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Torts

AGGRAVATION OF A PRE-EXISTING CONDITION: INCLUDING THE ALLERGY FACTOR

Introduction

The "general rule" seems to be the goal of the ordinary legal querist, whether law student or attorney, and once having determined that the specific factual circumstance is included within a favorable "general rule," the analyst is inclined to congratulate himself on a job well done. In reality the task often is merely begun; the "general rule" may be the lid to a Pandora's box of formal and substantial difficulties. The advantage achieved by the strength of a favorable general rule may be negated by the carelessness it tends to breed.

The text of this Note describes the various implications of such general rules in regard to injuries involving the aggravation of a pre-existing condition or, more explicitly, when the condition of the person harmed is one of the ingredients of the subsequent injury. The breadth of the topic presents a troublesome problem of limitation and organization. Consequently, the scope of the Note encompasses only negligent and intentional harms, and the subject matter is arranged according to the manner in which the injury was inflicted. The first section treats the usual "aggravation" case, where the injury results immediately from the tortious act of the wrongdoer. The second section examines the liability for injuries resulting from the negligent treatment of the original injury by a physician. The third section discusses the possibility of recovery for an injury resulting from an allergy of the victim himself. Within each of these areas there is a "pre-existing condition" rule which, from all outward appearances, renders the issue settled. However, a review of the case law indicates numerous difficulties which may appear unexpectedly in the ordinary case involving such conditions.

I. THE "USUAL" AGGRAVATION CASE

A. In General

The usual case in this area consists of the wrongful act of a tort-feasor causing another's injury which results in the aggravation of a weakened condition existing within the other.¹ Since these conditions for the most part are unforeseeable and often unknown even to the injured party, a theory has been proposed which would limit the tort-feasor's liability to those consequences which are foreseeable, because the test of negligence is usually based on foreseeability.² Despite the logical consistency of this theory, it has not been followed. As a general proposition, it is stated that the tort-feasor must take his victim as he finds him, and his liability is not to be measured by the physical strength of the party injured or his capacity to endure suffering. One of weak physical structure has as much right to protection from bodily harm as a robust athlete. Consequently, regardless of one's peculiar physical composition, the injury actually caused by the wrongful act is the natural consequence of the wrong.³

¹ Space does not permit a discussion of the issue of negligence in this situation; the scope of this section includes only the issue of liability when the tort-feasor's act or omission is proved wrongful. For an interesting discussion of the different tests to be applied in determining the issue of negligence, cf. 2 HARPER & JAMES, TORTS § 18.2 (1956); PROSSER, TORTS § 48 (2d ed. 1955); 1 COOLEY, TORTS 139-41 (4th ed. 1932).

² A Colorado court in *Pullman Palace Car Co. v. Barker*, 4 Colo. 344, 34 Am. Rep. 89, 92 (1878), favored this theory. However, subsequent cases in this jurisdiction have ignored its import although the case has never been expressly overruled. *City of Denver v. Hyatt*, 28 Colo. 129, 63 Pac. 403, 406 (1900). See also *Roark v. Missouri Pac. Ry.*, 163 Mo. App. 705, 147 S.W. 499 (1912). The weakness of the theory in general, and especially in the "aggravation" situation, is that its premises are founded on the nebulous term "foreseeable" which allows for either a strict construction to exclude most injuries or a loose construction to include all. Cf. 2 HARPER & JAMES, *op. cit. supra* note 1, at 1135; PROSSER, *op. cit. supra* note 1, at 259.

³ *Trascher v. Eagle Indem. Co.*, 48 So. 2d 695 (La. App. 1950); *Poplar v. Bourjois, Inc.*, 298 N.Y. 62, 80 N.E.2d 334 (1948); *Vosburg v. Putney*, 80 Wis. 523, 50 N.W. 403 (1891); *Lapline v. Morgan's L. & T.R. & S.S. Co.*, 40 La. Ann. 661, 4 So. 875 (1888). See PROSSER, *op. cit. supra* note 1, at 260.

Another less frequent circumstance which brings the "aggravation" rule into play is the "subsequent injury" case. If the victim suffers a subsequent injury not of his own fault, which aggravates injuries received in the primary accident so that recovery is retarded, the original wrongdoer is liable for the entire damage if the second injury is a natural result of the first.⁴ The issue of proximate cause becomes significant in these cases since the interval between injuries and the circumstances surrounding the second injury may usher in the defense of intervening cause. Where there is no evidence connecting the cause of the second injury with the first,⁵ or where the second cause is distinct and independent of the first,⁶ the courts have had little trouble sustaining the defense. However, in many situations the question is close and some courts have permitted the defense when a "voluntary" act of the injured party was involved in the second accident such as stepping,⁷ walking with crutches,⁸ standing,⁹ or, at the extreme, committing suicide.¹⁰ The rationale of most of these cases seems unwise since the plaintiff is being penalized for "voluntarily" doing that which he must eventually do of necessity, *e.g.*, ambulate. Later cases have not followed this reasoning in similar situations, although this may be due to a more profitable use of the expert witness.¹¹

One condition worthy of special mention is a pre-existing nervous or mental condition which is reactivated by the tort-feasor's wrongful act. Where this injury is incident to the plaintiff's physical injuries, recovery is permitted.¹² However, where the injury is mental anguish, *e.g.*, fright, followed by some sort of bodily injury, the courts have taken divergent views. Where the conduct of the tort-feasor is intentional or outrageous, recovery may be had.¹³ If his conduct is merely negligent some courts require impact for recovery,¹⁴ although this prerequisite is circumvented in many jurisdictions by a liberal construction of the term.¹⁵ Although this "impact" theory was formerly the rule in most courts, it has lost considerable ground in recent years and has recently been branded the "minority rule."¹⁶ However, if the injury suffered is

⁴ Underwood v. Smith, 261 Ala. 181, 73 So. 2d 717 (1954); Nikisher v. Benninger, 377 Pa. 564, 105 A.2d 281 (1954); Rasa v. City of New York, 95 N.Y.S.2d 291 (Sup. Ct.), *modified on other grounds*, 277 App. Div. 780, 97 N.Y.S.2d 520 (1950).

⁵ Zogg v. O'Bryan, 237 S.W.2d 511 (Ky. App. 1951).

⁶ Rainwater v. Timothy, 87 So. 2d 11 (La. App. 1956).

⁷ Sporna v. Kalina, 184 Minn. 89, 237 N.W. 841 (1931); Raymond v. City of Haverhill, 169 Mass. 382, 47 N.E. 101 (1897). *Contra*, Bowyer v. Te-Co., Inc., 310 S.W.2d 892, 900 (Mo. 1958); Underwood v. Smith, 261 Ala. 181, 73 So. 2d 717 (1954).

⁸ Vander Velde v. Village of Leroy, 140 Mich. 359, 103 N.W. 812 (1905). *Contra*, Welker v. State, 284 App. Div. 996, 135 N.Y.S.2d 342 (1954); Hartnett v. Tripp, 231 Mass. 382, 121 N.E. 17 (1918).

⁹ Snow v. New York, N.H. & H. R.R., 185 Mass. 321, 70 N.E. 205 (1904). *Contra*, Enslein v. Hudson & Manhattan R.R., 8 Misc. 2d 87, 165 N.Y.S.2d 630 (Sup. Ct. 1957). Plaintiffs in both of these cases alleged the fall was due to dizziness caused by the original injury.

¹⁰ Daniels v. New York, N.H. & H. R.R., 183 Mass. 393, 67 N.E. 424 (1903).

¹¹ See cases cited "*Contra*" in notes 7-9 *supra*.

¹² Erie R.R. v. Collins, 253 U.S. 77 (1920) (damages for shame and humiliation resulting from disfigurement permitted). These are often termed "parasitic" damages.

¹³ Guillery v. Godfrey, 134 Cal. App. 2d 628, 286 P.2d 474, 478 (1955) (continually calling the plaintiff a "dirty Mexican" and a "nigger lover"). *Cf.* PROSSER, *op. cit. supra* note 1, at 38. For a complete list of cases regarding liability for insulting or abusive language, see Annot., 15 A.L.R.2d 108 (1951).

¹⁴ Bosley v. Andrews, 393 Pa. 161, 142 A.2d 263 (1958).

¹⁵ *Cf.* Morton v. Stack, 122 Ohio St. 115, 170 N.E. 869 (1930) (smoke). See also McNiece, *Psychic Injury and Tort Liability in New York*, 24 ST. JOHN'S L. REV. 1, 51-58 (1949).

¹⁶ See Kaufman v. Western Union Tel. Co., 224 F.2d 723 (5th Cir. 1955); Belt v. St. Louis-San Francisco Ry., 195 F.2d 241, 243 (10th Cir. 1952); Nelson v. Black, 266 P.2d 817 (Cal. App.), *aff'd*, 43 Cal. 2d 612, 275 P.2d 473 (1954). See also 2 HARPER & JAMES, *op. cit. supra* note 1, at 1034; RESTATEMENT, TORTS § 46 (Supp. 1948). *But see* Bosley v. Andrews, 184 Pa. Super. 396, 135 A. 2d 263, *aff'd*, 393 Pa. 161, 142 A.2d 263 (1958), where the Pennsylvania court refused to repudiate the impact theory despite fiery criticism from fellow judges in both the superior and supreme courts. The fact that all the jurisdictions retaining the impact rule have urban areas in excess of one million in population has led one authority to theorize that the rule has been retained as a preventive against the false claims of ambulance chasers. McNiece, *op. cit. supra* note 15, at 15 n.40.

mental anguish alone, *e.g.*, fright, humiliation, indignation, it is insufficient to support a cause of action for negligence.¹⁷

B. Causal Connection

The requirement of causal connection is no less critical in "aggravation" cases than it is in any other problem of tort liability. Included in the general rule is the necessity of connecting the aggravation of the prior condition with the wrongful act of the tort-feasor. Because of the tendency of the injured party to expand his damages by alleging such aggravation, the courts are continually on guard to offset this propensity with a rigid requirement of causal connection.¹⁸ The resolution of the issue becomes obscure when the prior condition is active, rather than dormant, and the issue of acceleration is presented.¹⁹ The mere exacerbation of a latent or subsiding condition immediately following the accident is not proof of causal connection.²⁰

The medical expert is a *sine qua non* in these cases, and his opinion is often the only evidence of causal connection since the subject matter is usually beyond the comprehension of court and jury.²¹ Also, since the plaintiff must prove his case by a preponderance of the evidence, he has the burden of proving causal connection. Academically, plaintiff would have to exceed the defendant's experts in number; however, as a practical matter, courts tend to avoid a parade of expert witnesses and hold that lack of numbers alone will not preclude recovery.²²

C. Measure of Damages

The measure of damages is probably the courts' most difficult problem in the aggravation cases. The attempt is made to limit the damages to those which resulted from the injury.²³ Where the pre-existing condition was latent or dormant, causing no pain or discomfort to the plaintiff prior to the injury, the task of the court is relatively simple since the defendant is liable to the complete extent of the plaintiff's injury.²⁴ However, if the accident merely accelerated the plaintiff's existing malady, the plaintiff's damages are limited to the increase of ill effects resulting from the accident²⁵ or, phrased differently, defendant's liability is limited to that injury over and above the consequences which the pre-existing condition would have produced had there been no aggravation.²⁶ However, if the permanent injury resulting from the accident would have resulted na-

17 *Espinosa v. Beverley Hosp.*, 114 Cal. App. 2d 232, 249 P.2d 843 (1952). Cf. Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193, 228 n.128 (1944).

18 *Anderson v. Kinloch*, 252 S.W.2d 24 (Ky. App. 1952) (causal connections was "purely speculative" where plaintiff suffered a heart attack three weeks after auto collision).

19 *Walker v. Joseph P. Geddes Funeral Serv., Inc.*, 33 So. 2d 570 (La. App. 1948).

20 *Land v. Colletti*, 79 So. 2d 641 (La. App. 1955) (18 months); *Anderson v. Kinloch*, 252 S.W.2d 24 (Ky. App. 1952) (3 weeks).

21 See, *e.g.*, *Payton v. Great Am. Indem. Co.*, 83 So. 2d 575 (La. App. 1955). Failure to use expert testimony may create the inference of a weak case. 2 WIGMORE, EVIDENCE § 290 (3d ed. 1940). See also *Maroun v. New Orleans Pub. Serv. Inc.*, 83 So. 2d 397 (La. App. 1955); *Anderson v. Kinloch*, *supra* note 20.

22 7 WIGMORE, EVIDENCE § 2034 (3d ed. 1940). Also, a limitation may be set upon the number of expert witnesses. 6 WIGMORE, *supra* § 1908. But see *Walker v. Joseph P. Geddes Funeral Serv., Inc.*, 33 So. 2d 570 (La. App. 1948). In this case plaintiff's expert found causal connection, but defendant's expert disagreed. The appellate court reversed a verdict for plaintiff on the ground that plaintiff had not sustained his burden.

23 Cf. Bauer, *Fundamental Principles of the Law of Damages in Medico-Legal Cases*, 19 TENN. L. REV. 255, 261 (1946).

24 *Garrett v. Taylor*, 69 Idaho 487, 210 P.2d 386 (1949); *Owen v. Dix*, 210 Ark. 562, 196 S.W.2d 913 (1946). See also Note, 22 ST. JOHN'S L. REV. 135, 139 (1947).

25 *Sterrett v. East Texas Motor Freight Lines*, 150 Tex. 12, 236 S.W.2d 776 (1951).

26 *Nelson v. Twin City Motor Bus Co.*, 239 Minn. 276, 58 N.W.2d 561 (1953). An interesting case exemplifying the extension of damages is *Jameson v. Bloomingdale Bros.*, 132 N.Y.S.2d 682 (Sup. Ct. 1954). In this case plaintiff injured her right leg in an accident. She later lost her left leg. Although defendant was not liable for loss of the left leg, his damages for the original injury were raised since the loss of the left leg plus the damaged right leg rendered plaintiff no longer ambulatory.

turally from the pre-existing condition, the defendant nonetheless is liable if the injury hastened the process.²⁷ The extent of these damages in dollars, a question which would prove perplexing for the most scholarly of physicians, is for the jury to decide.²⁸ One wonders at the wisdom of using the normal lay jury for this function.

The court is able to exercise some control over this determination with its instructions and its power to grant a new trial or apply remittitur. The numerous cases involving erroneous instructions on this issue are a persuasive indication that trial court judges are either confused by the complexity of the issue or simply feel that a general charge is sufficient.²⁹ The difficulty of ascertaining the correct amount of damages has given rise to numerous appeals, both as to the excessiveness and inadequacy of the award.³⁰ Such appeals have occasionally met with success.³¹

D. Pleading

The method of pleading the "aggravation" issue has led to some unfortunate results. As a rule, in the code-pleading jurisdictions, general damages, or those which are naturally presumed to follow from the alleged injuries, need not be alleged in the pleadings. Those not presumed to follow are termed special damages and must be pleaded with particularity so that the defendant will not be taken by surprise.³² Although there is agreement that the aggravation of a pre-existing condition, *e.g.*, arthritis, may flow naturally from an injury alleged in the pleading, *e.g.*, a back injury, some courts require a special pleading of the existence of the condition prior to the accident, and its subsequent aggravation as a result of the injury.³³ These courts require that the damage "necessarily" result from the alleged injury before it can be presumed, and an aggravation of a pre-existing condition is not a "necessary" result.³⁴ Other jurisdictions admit evidence "as to aggravation of a pre-existing condition even though there is no allegation of such aggravation in the complaint."³⁵

Since the objective of the special pleading is to put the defendant on guard, some other courts have been persuaded to strike a middle ground. If it can be seen from the pleadings that the defendant had sufficient notice of the "aggravation" claim, the evidence will be admitted notwithstanding a technical oversight in the pleadings.³⁶ This approach seems consonant with the trend away from the obligatory fact pleading.³⁷

²⁷ *Walker v. St. Louis Pub. Serv. Co.*, 362 Mo. 648, 243 S.W.2d 92 (1951). See also *Allied Van Lines, Inc. v. Parsons*, 80 Ariz. 88, 293 P.2d 430 (1956).

²⁸ *Waterloo Sav. Bank v. Waterloo, C.F. & N. R.R.*, 244 Iowa 1364, 60 N.W.2d 572 (1953).

²⁹ *Western Guar. Loan Co. v. Dean*, 309 S.W.2d 857, 867 (Tex. Civ. App. 1957). See also *Coleman County Elec. Coop. v. Agnew*, 265 S.W.2d 911 (Tex. Civ. App.), *aff'd*, 153 Tex. 587, 272 S.W.2d 877 (1954); *Nelson v. Twin-City Motor Bus Co.*, 239 Minn. 276, 58 N.W.2d 561 (1953); *Louisville Taxicab & Transfer Co. v. Hill*, 304 Ky. 565, 201 S.W.2d 731 (1947).

³⁰ See, *e.g.*, *Thompson v. Healer Cartage Co.*, 287 S.W.2d 791 (Mo. 1956) (inadequate); *Knoblock v. Morris*, 169 Kan. 540, 220 P.2d 171 (1950) (excessive).

³¹ *Walker v. St. Louis Pub. Serv. Co.*, 362 Mo. 648, 243 S.W.2d 92 (1951) (\$14,000 to \$10,000); *Valence v. Louisiana Power & Light Co.*, 50 So. 2d 847 (La. App. 1951) (\$27,500 to \$5,000).

³² CLARK, CODE PLEADING 329 (2d ed. 1947).

³³ *Littman v. Bell Tel. Co.* 315 Pa. 370, 172 Atl. 687 (1934); *Salmi v. Columbia & N. R.R.*, 75 Ore. 200, 146 Pac. 819 (1915); *Whitlock v. Mungiven*, 35 R.I. 386, 90 Atl. 756 (1914); *Hayes v. City of St. Clair*, 173 Mich. 631, 139 N.W. 1037 (1913); *May v. Hexter*, 226 S.W.2d 383, 388 (Mo. App. 1950); *Samuels v. New York Rys. Corp.*, 226 App. Div. 94, 234 N.Y. Supp. 377 (1929). See also *Wood v. Lit Bros.*, 173 Pa. Super. 4, 94 A.2d 69 (1953).

³⁴ See *May v. Hexter*, *supra* note 33, at 388. *But see Varley v. Motyl*, 139 Conn. 128, 90 A.2d 869 (1952).

³⁵ *Johnson v. Howard*, 45 Wash. 2d 433, 275 P.2d 736, 745 (1954). See also *Virginia Ry. & Power Co. v. Hubbard*, 120 Va. 664, 91 S.E. 618 (1917); *Conrad v. Shuford*, 174 N.C. 719, 94 S.E. 424 (1917).

³⁶ *Varley v. Motyl*, 139 Conn. 128, 90 A.2d 869 (1952); *Leingang v. Geller, Ward & Hasner Hardware Co.*, 335 Mo. 549, 73 S.W.2d 256, 260 (1934); *Wadell v. Pub. Serv. Coordinated Transp.*, 3 N.J. Super. 132, 65 A.2d 766 (1949).

³⁷ The federal rules generally follow the code pleading states on this issue and require special pleading. FED. R. CIV. P. 9(g); 2 MOORE, FEDERAL PRACTICE 1921-24 (2d ed. 1948). Although some liberality is indicated, it must be remembered that defendant has numerous discovery procedures at his disposal under these rules.

However, because of the uncertainty in this area, it might well behoove counsel to plead specially the aggravation itself, or at least the pre-existing condition from which the aggravation can be "necessarily" implied.³⁸

II. LIABILITY FOR PHYSICIAN'S MALPRACTICE

A. General Rule

Another circumstance in the general theme of this Note which necessitates a separate discussion is that of a physician's act of malpractice which aggravates an injury the victim has received from the original tort-feasor. Few rules are as well-settled as the general rule regarding the extent of liability of the tort-feasor in this situation. If the victim's injuries are aggravated by the negligence, mistake, or lack of skill of a physician, the negligence of the wrongdoer in causing the original injury is also the proximate cause of the subsequent damages.³⁹ This rule is premised on the fact that the possibility of negligent medical treatment is a risk incident to the victim's injury and is therefore a foreseeable intervening cause.⁴⁰ A recent decision in New York reflects the seemingly limitless range of this rule. In *Ferrara v. Galluchio*,⁴¹ the court of appeals charged the original tort-feasor with liability for the victim's *cancerphobia* (phobic apprehension that cancer would ultimately develop) resulting from a doctor's statement that the original injury might *possibly* become cancerous.

The principal defenses available against this rule present a curious analytical inconsistency. If the victim selects the doctor, he must exercise ordinary care in the selection or be precluded from recovery.⁴² If the defendant selects the doctor, and uses ordinary care, he is not liable for the subsequent aggravation.⁴³ In the latter case, the "vision" of the defendant is evidently clouded by his own gratuitous act so as to preclude the court's use of the subtle "foreseeable" intervening cause rationale.

B. Release

Due to the presence of a third person (the doctor in this factual pattern) some conceptual difficulties have arisen regarding the process of suit. One difficulty which could prove to be a latent snare for the careless attorney is seen in the cases involving

³⁸ Code pleading states are not as ably equipped with discovery mechanism, and, consequently, more importance must be centered upon the pleadings for the purpose of giving adequate notice to the defendant. Therefore, any liberalizing trend in pleading must be accompanied by pre-trial discovery procedures.

³⁹ *Texas & Pac. Ry. v. Hill*, 237 U.S. 208 (1915). For numerous cases reiterating this rule, see 8 A.L.R. 506 (1920); 39 A.L.R. 1268 (1925); 126 A.L.R. 912 (1940). The early courts indicated that defendant could give evidence of the doctor's malpractice in mitigation of his own damages. *Thorne v. California Stage Co.*, 6 Cal. (2 Pac. St. Rep.) 232 (1856) (dictum). This theory was not followed.

⁴⁰ *Lucas v. City of Juneau*, 127 F. Supp. 730 (D. Alaska 1955); PROSSER, *op. cit. supra* note 1, at 272; RESTATEMENT, TORTS § 457, comment *a* (1934). It has been suggested that this rule extends to any third person who negligently harms the injured person in the process of obtaining medical treatment. *Lucas v. City of Juneau*, *supra* at 732 (ambulance driver); RESTATEMENT, *supra* § 457, comments *b* & *c*. However, the original tort-feasor is not liable for the third person's intentional harm or gross negligence. *Corbett v. Clarke*, 187 Va. 222, 46 S.E.2d 327 (1948); RESTATEMENT, *supra* § 457, comment *d*.

⁴¹ 5 N.Y.2d 16, 152 N.E.2d 249, 176 N.Y.S.2d 996 (1958).

⁴² See *Stephenson v. Steinhauer*, 188 F.2d 432 (8th Cir. 1951); *Bessinger v. De Loach*, 230 S.C. 1, 94 S.E.2d 3 (1956); *Hicks Rubber Co. v. Harper*, 131 S.W.2d 749 (Tex. Civ. App.), *appeal dismissed*, 134 Tex. 89, 132 S.W.2d 579 (1939).

⁴³ This rule is of ancient vintage. *Secord v. St. Paul, M. & M. Ry.*, 18 Fed. 221 (D. Minn. 1883), and has obtained to the present day. See *Knox v. Ingalls Shipbuilding Corp.*, 158 F.2d 973 (5th Cir. 1947); *Gosnell v. Southern Ry.*, 202 N.C. 234, 162 S.E. 569 (1932), *judgment vacated on other grounds*, 205 N.C. 297, 171 S.E. 52 (1933). *But see Easler v. Columbia Ry., G. & E. Co.*, 100 S.C. 96, 84 S.E. 417 (1915) (parents of victim objected to defendant's choice of doctors). On the other hand, if the defendant, usually an employer, employs the doctor for his own ends and purposes, e.g., for a pre-employment physical, the physician is his agent or servant and the defendant is liable vicariously for the doctor's negligence. *Knox v. Ingalls Shipbuilding Corp.*, *supra* at 975; *Rannard v. Lockheed Aircraft Corp.*, 26 Cal. 2d 149, 157 P.2d 1 (1945); *Mrachek v. Sunshine Biscuit Inc.*, 202 Misc. 527, 116 N.Y.S.2d 20 (1952).

a release. The doctor in the usual aggravation situation is liable only to the extent of the aggravation caused by his negligence. The original wrongdoer is liable for both the original injury and the aggravation, assuming that the intervening cause was foreseeable. The policy of preventing double recovery has persuaded a majority of the courts to hold that a release of the original tort-feasor is a bar to a subsequent action against the physician for malpractice.⁴⁴ With a release of the tort-feasor who is liable for the whole of the plaintiff's damage, the cause of action is discharged. A few courts have taken a contrary position, holding that the release of itself does not preclude suit against the physician.⁴⁵ The intention of the parties controls and must be proved by a preponderance of the evidence. This latter view seems the better, since it recognizes the fear of the majority—the possibility of a double recovery—yet also prevents injustice to the litigant who, because of an oversight, settled with the original tort-feasor. In any event, the physician does not escape unscathed, since the original wrongdoer, when required to pay the whole, is subrogated to any right of action the plaintiff had against the negligent physician.⁴⁶ No difficulty is presented when the first suit is brought against the doctor since he is liable only for the aggravation damages.⁴⁷

C. Release in Workmen's Compensation Cases

Some courts, imbued with the resolute purpose of prohibiting double recovery, have carried the common law tort rationale into workmen's compensation cases. If the employee accepts an award of full compensation from his employer, he is precluded from suing the physician in tort for malpractice.⁴⁸ At first glance this would seem highly discriminatory to the employee, since the award for the aggravation under a compensation statute is minimal in comparison to a recovery for malpractice.⁴⁹ This difficulty is circumvented in most of the states through their respective subrogation procedures.⁵⁰ However, in some states the practitioner is exempted from liability for his wrong in this situation since neither the employer nor the employee can bring a subsequent action.⁵¹

⁴⁴ *Milks v. McIver*, 264 N.Y. 267, 190 N.E. 487 (1934). For an exhaustive list of cases regarding this subject, see generally, 40 A.L.R.2d 1075 (1955). Within this rule, however, some courts will permit the subsequent action if the parties clearly indicated this intention at the time of the release. *Green v. Waters*, 260 Wis. 40, 49 N.W.2d 919 (1951). If, however, the aggravation was not foreseeable, and a new and independent injury resulted from the physician's malpractice, the release of the original tortfeasor is held not to be a bar. *Corbett v. Clarke*, 187 Va. 222, 46 S.E.2d 327 (1948).

⁴⁵ *Dickow v. Cookinham*, 123 Cal. App. 2d 81, 266 P.2d 63 (1954). See also *Wheat v. Carter*, 79 N.H. 150, 106 Atl. 602 (1919).

⁴⁶ *Clark v. Halstead*, 276 App. Div. 17, 93 N.Y.S.2d 49 (1949). An assiduous use of procedural impleading by the original tort-feasor would circumvent the difficulty of two suits. See *Clark v. Halstead*, *supra* at 51. However, the victim cannot make the doctor a party to a suit against the original tort-feasor since the two are not joint tort-feasors. The malpractice of the physician is an independent and unrelated cause of action even though the damages are congruous. *Bost v. Metcalfe*, 219 N.C. 607, 14 S.E.2d 648 (1941).

⁴⁷ *Cf. Parchefsky v. Kroll Bros.*, 267 N.Y. 410, 196 N.E. 308 (1935). However, a subsequent suit against the original tort-feasor can include only the damages prior to the aggravation. It would seem that this is the most advantageous procedure for the plaintiff since the aggregate of two jury verdicts may result in a larger award.

⁴⁸ *Cf. Comment*, 25 IND. L.J. 218 (1949).

⁴⁹ *Makarenko v. Scott*, 132 W. Va. 430, 55 S.E.2d 88 (1949); *Parchefsky v. Kroll Bros.*, 267 N.Y. 410, 196 N.E. 308 (1935). For an exhaustive list of cases on this subject, see 2 LARSON, WORKMEN'S COMPENSATION § 72.61 (1952).

⁵⁰ *Garrison v. Graybeel*, 308 S.W.2d 375 (Tenn. 1957); *Seaton v. United States Rubber Co.*, 223 Ind. 404, 61 N.E.2d 177 (1945); *Parchefsky v. Kroll Bros.*, *supra* note 49, at 312. Once the employee accepts the award, his right of action turns on the specific subrogation procedure. In the majority of states, the acceptance does not work a bar. *Duprey v. Shane*, 39 Cal. 2d 781, 249 P.2d 8 (1952); *Fauver v. Bell*, 192 Va. 518, 65 S.E.2d 575 (1951); *Schumacher v. Leslie*, 360 Mo. 1238, 232 S.W.2d 913 (1950). In any event no matter which party sues, the ultimate results are the same. Following a successful suit against the physician, the employer is reimbursed for the compensation paid for the "aggravation" part of the prior award, with the excess going to the employee. See 2 LARSON, *op. cit. supra* note 49, at § 74.

⁵¹ *Makarenko v. Scott*, 132 W. Va. 430, 55 S.E.2d 88 (1949); *Paine v. Wyatt*, 217 Iowa 1147, 251 N.W. 78 (1933); *Ross v. Erickson Const. Co.*, 89 Wash. 634, 155 Pac. 153 (1916). The Georgia

The jurisdictions recognizing the prior award as a bar to a subsequent suit by the employee seem to have fallen victim to a common error in compensation theory. The compensation acts were designed to recompense the employee for wrongs which previously were without remedy at common law due to circumstances surrounding his employment, *e.g.*, the employer-employee relationship. Whenever the injury has no connection with one's employment, the historical basis for compensation has been removed.⁵² In the "aggravating-physician" situation, the injury for compensation purposes is the original injury, although the employer is liable for the subsequent aggravation by way of supplementary damages.⁵³ Yet the negligent act of the physician also gives rise to an unrelated cause of action in tort, and under the general rule, the physician is liable for the "aggravation" damages.⁵⁴ However, the mere fact that recovery from

court seemed formerly committed to this rule in *McConnell v. Hames*, 45 Ga. App. 307, 164 S.E. 476 (1932); however, the case was criticized in *Gay v. Greene*, 91 Ga. App. 78, 84 S.E.2d 847 (1954) and the court declined to follow its rule. The New Jersey courts are in a similar dilemma since *Burns v. Vilardo*, 26 N.J. Misc. 277, 60 A.2d 94 (1948) exempted the practitioner while *Dettman v. Goldsmith*, 11 N.J. Super. 571, 78 A.2d 626 (1951) held the employee could sue notwithstanding a prior compensation award. See also *Shorridge v. Bede*, 51 Wash. 2d 391, 319 P.2d 277 (1957) where, although the Washington court reserved opinion on the issue, it seemed receptive to argument for change.

⁵² *Cf. Schumacher v. Leslie*, 360 Mo. 1238, 232 S.W.2d 913 (1950); *McGough v. McCarthy Improvement Co.*, 206 Minn. 1, 287 N.W. 857 (1939). See also 1 LARSON, *op. cit. supra* note 49, § 2.10.

⁵³ A few jurisdictions have construed the statute to mean that the employer need not compensate the employee for the "aggravation" injuries. *Duncan v. W.M. Davidson Const. Co.*, 170 Kan. 520, 227 P.2d 95 (1951); *Humber Towing Co. v. Barclay*, 5 B.W.C.C. 142 (1911). However, the vast majority include such damages. 2 LARSON, *op. cit. supra* note 49, at 188.

⁵⁴ *Garrison v. Graybeel*, 308 S.W.2d 375 (Tenn. 1957). The act itself is a tort and is not within the purview of the compensation act. All the states, with the exception of Ohio and West Virginia, have enacted specific "third person" provisions by which the employee's common law action is preserved against a tort-feasor who is not within the employer-employee status. *Cf. 2 LARSON, op. cit. supra* note 49, at § 71. This "third person" may include a co-employee in most states, *Garrison v. Graybeel, supra* at 379, although others extend immunity to co-employees and those in "common employment." 2 LARSON, *supra* at § 72.20-30. This distinction becomes vital under the instant circumstance since the physician is often an agent or employee of the employer, and if included within the act, is immune from suit at law. See, *e.g.*, *Martin v. Consolidated Cas. Co.*, 138 F.2d 896 (5th Cir. 1943); *Hayes v. Marshall Field & Co.*, 351 Ill. App. 329, 115 N.E.2d 99 (1953).

Formerly in two other states, Alabama and Illinois, and possibly a third, Washington, if the doctor carried compensation insurance for his employees, he was immune against suit at tort for malpractice while treating a compensable injury of any employee in the state. See, *e.g.*, *Duvarado v. Moore*, 343 Ill. App. 304, 98 N.E.2d 855 (1951); 2 LARSON, *op. cit. supra* note 49, at § 72.40. Larson favors this extension of immunity to all the members of the state's compensation system. He feels that since "the purpose of the legislation was to dispense with common law personal injury litigation for the benefit of members of the system, all members should benefit alike. . . ." Professor Larson envisions an extension of the immunity even beyond the particular state's boundaries.

However, this extension of the system seems inconsistent with the traditional objectives of the early compensation acts. It gives protection to employers outside the immediate employer-employee relationship from which the original acts developed, and precludes suits at common law which would not have been barred by the defenses accompanying that status. *Cf. 1 LARSON, op. cit. supra* note 49, § 4. The *Duvarado* result was upset in Illinois by *Grasse v. Dealer's Transport Co.*, 412 Ill. 179, 106 N.E.2d 124 (1952) where the applicable provision of the act was declared unconstitutional. The Alabama statute, ALA. CODE ANN. tit. 26 § 311 (1941), was subsequently repealed. Ala. Acts 1947, § 2, at 485. The Washington statute, WASH. REV. CODE § 51.24.010 (1939), was re-enacted without the unusual immunity provision. WASH. REV. CODE § 51.24.010 (1957). Thus, the statutory support for a trend in favor of Professor Larson's theory has faded. It is submitted that the practical and historical difficulties confronting this theory will prove to be insurmountable notwithstanding its idealistic worth.

The furthest extension of the "third person" provision is seen in *Duprey v. Shane*, 39 Cal. 2d 781, 249 P.2d 8 (1952). Here the employer was also a chiropractor and he sought to render aid after the industrial injury occurred, but succeeded only in aggravating the injury. The court held that the fact that the attending doctor is the employer does not affect the legal rights of the employee. The merit of this decision is that the court correctly adhered to the distinction between both acts of injury and recognized that the act of aggravation, although performed by the employer, was not executed by him as an employer within the relationship contemplated by the compensation act.

both actions overlap is not sufficient justification for using the compensation theory as a preventive to a perfectly valid action in tort. The intermingling of the systems may harm the very person the compensation statutes are designed to protect.⁵⁵

The jurisdictions providing employer subrogation are said to give the employee his due since he gets the excess of any recovery by the employer. However, this is little solace if the employer either refuses to sue or does so carelessly, with no real determination to obtain as large a recovery as he can. The employee was the person injured; he should be given the command of his own suit. Reason requires the conclusion that the two injuries be confined to their respective systems. A considerable amount of authority supports this conclusion.⁵⁶ Common sense suggests that the compensation statutes ought not be used to counteract the policy on which they stand, *i.e.*, the protection and advancement of employee claims. Little, if anything, need be said of the jurisdictions which discharge the negligent physician of liability.⁵⁷ The inequitable results in these cases give sufficient indication of the reasoning supporting the decisions.

III. THE ALLERGY CASES

A. The General Rule

When one begins a discussion of an aspect or area of the law using as his theme the "growth of the law," he is necessarily crystallizing one or more "general rules" in the area in order to have them conform with "change," either physical, as in the case of the discovery of unknown chemical elements, or psychical, as the recognition of the right of a particular minority. The "general rule" can be expanded, contracted, or even abrogated, whenever existing values are reformulated to recognize an action for antiquated remediless harms, or novel harms recently recognized. In the last few years it has become evident that an appreciable percentage of the populace has been harmed by hypersensitive reactions to ingredients contained within the growing number of products on the market composed mainly of chemical elements. Such products usually contain an allergenic ingredient which, though harmless to the public in general, adversely affects the allergic user.⁵⁸

The typical action for this injury is generally pleaded on alternate grounds: breach of warranty either express or implied, and negligence.⁵⁹ The parties defendant usually include both the seller and the manufacturer, since each may be liable under one or both theories. The preferred theory is that of breach of warranty, since the problem of proof is less demanding⁶⁰ and this remedy approaches the imposition of an absolute liability on the vendor.⁶¹ However, the difficulties arising from the use of this theory

⁵⁵ See Leidy, *Malpractice Actions and Compensation Acts*, 29 MICH. L. REV. 568 (1931).

⁵⁶ See notes 50 & 52, *supra*.

⁵⁷ See 2 LARSON, *op. cit. supra* note 49, at 191.

⁵⁸ Allergy is defined as "the abnormal reaction of tissues to physical stimuli." FEINBERG, *ALLERGY IN PRACTICE* 49 (1944). The type of allergy usually involved in these cases may be termed the "contact" type. This type is "manifested mainly by reaction in the upper layers of the skin, occasioned usually through direct contact with the antigen. The reaction produced is a contact dermatitis arising from the direct contact of the allergen with the skin surface." FEINBERG, *supra* at 54. An antigen is a "substance capable of stimulating the production of a specific anti-body. . . . Allergens are substances which produce responses of hypersensitiveness, regardless whether they do or do not result in demonstrable antibodies. [The term] "allergen" is also employed to signify the source of the allergenic substance." FEINBERG, *supra* at 65. See also Horowitz, *Allergy of the Plaintiff as a Defense in Actions Based Upon Breach of Implied Warranty of Quality*, 24 SO. CAL. L. REV. 221, 224-27 (1951).

⁵⁹ See, *e.g.*, *Cumberland v. Household Research Corp. of America*, 145 F. Supp. 782 (D. Mass. 1956).

⁶⁰ For instance, in some jurisdictions the seller's knowledge of the defect may be material in a negligence action, but he is liable notwithstanding knowledge in a warranty action if the other requisites are met. See *Zampino v. Colgate-Palmolive Co.*, 10 Misc. 2d 686, 173 N.Y.S.2d 117, 120 (Sup. Ct. 1958). Also, in a few jurisdictions, contributory negligence is not a defense against a suit for breach of warranty. *Bahlman v. Hudson Motor Co.*, 290 Mich. 683, 288 N.W. 309 (1939); *Challis v. Hartloff*, 136 Kan. 823, 18 P.2d 199 (1933).

⁶¹ 2 HARPER & JAMES, *TORTS* §§ 28.15, 28.26 (1956).

in the allergy situation—e.g., lack of privity of contract,⁶² the so-called “abnormality” of the vendee,⁶³ and the other usual defenses against an action on warranty⁶⁴—have generally precluded the plaintiff from recovery, although a few courts have indicated their receptiveness to recognize a remedy under this theory notwithstanding the defenses.⁶⁵ The basic principles involved in recovery under warranty follow closely that of negligence,⁶⁶ and to prevent an overlapping in the treatment of both, the remainder of this Note will focus on the negligence theory, with the understanding that the ar-

62 Breach of warranty is usually pleaded against the seller since under ordinary circumstances the buyer has no privity of contract with the manufacturer. Barasch, *Allergies and the Law*, 10 BROOKLYN L. REV. 363, 368 (1941). The general rule requires privity of contract between the parties for a recovery on express or implied warranty with the exception of sales of foodstuffs and medicines. 1 WILLISTON, SALES § 244 (rev. ed. 1948).

63 The favorite defense against both expressed and implied warranties is that the injury was caused by the abnormal physical condition of the user. It is said that “warranties do not extend to injuries caused by the peculiar idiosyncrasies or physical condition of the user which are not reasonably foreseeable.” *Merrill v. Beaute Vues Corp.*, 235 F.2d 893, 898 (10th Cir. 1956). See also *Hanrahan v. Walgreen Co.*, 243 N.C. 268, 90 S.E.2d 392 (1955); Comment, 25 FORDHAM L. REV. 306 (1956). For a list of cases supporting this proposition, see 26 A.L.R.2d 963 (1952).

64 Some of these are the following:

1. Failure to prove warranty: Few sellers expressly include the deleterious effects of an allergy in the warranty. The language used is that the product is “harmless” or “will not injure the skin.” See *Cumberland v. Household Research Corp. of America*, 145 F. Supp. 782, 785 (D. Mass. 1956). However, this language may also constitute the implied warranties of fitness or merchantability although the latter attaches automatically from the sale of the particular product itself. *Zampino v. Colgate-Palmolive Co.*, 10 Misc. 2d 686, 173 N.Y.S.2d 117 (Sup. Ct. 1958); UNIFORM SALES ACT 15(1), (2), (5). See also Horowitz, *op. cit. supra* note 58, at 222.

2. Contributory negligence: *Nelson v. Anderson*, 245 Minn. 445, 72 N.W.2d 861 (1955). Contributory negligence is a good defense against breach of warranty under the majority rule.

3. Disclaimer: see Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 157-67 (1943).

65 *Bianchi v. Denholm & McKay Co.*, 302 Mass. 469, 19 N.E.2d 697 (1939); *Zirpola v. Adams Hat Stores, Inc.*, 122 N.J.L. 21, 4 A.2d 73 (1939). As for the privity of contract preventive, numerous writers have advocated an extension of the “food and medicine” exceptions, especially in regard to packaged articles sold by the manufacturer to the general public through dealers. See 2 HARPER & JAMES, TORTS 1573 (1956); 1958 ILL. LAW FORUM 314. The tendency of courts to recognize express warranties in the extensive advertising accompanying the product may remove this limitation in suits against the manufacturer. *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 147 N.E.2d 612 (1958); *Worley v. Procter & Gamble Mfg. Co.*, 241 Mo. App. 1114, 253 S.W.2d 532 (1952). See 1 WILLISTON, *supra* at 648. It has also been suggested that cosmetics, which incidentally form the bulk of the “allergy” cases, and other preparations sold in sealed packages and designed for application to the body be included in the “foodstuffs and medicine” exception to the privity rule. *Rogers v. Toni Home Permanent Co.*, *supra* at 614; *Worley v. Procter & Gamble Mfg. Co.*, *supra* at 535. Also, application of the rule to implied warranties has recently received some adverse criticism because of the similarity between implied warranty and negligence. See *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, 353 Mich. 120, 90 N.W.2d 873 (1958).

In regard to the defense of abnormality of the vendee (see note 64 *supra* and accompanying text), some courts have recognized the necessity of protecting the allergic segment of the public and allow recovery despite the allergy if the plaintiff can show he is one of a class of “some” people. *Cumberland v. Household Research Corp. of America*, 145 F. Supp. 782, 785 (D. Mass. 1956); *Bianchi v. Denholm & McKay Co.*, *supra* at 699. It has been suggested that the confusion lies in the failure of the courts to understand allergy and to recognize the allergic plaintiff as a member of a class to be protected. See *Merrill v. Beaute Vues Corp.*, 235 F.2d 893, 899 (10th Cir. 1956) (concurring opinion); Horowitz, *op. cit. supra* note 58, at 223.

The semantic difficulty in the treatment of warranty in the allergy cases is seen in *Jacquot v. Wm. Filene's Sons Co.*, 149 N.E.2d 635, 639 (Mass. 1958). The Massachusetts court insists that the plaintiff prove “that the product was unfit to be used by a normal person” to recover under warranty. (Emphasis added.) However, in the same breath the court approved the holding in *Bianchi*, i.e., that although the allergen would not affect the “average person,” as long as the plaintiff could prove he was a member of a class of “some” persons allergic to the product, there will be a recovery. *Bianchi v. Denholm & McKay Co.*, *supra* at 699. In *Jacquot*, the court denied recovery because the plaintiff did not show she was one of a class of persons described in *Bianchi*. Therefore, it must be concluded that the Massachusetts court has held that a person who is a member of a class of persons sensitive to a product which is harmless to the average person is “normal.”

66 See *Merrill v. Beaute Vues Corp.*, 235 F.2d 893, 898 (10th Cir. 1956).

guments in favor of recovery under negligence may also be used in presenting a case under the warranty theory.

A preliminary statement must first be made before entering a discussion of the negligence theory. The allergy cases do not present the usual "inherently dangerous product" problem that generated the *MacPherson* rule.⁶⁷ The usual cases under this rule stem from the negligent manufacture of the product. The allergy cases, on the other hand, are concerned not with an article negligently made but with an article inherently dangerous to a *limited segment* of the general public, *i.e.*, those allergic to an ingredient in the article. Negligence arises from the failure of the manufacturer to warn this segment. The manufacturer is understandably reluctant to include this warning because of its pernicious effect on the product's marketability.

The duty of a manufacturer to warn the remote vendee of an inherently dangerous product was recognized in this country more than one hundred years ago.⁶⁸ However, the necessity of warning a minute segment of the ultimate users — those allergic to an ingredient within the product — is of recent vintage. The product is absolutely harmless to the vast majority of people, but may result in injury and even death to a few. The earliest thought on the matter was that the duty applied only when the manufacturer or seller had *actual* knowledge of the danger.⁶⁹ A later development, strengthening this rule in favor of the manufacturer or seller, was expressed in *Bish v. Employers Liab. Assur. Corp.*⁷⁰ This court stated that a warning was not required where an "injury results from the sensitivity or allergy of a person in the use of a product which would be innocuous to normal people."⁷¹ A few days later in *Merrill v. Beaute Vues Corp.*,⁷² the Tenth Circuit held there was no duty to warn even though the manufacturer *knew* 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.

A close reading of these cases reflects three salient considerations. The first is that these courts appear apprehensive of extending the manufacturer's duty beyond the "normal" or "average" person, intimating that a person with an allergy is not, for this purpose, normal.⁷³ Secondly, for the most part they seem unable to recognize the "allergic person" as a member of a distinctive class of sufficient size to warrant pro-

⁶⁷ *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916). See also Dillard & Hart, *Product Liability: Directions for Use and Duty to Warn*, 41 VA. L. REV. 145, 146 (1955).

⁶⁸ *Thomas v. Winchester*, 6 N.Y. (2 Seld.) 397, 57 Am. Dec. 455 (1857).

⁶⁹ *Briggs v. National Industries, Inc.*, 92 Cal. App. 2d 542, 207 P.2d 110 (1949). This case referred to the dangerous character of the product. In *Gerkin v. Brown & Sehler Co.*, 177 Mich. 45, 143 N.W. 48 (1913), the court found knowledge that the commodity would injure "some" innocent purchaser. See also *Arnold v. May Dep't Stores Co.*, 337 Mo. 727, 85 S.W.2d 748 (1935), where a beautician applied hair dye to plaintiff even though the plaintiff had warned her of a "sensitive" skin. This court indicated it was receptive to the theory of negligence without actual knowledge of the danger to a particular person. See note 76 *infra*.

⁷⁰ 236 F.2d 62 (5th Cir. 1956). This court supported its statement with a case from New South Wales. *Levi v. Colgate-Palmolive Proprietary, Ltd.*, 41 N.S.W. St. 48, 58 Weekly N. 63 (1941). See also *Zampino v. Colgate-Palmolive Co.*, 10 Misc. 2d 686, 173 N.Y.S.2d 117 (Sup. Ct. 1958) (dictum).

⁷¹ 236 F.2d at 69.

⁷² 235 F.2d 893, 897 (1956). This court relied on a quotation from *Bennett v. Pilot Prod. Co.*, 120 Utah 474, 235 P.2d 525 (1951) where the court criticized former cases for permitting recovery to an "unanticipated few whose sensitivities or allergies are not reasonably foreseeable. . . ." However, the cases it criticized, *Gerkin v. Brown & Sehler Co.*, 177 Mich. 45, 143 N.W. 48 (1913) and *Zirpola v. Adam Hat Stores, Inc.*, 122 N.J.L. 21, 4 A.2d 73 (Ct. Err. & App. 1939), found that the product affected more than a few—certain to injure "some" in *Gerkin*, and "4 or 5% of all persons" in *Zirpola*—which reasonably could have excluded them from the "unanticipated" class.

⁷³ See *Merrill v. Beaute Vues Corp.*, *supra* note 72, at 897; *Bish v. Employers Liab. Assur. Corp.*, *supra* note 70, at 69; *Bennett v. Pilot Prod. Co.*, *supra* note 72, at 527. See also PROSSER, TORTS 503 (2d ed. 1955). This consideration seems analogous to the requisite for liability in an action for breach of the warranty of merchantability. See *Worley v. Procter & Gamble Mfg. Co.*, 241 Mo. App. 1114, 253 S.W.2d 532 (1952); *Hahrahan v. Walgreen Co.*, 243 N.C. 268, 90 S.E.2d 392 (1955). *But see* the discussion of *Jacquot v. Wm. Filene's Sons Co.*, 149 N.E.2d 635 (Mass. 1958) in note 65 *supra*.

tection.⁷⁴ Thirdly, and as a necessary conclusion to the above premises, the courts fail to see the foreseeability of a reasonable man which would lodge negligence in the manufacturer for failing to warn under these circumstances.⁷⁵

B. The Plea for Change

The soundness of the accepted allergy theories was questioned in the concurring opinion of Judge Murrah in the *Merrill* case. He noted that some jurisdictions,⁷⁶ notably Massachusetts,⁷⁷ have recognized a duty to warn of "known or imputed dangers" if the allergic plaintiff could be placed in a class of "some" persons who would be injuriously affected by an ingredient in the product.⁷⁸ He then drew upon scientific and medical data to prove that the allergic and hypersensitive are recognized as a definite class, presenting "physiological and biochemical problems arising out of . . . contact with the products of advanced chemistry."⁷⁹ Judge Murrah concluded by fixing a duty to warn in the manufacturer if it knew or *should have known* that some of the product's ingredients were harmful to the "unusually susceptible."⁸⁰

Subsequent cases appear to have followed the reasoning of Murrah rather than the majority of the court in *Merrill*. In *Wright v. Carter Products, Inc.*,⁸¹ the Second Circuit, although committed to Massachusetts law on the tort issue, held that the manufacturer's standard of care "to its ultimate consumers may include a duty to warn those few persons who [sic] it knows cannot apply its product without serious injury."⁸² A further extension of this duty is seen in *Braun v. Roux Distrib. Co.*,⁸³ where the manufacturer was held liable when an ingredient in its hair dye, paraphenylenediamine, caused an allergic reaction in plaintiff which afflicted her with periarthritis nodosa, a rare and usually fatal disease. The manufacturer had a patch test to determine allergy which was used correctly by the plaintiff on the first application of the hair dye with no adverse results. However, following numerous applications of the dye, the plaintiff's skin became sensitized and she developed the reaction. It was shown that the defendant gave no warning regarding the danger of subsequent applications. The fact that the defendant knew nothing of the danger, and that this was the first case of record of periarthritis nodosa in 75 million applications of defendant's product and untold

⁷⁴ *Merrill v. Beaute Vues Corp.*, *supra* note 72, at 897; *Bish v. Employers Liab. Assur. Corp.*, *supra* note 70, at 69; *Bennett v. Pilot Prod. Co.*, *supra* note 72, at 527.

⁷⁵ *Ibid.* The *Merrill* case indicates the error in the rationale of former opinions in using lack of proximate cause as a basis for denying recovery. See *Walstrom Optical Co. v. Miller*, 59 S.W.2d 895 (Tex. Civ. App. 1933); *Hamilton v. Harris*, 204 S.W. 450 (Tex. Civ. App. 1918). These courts confused negligence with causation and held that allergy breaks the chain of causation as a matter of law. Yet if we presume negligence in the defendant, as we must if we are to discuss proximate cause, it is for failure to warn against these specific injuries. Consequently, the allergy cases stand or fall on the negligence issue. *Cf.* Note, 49 MICH. L. REV. 253 (1950).

⁷⁶ *Zirpola v. Adam Hat Stores*, 122 N.J.L. 21, 4 A.2d 73 (1939); *Arnold v. May Dep't Stores Co.*, 337 Mo. 727, 85 S.W.2d 748 (1935); *Gerkin v. Brown & Sehler Co.*, 177 Mich. 45, 143 N.W. 48 (1913).

⁷⁷ *Bianchi v. Denholm & McKay Co.*, 302 Mass. 469, 19 N.E.2d 697 (1939) (warranty). This holding, although not overruled, appears somewhat tenuous in view of subsequent decisions on the issue of warranty of fitness in Massachusetts. *Cf.* *Graham v. Jordan Marsh Co.*, 319 Mass. 690, 67 N.E.2d 404 (1946). These cases emphasize the requirement of normalcy in the plaintiff. A possible distinction is suggested in *Wright v. Carter Prod. Co.*, 244 F.2d 53, 58 n.2 (2d Cir. 1957). In *Graham*, the dealer was sued; in *Bianchi*, it was the manufacturer. The scope of the dealer's duty to warn is said to include only the normal people. The manufacturer, however, is said to be an expert and should foresee harm to the unusually susceptible. *But see* Comment, 25 FORDHAM L. REV. 306, 312 (1956), which concluded that *Graham* overruled *Bianchi*. This conclusion, although justifiable at the time the article was written, appears to have been incorrect in the light of *Jacquot v. Wm. Filene's Sons Co.*, 149 N.E.2d 635, 639 (Mass. 1958).

⁷⁸ *Merrill v. Beaute Vues Corp.*, 235 F.2d 893, 899 (10th Cir. 1956) (concurring opinion).

⁷⁹ *Ibid.*

⁸⁰ *Id.* at 900.

⁸¹ 244 F.2d 53 (2d Cir. 1957).

⁸² *Id.* at 58. Note the favorable quote to Murrah's opinion on p. 58 n.3.

⁸³ 312 S.W.2d 758 (Mo. 1958). See also *Schilling v. Roux Distrib. Co.*, 240 Minn. 71, 59 N.W.2d 907 (1953).

millions of other companies, were to no avail.⁸⁴ There was some existing scientific information that the ingredient was a "sensitizer," and this was sufficient to raise the duty to warn in the defendant.⁸⁵

These cases appear to disagree with the rationale elicited in the *Merrill* line of cases. Although they seem to agree that the allergic person is not normal, they part company on the second premise and find that the law ought to extend its protection to the hypersensitive. He is not an "isolated" or "unanticipated" user, but a member of a distinctive class. The conclusion of foreseeability in the manufacturer follows a fortiori.

The courts sanctioning the *Merrill* approach seem to consider it unfair to charge the manufacturer with the duty of recognizing the danger to so small a segment of his ultimate consumers. Yet, there is little to say in favor of this view. The manufacturer is not asked to be an insurer of his product against any or all harms; he is merely required to discover the nature of his product in the light of the available scientific information. He is said to be an expert in his particular product and his standard of care must be measured correspondingly.⁸⁶ The expense of maintaining an adequate staff, well-schooled in ferreting out the latent dangers of the product's ingredients, seems minimal in comparison with the safety of the unsuspecting hypersensitive.

It has been asserted in defense of the maker that a warning is usually ineffectual since the ultimate user is generally unaware of his allergic condition or, even if he were aware of it, he would not have foreseen the particular consequences and used the product anyway.⁸⁷ In other words, the ignorance of the victim is used to discharge the obligation to warn. The transparency of this assertion is apparent on its face for two reasons. First, it is assumed that every vendee ignorant of his allergy will ignore the warning. The vendee is thereby given no opportunity to choose between accepting or rejecting the risk of an allergic reaction. Secondly, this argument is contrary to public policy. It tends to promote the refusal to warn even when the manufacturer knows of the harmful ingredient on the belief that he may have an available defense against one subsequently harmed who is ignorant of the allergy.

Once the duty to warn is recognized, the general principles of tort liability can be applied. The warning must be sufficiently adequate to afford the user the opportunity of avoiding all dangers from the product.⁸⁸ If instructions accompany the product and are found wanting or ambiguous, the maker may be liable for subsequent injuries.⁸⁹ Failure of the user to follow the instructions or conform to the warning constitutes contributory negligence and precludes recovery.⁹⁰

One element of the duty to warn remains to be discussed. Emphasis is usually placed on the requirement that the allergic victim be included within a distinctive class. Some would maintain this to be impossible, that the victims are isolated and their injuries are simply *damnum absque injuria*.⁹¹ The better view recognizes the common plight

⁸⁴ It was estimated that approximately 65 million applications per year were manufactured by another company. See *Phillips v. Roux Lab.*, 286 App. Div. 549, 145 N.Y.S.2d 449 (1955).

⁸⁵ *Braun v. Roux Distrib. Co.*, *supra* note 83, at 763.

⁸⁶ *Ibid.*

⁸⁷ The majority in *Merrill v. Beaute Vues Corp.* 235 F.2d 893, 897 (10th Cir. 1956) seemed particularly concerned with this aspect. Even *Murrah* in his concurring opinion appears to stress the importance of the plaintiff's knowledge of her unusual susceptibility before the duty to warn is brought into play. (*Cf.* the second question *Murrah* would have submitted to the jury had he been able to use his theory. 235 F.2d at 900.) Directly opposed in its outlook was the court in *Braun v. Roux Distrib. Co.*, 312 S.W.2d 758 (Mo. 1958), where the consideration was obviously present due to the rarity of the disease, and the court thought enough of it to exclude it entirely from the opinion. *Cf.* *Dillard & Hart, op. cit. supra* note 67, at 163.

⁸⁸ See *Braun v. Roux Distrib. Co.*, *supra* note 87. See also *Dillard & Hart, op. cit. supra* note 67, at 160, for an excellent analysis of the scope of the warning.

⁸⁹ *Schilling v. Roux Distrib. Co.*, 240 Minn. 71, 59 N.W.2d (1953).

⁹⁰ *Arata v. Tonegato*, 152 Cal. App. 2d 837, 314 P.2d 130 (1957).

⁹¹ *Merrill v. Beaute Vues Corp.*, 235 F.2d 893 (1956) and cases cited therein.

of the hypersensitives and gives them the status of a "class."⁹² Yet in their phraseology, these courts allude to a quantitative requirement of the class, that the victim be of a class of "some" people,⁹³ a recognized "few."⁹⁴ The question arises whether this quantitative requirement is satisfied by the fact of being allergic to the ingredient or whether it additionally demands that the allergy be among the various recognized allergies in existence. Since the vast majority of cases involve injuries from familiar forms of dermatitis, the question may be academic. However, it is within the realm of reason to have an allergy so rare as to effect but one, or at the very most, a meager few of the users.⁹⁵ In this case, the distinction might be dispositive of the issue of negligence. The better view, that which seems more consonant with the reasoning supporting the general duty to warn, is that the quantitative requirement is satisfied by proof of the victim's hypersensitivity without the necessity of proving other cases of like instances of allergic reactions.⁹⁶

Conclusion

From the foregoing discussion, it is evident that blind adherence to a "general rule" in any case may lead to disaster. The usual aggravation cases have shown little, if any, substantive changes over the last half-century. Yet on numerous occasions a strong case for plaintiff is unsuccessful due to the attorney's failure to recognize and avoid one of the many danger areas in the process of litigation. Perhaps a check-list of the various troublesome areas may circumvent this result.

Of special concern to every personal injury attorney is the peculiar rule absolving the original tort-feasor from damages due to subsequent malpractice by a doctor if the tort-feasor has prudently selected the doctor. This selection must be made by the victim or he may be precluded from holding the original wrongdoer liable for the "aggravation" damages and run the risk of the physician being insolvent, leaving him remediless for these subsequent damages. An injudicious release of the original wrongdoer may also result in a denial of recovery for the malpractice damages in most jurisdictions. Three observations seem patent from the textual discussion of this problem: 1) an attorney should be extremely hesitant about advising the victim to release the original tort-feasor soon after the injury has occurred; 2) if a release is given and the "aggravation" damages are known, the consideration for the release should include the "aggravation" damages; 3) if there is no indication of "malpractice" damages at the time of the release, the instrument nevertheless should be worded so as to express clearly an intent to preserve a cause of action against the physician when and if any injuries result from his malpractice.

The allergy cases present the difficult problem of reconciling a small minority's right of protection against harm with a just consideration of the rights of the manufacturer or dealer, while at the same time recognizing the legitimate consumer interests of the majority of purchasers. The issue confronting the courts may be phrased as follows: is the imposition of a duty to warn the hypersensitive, or is the extension of the scope of the warranty of merchantability to include his "abnormality," so burdensome that it becomes unjust under the circumstances? An omnipresent consideration in the

⁹² *Id.* at 899 (concurring opinion).

⁹³ *Merrill v. Beaute Vues, Corp.*, 235 F.2d 893, 899 (10th Cir. 1956) (concurring opinion); *Gerkin v. Brown & Sehler Co.*, 177 Mich. 45, 143 N.W. 48 (1913).

⁹⁴ *Wright v. Carter Prod., Inc.*, 244 F.2d 53 (2d Cir. 1957).

⁹⁵ See, e.g., *Braun v. Roux Distrib. Co.*, 312 S.W.2d 758 (Mo. 1958); *Merrill v. Beaute Vues Corp.*, 235 F.2d 893 (10th Cir. 1956).

⁹⁶ See *Braun v. Roux Distrib. Co.*, *supra* note 95. However, this analysis must be limited to actions on negligence. The emphasis on normalcy in warranty actions would preclude recovery to those afflicted with rare allergies. See *Worley v. Procter & Gamble Mfg. Co.*, 241 Mo. App. 1114, 253 S.W.2d 532 (1952). Even in the jurisdictions which seem to favor extending the warranty to a class of "some" persons sensitive to the product, the requirement "some" means more than the fact of being allergic. See *Jacquot v. Wm. Filene's Sons Co.*, 149 N.E.2d 635 (Mass. 1958).

resolution of this issue is the fact that any expense on the manufacturer, either by way of liability in damages or increased insurance premiums, will ultimately be passed on to the consumer in the form of an increase in price.

The duty to warn is not unduly burdensome, for the manufacturer is merely required to give the allergic an opportunity to avoid the harmful effects of his malady. Once it is understood that the failure-to-warn action is to serve a preventive as well as a compensatory purpose, four well-defined values emerge: 1) it prevents the manufacturer from using the general public as a testing ground for potentially harmful products; 2) since the duty extends only to those elements in the products which the manufacturer knew or should have known were likely to sensitize, the duty will result in preventive measures of social and economic value, such as product research; 3) the manufacturer will be induced to rid his product of any allergenic ingredient; 4) the manufacturer's response to the rule may promote an awareness of allergies and their symptoms, so that allergic persons may avoid injury by simply avoiding the product. With these considerations in mind, accompanied by the fact that the manufacturer can avoid liability by inserting an adequate warning, the imposition of this duty does not seem to be unjust in the light of the protection it gives the hypersensitive person. It is merely part of the consideration the allergic receives for the purchase price of the product.

The extension of the scope of the implied warranty presents a more difficult problem. While the duty to warn, as reflected in the *Braun* case, *supra*, approaches strict liability, the warranty in fact requires mere proof of damage from the product for recovery. Also, the dealer is usually the defendant in these actions, rather than the manufacturer, although the dealer may have an action against the manufacturer following an unsuccessful defense. There is little that the dealer or maker can do to escape liability. However, it is submitted that the beneficial aspects of the inclusion of the hypersensitive within the warranty outweigh the burden it places on manufacturers of sensitizing products. The inclusion would be a persuasive instrument in producing the results mentioned above relative to the duty to warn. It would also serve as an effective safeguard against the harmful effects stemming from the frequent use of products containing newly-discovered chemical ingredients.

One limitation must be inserted, however. It would seem that even the most liberal concept of warranty would exclude the hypersensitive with a rare allergy. That is, even the jurisdictions including within the warranty those persons sensitive to a product which is harmless to the "average person" would require that the allergic person be a member of a class of "some" number of persons similarly situated. Although the number of people or percentage of the general populace comprising the term "some" has never been definitively enunciated in any jurisdiction, it is clear that the number is certainly more than one or a few. This limitation seems reasonable at the present time since the basic concept of warranty does not require the vendor to insure every vendee against every harm resulting from the product. On the other hand, to preclude recovery on the ground that the sensitivity of the vendee renders him abnormal is to overlook the fact that the class of hypersensitives has grown to a size of sufficient number to require protection.

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