Vanderbilt Law Review

Volume 12
Issue 2 *Issue 2 - March 1959*

Article 2

3-1959

The Duty to Warn Allergic Users of Products

Dix W. Noel

THE DUTY TO WARN ALLERGIC USERS OF PRODUCTS

DIX W. NOEL*

There has been much recent development of the law in the field of products liability, and one of the more significant aspects of this development relates to harm suffered by allergic users of cosmetics, dyed clothing, and other familiar products. The medical descriptions of allergy are complicated and changing, but from a legal standpoint the significant factor is that an allergic reaction is one suffered by only a minority of the persons exposed to a particular substance. A description which brings out this factor is one which defines allergy or hypersensitivity as "the condition or state of an individual who reacts specifically and with unusual symptoms to the administration of, or contact with, a substance which when given in similar amounts to the majority of all other individuals proves harmless or innocuous."[1]

During the past few years a number of significant cases involving injuries to allergic consumers have been decided, and the principal issue has been whether or not there was an actionable failure to warn the allergic consumer. An attempt will be made to determine when this duty to warn arises and the nature of the warning which must be given. Consideration will be given to situations where the failure to warn is regarded as negligence and also to cases where the failure is considered to be a breach of warranty.

The two most recent cases in the field seem definitely to enlarge the scope of the duty to warn. The latest of these decisions, *Braun v. Roux Distrib. Co.*,[2] involved injuries claimed to have been caused by hair dye. Suit was brought on negligence grounds against the defend-

* Professor of Law, University of Tennessee.

1. *Medico-Legal Aspects of Allergies*, discussion by William A. Nelson, M. D., 24 TENN. L. REV. 840 (1957). A more technical definition of allergy is as follows: "Any specifically acquired alteration in the capacity of living tissue to react. This alteration in capacity to react results from exposure to an exciting agent and is manifested on re-exposure to the same or to an immunologically related agent." HANSEL, CLINICAL ALLERGY 18 (1953). In a recent article, Schmidt, *Some Medical Terms Defined for the Layman*, in HOUTS, COURTROOM MEDICINE 376, 377 (1958), it is stated that the substances to which the sensitivity is manifested may be almost anything, but that most often they are pollens, plants, hair, cosmetics, or drugs. These offending substances, known as allergens, often may be detected by a patch test.

It appears that no one is allergic to a substance to which he is exposed for the first time, and that every allergy requires a period of incubation or sensitization. After sensitization, the allergic reactions may be divided into two groups: (1) Those which develop shortly after re-exposure to the offender, a group which includes hay fever, asthma, and urticaria or hives; and (2) those which develop slowly within 24 to 48 hours after re-exposure, such as contact-dermatitis and other skin diseases. Samter, *Allergy*, in HOUTS, COURTROOM MEDICINE 40 (1958).

2. 312 S.W. 2d 758 (Mo. 1958), 36 U. DET. L.J. 196 (1958).

ant, which distributed the dye as a company wholly owned by the president of the manufacturer. The plaintiff recovered $85,000 in a trial court. The extensive opinion of a commissioner, adopted as that of the Missouri Supreme Court, affirmed this judgment except as to the amount, which was reduced to the still considerable sum of $65,000.

The plaintiff in this case, after about two and a half years use of the defendant's dye, contracted allergic periarteritis nodosa. This is a rare and serious disease of the arteries, involving systemic infection, and usually fatal. Two physicians gave an opinion that this illness was a sensitivity or allergic reaction to paraphenylenediamine contained in the hair dye. On the basis of this testimony the verdict was sustained on the causation point, although it was observed that the plaintiff's evidence was not "conspicuously impressive" and that there might be a lack of "awareness of the grave responsibility involved in testifying to matters about which there is in fact no accurate or reliable scientific or medical knowledge and information."

The defendant seems to have relied mainly on the causation point, but the facts also raise a negligence question. The plaintiff's case was based on the assertion that there was a "negligent failure to give an adequate warning of the danger to consumers of systemic injury because of acquired sensitivity to defendant's product." The defendant had given the usual warning prescribed by the Federal Food, Drug and Cosmetics Act for coal tar hair dye, reading, "Caution—This product contains ingredients which may cause skin irritation on certain individuals and a preliminary test according to accompanying directions should first be made. This product must not be used for dyeing the eyelashes or eyebrows; to do so may cause blindness."[3] The plaintiff made the prescribed test, with no reaction, before her first use of the dye. It was not clear that the instructions directed other patch tests than the initial one, but in any event it appeared that such 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.

The duty to warn with reference to the more usual allergic reactions to hair dye seemed clear, even apart from the federal act, since it appeared that three to four per cent of all users of the dye were allergic to it. The situation is far less clear with reference to the grave systemic injury suffered by this plaintiff. It appeared that between 1934 and 1955, over 50 million packages of the hair dye had been distributed, and it was conceded by the plaintiff that "unless the

3. 52 STAT. 1040 (1938), 21 U.S.C. § 361 (1952).

present case is an instance, that there has never been either a reported or an established case of periarteritis nodosa caused by paraphenylenediamine hair dye."

In spite of the fact that no previous injury of this sort had occurred, the court sustained a finding by the jury that defendant "knew, or by the exercise of due care should have known," of the risk of systemic injury and should have given a more adequate warning. This finding of a duty to warn obviously could not be based on any statistical frequency of this type of injury, since this was the first case of the kind. The duty was based rather on the concept of expert knowledge, with emphasis on an obligation of the plaintiff "to keep reasonably abreast of scientific knowledge and discoveries concerning this field." In that connection, one of plaintiff's witnesses testified that knowledge of "the lurking dangers of paraphenylenediamine had been available for thirty years." Another witness provided a list of twenty-three articles in periodical medical literature concerning paraphenylenediamine and its effects on animals and human beings. There was no testimony, however, that this chemical in the concentration used in defendant's hair dye, 1/20 to 2/20 per cent, was known to be dangerous. It appeared that 95 per cent of all hair dyes contain paraphenylenediamine, and that there are approximately 65 million applications of hair dye a year, and still there had been no other case involving a serious systemic allergy of the type to which the plaintiff claimed the warning should have been extended.

The decision cannot be based on the theory of *In re Polemis*,[4] that a defendant who negligently threatens a minor injury to the plaintiff is liable for harm of an unforeseeable extent which in fact results. In the *Braun* case, while less serious allergic reactions were clearly foreseeable, there was no negligence in that connection, for there was an adequate warning with respect to the less serious allergies, and the only negligence alleged was a failure to warn of the grave systemic allergy to which the plaintiff was susceptible. In substance the Missouri court seems to be imposing a strict liability on the manufacturer. While there is some authority for extending the principle of strict liability to non-food products,[5] particularly in the case of chemical products,[6] it would seem that if strict liability is to be imposed this should be done expressly and not by finding foreseeability of injury where the result is quite unexpectable. It might be added, however, that in the case of this particular product, hair dye,

4. [1921] 3 K.B. 560.

5. See Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 TENN. L.REV. 963, 988 (1957).

6. See Green, *Should the Manufacturer of General Products be Liable without Negligence?* 24 TENN. L. REV. 928, 936 (1957).

the courts have been noticeably more inclined to allow recovery by an allergic plaintiff than in the case of other products.[7]

The other recent case referred to, *Wright v. Carter Products, Inc.*,[8] likewise places a new emphasis on expert knowledge. The product there involved was a deodorant known as Arrid. The plaintiff, after using this product for about five years without ill effects, contracted a slight rash under her arms. Although the rash soon subsided, plaintiff discontinued use of the deodorant for about five months, then used the same jar she had purchased earlier without any ill effects. When she again used the product from this jar, however, a few weeks later, she suffered a severe case of contact dermatitis.

Suit was brought for this injury in the United States District Court for the Southern District of New York, against the manufacturer, on negligence grounds. It was conceded at the trial that Arrid contained aluminum sulphate, an astringent which causes the pores to close and reduces perspiration. Expert testimony was introduced by the plaintiff to show that some individuals are allergic to aluminum sulphate. There was further evidence that during the four years prior to the plaintiff's injury, during which the defendant had sold over 82 million jars of the product, it had received 373 complaints of skin irritation allegedly caused by Arrid. It also appeared that the product had been the object of a Federal Trade Commission order prior to plaintiff's purchase in 1951, and that in connection with this order one medical expert testified that during the course of ten years he had treated fifty cases of dermatitis caused by Arrid.[9]

Since the evidence indicated that only a "miniscule" percentage of potential customers would be harmed by using Arrid, the trial court found that there was no duty to warn of any harmful propensities of the product, dismissing the complaint and awarding judgment to the defendant. The court of appeals reversed and remanded the case for further findings. It concluded that nnder the law of Massachusetts, where the injury took place, there may have been a negligent failure to warn. It was found that a duty to warn might arise in any case where injury was foreseeable, and that "duties to warn are not, in

7. See notes 60-73 *infra*.

8. 244 F.2d 53 (2d Cir. 1957).

9. In the FTC proceeding the Commission found that Arrid "is not harmless, and its use will cause skin irritation, and dermatitis in some people." Consequently the Commission ordered the manufacturer to cease and desist from advertising "that said preparation is safe and harmless to use, without disclosing it may cause irritation of sensitive skin." This order was upheld in Carter Products, Inc. v. FTC, 186 F.2d 821 (7th Cir. 1951). The sale involved in the *Wright* case apparently was made before this order became effective, and the court in the *Wright* case stated that since the findings in the FTC case were made in a controversy between different parties and at an administrative hearing, they were admissible in evidence only on the issue of notice and not as evidence of the fact of Arrid's propensities.

all cases, measured by solely quantitative standards." The appellate court thought that the statistical analysis of injury, "so heavily relied upon by the trial court," was only one relevant factor on the issue of foreseeability.

In its determination of the foreseeability issue, the lower court was directed to consider whether "at least some potential users of Arrid would suffer serious injuries." In addition to "the incidence of sensitivity," the court was directed to consider the gravity of any possible injury. There was also a direction to take account of the defendant's status as an expert in the use of chemicals for deodorant purposes. This expert status was regarded as "tending to show that the defendant knew, or should have known, of the possible harm that might befall users of its product." The court took occasion to point out in this connection that in Massachusetts the plaintiff might be entitled to the benefit of a presumption that the defendant knew the nature and quality of its product.[10] As a factor in favor of the defendant, the court was instructed to consider "the difficulty, if any, of embodying an effective precaution in the labels or literature attached to the product."

There was no thought by the court in this decision but that a warning would be sufficient to avoid liability. On this point it was stated, "It would seem that a manufacturer cannot be required to alter a formula that has proven safe for use by the overwhelming majority of its users, but the standard of care owed by that manufacturer to its ultimate consumers may include a duty to warn those few persons who it knows cannot apply its product without serious injury." Even in *Braun v. Roux Distrib. Co.,* where there was some evidence that the offending element in the hair dye was "the most dangerous of all cosmetics," there was no claim that the fromula would have to be altered to avoid liability. The plaintiff's case was based entirely on a negligent failure to give an adequate warning.

Although in the *Wright* case the plaintiff had suffered a slight rash from the use of Arrid prior to her serious injury, it was found by the appellate court that she was not barred by contributory negligence or voluntary assumption of risk. It was pointed out in this connection that she had a long and satisfactory experience with the product before the occurrence of the first rash and an apparently harmless application after it. Furthermore, it was considered that as a housewife unfamiliar with the chemical mysteries of cosmetics, she was

10. The court cited Sylvania Elec. Prods., Inc. v. Barker, 228 F.2d 842 (1st Cir. 1955) as authority for this presumption. The *Sylvania* case refers to such a presumption, provided, however, that the plaintiff has first shown that the product is "dangerous in its ordinary use." There is no reference to allergies in the *Sylvania* case, which involved lung injury to a glass blower from glass tubing coated with a compound containing beryllium.

entitled to rely on well publicized assertions about the "harmless nature of the product." In connection with these assertions the possibility of a liability based on negligent or false advertising was suggested in the opinion, but the reversal of the lower court was based on its refusal to find any duty to warn.

It is evident from these two decisions that a manufacturer may no longer be safe in relying on the fact that only a very small percentage of the users of his product will be injured. The duty to warn nevertheless may arise from expert knowledge, actual or presumed. It is not at all clear, however, that other courts will go as far in finding foreseeability of harm as did the Missouri court in the *Braun* case, or even as far as did the federal court in the *Wright* decision. To make a balanced appraisal of the present law on the duty to warn allergic consumers, it will be necessary to examine the earlier decisions, in many of which the plaintiff has been less successful. Attention will be given first to cases where the allergy is regarded as peculiar to the plaintiff, then to cases where a definite class of persons is susceptible. Most of the decisions, as will be seen, emphasize statistical frequency of injury as a basis for determining liability, but in some of the cases the matter of expert knowledge is regarded as a vital factor, as in the *Braun* and *Wright* decisions.

I. ALLERGY FOUND TO BE PECULIAR TO THE PLAINTIFF

There is a group of cases in which recovery ordinarily has been denied on the ground that the plaintiff's allergy is peculiar, in the sense that no other examples, or only one or two others, have been brought to the attention of the court. A denial of recovery usually results in this situation whether the action is based on negligence or breach of warranty. Attention will be given first to the negligence cases, then to the warranty actions.

Negligence—Isolated Injury

Perhaps the earliest decision involving an isolated sort of injury is *Gould v. Slater Woolen Co.*[11] The plaintiff there purchased cloth manufactured by the defendant and was injured simply from handling it, apparently on account of some chrome compounds contained in the dye. In a negligence suit it was held that there was no evidence to go to the jury. It was pointed out that the dyes used were the most common mordant used in wool dyeing and "had never caused injury to anybody who merely handled the cloths." The opinion refers to the general lack of knowledge at the time of the injury, finding that defendant had "no reason to know" of the danger; but the court seems

11. 147 Mass. 315, 17 N.E. 531 (1888).

to rely principally on the point that this was "the first instance of injury."

There are a number of other cases in which the isolated character of the plaintiff's injuries seems quite clear, and the denial of recovery is based on that ground. One of the principal decisions is *Cleary v. John M. Maris Co.*,[12] which involved some metallic nipple shields made of lead. The shields were advertised as "in no way likely to be injurious to the infant." They were worn steadily except during the feeding of the child. The infant plaintiff contracted lead poisoning, allegedly as a result of the use of the nipple shield. A negligence suit was brought against the defendant manufacturer on the ground that the shields were inherently dangerous and should not have been marketed without a warning.

The jury found for the plaintiff, but the court entered judgment for the defendant, dismissing the complaint on the merits. It appeared that during a period of ninety years "many thousands" or "vast quantities" of these shields had been used, and it was not established that there had been any other instance of lead poisoning. The court conceded a duty to warn wherever danger was foreseeable, but emphasized the lack of knowledge that the shields were "in any sense dangerous." The opinion states in this connection, "Prior to the time that this infant became ill there was no way of determining whether the infant would, by some idiosyncratic reaction, respond to the infinitesimal quantities of lead which it claimed were ingested with each feeding."

While there seemed to be some doubt in this case as to whether the poisoning was in fact caused by a proper use of the shields or by some other factor, the court evidently felt that even if there was causation there would be no liability because of the lack of foreseeability. It was observed that anticipation "results from knowledge possessed or knowledge which a reasonably prudent manufacturer would possess." In support of its conclusion against liability the court referred to an earlier New York decision finding that there was no liability in the case of a drug containing calomel, a cathartic, quoting from that decision a statement that a preparation is not deleterious "simply because one person in a multitude of those using it happens to meet with ill effects."[13] In the *Cleary* case the opinion refers to lack of actual knowledge of any danger from the shields and emphasizes the lack of foreseeability of injury where the plaintiff's case is an isolated one.[14]

12. 173 Misc. 954, 19 N.Y.S.2d 38 (Sup. Ct. 1940).

13. Willson v. Faxon, Williams & Faxon, 138 App. Div. 359, 364, 122 N.Y. Supp. 778, 781 (4th Dep't 1910), *rev'd*, 208 N.Y. 108, 101 N.E. 799 (1913), 47 L.R.A. (N.S.) 693 (1914).

14. A lower court opinion in New York, Singer v. Oken, 193 Misc. 1058, 87 N.Y.S.2d 686 (N.Y. City Ct. 1949), involving dermatitis from use of calomine

Another decision which seems to involve an isolated sort of injury is *Walstrom Optical Co. v. Miller*.[15] There the plaintiff's skin was injured from contact with dye on eyeglass frames which were manufactured and sold by the defendant. Suit was brought on negligence grounds. The experts on both sides testified that plaintiff's injuries were due to "a peculiar idiosyncrasy of her skin." This sensitivity could be discovered only by a test covering a period of two or three days. The dye was of a kind customarily used by manufacturing opticians, had been used by the defendant "for many years and on many thousand eyeglass frames without injurious effect and had proven to be harmless to persons of ordinary susceptibilities." Under these circumstances the court reversed a judgment for the plaintiff, finding that she had established "neither negligence nor proximate causation."

There is language in the opinion suggesting that the court regarded the plaintiff's sensitivity, rather than the dye, as the sole proximate cause of the injury.[16] The proximate causation approach has been properly criticized, on the ground that the only real issue is negligence, since it is clear that the offending product as well as the plaintiff's sensitivity is an immediate cause of the injury, assuming it is established that the harm results from contact with the product.[17] The court also found, however, that there was no negligence since the defendant could hardly be expected to foresee the plaintiff's sensitivity in view of the long and extensive use of the product without injurious results. The matter of warning was not discussed, but since this apparently was the first injury from the product, the court evi-

lotion containing one per cent phenol, also seems to involve an isolated injury. In finding for the defendant retailer the court stated that "in an action against a druggist for negligence wherein he has sold a used and known combination of drugs without reason to apprehend that it may prove dangerous or harmful to one person among a multitude of users, but on the contrary from long experience in selling it he has reason for the belief that it might be used without deleterious results, he is not guilty of negligence although it did in fact injure one who bought and used it." The same lack of foreseeability of injury was found in a federal case involving death from the administration of novocaine. This was found to be an "accidental" death, within the meaning of an insurance policy, because the harm due to the "hypersusceptibility" of the plaintiff was a result "which could not reasonably have been foreseen." There was no evidence of any similar reactions. Mutual Life Ins. Co. v. Dodge, 11 F.2d 486 (4th Cir. 1926). One of the New York cases, Kinkead v. Lysol, Inc., 250 App. Div. 832 (N.Y. 1937) (memorandum decision), seems to exclude recovery by allergic plaintiffs generally, but apparently the plaintiff's injury, from Lysol, was a unique one. See Barasch, *Allergies and the Law*, 10 BROOKLYN L. REV. 363, 370, 373 (1941).

15. 59 S.W.2d 895 (Tex. Civ. App. 1933).

16. An earlier opinion in the same jurisdiction clearly takes this position, stating: "We think the jury should have been told in appropriate language that, if they believed the proximate cause of the injuries to appellee was his abnormal hypersensitiveness, but for which the injury would not have occurred, a verdict should be returned for defendant." Hamilton v. Harris, 204 S.W. 450, 451 (Tex. Civ. App. 1918).

17. Comment, 49 MICH. L. REV. 253, 255 (1950); Note, *Legal Aspects of Allergy*, 5 VAND. L. REV. 212, 223 (1952).

dently considered that there would be no duty to warn all persons interested in purchasing the frames to take tests requiring a period of several days.

A number of negligence cases involving what was considered by the court to be an isolated allergy are concerned with harm from permanent wave products. In one of these, *Briggs v. National Industries, Inc.*,[18] the plaintiff's hair was processed with some "Helene Curtis" cold wave solution. Some of the solution was spilled by the beauty parlor operator on the plaintiff's face and forearm. About three days later she developed severe dermatitis, and suit was brought against the manufacturer on negligence grounds. The negligence alleged was that the defendant failed to warn users of the product that the solution contained 6.28 per cent thioglycollate acid, and that many persons were susceptible to harm from this ingredient.

Plaintiff's physician testified that she had suffered an allergic reaction, which he defined as "an abnormal reactivity of tissue." The jury found for the plaintiff, but on appeal a judgment for the defendant notwithstanding the verdict was upheld. It was emphasized in the opinion that the plaintiff's injury was of an isolated character, and that the record was "devoid of any evidence indicating that the product in question had ever caused irritation prior to its use in the instant case." The court referred to a rule that "a manufacturer must give appropriate warning of any known dangers which the user would not ordinarily discover" but emphasized the absence in this case of any actual knowledge of the dangerous character of the product. The opinion does not consider the possibility of any duty to know as experts. It has been criticized on this point,[19] and as indicated above, the recent *Braun* and *Wright* decisions place considerable reliance on the concept of a duty to know as experts as well as actual knowledge, even though no appreciable percentage of allergic consumers is involved.[20]

It has been observed that since the decision in the *Briggs* case a number of medical articles have been published showing that in fact the plaintiff's susceptibility to thioglycollate was not unique.[21] In view, however, of the lack of any proof about the state of medical knowledge at the time of the case, together with a lack of evidence of any other injuries, the decision seems correct in finding that there was no duty to warn, and it is regarded as correctly decided on its facts in the standard treatises on torts.[22]

18. 92 Cal. App.2d 542, 207 P.2d 110 (1949).
19. See Comment, 49 MICH. L. REV. 253, 258 (1950).
20. See also 2 HARPER & JAMES, THE LAW OF TORTS 1551 (1956).
21. See Comment, 49 MICH. L. REV. 253, 258 (1950).
22. See PROSSER, TORTS 503 (2d ed. 1955); 2 HARPER & JAMES, THE LAW OF TORTS 1552 (1956).

The *Briggs* case was followed in *Bennett v. Pilot Products Co.*,[23] which likewise involved a permanent wave lotion containing ammonium thioglycollate. The plaintiff was a beautician who applied this lotion with her hands, along with a powder fixative which contained potassium bromate. After handling this mixture for seven or eight times the plaintiff developed a dermatitis severe enough to cause her to leave her profession. Suit was brought against the distributor of the lotion on grounds of negligence in failing to warn that its product contained irritants dangerous to users. The case is unusual in that patch tests showed that the plaintiff did not react unfavorably to the lotion alone but only to the combination of the defendant's lotion and the powder fixative. While there was testimony that one woman in a thousand was allergic to the ammonium thioglycollate in the wave solution, the court nevertheless, regarded the plaintiff's injury as an isolated one, stating there was no testimony "that would render reasonably foreseeable the peculiar sensitivity or idiosyncrasy" of this plaintiff. Consequently it was concluded that the defendant "could not be held to have foreseen what in fact happened when the thioglycollate, itself harmless to appellant, in combination with the fixative, equally harmless, reacted on her because of an allergic skin."

The general tone of this opinion is quite unfavorable to recovery by an allergic consumer, and it seems unlikely that recovery would have been allowed even if the plaintiff had been injured by the defendant's lotion alone. The court cites in support of its decision, rather than as a point favorable to recovery, evidence that ammonium thioglycollate produced a reaction in "but one allergic woman in 1000," and seems to be using the word allergic as a term of condemnation. The opinion concludes that there was no evidence to go to the jury on the question of "the reasonable foreseeability of danger and harm to the normal person contemplated by the law."

A concurring opinion in this case takes issue with the concept that only the normal user is foreseeable, stating that if the defendant had reason to believe that one out of every 1000 would be harmed as the plaintiff was, "then it could foresee, and therefore must reasonably anticipate that such would be the result." It was conceded that to place a duty on the producer to warn the allergic of possible dangers might in some circumstances "overburden business" but the actual ground of the concurrence was that there was no evidence that defendant "had reason to believe that its product would be harmful even to the allergic," prior to the plaintiff's injury. One wonders about this statement, in view of the testimony that one out of 1000 reacted unfavorably to ammonium thioglycollate. Since, however, the plain-

23. 120 Utah 474, 235 P.2d 525 (1951).

tiff apparently did not introduce evidence of other injuries from the defendant's product, the case seems best classed with those denying recovery where plaintiff's injury apparently is an isolated one, and the defendant does not acutally know that its product will cause harm even to a few.[24]

There is a recent case involving the same kind of product, *Merrill v. Beaute Vues Corp.*,[25] where the plaintiff was equally unsuccessful. The defendant used the hair waving product there involved in accordance with directions. Shortly afterwards her eyes and face became swollen, large hives appeared on her body, and her vision became blurred. The eye injury proved to be permanent, and there was testimony that the product had damaged the plaintiff's optic nerve. Suit was brought both on negligence and warranty grounds, but the plaintiff seems to have emphasized the negligence count. There were allegations that her injuries were caused by ammonium thioglycollate contained in the product and described as inherently dangerous. In response to special interrogatories the jury found that ammonium thioglycollate is "dangerous and injurious to the health of those who use it" and that the defendant knew or should have known of the danger. A verdict was returned for the plaintiff in the amount of $45,000, but the trial judge sustained defendant's motion for judgment notwithstanding the verdict, on the ground that there was insufficient evidence to support the special findings of the jury. His own findings were that the plaintiff was "not a member of a class expected to be affected by the use of defendant's product" and that "her injury constituted an isolated instance of injury to an unusually susceptible individual."

The court of appeals sustained this action. It did not find the plaintiff's injury to be a completely isolated one, for a medical article introduced at the trial brought out two other cases of injury to the optic nerve resulting after use of a home permanent containing ammonium thioglycollate. The opinion emphasizes, however, that the defendants had sold over 13,500,000 packages of the product, and the industry at large had sold over 500,000,000 packages of a similar product with no injuries to the optic nerve reported except these two. Under these circumstances the court found the issue to be as follows: "We therefore have the question as to whether a manufacturer who places a product on the market, knowing that some unknown few, not in an identifiable class which could be effectively warned, may suffer allergic reactions or other isolated injuries not common to the ordinary or normal person, must respond in damages." In answering this question in the negative, the opinion states that a reasonable person

24. See 51 MICH. L. REV. 447 (1953).
25. 235 F.2d 893 (10th Cir. 1956).

could not foresee the purchaser's condition and anticipate the harmful consequences. On this same ground recovery on express or implied warranty was denied with the statement: "Warranties do not extend to injuries caused by peculiar idiosyncrasies or physical condition of a user which are not reasonably foreseeable. The rule as to negligence in such cases applies to warranties."

The general tone of the opinion is against recovery by an allergic consumer, but there is nothing in the opinion which excludes the concept of a duty to warn allergic consumers where "an identifiable class which could be effectively warned" is involved.[26] The court's conclusion that no such class was established in this case is questioned in a concurring opinion by Judge Murrah, who states that a clear duty to warn arises wherever "some" or even a "small proportion" of allergic users is involved. Judge Murrah's concurrence with the prevailing opinion was only because the plaintiff denied any allergy and rested her case on the grounds that ammonium thioglycollate was generally dangerous. The verdict was not supportable on this theory, for the plaintiff's own physician did not testify that the substance was inherently dangerous or poisonous, or likely to injure anyone who used it.[27]

It is arguable that since serious injury to sight was the danger threatened, a duty to warn arose in this case even though only two cases of such injury prior to the plaintiff's injury were known to science. The reluctance of the majority to impose such a duty is understandable, however, in view of the fact that over 500,000,000 packages of this kind of product had been marketed without any evidence of injury to the optic nerve except for the two cases reported in a medical article introduced at the trial. This article had not come to the attention of the defendant before the trial, and while there might well be a duty to know of it, there was other scientific information, based on findings of the Federal Food and Drug Administration and the Committee on Cosmetics of the American Medical Association, to the effect that a judicious use of ammonium thioglycollate was a "relatively harmless" procedure. Under these circumstances it is not

26. See 22 Mo. L. REV. 223 (1957).

27. The case differs in this respect from Hardy v. Proctor & Gamble Mfg. Co., 209 F.2d 124 (5th Cir. 1954), where the plaintiff lost her sight completely after using a detergent, Dreft, to wash surgical instruments. Perspiration mingled with the detergent had run into her eyes. The product had been advertised as safe for the eyes. Suit was brought on grounds of negligence and breach of implied warranty. The negligence alleged was a failure to warn of an inherently dangerous chemical, sodium lauryl sulfate, in the product, and there was some medical testimony that the injury was due to this chemical. The court held that it was error to direct a verdict for the defendant. There is no discussion of the allergy problem, but since there was no indication of other injuries of this kind from Dreft, the case may involve an isolated allergic reaction.

surprising that the statistical rarity of serious injury was regarded as negativing any duty to warn. The court also apparently thought that a warning that the product might injure the eyes of about three persons out of 500,000,000 would not have much practical effect. While this cause does not involve a completely isolated injury, the number of other injuries was so small that it seems more like the cases involving an allergy peculiar to the plaintiff than those which will be considered later involving a definite class of susceptible users of the product.[28]

It thus appears that where the suit is based on negligence, the courts seem to regard the isolated character of the injury as conclusively establishing that the harm is unforeseeable. Efforts to establish foreseeability of injury on the basis of expert knowledge have been unsuccessful, in the case where isolated allergic injury is involved, except in the recent Missouri case discussed above, *Braun v. Roux Distrib. Co.* The *Braun* case seems to represent a sharp departure from earlier decisions in this respect. It also seems to be imposing, as indicated above, what is in substance a strict liability. Since about 65,000,000 applications of similar hair dye had been made annually without other injuries of the type involved in this case, it seems quite

28. There is another cosmetics negligence case, involving suntan oil, Elizabeth Arden, Inc. v. Brown, 107 F.2d 938 (3d Cir. 1939), in which the plaintiff failed to recover for what apparently was an allergic injury. The case is not significant, however, because of the defective proof of causation. The plaintiff's doctor testified that her injury was due to an aniline dye known as "Bismark" brown, an element which it was later stipulated was not contained in the defendant's product. Likewise in the recent case of Kent v. McKesson & Robbins, Inc., 19 N.Y.L.J. No. 13, p. 7, F.D.C.L.R. ¶ 22,526 (N.Y. Sup. Ct. 1958), a suit against the manufacturer on negligence grounds and against the retailer for breach of warranty failed because of the lack of sufficient evidence that the defendant's Abolene cream was in fact the cause of the plaintiff's atropic dermatitis. The case of Luckett v. Adolphus Cleaners, 262 S.W.2d 191 (Ky. 1953) involved what may have been an allergic dermatitis from oxalic acid found in a hat band, but recovery was denied because of lack of evidence that the defendant cleaners were responsible for the presence of the harmful substance. The leading case of Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693, 164 A.L.R. 559 (1946), which may in fact have involved an allergic injury from perfume, does not seem significant from this standpoint since the jury found in fact that the injury "was caused by some harmful ingredient in the perfume rather than by her own peculiar and unforeseeable susceptibility." The *Yardley* case was followed in Cumberland v. Household Research Corp. of America, 145 F. Supp. 782 (D. Mass. 1956) although the maker testified that he had sold 70,000 bottles of the household disinfectant there involved, and had never received a complaint before, because "it can be found to be negligence not to anticipate harm which a product will cause to a normal person." See text accompanying note 48 *infra*. Likewise in Grant v. Australian Knitting Mills, Ltd. [1936] A.C. 85 (Austl.), it was found that the plaintiff was a "normal" user. There is a case involving dermatitis from bath salts, where the plaintiff was nonsuited because the evidence that she was hypersensitive, and that the salts were innocuous to normal persons, with a statement that in the absence of "special circumstances" there was no duty to abnormal users. Levi v. Colgate-Palmolive Proprietary, Ltd. [1941] 41 S.R. 48 (N.S.W.), 58 W.N. 63. This case apparently involved an isolated sort of injury.

unrealistic to hold that there was in fact any foreseeability of this injury.

Warranty—Isolated Injury

Plaintiffs have been about equally unsuccessful in actions for breach of warranty in the situation where the plaintiff's injury is found to be of an isolated character. The suits have been on grounds of breach of the implied warranties of merchantability or of fitness incorporated into the Uniform Sales Act, and occasionally they have been based on breach of an expressed warranty.[29] In only a few of these cases has the plaintiff succeeded.

A good many of the warranty cases have involved harmful dye in articles of apparel. The earliest of these are two Massachusetts decisions, *Flynn v. Bedell Co.*,[30] and *Bradt v. Holloway*.[31] Both cases involved dermatitis alleged to have been caused by some "poisonous" substance in dyed fur coats, and both were decided on the same day. In the *Flynn* case recovery was allowed on an implied warranty of fitness, but only because the court found that the dye "was injurious in the course of normal use." The decision goes on to say that "where there is no evidence of any intrinsically unhealthful feature in a fur, but only that the buyer is constitutionally unable to wear fur of this sort because of a supersensitive skin, the warranty of fitness presumably does not apply." The warranty was not regarded as extending to "matters wholly unknown to the dealer and peculiar to the individual buyer."

In the companion case of *Bradt v. Holloway,* the plaintiff failed to recover on the warranty because there was no evidence that the dyed fur involved in that case would cause injury "to any normal person." As in the *Flynn* case the opinion seems to consider injury to "hypersensitive" persons as outside the scope of implied warranty. It has been said that the court in the *Flynn* case was thinking in terms of an isolated susceptibility, rather than in terms of a class of persons.[32] Against this interpretation of the case is the fact that the verdict was sustained only on the ground that "the plaintiff's skin was not delicate" and because "it appears that the particular 'defect' which injured the

29. The implied warranties are in § 15 of the act. Section 15(1) reads: "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." Section 15(2) states: "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."

30. 242 Mass. 450, 136 N.E. 252 (1922).

31. 242 Mass. 446, 136 N.E. 254 (1922).

32. Horowitz, *Allergy of the Plaintiff as a Defense in Actions Based upon Breach of Implied Warranty of Quality*, 24 So. CAL. L. REV. 221, 230-31 (1951).

plaintiff would have similarly injured any normal person." It may well be, however, that since no attempt was made in either of these two cases to show that the plaintiff was a member of an allergic class, the decisions do not actually mean anything more than that the implied warranty will not extend to a plaintiff who fails to submit evidence that his allergy is more than an isolated one. In neither the *Flynn* nor the *Bradt* decision does the court indicate any realization of the point brought out in an earlier negligence decision, *Gerkin v. Brown & Sehler Co.*,[33] which will be discussed in connection with the negligence cases involving a definite class of allergic users, that a considerable percentage of persons are sensitive to dyed fur.

In a number of later cases involving injury from apparel, in which the plaintiff failed to point out others who were allergic to the same product, it likewise has been held that there is no breach of warranty. In the first of these, *Ross v. Porteous, Mitchell & Brum Co.*,[34] involving dress shields used to protect from arm pit perspiration, the plaintiff sued the retailer, claiming a breach of the implied warranty of fitness when she contracted dermatitis. It appeared that the shields had been on the market for four years and that annual sales ran into the millions. The defendant's chemist testified that no injury had ever been known to result from the shields, although they had been sold throughout the country. The plaintiff did not produce any evidence that others had been harmed, nor did his witness point to any particular harmful substance in the product. Under these circumstances the court found no breach of the implied warranty. The language of the court seems to go far enough to exclude recovery on warranty grounds by allergic consumers generally, for it is stated that "if the article could be worn by any normal person without harm and injury is suffered by the purchaser only because of a supersensitive skin, there is no breach of the implied warranty of reasonable fitness of the article for personal wear."[35]

The *Ross* decision was cited with approval two years later in a case involving injury from dye in a cotton dress, *Barrett v. S. S. Kresge Co.*[36] After wearing the dress the plaintiff suffered extensive dermatitis and sued the retailer on grounds of breach of implied warranty of fitness for the purpose for which the article was intended. It was

33. 177 Mich. 45, 143 N.W. 48 (1913).
34. 136 Me. 118, 3 A.2d 650 (1939).
35. In the same year the English Court of Appeal held, in a case involving dermatitis from a tweed coat, that the implied warranty of fitness under the Sales of Goods Act did not extend to a person who could not satisfy the court that she was a "normal person." It appeared that "hundreds of thousands" of similar coats had been supplied and that no other complaint had been made. There was medical evidence that the plaintiff was "abnormal" and suffered an "idiosyncratic effect." Griffiths v. Peter Conway, Ltd. [1939] 1 All E.R. 685 (C.A.).
36. 144 Pa. Super. 516, 19 A.2d 502 (1941).

shown that the defendant had sold 4,000 of these dresses and "had no knowledge of anyone else experiencing any skin reaction to the wearing of them." Furthermore, there was no testimony that "the material in the dress would cause irritation to anyone other than Mrs. Barrett." Under these circumstances the court held that there was no implied warranty that the dress, "although harmless to practically all the public, does not contain any substance or ingredient that may injuriously affect some individual purchaser who has a peculiar susceptibility unknown to the vendor." It was considered that to hold otherwise would expose merchants to a "far reaching and possibly ruinous liability, which they cannot anticipate and with reasonable precaution avoid." The plaintiff did not point out any specifically harmful chemical in the dress, and there was no evidence of any actual knowledge of a harmful ingredient. While it may be that plaintiff's allergy to the dye was not as unique as the court supposed the case is typical in holding that where the evidence before the court indicates that plaintiff's allergy is an isolated one, recovery will be denied on warranty as well as on negligence grounds. The general tone of the opinion is not favorable to recovery by anyone other than the "normal person," but the court does not expressly exclude the possibility of recovery on warranty grounds where a definite class of allergic persons is involved, for then it might not be dealing with "a peculiar susceptibility unknown to the vendor" which he could not with reasonable precaution guard against.

The *Barrett* case was followed in *Stanton v. Sears Roebuck & Co.*[37] where the plaintiff suffered severe dermatitis after wearing a dyed rayon dress purchased from the defendant. Here again no chemical analysis of the dress was made, but two doctors testified that the dye in it was the cause of the plaintiff's illness. The same doctors testified that "countless other women could have worn the dress without any reaction or ill effect whatever." During the year that preceded this purchase, the defendant had sold half a million dresses of the same type, and the plaintiff apparently "was the only one who had complained of any ill effects." Under these circumstances the court held, quoting extensively from the *Barrett* decision, that the implied warranty of fitness did not extend to a purchaser with a peculiar susceptibility.

The Massachusetts court had to again consider the problem of harm from dyed dresses in *Kurriss v. Conrad & Co.*[38] and *Payne v. R.H. White Co.*[39] In both of these cases the plaintiff fared better than in the ones just considered. In the *Kurriss* decision the plaintiff did not point

37. 312 Ill. App. 496, 38 N.E.2d 801 (1942).
38. 312 Mass. 670, 46 N.E.2d 12 (1942).
39. 314 Mass. 63, 49 N.E.2d 425 (1943).

to any specific harmful ingredient but was able to show that the dermatitis was present at the particular places where the pink dress came into contact with her body. Under these circumstances the court considered that on the causation point the case was like *Flynn v. Bedell Co.* rather than *Bradt v. Holloway.* Although there was evidence that the dermatitis from which the plaintiff suffered was to be classed as an allergic disturbance, the court did not seem to regard this as grounds for considering the plaintiff as other than a normal user. The opinion does not refer to the language in the *Flynn* and the *Bradt* cases excluding the hypersensitive from the operation of the warranty. Instead the court seems to avoid the problem by invoking a rudimentary concept of allergy. The evidence that plaintiff's injury was to be classed as allergic is brushed aside with the statement:

> It is consistent with the testimony as to this classification that what is meant is that the dermatitis is something that is not "due to anything taken in or inhaled but . . . to something that the skin comes in contact with." We are of opinion that there is nothing in this specific piece of evidence which requires a finding for the defendant, if in other aspects of the possible findings the plaintiff is entitled to recover.[40]

As authority for this statement, the court cites *Bianchi v. Denholm & McKay Co.*[41] That is a case where the plaintiff was regarded as a member of a group, and it will be discussed in connection with the warranty cases where a definite class of allergic users is involved. It is possible that in the *Kurriss* case the plaintiff is being regarded as a member of a sensitive class, but there was no evidence of other allergic injuries from the product, and it seems more likely that the court was regarding the plaintiff as normal, since obviously normal people as well as the hypersensitive may be harmed by contact as well as inhalation.

The other Massachusetts case, *Payne v. R. H. White Co.,* decided a year later, quite clearly is based on the ground that the plaintiff was to be regarded as normal. The plaintiff there suffered from dermatitis after wearing a brown dress purchased from the defendant. The court stated that in order for the plaintiff to recover under the implied warranty of fitness she "must show that the dress was unfit to be worn by a normal person and cannot recover by a mere showing that it was unfit for her or for some unusually susceptible person to wear." The court further found, however, that it would be assumed "that the plaintiff is a normal person without any evidence specifically directed to that fact" and that therefore the implied warranty of fitness would be applicable, if properly alleged.

40. 46 N.E.2d at 15.
41. 302 Mass. 469, 19 N.E.2d 697 (1939).

A few years later, another plaintiff in Massachusetts failed to recover for dermatitis from gloves because it appeared she was not normal. In that case, *Longo v. Touraine Stores, Inc.*,[42] the plaintiff's doctor did not point to any substance in the gloves harmful to the group of sensitive users but did testify that the plaintiff "was allergic to this particular pair of gloves" as shown by patch tests. Under these circumstances the court said, quoting from the *Payne* case, "the plaintiff had the burden of proving that the gloves were unfit 'to be worn by a normal person, and cannot recover by merely showing that (they were) unfit for her or for some unusually susceptible person to wear.'" It thus appears that while in some of the Massachusetts cases involving injury from clothing the plaintiff has recovered, there is little in these decisions to encourage an action based on an allergic injury of an isolated character.

There is a Missouri case, *Marra v. Jones Store Co.*,[43] involving dermatitis contracted after use of a dyed satin blouse purchased from the defendant retailer. Suit was brought for breach of implied warranty of fitness. Plaintiff's doctor testified that the blouse contained a "toxic foreign substance" which had caused the harm. The doctor had not analysed the garment and could not name any specific poisonous substance. He had not made any patch test but testified that plaintiff's skin was normal and that her dermatitis "was not an allergic condition." A chemist testifying for defendant had analysed the garment and gave evidence that it did not contain any poisonous substance. He further stated that some individuals might be sensitive to the dye, but that there was no way of predicting this in advance, and that the sensitive individuals "would not be numerous enough to constitute a class." The jury found for the plaintiff and the verdict was sustained on appeal. The court referred to testimony that probably not all the chemical contents of the dyes used in the garment had been discovered by the tests made, stating, "Consequently we cannot say that there may not have been some unknown chemical in the blouse which, under certain conditions, could or would cause any normal person to contract dermatitis." In view of the conflicting medical testimony as to whether the plaintiff's condition was an allergic one or not, it is clear that this decision does not hold that the implied warranty of fitness covered anyone other than a normal person, or that the plaintiff can recover without testimony that the product is poisonous to a normal person.

There are several warranty cases involving cosmetics in which isolated allergic consumers are excluded from the scope of the warranty,

42. 319 Mass. 727, 66 N.E.2d 792 (1946).
43. 170 S.W.2d 441 (Mo. App. 1943).

besides the case of *Merrill v. Beaute Vues Corp.*,[44] which, as indicated earlier, denied recovery in warranty as well as on negligence grounds. In one of the earlier cosmetics cases, *Zager v. F. W. Woolworth Co.*,[45] the plaintiff used some freckle cream containing mercury purchased from defendant retailer. Four or five hours later plaintiff suffered from dermatitis, and a patch test showed that she was allergic to the cream. Suit was brought on grounds of breach of express warranty and breach of the implied warranties of merchantability and fitness. In defense it was alleged that any injury suffered by plaintiff was the "sole result of plaintiff's physical and bodily condition and constitutional composition." A judgment for defendant was sustained on appeal, with a statement that the evidence supported the finding that the plaintiff's "constitutional composition was the proximate cause of the dermatitis which she suffered." The court seemed to take it for granted that if the plaintiff's reaction was an allergic one, due to hypersensitivity, it was not covered by the express or implied warranties. There was no evidence of injury to other persons, or of knowledge on the part of the defendant that the mercury or any other ingredient in the cream was harmful to a class of users, and so far as appears from the record the plaintiff's susceptibility was unique. It may be that all the case actually holds is that an isolated allergic consumer is not covered by the warranties.

The plaintiff was more successful in *Graham v. Jordan Marsh Co.*,[46] which involved dermatitis from the use of cold cream purchased at defendant's store. The lower court directed a verdict for defendant, in a suit for breach of express warranty and breach of the implied warranty of fitness. This action was taken apparently on the basis of testimony by the plaintiff's own physician that her injury was an allergic one, due to sensitivity. In sustaining exceptions to the directed verdict the court stated that the jury could disregard the testimony of the plaintiff's physician and "adopt as true the testimony of the plaintiff that there was nothing wrong with her skin when she purchased the jar of cold cream . . . and draw the inference that she was normal."[47] The Massachusetts court clearly makes easier than does the California court in the *Zager* case the plaintiff's road to recovery. The facts in the two cases seem about the same, for in the *Zager* case also the record contained evidence which might have supported contrary findings on the issue of whether plaintiff's "constitu-

44. See note 25 *supra*.
45. 30 Cal. App. 2d 324, 86 P.2d 389 (App. Dep't 1939).
46. 319 Mass. 690, 67 N.E.2d 404 (1946).
47. In a negligence case a plaintiff succeeded in Massachusetts in what may in fact have been an isolated allergy injury on the basis of a jury finding that the injury was not due to her susceptibility. See Carter v. Yardley & Co., note 28 *supra*.

tional composition" was the cause of the injury. In the *Zager* case, however, the court was faced with a finding of fact at the trial in favor of the defendant. It is clear that both courts considered that if the injury was in fact an allergic one it was not covered by the express or implied warranties, in the absence of evidence that there was a definite class of susceptible consumers of the product. The substantial aid which the plaintiff may receive, however, from the presumption of normality is illustrated by *Cumberland v. Household Research Corp. of America*,[48] a case involving injury to the plaintiffs from a disinfectant containing chlorophenyl phenol. There was testimony by the maker that he had sold 70,000 bottles of the product and had never received a complaint before, and that there were 100 gallons in the particular batch involved. The plaintiff produced no evidence that chlorophenyl phenol in the concentration used "was harmful to anyone except the plaintiff." The court nevertheless refused to direct a verdict for the defendant in an action for breach of express and implied warranties. While the court granted a new trial on the issue of liability, as well as because of excessive damages, it refused to direct the verdict for the defendant even though it referred to the presumption of normality in this case as a "very weak one." This decision indicates that it may be quite difficult to conclusively rebut the presumption of normality.[49]

The most recent Massachusetts case based on warranty is *Jacquot v. Wm. Filene's Sons Co.*[50] This decision, like most of the earlier ones, denies recovery to an allergic plaintiff. The injury was from dermatitis after use of a fingernail kit consisting of five liquids and a powder purchased from the defendant retailer. There was no presumption of

48. 145 F. Supp. 782 (D. Mass. 1956).

49. The court also refused to direct a verdict for the defendant as a maker on negligence grounds. See note 28 *supra*. Another implied warranty of fitness case involving injury to plaintiff's hands, allegedly from bleaching solution, Landers v. Safeway Stores, Inc., 172 Ore. 116, 139 P.2d 788 (1943), follows the other warranty cases involving an isolated sort of injury and denies recovery. The jury found for defendant, and the trial judge ordered a new trial. This order was reversed principally on the ground that there was no evidence that the solution contained any specific deleterious ingredient which "made it reasonably likely that it would cause injury when used as directed." Under these circumstances the court found that evidence showing merely that injury following use was insufficient to establish causation. With reference to the allergy point the court stated: "It is not necessary for us to go as far as some of the cited cases which hold that there is no breach of implied warranty where the injury is caused by the peculiar susceptibility of the plaintiff, persuasive as those cases may be." 139 P.2d at 797. Likewise in a more recent North Carolina case involving dermatitis from a hair rinse the court was unsatisfied with the proof of causation, but in any event took the position that "in an action by the buyer of a product against the seller for breach of warranty to recover damages for injuries resulting from the use of the product, there is no liability upon the seller, where the buyer was allergic or unusually susceptible to injury from the product, which fact was wholly unknown to the seller and peculiar to the buyer." Hanrahan v. Walgreen Co., 243 N.C. 268, 90 S.E.2d 392, 393 (1955).

50. 149 N.E.2d 635 (Mass. 1958).

normality because of the plaintiff's own testimony that following the use of such things as perfumes, nail polish, and mascara she had temporary blotches on her skin. The injury was considered to be an isolated one because of testimony by a dermatologist that during ten to eleven years of practice this was the first case he had encountered of dermatitis from the use of this product, together with evidence that in 1955 over 500 kits of this product had been sold without any other claim of injury. There was no analysis of the contents of the kit nor was there a showing of any "generally injurious" ingredients. Under these circumstances the court found that the product was fit for use by normal persons and further that plaintiff was not a member of an allergic class. On this latter point the court said, "The plaintiff has not shown that she is one of a class of persons sensitive to the fingernail kit to whom the implied warranty of fitness might extend. . . ." It was found that an express warranty would not extend any further than an implied one.[51] It might be added that even if a duty to warn had been found, the duty may have been adequately fulfilled by means of instructions inclosed with the kit warning against use by persons with allergies. This point was explicitly considered in another Massachusetts case, *Taylor v. Jacobson*,[52] involving hair dye. That case makes it clear that where plaintiff reads and disregards "reasonable, intelligible, and adequate warnings" to take a preliminary or patch test, a resulting illness of the type warned against is not within the scope of any implied warranty given by the retailer.

There is a quite recent decision by a trial court judge, *Zampino v. Colgate-Palmolive Co.*,[53] which seems to go much further in allowing recovery for an isolated allergic injury than do the cases which have been discussed. This decision apparently extends the scope of the implied warranties of fitness and merchantability to a plaintiff who may be allergic, even where there is a failure to point out any others who have suffered similar harm. The plaintiff had used a deodorant called Veto, and suffered after its use from burning, pimples and swelling under both arms. She sued both the manufacturer and the retailer on grounds of breach of the implied warranties of fitness for purpose and merchantability. The suit was dismissed as to the manufacturer, but the plaintiff recovered $4,500 from the retailer.

The defendant urged in this case that a mere showing that the prod-

51. This finding may be contrasted with a dictum in a Delaware case where the court stated that an implied warranty might well not extend to allergic risks unknown to the seller, but that "where the warranty was expressly made, it makes no difference whether the warrantor knew [that] it was false." See McLachlan v. Wilmington Dry Goods Co., 41 Del. 378, 22 A.2d 851 (Super. Ct. 1941), 26 MINN. L. REV. 668 (1942).

52. 147 N.E.2d 770 (Mass. 1958).

53. 173 N.Y.S.2d 117 (Sup. Ct., Spec. T. 1958); 13 FOOD DRUG COSM. L.J. 559 (1958).

uct did not prove fit for application to this plaintiff's skin did not establish that Veto was not of merchantable quality. The trial judge found this contention without merit, stating, "Defendant's argument along this vein may have had some force if the plaintiff, Mrs. Zampino, was suing in negligence, and, if there was a showing that she was suffering from an allergy or some unusual susceptibility which could have been attributed to the ingredient, aluminum sulfamate, which went into the making of Veto, and, that the cause of the injury was the allergy and not the product." So far as the warranty action was concerned, however, the court stated that the fact that the product did not prove fit for application to this plaintiff constituted "the very reason why it is unmerchantable."

Except for this trial court decision in the *Zampino* case, it seems clear that even courts favorably inclined toward an allergic plaintiff require that he establish himself as one of an identifiable class, and will not regard an isolated sort of allergic injury as within the scope of the implied warranty. It may be that in a case like *Cumberland v. Household Research Corp. of America* where the "presumption of normality" is applied notwithstanding the isolated character of the plaintiff's injury, the court is in effect finding liability for an allergic injury, but the language of such an opinion, with the emphasis on the plaintiff's normality, certainly does not purport to bring an isolated allergic plaintiff within the warranty.[54]

II. ALLERGIES INVOLVING A DEFINITE CLASS

When we turn to cases where it is established that a definite class of persons is allergic to a product, recovery has been much more frequent. Attention will be given first to the negligence cases, then to those where the plaintiff's claim is based on breach of warranty.

Negligence—Susceptible Class

It would seem that the recent negligence case of *Wright v. Carter Products, Inc.*[55] should be considered as involving a class of allergic users. It appeared that the defendant had received 373 complaints of skin irritation resulting from Arrid, the deodorant there involved, and one doctor had treated fifty cases of dermatitis caused by the product in the course of a ten-year period. Since the defendant had sold 82,000,000 jars of Arrid over the four-year period during which the complaints were received the class was very small from a percentage

54. The case of Hardy v. Proctor & Gamble Mfg. Co., note 27 *supra*, may involve liability for an isolated allergic injury on grounds of breach of implied warranty, but there is no discussion of the allergy problem and it seems to have been assumed that plaintiff could prove that the detergent there involved was harmful to normal users.

55. Discussed note 8 *supra*.

angle, but it nevertheless included a substantial number of persons, with the result that the court did not regard the plaintiff's injury as one of an isolated character. As indicated, however, in the earlier discussion of the case, the court emphasized expert knowledge, as well as statistical frequency, as the basis for the duty to warn. It was found to be enough that "at least some" of the potential users of the product would suffer injuries, and that the defendant's duty to know as an expert should be taken into account along with "the incidence of sensitivity."

Turning to the earlier decisions, the first negligence case which deals with the situation where the plaintiff establishes himself as a member of a class is *Gerkin v. Brown & Sehler Co.*[56] This decision was back in 1913, but it is characterized by a forward looking approach and has exerted great influence on the law relating to allergies. The case involved a dyed fur collar which when turned up caused dermatitis. The jobber who supplied the coat to the retailer was sued on negligence grounds. The defendant's president admitted that about one out of every hundred customers could not wear any kind of dye in fur, that he had received about twenty complaints during the preceding ten years, and that it was common knowledge in the fur trade that some people simply could not wear dyed furs. The complaint alleged that the defendant was negligent under these circumstances in failing to warn customers that the dyed fur was injurious to some persons. In sending the case back for a new trial on other issues, the court stated with reference to the duty to warn:

> When the fact is once established and demonstrated by experience that a certain commodity apparently harmless contains concealed dangers, and when distributed to the public through the channels of trade and used for the purposes for which it was made and sold is sure to cause suffering to, and injure the health of, some innocent purchaser, even though the percentage of those injured be not large, a duty arises to and a responsibility rests upon the manufacturer and dealer with knowledge to the extent, at least, of warning the ignorant consumer or user of the existence of hidden danger . . . .
>
> That the great majority of persons are safe from the particular danger concealed in the article sold, or that few injuries in fact result from its use, does not militate against this principle when the certain fact of imminent danger to a percentage is established.[57]

The court distinguished the Massachusetts decision in *Gould v. Slater Woolen Co.*[58] on the grounds that there were no previous cases of harm from the cloth there involved, and the defendant had no reason to know of the danger. In the *Gerkin* case there was knowledge of

56. 177 Mich. 45, 143 N.W. 48 (1913).
57. 143 N.W. at 53.
58. Discussed in text accompanying note 11 *supra.*

the danger, together with a considerable statistical frequency of injury.

The principle that there is a duty to warn allergic consumers has received a considerable development in a series of cases involving hair dye, which may tend to explain somewhat the decision for the plaintiff in *Braun v. Roux Distributing Co., Inc.*[59] The earliest of these, *Wilson v. Goldman*,[60] involved a hair dye containing three per cent nitrate of silver. The dye was advertised as "harmless." Fifteen minutes after using it the plaintiff suffered from severe itching of the scalp, followed by inflamation and eruptions. In a negligence suit against the manufacturer two physicians testified that the silver nitrate solution in the dye could produce this result, and there was evidence that this ingredient, when applied to the skin, "produces a burning pain with partial destruction of the tissues." The defendant's experts testified that silver nitrate in the quantity used in the dye was harmless. The opinion does not include much discussion of the allergy problem, but the court observed, in sustaining a verdict for the plaintiff, that "it is well known that some persons are more sensitive to skin irritation than others." Evidently the court considered that the plaintiff's sensitivity, if present, was one possessed by a substantial class and should not operate as a defense if the jury believed that the harm resulted from the use of the dye and that this injury was foreseeable.

The next case, *Cahill v. Inecto, Inc.*,[61] involved a hair dye called "Inecto Rapid," a product which is involved in several later decisions, sometimes under other names. About seven hours after application of the dye the plaintiff began to suffer from severe itching and soon her face became so swollen that she could not open her eyes. Ulcers formed and her hair fell out. In a negligence suit it was alleged that while the dye was stated to be "positively safe for use on all healthy skins," it in fact was inherently dangerous. The defense of allergy was raised, for the court refers to testimony of two physicians called by the defendant "to prove that the plaintiff had some pre-disposition or some idiosyncrasy making her susceptible to hair dye." The court adds, however, that the witnesses "absolutely failed to make such proof" and finds that the plaintiff was "in perfect health." Under these circumstances the court thought that it was incumbent on the defendant rather than the plaintiff, once it had been shown that the product had caused the harm, to supply an analysis and produce proof that the dye contained no harmful ingredient. If the defendant had been able to prove that the plaintiff had possessed an isolated sensitivity to the dye the decision apparently would have been in its favor;

59. Discussed in text accompanying note 2 *supra*.
60. 133 Minn. 281, 158 N.W. 332 (1916).
61. 208 App. Div. 191, 203 N.Y. Supp. 1 (1st Dep't 1924).

but since there was a failure of any such proof, the court emphasized the testimony of a physician that the dye was "the competent producing cause . . . and the sole possible one" of the plaintiff's injuries.

A few years later in *Karr v. Inecto, Inc.*,[62] involving the same product, recovery was denied. The plaintiff in this case was a hairdresser. Her finger became stained with the dye and twelve hours later developed a morbid condition which the attending physician thought was caused by the dye. No analysis of the dye was produced by either party. The court sustained a dismissal of the complaint because of lack of evidence on the causation point. The court emphasized that the dye had not injured the customer the plaintiff was treating, stating:

> Possibly some individuals may possess a peculiar immunity against the effects of a particular chemical poison or irritant; possibly other individuals possess a peculiar susceptibility. We know only that, even if the dye used may possibly be a competent producing cause of a morbid condition such as developed on plaintiff's finger, it does not always produce such a result, otherwise the customer would not have escaped injury. All else rests purely on conjecture.[63]

This case does not seem very different on its facts from the *Cahill* decision where the plaintiff also failed to point out any specific harmful ingredient. The court distinguished the *Cahill* case simply by stating that there "apparently" all "other possible causes were excluded." In neither case was there any convincing evidence, apparently, that the plaintiff was unusually sensitive to the product. In the *Karr* decision the court stresses the twelve hour lapse of time between the use of the dye and the injury, but in the *Cahill* case also there was a considerable time interval, a lapse of seven hours. It seems evident that in the *Karr* case the court is insisting on stricter standards of proof as to cause in fact, and also that it was unwilling to regard an allergic reaction as a proximate result, since the dye did not "always" cause harm.

This disposition to rule against an allergic plaintiff was reaffirmed by the New York court five years later in *Drake v. Herrman*,[64] where the court refused to order disclosure of the secret Inecto formula on an examination before trial. The court there said that the plaintiff must prove the presence of "inherently dangerous and poisonous ingredients" and concluded that these could be discovered by analysis of the product. With reference to the allergy point the court stated that "if the secret compound contains nothing except harmless ingredients and its alleged injurious effect upon plaintiff was due to her

62. 247 N.Y. 60, 160 N.E. 398 (1928).
63. 160 N.E. at 399.
64. 261 N.Y. 414, 185 N.E. 685 (1933).

idiosyncrasy, then defendant's property right is entitled to preservation." The general approach in both the *Karr* and *Drake* cases is that only the "normal person" will be protected and that the plaintiff must prove that the product contains an ingredient which is "poisonous" to such a person.

In the next hair dye case, *Arnold v. May Dep't Stores Co.*,[65] the plaintiff was more successful. The same dye, Inecto, was involved, with its name changed to Notox. The suit was brought against the beauty shop operator rather than the manufacturer, but the opinion deals more explicitly than the earlier ones with the general question of foreseeability of injury to allergic users. The plaintiff in this case had informed the operator that she had trouble ten years earlier with hair dye and had used only henna since that time. The operator then advised her that Notox was harmless and applied it to her hair, in spite of a warning on the package that persons known to have idiosyncrasy to skin and scalp diseases should apply no form of hair coloring. About two hours after the application the plaintiff's face became red and swollen. This condition became worse and she lost nearly all of her hair. In a suit for negligence the plaintiff recovered $9,500.

In affirming this decision the court distinguished *Karr v. Inecto, Inc.* on the ground that there the plaintiff alleged and failed to show that the dye was inherently poisonous, while in the *Arnold* case the plaintiff recovered at the trial "not on the theory that the dye was inherently dangerous and poisonous to the skin, but on the theory that the plaintiff was sensitized, or possessed of an idiosyncrasy to the dye, which caused her to suffer the injuries complained of, and that the defendant knew or should have known, that the plaintiff was so sensitized." Since there was some notice of this particular plaintiff's sensitivity to hair dye, the case perhaps is not very siguificant with respect to any general duty to warn unknown allergic consumers. The language quoted, however, does seem to do away with the concept expressed in several of the earlier cases that only a normal person can recover, and that the product cannot be regarded as a proximate cause of the injury to an allergic plaintiff. With reference to negligence, the court makes the statement that there is liability if a reasonable person can foresee harm, and significantly adds in that connection that "what one knows or should know is equivalent in law." This language suggests that liability might have been found even if the plaintiff had not mentioned her earlier difficulty with hair dye, for it would seem the defendant should have realized from the warning on the package that a definite class of persons was sensitive to hair dye. With such knowl-

65. 337 Mo. 727, 85 S.W.2d 748 (1935).

edge a failure to pass the warning on would seem to constitute negligence, even with respect to customers who had not reported any previous trouble.

In *Bundy v. Ey-Teb, Inc.*,[66] another New York case, the plaintiff recovered in a negligence suit for harm from a preparation used to dye eyebrows. The *Karr* decision was not regarded as barring recovery because of testimony by a chemist, who analyzed the product, that it contained silver nitrate, ammonia and progalic acid, and that these ingredients "were poisonous, harmful, and dangerous for external use about the human face and especially in or about the eye." The product had been advertised as containing no poisonous materials and as harmless to the eyes. There was no testimony as to whether or not the injury was an allergic one, and this decision, like the one in the *Cahill* case, is based on the ground that the product is inherently dangerous or poisonous, apparently to normal persons. With reference to proof of negligence the court, following a dictum in the *Karr* case, permitted an inference of negligence once the presence of a poisonous ingredient had been established. The same inference of negligence was permitted in *Petzold v. Roux Laboratories, Inc.*,[67] after proof that the hair dye involved was "dangerous or poisonous." It is not clear from the short opinion in this case whether the court is referring to the product as poisonous to "normal persons" or to a class of sensitive users, for here also there was no consideration of whether or not the plaintiff's injury was an allergic one. In *Maher v. Clairol, Inc.*,[68] another hair dye case, the defendant's position was somewhat improved by the fact that an instruction sheet urged the making of preliminary tests before use of the dye. The court nevertheless held that the case should have been allowed to go to the jury, since a chemist was ready to testify that the dye was poisonous and inherently dangerous. There was the additional point that the instructions did not prescribe a test after an earlier application, as in this case, without harmful results.

There is an English case, *Holmes v. Ashford*,[69] which involves Inecto hair dye. Instructions enclosed with the dye warned that it might be dangerous to certain skins and advised that a test be made before use. A hairdresser who read these instructions nevertheless omitted the test, and after the dye was applied the plaintiff contracted dermatitis. The hairdresser admitted liability, and the issue on appeal was whether or not the defendant manufacturer was negligent. The negligence alleged was failure to give adequate warning of the danger. The court held that the warning given was sufficient, stating:

66. 160 Misc. 325, 289 N.Y. Supp. 905 (1935).
67. 256 App. Div. 1096, 11 N.Y.S.2d 565 (2d Dep't 1939).
68. 263 App. Div. 848, 31 N.Y.S.2d 751 (2d Dep't 1941).
69. [1950] 2 All E.R. 76 (C.A.).

> Counsel for the plaintiff says they must take reasonable steps to see that it will come to the notice of any customer. I cannot contemplate any steps which could be calculated to bring a matter of this kind to the knowledge of any person who is treated with the preparation. The most that can be expected of the manufacturers of goods of this kind is to see that the hairdresser is sufficiently warned.[70]

It seems clear from this language, together with the fact that almost the entire opinion is addressed to the adequacy of the warning, that the plaintiff would have been able to recover if an adequate warning had not been given, even though her injury was of an allergic character. The warning actually given indicates that the manufacturer had in mind a definite class of allergic users. The duty to warn in this situation is more specifically indicated in an earlier English decision, *Parker v. Oloxo, Ltd.*,[71] which also involved a hair dye. The court there held that an inherently dangerous product was involved, even though "in the vast majority of cases, the article might be used without ill effect." It was found that the manufacturer "well knew that Oxolo might injure anyone whose skin was susceptible to the irritating agent" contained in the dye, and that under these circumstances it was negligence to fail to give a warning that "unless a skin test was made, it was dangerous."[72] The point that the defendant is obsolved from liability by an adequate warning is also made in *Petzhold v. Roux Laboratories, Inc.*[73]

Looking at these earlier hair dye cases as a whole it is evident that this particular cosmetic is not looked upon with favor by judges, and that the plaintiff's chances of recovery are good, even though an allergic sort of illness may be involved. While in most of the decisions for the plaintiff there has been no finding that a sensitive user was involved, the courts seem quite ready to allow recovery once there has been testimony that the dye is "poisonous" even though it is evident that the great mass of users are suffering no ill effects. Probably testimony in these cases that the dye is "poisonous" means simply that it is harmful to a substantial class of users. This in fact seems to be the situation judging from the nature of the warning now enclosed with hair dyes, taken together with their generally harmless use. It should be noted in this connection that the present Federal Food, Drug and Cosmetics Act requires a clear warning to allergic consumers in the case of coal tar hair dye.[74] These earlier decisions in favor of the plaintiff do not furnish any direct support, however, for the latest

70. *Id.* at 80.

71. [1937] 3 All E.R. 524.

72. The court also emphasized the point that it had been represented to an apprehensive purchaser that the dye was safe.

73. Note 67 *supra.*

74. See note 3 *supra.*

hair dye decision, *Braun v. Roux Distrib. Co.*,[75] for there a warning against expectable allergies was given and liability was based on a failure to give warning of the unique and grave type of allergic injury which there occurred.

There are a number of cases involving soap or detergents where the allergy issue has been presented. The first of these, *Taylor v. Newcomb Baking Co.*,[76] involved a suit against an employer based on negligence. The plaintiff was employed to wash pots and trays in a bakery restaurant. He was supplied with a "strong" soap powder which contained a trisodium phosphate base, and told how much to use. He developed serious allergic dermatitis. There was testimony that "quite a percentage" of people are "hypersensitive" to soap powder, and that this was a matter of common knowledge in the trade. In sustaining a verdict for the plaintiff, the court said: "It is not necessary that the majority of possible employees be susceptible. It is enough if a sufficient number are susceptible so that a jury could reasonably say that the defendant ought to have known and recognized the danger of injury and ought to have guarded against it." This decision is relied on in the recent case of *Wright v. Carter Products, Inc.*,[77] as establishing the Massachusetts law to the effect that there may be a duty to be aware of the risk to allergic consumers apart from any statistical frequency of injury. It seems clear, however, from the above quoted statement that the duty to know arises only "where a sufficient number are susceptible." Other language in the opinion emphasizes the fact that the case involves a "good class people" and an allergy "known to be common." It may well be, however, that the case represents a significant development in holding liable a defendant who had no actual knowledge that other persons previously had suffered from use of the product.[78]

The court was likewise favorable to an allergic plaintiff in an English case, *Board v. Thomas Hedley & Co.*,[79] where the plaintiff suffered dermatitis of both hands after using Tide. The plaintiff alleged in a negligence suit against the manufacturer and distributor that the product was dangerous and the defendant knew or ought to have known this fact. By means of a discovery procedure the plaintiff secured an order directing the defendants to reveal all complaints received up to the time she purchased her carton of Tide. On appeal it was held that the order should be expanded to cover all complaints and personal injuries, including those received after the date of the plaintiff's purchase. It was held that while the subsequent complaints

75. Discussed in text accompanying note 2 *supra*.
76. 317 Mass. 609, 59 N.E.2d 293 (1945).
77. Discussed in text accompanying note 8 *supra*.
78. See 51 MICH. L. REV. 447, 448 (1953).
79. [1951] 2 All E.R. 431 (C.A.).

would not be relevant on the issue of whether the defendant ought to have known of the danger at the time of the plaintiff's purchase, they did have a bearing on whether or not the product was in fact dangerous. The court considered that it might be dangerous "if it might affect normal users adversely, or even if it might adversely affect other users who had a higher degree of sensitivity than the normal, so long as they were not altogether exceptional." This case, besides illustrating the value of discovery procedures to a plaintiff in an allergy case, clearly indicates that where a class of susceptible users is concerned there may be liability to other than normal users on negligence grounds, where there is reason to know of the danger and a failure to warn.

There is a similar case in California, *Proctor & Gamble Mfg. Co. v. Superior Court*,[80] involving discovery proceedings with reference to the detergent Cheer. It was claimed that the product contained sodium alkyl argl sulphonate which caused dermatitis and other illness of the plaintiff. In a suit based both on negligence and breach of warranty, the defendant asserted that the injury was due solely "to plaintiff's physical and bodily condition and constitutional composition." To refute this defense the plaintiff sought an order directing the defendant to furnish the names of all persons who had complained of injuries from Tide or Cheer, alleging on information and belief that Tide and Cheer were similar in chemical composition. On appeal it was held that the information need not be furnished because of failure to allege sufficient facts as to whether the alleged complaints in fact existed, and as to whether in fact the chemical composition of Tide and of Cheer were similar, when such information could be obtained by examination of one of defendant's officers. The opinion makes it clear, however, that there would be a duty to warn allergic consumers, stating:

> It is settled that if a manufacturer knows or should know that an article sold by him is dangerous he must give appropriate warning to the user of a danger which he ordinarily would not discover. . . . It has been held that if a seller knows or should know that an article sold by him is dangerous to *some* persons, even though few in number as compared with the number of users of the article, he is negligent if he fails to warn the ignorant of the hidden danger.[81]

The court regards this duty to warn as arising whether the action is based on negligence or on breach of warranty.[82]

Before leaving the negligence cases mention should be made of an

80. 124 Cal. App. 2d 157, 268 P.2d 199 (1954).
81. 268 P.2d at 202.
82. A case involving Tide based solely on breach of warranty, Worley v. Proctor & Gamble Mfg. Co., is discussed in textual matter to note 97 *infra*.

employer's liability case, *Evinger v. Thompson*,[83] brought under the federal act, where the court finds a duty to foresee an injury to a class and give appropriate warning. The employee sued on account of chrome dermatitis caused by contact with sodium bicarbonate used by the defendant as a rust inhibitor in the cooling systems of its diesel engines. The plaintiff's doctor testified that from twenty to twenty-seven per cent of the persons exposed to sodium bicarbonate were affected by it, and even the defendant's witness testified that about two per cent were sensitive. Furthermore the plaintiff offered to prove that other employees, working with him on the diesels, had suffered from the same kind of dermatitis. After pointing out that the defendant had not been warned of any danger, the court affirmed a judgment for the plaintiff, with a remittitur to $25,000, stating:

> In any event, the evidence of experience in other industries at least showed that a very substantial per cent of those exposed to chrome compounds would be affected; and if defendant could reasonably foresee that a considerable number of its employees would be so affected, it would have the duty to exercise due care to prevent such injury. This principle has been applied in cases of liability of a manufacturer or seller to persons unusually susceptible to harm from the article or substance sold.[84]

The court further stated that the jury could find negligence on the basis either of actual or constructive knowledge. It appeared that this was the first case of dermatitis after the defendant began the use of sodium bicarbonate, but in view of testimony that chrome dermatitis had been understood in medical circles for a long time, and the evidence about the high incidence of sensitivity, the case seems a strong one for imposing a duty to warn the very considerable class of susceptible persons there involved.

When we look at these cases where a class of allergic users is involved as a whole, it seems clear that the courts are quite likely to permit a finding that a defendant who fails to warn of the possibility of harm may be guilty of negligence. The size of the class may in some cases be quite small. So in *Wright v. Carter Products, Inc.*, the percentage of persons sensitive to the deodorant which injured the plaintiff was far less than one per cent, but it nevertheless was found that a duty to warn might arise, in view of the defendant's knowledge as an expert. In *Gerkin v. Brown & Sehler Co.*, the decision most frequently relied on where the court finds for the allergic plaintiff, one per cent of the users were affected by the dyed fur there involved. In the hair dye cases prior to the *Braun* case there are no clear statements that even a class of allergic users must be warned, but several of the holdings suggest that there is a duty to warn the substantial class

83. 364 Mo. 658, 265 S.W.2d 726 (1954).
84. 265 S.W.2d at 732.

which is in fact allergic to this product, and it is clear that allergic consumers of coal tar hair and dyes must be warned under the Federal Pure Food, Drug and Cosmetics Act.[85] The detergent cases seem to impose a duty to warn allergic consumers, with no indication, however, of the size of the class. The net result appears to be that whenever the plaintiff can show that his allergy is not of an isolated or exceptional character, he has a fair chance of recovery on negligence grounds where the defendant has failed to give warning. Where, however, the size of the class is quite small, as in the *Wright* case, the plaintiff may need to buttress his case with testimony concerning the availability to the defendant of expert knowledge. On the other hand if a large percentage of sensitive users can be established, this factor alone is likely to give rise to the duty to warn, particularly if the harm likely to be suffered is of a serious kind.

Warranty—Susceptible Class

The warranty cases in which the plaintiff is able to establish that a class of users is involved are much less numerous than the negligence ones. As indicated in the discussion of warranty cases involving isolated injuries, many of the earlier cases seem to regard even a class of allergic users as outside of the scope of the warranty, and unable to recover in the absence of evidence that the product is harmful to normal persons. In a few of the modern cases, however, the courts have found that a breach of warranty does occur when there is a failure to warn a recognized class.

Two cases decided in 1939, both involving aniline dyes, apparently are the first ones recognizing this new duty.[86] The first of these decisions, *Zirpola v. Adam Hat Stores, Inc.*,[87] arose in New Jersey, and the other, *Bianchi v. Denholm & McKay Co.*,[88] was decided the same year in Massachusetts. The *Zirpola* case involved a hat band "impregnated by dye known as paraphenylene-diamine, an aniline derivative," which was alleged to be of a poisonous nature. A few weeks after the plaintiff purchased the hat from one of defendant's stores, his black hair turned reddish-orange on each side of his head, and he experienced a skin eruption on his forehead and scalp. It was asserted that this condition was caused by the dye in the sweat band of the hat, and

85. See note 3 *supra*.

86. There is a statement favoring recovery on warranty grounds in the earlier case of Smith v. Denholm & McKay Co., 288 Mass. 234, 192 N.E. 631 (1934), but the product there involved, a hair remover containing thallium acetate, was proved harmful to a normal person. That being the case, it was indicated that plaintiff could recover for the whole injury even though the harm was accentuated by the plaintiff's susceptibility. This is the generally accepted rule in such cases, where the injury is simply aggravated by a pre-existing infirmity. See DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER 212 (1951).

87. 122 N.J.L. 29, 4 A.2d 73 (1939).

88. 302 Mass. 469, 19 N.E.2d 697 (1939).

suit was brought for breach of the implied warranty of fitness. There was considerable evidence that four or five per cent of all persons coming in contact with the dye would be injured by it, along with testimony that the dye was forbidden by law in some states, and that "all persons are somewhat sensitive to the poison." There also was evidence, apparently uncontradicted, that the plaintiff was "abnormally sensitive." In affirming a judgment for the plaintiff the court made the following significant statement with regard to the defense of allergy:

> The mere fact that only a small proportion of those who use a certain article would suffer injuries by reason of such use does not absolve the vendor from liability under the implied warranty created by the statute; otherwise, in every action to recover damages for the breach of an implied warranty, it would be necessary to show that the article sold, whether it be food or wearing apparel, would be injurious to every user. It is well known that many people are immune from certain poisons as well as contagious and infectious diseases, yet it could not be contended by reason thereof that a vendor selling an article infected with disease germs or containing a poisonous substance injurious to the user of the article would not be liable under an implied warranty, unless it could be proved that injury would be the inevitable result of the use of such article.[89]

It is evident from the above passage that the court is not relying on testimony that the dye is somewhat harmful to all persons, but is regarding the dye as "poisonous" if it will injuriously affect what is referred to as a "small proportion" of the users. While it appeared in this case that quite a substantial percentage of users were sensitive to the dye, the language suggests that the result would be the same even though a lesser proportion of allergic users had been involved. Nothing is said in the opinion about a duty to warn, and it is likely that the court regarded the dye used as sufficiently dangerous so that it should be eliminated. It is significant that the opinion assumes that the dye may be regarded as the proximate cause of the harm, even though the plaintiff was abnormally sensitive. The plaintiff recovered only the modest amount of $200, but obtained what seems to be the first decision in favor of an allergic plaintiff in an action for breach of warranty.

A similar approach was adopted by the Massachusetts court in the *Bianchi* case, where the aniline dyes were contained in a face powder purchased from the defendant. It appears from the opinion that aniline dyes are commonly used and "do not irritate the average person," but that the dyes "are irritants to some people in the sense that their skins have a sensitiveness which is medically known as an 'allergic' condition." The plaintiff was found to be one of this allergic class, "not defined as to numbers or percentage." It was found that the applica-

89. 4 A.2d 73, 75 (1939).

tion of the powder to the plaintiff's face caused dermatitis on the side of her face.

The court affirmed a judgment for the plaintiff, sustaining a refusal to charge that the implied warranty of fitness, on which the suit was based, would not extend to matters "wholly unknown to the dealer and peculiar to the individual buyer." In that connection the court stated:

> If the words "peculiar to the individual buyer" . . . are intended to apply to the plaintiff as the only person who would be injuriously affected, or if it was intended to exclude the existence of a class of "peculiar" persons and there was evidence to support findings in these respects, that would be one thing. But the evidence is not so restrictive. . . . We do not think that a seller of face powder containing a known irritant to "some" persons' skins can be heard to say that he is not liable for a breach of implied warranty of fitness where injury results from a use of the powder by one such as is described by the evidence in the case at bar.[90]

The court indicates that it does not intend to pass on the question of whether allergic users of "harmless and non-dangerous substances such as strawberries, eggs, or other products in common use" can recover for a breach of warranty. It would seem that there would be no recovery in these "strawberry" and "egg" cases even though a definite class of allergic users is involved, on the ground that the buyer may be charged with common knowledge that many persons are allergic to these products, with the result that there is no duty to warn, even though the particular buyer may not realize the risk.[91] One writer states in this connection, "Even if a specific food allergent is found to be both widespread and serious, responsibility should not be imposed on the producer unless the court also finds that the consumers—in general—of the product lack knowledge of the allergy problem which it is practicable for producers—in general—of the product to give them, and, without it, lack the reasonable opportunity to avoid the injury."[92] The situation seems much like that where the consumer of creamed chicken is held to a normal expectation that it may contain bones.[93]

There is a later New Jersey case, *Reynolds v. Sun Ray Drug Co.*,[94] in which the plaintiff recovered on warranty grounds for injuries from lipstick. The opinion is quite brief, with no indication of what the offending element was, or how many persons were likely to suffer a harmful reaction from the product. The allergy issue was clearly

90. 19 N.E.2d 697, 699 (1939).
91. Horowitz, *Allergy of the Plaintiff as a Defense in Action Based on Breach of Implied Warranty of Quality*, 24 So. CAL. L. REV. 221, 236 (1951).
92. DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER 228 (1951).
93. Goodwin v. Country Club of Peoria, 323 Ill. App. 1, 54 N.E.2d 612 (1944); DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER 186 (1951).
94. 135 N.J.L. 475, 52 A.2d 666 (1947).

raised, however, by the defendant's request for instruction that the implied warranty of fitness was not applicable "when only a small proportion of those who use a certain article are injuriously affected thereby." The court refused to give this instruction, relying on the *Zirpola* and *Bianchi* decisions. The defendant attempted to distinguish the *Zirpola* decision on the ground that the defendant there involved was also a manufacturer who might be charged with knowledge of the ingredients used in this product, while this defendant was a retailer, selling the product in a sealed container not open to inspection. The court, however, regarded this factor as immaterial in a warranty action. As remarked in a standard treatise, the state of the particular seller's knowledge in the situation does not seem relevant, for the "inquiry into scienter is here an inquiry into negligence, and liability for breach of warranty is strict."[95] On the other hand, it is evident that the courts, in limiting recovery to situations where a class of susceptible users are involved, do consider that some general knowledge of consumer reactions is essential to liability on warranty grounds.[96]

There is one recent case, *Worley v. Proctor & Gamble Mfg. Co.*,[97] which runs counter to the tendency in the cases just considered to find that a class of allergic plaintiffs may be within the scope of the warranty. The plaintiff there involved contracted dermatitis after using Tide for washing dishes. The court found, contrary to the usual view in the case of general products, that the plaintiff's case did not fail for lack of privity. It was concluded, however, that there was no evidence of breach of the warranty, because the plaintiff failed to produce any testimony that the product was "in any way detrimental or injurious to the skin of normal persons" and did not point out any specific "deleterious substance." Apparently it would not have helped the plaintiff to point out a substance injurious to an allergic class, for the court states, "The scope of the warranty in question is limited, as appellant contends, to the absence in preparation in question of ingredients injurious to the skin of normal persons using the soap in normal manner, and the burden was upon plaintiff to bring herself within the class contemplated." This language is reminiscent of that in the cases decided prior to the *Zirpola* and *Bianchi* decisions. On the other hand the language of the California case involving Tide, *Proctor & Gamble Mfg. Co. v. Superior Court*,[98] contains a clear dictum in

95. 2 HARPER & JAMES, THE LAW OF TORTS 1581 (1956).

96. There is an earlier lipstick case, Smith v. Burdine's, Inc., 144 Fla. 500, 198 So. 223 (1940), where the testimony suggests that "hypersensitivity" was involved. The implied warranty of fitness was held to be applicable, but there was no discussion of the allergy issue, which apparently was not raised. The court refers to the lipstick as containing a "poisonous substance" and apparently it was found to be harmful to normal persons.

97. 253 S.W.2d 532 (Mo. App. 1953).

98. Discussed in text accompanying note 80 *supra*.

favor of liability to an allergic class on warranty as well as negligence grounds.

CONCLUSIONS

Warranty: Looking at the warranty cases as a whole, it appears that there is a distinct trend toward allowing recovery on warranty grounds where the plaintiff can point to a definite class of allergic users, with clear holdings to this effect in New Jersey and Massachusetts. In a number of other jurisdictions there are statements that only normal persons are within the scope of the warranty, but in most of those cases the court seems to have been considering an isolated sensitivity rather than an allergic class, and it is not at all clear that these dicta would be followed in a case involving a definite class.

The warranty cases permitting recovery indicate very little about the size of the class, since the only actual figures involved are the four or five per cent of susceptible users involved in the *Zirpola* decision. In view of the fact that the liability imposed under warranty doctrines is a strict one, without reference to any ability on the part of the defendant to know of the danger, it may well be that recovery would not be extended to groups as small as those which have been protected in some of the negligence cases. For example, the decision in *Wright v. Carter Products, Inc.*, involving the deodorant to which far less than one per cent of the users were sensitive, might well have been for the defendant if the suit had been based on warranty rather than on negligence grounds. A leading treatise states in connection with warranty liability that while a defendant should "not be held as an insurer against illness from his products" there should be liability "where medical men can point to a definite pattern of allergy which the court is willing to call unreasonably dangerous."[99] The *Zirpola* and *Bianchi* cases indicate that this point may be reached by a court when "a small proportion" or "some" of the users are affected. Doubtless, as in the negligence field, the gravity of the harm threatened and the practicality of giving a warning will influence the courts in determining whether or not the danger is sufficient to bring the plaintiff's injury within the scope of the warranty. The theory on which a duty to warn can be imposed in warranty cases is that the goods are legally defective unless an adequate warning is given, in those cases where it is known to the experts in science, or in the industry concerned, that a significant group will suffer substantial harm unless warned.[100] Where this general awareness of the danger is present, the knowledge, or means of knowledge of the particular seller would not be essential

99. 2 HARPER & JAMES, THE LAW OF TORTS 1586 (1956).

100. DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER 217, 226 (1951).

to liability, for the responsibility for breach of warranty is a strict one, not based on scienter or fault.[101]

Where the plaintiff's sensitivity appears to be peculiar to himself there is practically no authority that the harm suffered is within the scope of the warranty. This is the conclusion generally arrived at even by those favorable to recovery by allergic plaintiffs.[102] The only case which seems to hold otherwise is the *Zampino* decision.[103]

Negligence: Where the plaintiff's sensitivity is unique his chances of recovery are no greater in a negligence suit than when he bases his action on breach of warranty. The only decision which seems to hold otherwise, *Braun v. Roux Distrib. Co.*, seems out of harmony both with the earlier decisions and with general negligence principles.

Where it appears that a recognizable class of allergic use is involved it is evident that since the *Gerkin* decision in 1913 a clear majority of the courts which have considered the problem have found that a duty to warn may arise. Often there is uncertainty as to the size of the class, since the decisions allowing recovery seldom indicate percentage of allergic users involved. If the viewpoint expressed in the recent case of *Wright v. Carter Products, Inc.* is followed, the emphasis will be placed in the future not so much on statistical frequency of injury as on such matters as the availability of scientific information, the gravity of the harm threatened, and the practicability of giving an effective warning.

Burden of Proof: The important matter of what the plaintiff must prove in order to recover is not entirely clear from the cases. There is considerable authority that the plaintiff will be presumed to be normal, and that the burden is on the defendant to show that the injury resulted from the plaintiff's peculiar sensitivity. It quite often appears, however, from the examination of the plaintiff's own physician that plaintiff's injury is one of an allergic character. Where that is the situation the courts which permit recovery ordinarily require that the plaintiff point out the offending element in the product and show that this is harmful to a class of users. The harmful character of the ingredient involved can be shown by proof that similar injuries have occurred to others, or expert testimony that the ingredient is known to produce harmful results to a recognizable group.[104]

Contributory Fault: Ordinarily if the case is one where the court finds a duty to warn, this duty is based on the consideration that the

101. See note 95 *supra.*
102. See 2 HARPER & JAMES, THE LAW OF TORTS 1586 (1956); Horowitz, *Allergy of the Plaintiff as a Defense in Action Based upon Breach of Implied Warranty of Quality,* 24 So. CAL. L. REV. 221, 234 (1951).
103. Discussed in text accompanying note 53 *supra.*
104. For a good discussion of the problems of proof see Note, 5 VAND. L. REV. 212, 218 (1952).

supplier of the product knows or should know that there is an ingredient in the product which can be expected to cause harm to a class of consumers. On the other hand the user of the product, as pointed out in the *Wright* case, ordinarily does not know what substance the product contains. Where the plaintiff is in this unfavorable position the issues of contributory negligence and voluntary assumption of risk are not likely to arise.[105] If, however, the plaintiff clearly knows of the danger from an independent source, or from his own previous experience with the product, he may well be barred from recovery by his own conduct, even though there has been a failure to warn allergic consumers generally.

A warning is of course particularly appropriate where the nature of the product permits reasonable tests prior to its use. Where the sensitivity of the user cannot be discovered in advance the warning is of much less value. It is likely, for example, that the plaintiff in the *Braun* case would have used the hair dye even if the warning which the court required had been given, since she would not have realized her susceptibility to the rare allergic disease there involved. In many cases, however, the user will realize that he is sensitive to a good many substances, and he may well avoid products which contain a clear warning to the allergic.

It would seem that the development of the duty to warn allergic consumers which has been described is a reasonable one. Of course the defendant has done nothing wrong in manufacturing or selling a product which normal persons find satisfactory, and he should not be expected to please the abnormal few at the expense of the normal many. The obligation, however, is not to remove the offending ingredient, but simply to give an appropriate warning that it can be expected to cause harm to a class of users. The imposition of a duty under these circumstances is in accord with generally accepted negligence principles, and does not seem to involve any undue expansion of liability for breach of warranty.

105. See Dillard and Hart, *Product Liability: Directions for Use and the Duty to Warn*, 41 VA. L. REV. 145, 163 (1955).