textsuperscript{11} If the plaintiff charges the defendant manufacturer with a negligent failure to warn of the possibilities of an allergic reaction, the question of foreseeability becomes the crux of the problem.\textsuperscript{12} Almost any product may cause an adverse reaction to a consumer, but a mere possibility of injury has not been held sufficient to hold a manufacturer liable. Present decisions indicate there must also exist a probability.\textsuperscript{13}

Certain cases in the field of negligence have definitely enlarged the scope of duty to warn. One such case involved injuries claimed to have been caused by hair dye.\textsuperscript{14} The Supreme Court of Missouri affirmed a judgment in favor of the plaintiff even though the defendant had given the standard warning prescribed by the Federal Food Drug and Cosmetics Act for coal tar hair dye—"Caution - This Product Contains Ingredients Which May Cause Skin Irritations On Certain Individuals And A Preliminary Test According To Accompanying Directions Should First Be Made."\textsuperscript{15} The plaintiff made the prescribed test, with no reaction, before her first use of the dye. It was not clear whether the instructions directed patch tests in addition to the initial one. In any event it appeared that repeated tests, while they might have revealed a local or skin sensitivity, would not have indicated the plaintiff's type of "toxic systemic allergic reaction." Consequently, the plaintiff claimed that the warning given was insufficient with respect to the plaintiff's systemic reaction which resulted from the continued use of the dye.

\textsuperscript{11} Zirpola v. Adam Hat Stores, 122 N.J.L. 21, 4 A.2d 73 (Ct. Err. & App. 1939).
\textsuperscript{13} "The law requires a person to reasonably guard against probabilities, not possibilities." Merrill v. Beaute Vues Corp., 235 F.2d. 893, 896 (10th Cir. 1956).
\textsuperscript{14} Braun v. Roux Distributing Co., Inc., 312 S.W. 2d 758 (Mo. Sup. Ct. 1958).
In spite of the fact that no previous injury of this sort had occurred, the court sustained a finding by the jury that the defendant "knew, or by the exercise of due care should have known," of the risk of systemic injury; and that the defendant should have given a more adequate warning. The finding of a duty to warn obviously could not have been based on any statistical frequency for this type of injury since it was the first case of its kind. The duty was based on the concept of expert knowledge. The court emphasized the obligation of the defendant to keep reasonably abreast of scientific knowledge and discoveries concerning the field. Therefore, in *Braun v. Roux Distributing Co., Inc.*,16 there was an adequate warning with respect to the less serious allergies. The negligence alleged was a failure to warn of the grave systemic allergy to which the plaintiff was susceptible. In substance, the Missouri court appeared to be imposing strict liability on the manufacturer.

A fundamental objection to imposing a duty to warn on manufacturers or vendors is that it would be a rare case where the failure to warn would be the cause of the plaintiff's injury. Even if the plaintiff read the warning, it is unlikely that he would refrain from using the product unless he knew he was allergic to one of its ingredients. If the consumer has knowledge of an allergy, he is not likely to use a new product without first obtaining the advice of a physician.

To answer that causation is simply a question of evidence does not solve the fundamental objection. The plaintiff might testify that he would not have used the product had it displayed a warning. He might, of course, be telling the truth; but it is quite likely that the plaintiff would recover even though a causal relation was lacking. Although the failure to warn would be negligence, the absence of a causal relation would often make the manufacturer an insurer of his product.

16 312 S.W.2d 758 (Mo. Sup. Ct. 1958).