Fordham Law Review

Volume 25 | Issue 2 Article 6

1956

Allergy and the Implied Warranty of Fitness for a Particular Purpose

ALLERGY AND THE IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE

INTRODUCTION

As the problem of allergy manifests itself in the legal area of implied warranties in the sale of goods, it is observed, that as a defense to the breach of the implied warranty of fitness for a particular purpose,[1] both counsel and the bench have adopted a non-medical and unrealistic attitude toward this class of physical malady. In fact the medical term allergy denotes an area of many serious and baffling problems to those involved in diagnostic research. Medical science is still groping with the task of discovering, classifying and remedying ills of this nature.[2] While most of the decisions in this field may be correct in result, judicial reasoning, presentation of proof, and the attitude of trial and appellate courts manifest a lack of a proper basic legal approach and medical understanding. The paucity of cases wherein the defense of allergy was overcome as a matter of law or fact, when it was interposed as a defense to an alleged breach of implied warranty, may be partially explained, at least from the qualitative aspect, as being the consequence of a failure to understand and relate the medical facts to the legal principles.

One author has attempted to supply a medical framework wherein the legal profession may find sources and approaches which will enable it to understand the vagaries of these physiological phenomena.[3] He suggests that, "Allergy is a collective name for a number of physiologically similar diseases of man. . . . [The legal profession] should then recognize that plaintiff is not a *sui generis* case of injury strange unto himself—he is, rather, one person in a class of persons who would be so affected by the product involved. This is the medical fact which lawyer and judge should have before them in solving the problem of whether 'allergy' should be a defense in a breach of warranty action."[4] Professor Williston suggests that the problem of the area over which recovery should extend is "evidently one of degree."[5] With these textual criteria in mind, certain questions can be posed concerning the present state of law. Does a solution to the problem of allergy inhere in the general law of implied warranty? What has been the approach of judges and litigants in the decided cases? What approach can be made? An analysis of these questions is the contemplated scope of this article.

THE WARRANTY

The implied warranty of quality, which includes the warranty of fitness for a particular purpose, and which is embodied in section 15 of the Uniform

1. Uniform Sales Act § 15(1); 1 Williston, Sales §§ 227-57 (rev. ed. 1948).

2. Sheldon, Lovell and Mathews, A Manual of Clinical Allergy (1953); Hansel, Clinical Allergy (1953).

3. Horowitz, Allergy of the Plaintiff as a Defense in Actions Based upon Breach of Implied Warranty of Quality, 24 So. Calif. L. Rev. 221 (1951).

4. Id. at 224, 227.

5. 1 Williston, Sales § 243 (rev. ed. 1948).

Sales Act,[6] embraces obligations imposed by law as distinguished from mutual, express or implied assent.[7] The nature of that warranty of fitness requires two elements: (1) knowledge on the seller's part of the buyer's intended purpose, and (2) a reliance on the seller's skill or judgment on the part of the buyer.[8] The result is the vendor's obligation to provide goods that conform to the vendee's purpose. Yet this conformity is essentially a *reasonable* one as is expressed in the language of the statute.[9] Does this independent obligation to provide a product of reasonable suitability, when the elements of seller's knowledge and buyer's reliance are present, encompass a situation wherein only a small number of users of a product are effected adversely by using the product? That question is essentially the pure warranty situation involved in the allergy dispute. Admitting knowledge and reliance in a warranty-allergy situation, is it necessary to make the additional requirement that reasonable fitness obtains only to the normal buyer? Is reasonable fitness a question of degree or is it applicable only to the average or normal buyer? These questions involve more than mere semantic byplay. The nature of an implied warranty obligation is absolute in that it exists regardless of fault or assent.[10] Its scope is to protect the unknowing but believing buyer. Protection can not be logically limited to a class arbitrarily determined, viz., the normal buyer. It would be reasonable to extend the warranty to varying classes of buyers if regard is given to the principles of distributive justice which seem basic to the present law of implied warranty.

Yet this extension of liability should be limited by a compensating restraint which would preclude recovery where the size of the class is negligible in amount. This would obviate an unreasonable requirement of fitness. When the nature of the substance or product causing the injury is one not practically capable of being avoided or eliminated, again recovery should not be allowed. Though there is no case authority for this proposition, with the exception of an express reluctance to decide the legal liability where injury results from the use of products commonly known to cause allergic reactions, such as strawberries, oysters, and pollen in flowers,[11] it would be unreasonable to extend the scope of fitness to the pure allergy-warranty problem, i.e., where a natural product produces the injury. A natural product may be defined as one which has not been physically or chemically altered by the manufacturer, grower or retailer. It would not be socially or economically desirable to impose the burden of liability on the seller where, aside from inherent

6. Uniform Sales Act § 15 (1) provides: "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or 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."

7. 1 Williston, Sales § 230 (rev. ed. 1948).

8. Jones v. Just, L.R. 3 Q.B. 197 (1868).

9. See note 6 supra.

10. 1 Williston, Sales §§ 237-38 (rev. ed. 1948).

11. Bianchi v. Denholm & McKay Co., 302 Mass. 469, 473, 19 N.E.2d 697, 699 (1939).

defects in a natural product, e.g., rotted strawberries, injury comes to smaller classes of buyers who are susceptible to it. It might be argued that the buyer is deemed to know that some persons are allergic to them and that perhaps he is a member of that class. Similarly, in the case of a commonly used product that is in someway processed, e.g., preserved strawberries, if the tendency of the product in its natural state to produce injury is the cause of injury and not the manner or substance of the processing, again recovery should be precluded.

The Massachusetts Rule

As to the status of existing case law, only one jurisdiction has a series of decisions, emanating from its highest court, which can be analyzed for the purpose of noting development, modification, and apparent reversal of attitude with respect to allergy and implied warranty. The two earliest Massachusetts cases in which the allergy-warranty problem arose were decided on the same day. In *Flynn v. Bedell Co.*,[12] the plaintiff had purchased a fur collar and as a result of wearing the clothing she allegedly became ill from the dye used in the manufacturing process. The main issue in the case was whether or not an implied warranty of fitness for a particular purpose existed. Holding that that question was one of fact[13] the court gratuitously stated that, "It well may be that the scope of an implied warranty of fitness does not extend to fitness in respect of matters wholly unknown to the dealer and peculiar to the individual buyer. . . . [W]here there is no evidence of any intrinsically unhealthful feature in a fur, but only that the buyer is constitutionally unable to wear [the] fur . . . because of a supersensitive skin, the warranty of fitness presumably does not apply."[14] Plaintiff had not introduced evidence that the clothing had been analyzed. In developing the holding in the case, the court indicated that the jury was justified in finding the warranty since the ". . . particular 'defect' which injured the plaintiff would have similarly injured any normal person."[15] The use of the term normal person set the tone for subsequent cases where injury could be viewed as the result of latent physiological susceptibility. *Bradt v. Hollaway*,[16] the companion decision to the *Flynn* case, also involved an allegedly injurious fur piece. The jury's verdict had denied that there was any breach of an implied warranty of fitness for use. Plaintiff introduced no evidence as to the dye or material content of the fur piece. Her failure to do so may be viewed on speculation as possibly having caused the loss of her action. Had the contents of the

12. 242 Mass. 450, 136 N.E. 252 (1922).

13. " . . . [W]e cannot say that there was no evidence to warrant a jury in finding that [the plaintiff] bought in reliance upon the seller's skill and judgment. . . . " Id. at 435, 136 N.E. at 253. Hereinafter, unless otherwise noted, it will be assumed in the analysis of the cases that the court found the existence of the implied warranty of fitness for a particular purpose. Discussion will be focused on the treatment of the defense of allergy in the cases.

14. Id. at 453, 136 N.E. at 253.

15. Id. at 454, 136 N.E. at 253.

16. 242 Mass. 446, 136 N.E. 254 (1922).

clothing contained a substance injurious to at least some individuals, the issue of allergy as a defense to breach of warranty would have been squarely presented. The net effect at least would have been to strengthen the plaintiff's case. The case as it was made out for the plaintiff was found by the court to have been devoid of sufficient facts to constitute a breach of the warranty. The plaintiff's expert, a medical doctor, attested to her having hypersensitive skin. No language in the opinion, however, can be construed as having intimated that the evidence of allergy, when considered on appeal, was a controlling factor in precluding recovery. A case simply was not shown relating, by a preponderance of fact, the fur piece to the injury to plaintiff's skin. Yet the *Bradt* case has been cited for the proposition that allergy is a defense to the breach of the implied warranty of fitness.[17] Of these two early decisions, the *Flynn* case is more properly germane to the allergy problem; however, the statements with respect to allergy in that decision were clearly dicta.

The next link in the chain of Massachusetts cases involving the allergy-warranty problem was *Smith v. Denholm & McKay Co.*[18] There plaintiff suffered injuries to her skin described as peripheral neuritis from thallium poisoning allegedly caused by a depilatory cream sold by defendant to the plaintiff on three different occasions. An analysis of the cream indicated that the total of five jars that the plaintiff had purchased contained thallium acetate in amounts varying from approximately three per cent to ten per cent. It was found that thallium is a dangerous poison and a strength of one per cent or better may injure the motor fibre of the nerves causing a form of paralysis. An express warranty as to the safety of the cream was held to have been made at the initial purchase, but such warranty did not carry over to the subsequent purchases where no affirmations as to safety were made. Nor did an implied warranty exist by reason of trade usage as to fitness for the particular purpose for which the cream was sold. In rejecting the defendant's contention that the plaintiff was unusually susceptible to thallium acetate by reason of abnormal endocrine glands, the court upheld the existence of the express warranty ". . . in view of the evidence . . . that the use of the jar of cream in the way the plaintiff was directed to use it might affect the system of a normal person, but not to the extent found in the plaintiff."[19] The court directed a new trial with respect to damages only on the breach of the express warranty. Though this case dealt with express warranty, it is in point. The court cited no case for the proposition which met the defense of allergy. The implication from the holding, however, is that had there been no evidence of possible injury to a normal person there would have been no recovery. Plaintiff's susceptibility in this case was, upon the new trial, to mitigate

17. Longo v. Torraine Stores, Inc., 319 Mass. 727, 66 N.E.2d 792 (1946); Landers v. Safeway Stores, Inc., 172 Ore. 116, 139 P.2d 788 (1943); Ross v. Porteous, Mitchell & Braun Co., 136 Me. 118, 3 A.2d 650 (1939).

18. 288 Mass. 234, 192 N.E. 631 (1934).

19. Id. at 242, 192 N.E. at 634.

defendant's damages.[20] The case fits in the pattern of Massachusetts decisions because of the readiness with which its rule might be said to apply to implied as well as express warranties.

Bianchi v. Denholm & McKay Co.[21] was the first Massachusetts instance in which the defense of allergy was expressly overcome on its merits. The Massachusetts law on the subject prior to the *Bianchi* case, as expressed in the three cases analyzed above, was in substance: "presumably" or "it may be that" fitness did not extend to allergy situations. Yet by decision this much was certain: allergy is not a defense to recovery on express warranty in a situation where a normal person would have been injured by the product involved. The allergy factor, however, was to be considered in mitigation of damages.[22] The facts of the *Bianchi* case were these: plaintiff purchased a face powder from defendant and a skin rash diagnosed as dermatitis appeared after she used the powder. It was established that the plaintiff's skin was allergic to an analine dye derivative contained in the powder. Though analine dyes were found by the court to be safe for the average person, it was established that a minority of individuals would be sensitive to them. In answer to the defendant's contention that an implied warranty of fitness did not extend to matters wholly unknown to the seller and peculiar to the individual buyer, the court said, ". . . analine dyes are irritants not only to this plaintiff, but also to 'some' persons whose skin is allergic thereto. . . . [P]laintiff is one of a class of persons not defined as to numbers or percentage, the only qualifications being that the members of the class are 'allergic' and not 'average.' . . . 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 an implied warranty of fitness where injury results from a use of the powder by one such as is described by the evidence. . . ."[23] The court expressly noted that it was not laying down rules which were to apply to harmless and commonly used products such as strawberries, eggs, and pollen.[24] The court also restricted by implication recovery in instances where the buyer is in fact peculiar unto himself, i.e., where it can be shown that there is no class of susceptible persons. The earlier Massachusetts cases were held to be inapplicable to the present decision.

The *Bianchi* case presented an analysis of the application of the implied warranty of fitness, which cut through the sweeping generality of the earlier cases, that if the plaintiff was peculiarly susceptible to an ingredient he could not recover. If peculiar susceptibility, said this court, meant him alone, or where the facts did not indicate a class of persons who would be injured by an ingredient, then there should be no recovery. However, if a class of persons, though not the average, would be affected, then whether or not the normal person would be a member of that class was immaterial and the purchaser

20. 1 Williston, Sales §§ 614-14a (rev. ed. 1948).
21. 302 Mass. 469, 19 N.E.2d 697 (1939).
22. Ibid.
23. Id. at 472, 19 N.E.2d at 699.
24. See note 21 supra.

could recover. The reasonableness of the *Bianchi* rule is further attested to by the court's not having purported to lay down a general rule which would impose liability on vendors of commonly used products which do affect some individuals. It is apparent from the above limitations that the court was carefully defining a rule which was intended to cover the basic warranty-allergy problem. This ruling was the essence of the opinion and can not be classified as dicta. It was a holding that should have been respected as such in future decisions, but which subsequent Massachusetts decisions either ignored or incorrectly distinguished.[25]

The problem of allergy and implied warranty occurred again in *Payne v. R. H. White Co.*[26] The plaintiff's skin became swollen and erupted allegedly from wearing the dress she had purchased from the defendant. In upholding the trial court's directed verdict for the defendant, the court ignored the ruling in the *Bianchi* case, that the plaintiff may be a member of a class of individuals not necessarily the average or normal buyer which would be injured by the product, and held that under the *Flynn* case, ". . . the plaintiff must show that the dress was unfit to be worn by a normal person, and can not recover by merely showing that it was unfit for her or for some unusually susceptible person to wear."[27] To this reference to the *Flynn* case was casually appended a direction to "see" the *Bianchi* case. The court said further: "There was no evidence that the plaintiff was or was not a person whose skin was only normally sensitive to infection or irritation."[28] It must be observed, however, that the plaintiff failed to offer an analysis of the dress. Such an analysis might have afforded her facts analogous to those in the *Bianchi* case. The significance of the case, nevertheless, is the by-passing of the *Bianchi* rule. The cautions made in that case were ignored in this decision, the court viewing the plaintiff as an individual peculiar in the sense of her being an isolated and singular case. While apparently the *Payne* court considered the *Bianchi* case in arriving at its decision, it did not discuss the rule of that decision. The facts of both cases were substantially similar, the difference being contained in the nature of the proof offered by the plaintiffs in each case. Admitting the plaintiff's proof in the *Payne* case to have been inadequate, had the court been desirous of following the *Bianchi* rule it could have denied recovery and still have been within that rule by saying that plain-

25. Apparently only one Massachusetts decision has favorably cited the Bianchi case. In Taylor v. Newcomb Baking Co., 317 Mass. 309, 59 N.E.2d 293 (1945), plaintiff sued for injuries to his hands from the use of trisodium sulfate in the course of his employment as a dish washer. The defendant was an uninsured employer under the Workmen's Compensation statute. The court in overcoming the defense of allergy and allowing recovery said that the employer might have known that " . . . the soap powder was a possible source of danger to a class of persons of whom the plaintiff might be one. It is not necessary that the majority of employees be susceptible . . . . " for the jury to conclude that the defendant should have guarded against its use. Supra at 311, 59 N.E.2d 294.

26. 314 Mass. 63, 49 N.E.2d 425 (1943).

27. Id. at 65, 49 N.E.2d at 426.

28. Ibid.

tiff had not presented proof indicating that she was a member of a class of persons who would have sustained injuries from this product, and could have stated further that it is not essential that the class be composed of persons who would ordinarily react injuriously to the product. Instead, the court in *Payne v. R. H. White & Co.* by deciding to rely on the dictum in *Flynn v. Bedell & Co.*, in effect impliedly overruled the *Bianchi* case.

Longo v. Torraine Stores, Inc.[29] is a case similar in most respects to the *Payne* case. The plaintiff attributed her skin injuries to the gloves purchased at the defendant's store. She introduced no evidence of a chemical analysis of the gloves, which, for the reasons stated above with respect to the *Payne* case, would have precluded recovery under an application of *Bianchi v. Denholm & McKay Co.* Again the *Flynn* case was cited for the rule that an allergy would preclude the recovery on breach of warranty unless the plaintiff could have shown injury to a normal buyer. The *Bianchi* case was not cited.

The most recent decision in the succession of cases illustrating the development of the Massachusetts law on the subject of implied warranty of fitness and allergy is *Graham v. Jordan Marsh Co.*[30] The plaintiff alleged that her skin injuries were the result of applying cold cream purchased at the defendant's store. Her medical witness testified to the plaintiff's history of allergic dermatitis. The court sustained the plaintiff's objections to a directed verdict for the defendant on the grounds that the relationship of the cold cream to the skin injury was a fact question, in the deliberation of which the jury might ignore the testimony of the plaintiff's expert. In doing so, however, the court affirmed both the *Payne* and *Flynn* cases holding that, "the burden . . . was upon the plaintiff to prove that the cream was unfit for use by a normal person . . . [and not] that it was merely unfit for use by one who was constitutionally unable to use cold cream because of a supersensitive skin."[31] The result of the decision was the final process of ignoring and, in effect, the complete overruling of the principle of the *Bianchi* decision. Again the Massachusetts court did not cite or discuss that case.

From the above analysis it will be noted that Massachusetts law today precludes recovery under the warranty of fitness where it is shown that a plaintiff's injury is such as would not have occurred to the normal buyer. This present position has evolved from dicta, analogous holdings, reversal of the first square decision, affirmation and application of the reversal. It is interesting to note that in the two cases granting recovery (*Smith* and *Bianchi*), a chemical analysis of the products involved was introduced. Though the *Smith* case was not denying allergy as a defense, it is doubtful that recovery, even to the extent allowed, would have been made had no analysis been offered in evidence. Under the *Bianchi* rule, which would allow recovery to members of a smaller than average class who would be injured, chemical analysis of

29. 319 Mass. 690, 66 N.E.2d 792 (1946).
30. 319 Mass. 727, 67 N.E.2d 404 (1946).
31. Id. at 693, 67 N.E.2d at 405.

the product involved is essential. This illustrates that, even in the collateral matter of proof, the rejected Massachusetts rule was more concerned with fact than fancy.

Ramifications of the Massachusetts Rule

It would not be completely accurate to state that the Massachusetts cases have been the complete basis for decisions in other jurisdictions on the question of allergy as a defense to an action for breach of the implied warranty of fitness for a particular purpose. A decision with the same basic holding as *Bianchi v. Denholm & McKay Co.* was reported in New Jersey just several weeks prior to the latter case.[32] Nevertheless, the Massachusetts decisions have had considerable influence in most of the cases involving the allergy-warranty problem. The non-Massachusetts cases may be described generally as either following the *Flynn* rule and denying recovery on the ground that the plaintiff's susceptibility caused the injury, or allowing recovery where, though the plaintiff might be classified as being allergic, he is shown to be a member of a class of persons whose number, though not numerically the average, is defined and significant.

In *Ross v. Porteous, Mitchell & Braun Co.*,[33] which was decided some six weeks prior to the *Bianchi* case, the plaintiff attempted to recover for injuries to her skin allegedly caused by defective dress shields. The shields were dyed a flesh color by a rhodamine dye. No evidence was introduced by the plaintiff as to an analysis of the shields, which might have revealed that they contained harmful chemicals or substances. The plaintiff's medical witness testified that the injury might have been due to an allergy of the plaintiff (though to determine whether the plaintiff was allergic or not would require an intradermal test), or that the prevention of evaporation of bodily perspiration might have caused her injury. For the reason of uncertainty as to the cause of the plaintiff's injury, recovery was denied. With respect to the warranty of fitness, the court stated, ". . . in the sale of wearing apparel, 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." [Citing *Flynn v. Bedell Co.* and *Bradt v. Hollaway.*][34] Thus the Massachusetts dictum in the *Flynn* case and the innocuous *Bradt* decision were cited for upholding that the plaintiff's allergy (if she had one) was a defense to defendant's liability on the warranty of fitness.

Before proceeding to discuss still other cases that have relied on what is the present Massachusetts rule, two cases, which were decided as original propositions in their respective jurisdictions, merit consideration. In *Zager v.*

32. Zirpola v. Adam Hat Stores, Inc., 122 N.J.L. 21, 4 A.2d 73 (1939). Zager v. F. W. Woolworth Co., 30 Cal. App. 2d 324, 86 P.2d 389 (1939), also decided a warranty-allergy problem ostensibly without the aid of the Massachusetts decisions. A consideration of both these cases follows in the text.

33. 136 Me. 118, 3 A.2d 650 (1939).

34. Id. at 122, 3 A.2d at 653.

F. W. Woolworth Co.,[35] the plaintiff had become afflicted with a skin disorder diagnosed as dermatitis venenata allegedly from the use of a freckle cream purchased at the defendant's store. The California court impliedly established the defense of allergy as valid when it held that whether or not the plaintiff's hypersensitive skin was a defense to the breach of warranty was a question of fact. However, a New Jersey court, which was faced with the same problem several weeks later, decided differently. In *Zirpola v. Adams Hat Stores, Inc.*,[36] the plaintiff received injuries to his hair and skin caused by the dye in the band of a hat purchased at one of the defendant's stores. The hat band contained a dye, paraphenylene diamine, which was found to be of a poisonous nature. It was established that four or five per cent of all persons who might come in contact with this dye would react adversely to it, and that the plaintiff was abnormally sensitive to it. It was also established that several states forbade its use. The New Jersey court, in answer to the defense that plaintiff's susceptibility was the cause of the injury, said: "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. . . . [O]therwise, in every action to recover damages for the breach of an implied warranty, it would be necessary to show that the article sold . . . would be injurious to every user."[37]

The *Zirpola* and *Bianchi* cases are basically congruous in principle. They, the former by implication and the latter expressly, reject the earlier warranty-allergy decisions which, when applying the rule that the implied warranty of fitness for a particular purpose is limited to reasonable fitness, interpreted reasonable fitness to be coextensive with the normal buyer. The cases, however, are distinguishable in a limited manner on their facts. In the *Zirpola* case, the court regarded the dye as a poisonous substance; whereas in the *Bianchi* case the face powder was determined to contain merely a known irritant. Should this factor distinguish the case from the *Bianchi* decision or from those cases upholding the normal person as the criterion for recovery, on the basis that where there is a poisonous substance involved the warranty can probably be applied more liberally, and that the greater interest of public protection and safety in a sense estopps the vendor from arguing "my customer is allergic"? Again, the solution to an implied warranty and allergy problem should be, as Williston says, ". . . evidently one of degree."[38] The *Bianchi* case with a more careful exposition of that underlying approach and the *Zirpola* case with a specific application of the principle to a situation where a class (four or five per cent) would be injured, are clearly reconcilable. The factor of a poisonous substance in the latter decision does not make the case unique and can not be regarded as an exception to a supposed general rule encompassing only normal persons.

The last few sentences in the preceding paragraph anticipate and attempt

35. 30 Cal. App. 2d 324, 86 P.2d 389 (1939).
36. 122 N.J.L. 21, 4 A.2d 73 (1939).
37. Id. at 23, 4 A.2d at 75.
38. See note 5 supra.

to answer the reasons presented in *Barrett v. S. S. Kresge Co.*[39] for holding that the *Bianchi* and *Zirpola* rules were inapplicable to that decision. In the *Barrett* case, the plaintiff received skin injuries allegedly from the wearing of a cotton dress purchased in the defendant's store. By means of patch tests on the plaintiff's skin her medical doctor determined that she was allergic to a substance in the dress. The substance, however, was never specifically named by the plaintiff. Nor did the plaintiff attempt to show that anyone else besides herself would have been injured by the dress. The plaintiff's proof, therefore, was devoid of the elements necessary to bring her injury within the rule laid down in the *Bianchi* and *Zirpola* decisions. To the extent that her proof failed to show that she came within a class who would be injured, her lack of success can be attributed to her own inadequately presented case. On the other hand, the Pennsylvania court was content to distinguish the *Bianchi* rule on the basis that the face powder involved contained an irritant,[40] without considering the principle upon which it was decided. It distinguished the *Zirpola* case by implication, in much the same manner, by indicating that where a poisonous dye is involved such situation is readily distinguishable from imposing liability in the instance of mere physical susceptibility.[41] The court cited the dictum in *Flynn v. Bedell Co.* and said: "We do not conceive that . . . a retail vendor of wearing apparel obligates himself by an implied warranty that the merchandise he offers for sale, 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. . . . [To admit such obligation] would mean that many merchants have a far reaching and possibly ruinous liability which they can not anticipate or with reasonable precaution avoid."[42] This view of the allergy problem has merit and might be considered as somewhere between the poles found in the sphere of the Massachusetts decisions. Yet, from the fact that allergies are not in many instances isolated situations,[43] it is submitted that in expressing the rule the emphasis should be on requiring the plaintiff to show what the injurious substance was and whether or not a class of buyers might be affected by it, and should the plaintiff not be able to show at least the latter, he will be denied recovery. The fact that of the four thousand purchasers of the same dress sold by the Kresge company, the plaintiff was

39. 144 Pa. Super. 516, 19 A.2d 502 (1941).

40. In Bianchi v. Denholm & McKay Co., 302 Mass. 469, 473, 19 N.E.2d 697, 699 (1939), the court expressly stated that it was not deciding the legal effect of the strawberry type allergy saying: "The case does not call for a consideration of the possible legal consequences which may follow from the use of such substances or products by a person who may be said to be 'allergic' to them." The Barrett case adopted this quotation as a statement by the Massachusetts court that it was not deciding the allergy aspect of the case at all. Barrett v. S. S. Kresge Co., Id. at 521, 19 A.2d at 504. This was an erroneous interpretation of the quotation, which in context was intended by the Massachusetts court to have a specific, limited application.

41. 144 Pa. Super. 516, 521, 19 A.2d 502, 504 (1941).

42. Id. at 522, 19 A.2d at 504.

43. See note 2 supra.

the only one to complain would be some evidence as to whether or not such a class existed.

Another case where evidence was presented that the defendant had received no other complaints concerning the product except that of the plaintiff's is *Stanton v. Sears Roebuck & Co.*[44] In that case the plaintiff alleged injuries to her skin from wearing two black rayon dresses purchased from the defendant. A patch test indicated that the plaintiff was susceptible to the contents of the dress. However, no chemical analysis of the material had been made. Though it was correctly noted that the burden was on the plaintiff to prove the chemical contents of the dresses, so that a relationship between her injuries and the dresses might be established, the court evinced a blatant oversimplification of the subject of allergy; "it is well known that persons become allergic or unduly sensitive to food, dust, odors, plants, drugs and clothing. Apparently, plaintiff became allergic to black rayon dresses."[45] In the first place the court did not distinguish, as the *Bianchi* case did, between commonly used substances such as foods and those which are the end product of a manufacturing process over which there is some control exercised by the manufacturer. Secondly, to draw the broad conclusion that the plaintiff was allergic to a kind of clothing was to oversimplify the physiological problem involved. Concededly the court reached a correct conclusion in that the plaintiff had failed to show that she was a member of a class of individuals who would be injured by the dresses. There was some evidence that perhaps the plaintiff was unique unto herself in that hers was the only complaint that defendant had received as to the quality of its product.[46] The point is, however, that the court in relying on *Barrett v. S. S. Kresge Co.*, which in turn had relied on the *Flynn* rule, served to perpetrate the erroneous interpretation of the scope of the warranty of fitness that if the buyer has an allergy and the normal buyer would not similarly react there can be no recovery. The attempt by the court in this case to lump together into one category all the products which may cause allergic reactions was an unfortunate classification which served to contradict, by reason of this superficial analysis of both the medical and judicial facts, the equitable scope of the obligation imposed by law upon vendors to sell reasonably fit products. It is reasonable to assert that where the composition of a product is within the purview of the vendor, he is liable to members of a defined class, though not the majority, who would be injured by the product.

On the other hand in New Jersey, in *Reynolds v. Sun Ray Drug Co.*,[47] both the *Bianchi* and *Zirpola* cases were adopted. The court said, "the appellant contends that the statutory warranty is limited to a warranty that the goods are reasonably fit for the purpose for which they are sold and that it cannot be said the goods are not reasonably fit for the purpose when only a small proportion of those who use a certain article are injuriously affected there-

44. 312 Ill. App. 496, 38 N.E.2d 801 (1942).
45. Id. at 500, 38 N.E.2d at 803.
46. Worley v. Proctor & Gamble Mfg. Co., 241 Mo. App. 1114, 253 S.W.2d 532 (1952).
47. 135 N.J.L. 475, 52 A.2d 666 (1947).

by."[48] The court answered this contention by referring to its previously having adopted in the *Zirpola* case the rule that the abnormality of the group that would be injured does not absolve the vendor from liability. Recovery was allowed the plaintiff for the skin injuries she had received using the lipstick sold to her by the defendant.[49]

In *Landers v. Safeway Stores, Inc.*,[50] the plaintiff's hands were allegedly burned from the use of a bleaching solution bought from the defendant. The plaintiff introduced no evidence that the solution contained any harmful substances. Since the plaintiff had failed to sustain the burden of proof, the appellate court reversed the lower court judgment in his favor. In the course of its opinion the court discussed at length the chain of cases which precluded recovery in the warranty-allergy situation, wherein it was not proven that a normal person would have been injured by the substance involved. No mention was made of the minority rule expressed in the *Bianchi* and *Zirpola* cases.

Another instance where the plaintiff failed to introduce the proper evidence of the cause of his injury is *Worley v. Proctor & Gamble Mfg. Co.*[51] The plaintiff had received burns on his hands from the use of a detergent manufactured by the defendant. The obligation involved appears to have been treated by the court as an express warranty, for on the package was an affirmation of the fact that the detergent was safe to use. However, the court, in what constitutes the most recent statement[52] of the rule precluding recovery, disallowed the plaintiff's action by stating that he had failed to prove that the product would have been injurious to a normal person, citing *Ross v. Porteous, Mitchell & Braun Co.* and *Barrett v. S. S. Kresge Co.*[53]

From the above analysis, it is evident that the preponderance of authority by case decision denies recovery where it can not be proven that a normal person would be adversely affected by the use of a particular product. However, there is a strong minority voice which, through the opinion in *Reynolds*

48. Id. at 476, 52 A.2d at 667.

49. The New Jersey court also cited as authority for its holding Smith v. Burdine's, Inc., 144 Fla. 500, 198 So. 223 (1940). This case involved a plaintiff who attributed a kidney ailment to substances contained in a lipstick she had purchased from the defendant. There is no indication in the report of the case that allergy was given consideration as a legal issue pertinent to the decision.

50. 172 Ore. 116, 139 P.2d 788 (1943).

51. 241 Mo. App. 1114, 253 S.W.2d 532 (1952).

52. Another recent decision, Proctor & Gamble Mfg. Co. v. Superior Court, 124 Cal. App. 2d 157, 268 P.2d 199 (1954), was a prohibition action to restrain a District Superior Court in California from compelling the petitioner to provide the plaintiff, in an action on express warranty, with the names of those who had complained to the petitioner, the defendant in the warranty action, of injuries allegedly received from the use of its detergent. The District Court was restrained. The case evinces a unique method of attempting to gain evidence upon which to base either an affirmative case for recovery or to make a reply to the defense of allergy.

53. Worley v. Proctor & Gamble Mfg. Co., 241 Mo. App. 1114, 1123, 253 S.W.2d 532, 538 (1952).

v. Sun Ray Drug Co.,[54] persists in asserting the rights of the so-called less than normal classes of buyers and does not allow their physiological predispositions to militate against their receiving compensation when injured from the use of an article which aggravates their susceptibility.

A Suggested Approach in Warranty-Allergy Litigation

Despite the quantitatively overwhelming authority to the contrary, recovery on an implied warranty of fitness is possible where the defense is asserted that the plaintiff is allergic. If litigants more carefully prepare their cases in the matters pertaining to fact and law, the defense of allergy can be anticipated, and the difficulties which the defense presents can be overcome. In this regard the following suggestions are offered. (1) Where the plaintiff has suffered physical injury from the use of goods sold, and in all likelihood an implied warranty of fitness can be proven, experience from case law has indicated that it is essential that the plaintiff procure a chemical analysis of the product and attempt a classification of the various components of the product as to their tendency to cause physical injury. (2) Plaintiff, through expert medical and chemical assistance, must then attempt to establish the causal connection between the physical injury and the product or its components. An essential aspect of this procedure is the determination, through intradermal tests and other such diagnostic methods, of whether or not the plaintiff is susceptible to one or more of the components.[55] (3) If the procedure suggested in (2) indicates that the plaintiff was injured by an ingredient or ingredients that would not ordinarily injure a buyer, then further medical and chemical information must be adduced to indicate, if possible, that plaintiff is a member of a class who would similarly be affected by the product. With these suggestions in mind, and upon the basis of the underlying principles of the implied warranty of fitness and of the vulnerable aspects of the majority decisions, recovery in future litigation is a calculated probability. In most jurisdictions the problem has not been decided. In those jurisdictions where there is some case law, a corrected approach by plaintiffs, eliminating past errors in evidential approach, can bring about the modification of what has become a stagnant area of legal development.

Judicial analysis of the problem from the basic approach suggested in the cases defining the minority rule, coupled with an abdication of the superficial attitude toward allergy expressed by the court in *Barrett v. S. S. Kresge Co.*,[56] will assist the cause of modification of an arbitrary rule in a situation where modification appears necessary. "Given a problem whether the directive force of a principle or a rule or a precedent is to be exerted along this path or along that, we must know how the principle or the rule or the precedent is functioning, and what is the end which ought to be attained."[57] In the war-

54. 135 N.J.L. 475, 52 A.2d 666 (1947).
55. See note 2 supra.
56. See note 39 supra.
57. Cardozo, The Growth of the Law 80 (1924).