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Legal Safety Standards for Detergents

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IN THE RECENT CASE of *Brooks v. Temple Sinai,* the Court of Appeals of New York affirmed an award of the Workmen's Compensation Board in favor of the claimant, holding that "the evidence sustained a finding of causal relationship between the splashing of detergent in the claimant's eye and the subsequent loss of sight in such eye, notwithstanding a prior history of eye trouble." [1] Two judges protested vigorously on the grounds of overwhelming testimony against causal relationship and questioned the granting of the award on the bare legal sufficiency of other medical opinion.

The dispute between the expert witnesses concerned the origin and cause of the infection which resulted in the claimant's loss of use of his right eye. Claimant had a pre-existing bleb[2] on his right eye and the crux of the infection controversy pivoted on the testimony that the claimant's eye condition, known as iridocyclitis[3] with bacterial origin, could have manifested itself within one half hour after the detergent had splashed into his eye. The fatal infection had been diagnosed by the claimant's physician the day after the injury. The non-causal relationship testimony averred that the incubation period for an iridocyclitis with bacterial origin must be at least 48 hours, and that the infection came from within.

The disturbing element presented by the *Brooks* case holding is not so much the ruling concerning the weight of the testimony, but rather the arbitrariness of the court in declaring the manufacturer liable for an injury caused from the use of its product by a person having a serious pre-existing injury, who, with reasonable diligence and care, should have known that any irritant, such as strong soap or similar detergent, would be deleterious upon contact with his existing condition.

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[1] Brooks v. Temple Sinai, 9 N. Y. 2d 917, 217 N. Y. S. 2d 88 (1961).

[2] Stedman's Medical Dictionary, Unabridged Lawyer's Edition (1961), p. 213, defines "bleb: a collection of fluid beneath the skin; usually the lesions are smaller than bullas or blisters."

[3] Stedman's Medical Dictionary, Unabridged Lawyer's Edition (1961), p. 788, defines "iridocyclitis: inflammation of both iris and ciliary body."

The decision of the *Brooks* court seems to be a stinging contradiction of the generally accepted principles applicable in the area of products liability. This article will attempt to reconstruct these principles in order that we may not lose sight of, nor stray beyond, that which has become the well ordered test of the manufacturer's liability for injuries sustained from the use of its products.

The Negligent User and Obvious Danger

Haberly v. Reardon Company involved an action brought against a paint manufacturer for damages resulting in blinding of one eye of a minor child, caused by a drop of cement base paint which splashed into his eye while helping his father paint.[4] The court seemed to stress the "natural proclivity of children to insist upon being in close proximity to a father when he is performing tasks such as painting." [5] In determining the manufacturer's liability, the court concluded that had the father been adequately warned that a blob of that paint lodged in the eye might mean immediate blindness, his preventative measures would have been different. Two judges concurred in the pointed dissent delivered by Judge Hyde, who concluded that "while a manufacturer may be liable for injuries caused by the use of his product in the manner and for the purpose for which it is supplied . . . (he) does not warrant that all users will act without negligence in using it." [6] Clearly this principle should have been applied to the facts in the *Brooks* case, as being in accord with the recent holding in *Siemer v. Midwest Mower Corp.*[7] wherein the court concluded that a manufacturer is not liable, under New York law, unless the accident was the result of an unknown or latent danger not known or obvious to the plaintiff using the manufactured article.

The "danger" in the *Brooks* case, to that particular plaintiff

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[4] Haberly v. Reardon Co., 319 S. W. 2d 859 (Sup. Ct. Mo., 1958).

[5] *Id.* at p. 869.

[6] *Id.* at p. 870.

[7] Siemer v. Midwest Mower Corp., 286 F. 2d 381 (8 Cir., 1961). Further emphasis of this point is made in Sawyer v. Pine Oil Sales Co., 155 F. 2d 855 (5 Cir., 1946), wherein the court determined that no one is under an actionable duty to warn another of a fact of which he is already fully aware, and that consequently there was no duty owing to the plaintiff by the defendant to warn the plaintiff because the "danger" of injury from getting the cleaning agent in the eye was "obvious."

was clearly obvious, as the facts disclosed the serious nature of his pre-existing condition and the high susceptibility thereof to infection.

Negligence and The Normal User

In *Lehner v. Procter & Gamble Mfg. Co.*, the plaintiff sought damages for alleged injuries (contact dermititis) sustained from the use of "Tide." She claimed that the defendant was negligent in marketing a product composed of "harmful, deleterious and inherently dangerous substances" and did falsely advertise the product as being "kind and harmless" to hands.[8] Reversing a judgment of the City Court of the City of New York, the Supreme Court, Appellate Term, deciding as a matter of fact that the plaintiff did not establish that the product was harmful or inherently dangerous, concluded that the results of the tests conducted by the defendant (a mere redness of hands acquired by a small percentage), could not be considered as establishing proof of knowledge by the defendant of a potential danger to a number of persons in using its product.

Negligence and The Allergic User

The decisions concerning known allergic users are clearly defined in *Taylor v. Newcomb Baking Co.*[9] In that case the plaintiff was employed as a dishwasher and was supplied with a strong soap powder which contained a tri-sodium phosphate base, with instructions by his employer as to how much to use. He developed a serious allergic dermititis and sued his employer for negligence. Testimony disclosed that it was common knowledge in the trade that a good percentage of people are "hypersensitive" to soap powder. In granting an award of damages to the plaintiff, the court emphasized that "It is not necessary that the majority of employees be susceptible. It is enough if a sufficient number are susceptible so that a jury could reasonably say that the defendant ought to have known and recognized the danger of injury and ought to have guarded against it." [10]

Authority from the British Empire is clearly expressed in *Board v. Thomas Hedley & Co.*[11] In that case, which developed

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[8] Lehner v. Procter & Gamble Mfg. Co., 208 Misc. 186, 143 N. Y. S. 2d 172 (1955).

[9] Taylor v. Newcomb Baking Co., 317 Mass. 609, 59 N. E. 2d 293 (1945).

[10] *Id.* at p. 294.

[11] Board v. Thomas Hedley & Co., 2 All E. R. 431 (C. A. 1951).

into an interesting controversy concerning discovery proceedings, the plaintiff suffered contact dermititis of both hands after using "Tide," and sued the American manufacturer and the distributor for negligence, alleging that the product was dangerous and that the defendant knew or ought to have known this fact. The defendants were ordered to reveal all complaints received prior and subsequent to the date of the plaintiff's purchase, the latter being relevant only on the issue of whether or not the product was in fact dangerous. Holding for the plaintiff, the court declared that "The product would . . . be dangerous if it might affect normal users adversely, or even if it might adversely affect other users who had a higher degree of sensitivity than the normal, *so long as they were not altogether exceptional.*" [12] (Emphasis supplied.)

In this area, the courts are prone to consider the manufacturer's expert knowledge and access to information concerning his product. However, the confidence of the present-day detergent manufacturers may be evidenced by the general lack of warning, on their products, of possible deleterious effects therefrom to the possible class of susceptible or allergic users.

Breach of Warranty and The Normal User

The limitation on recovery on the basis of breach of warranty in cases concerning detergents is particularly well-defined by the court in *Worley v. Procter & Gamble Mfg. Co.*, wherein the plaintiff sued the manufacturer for alleged injuries suffered (contact dermititis) after using "Tide." [13] The court accepted the circumstances of the purchase as evidence of the plaintiff's reliance necessary in part to establish her case on a breach of warranty basis. However, in determining that the plaintiff failed to show that "Tide" contained any ingredient injurious to the skin of persons using that product, the court dismissed the com-

[12] *Id.* at p. 432. For comment on the "altogether exceptional user," see Cumberland v. Household Research Corp. of America, 145 F. Supp. 782 (D. C., D. Mass., 1956), wherein the court, in granting the defendant's motion for a new trial, instructing that the damages awarded to the plaintiff were excessive ($5000 for contact dermititis caused by the use of "Pine"), and inferred that although "a person is presumed to be normal," one might be sensitive to one substance and not to another, and that on this basis recovery might be defeated upon a showing that the plaintiff was of an isolated class overly susceptible to the product, whereof the defendant could not reasonably be held to have knowledge.

[13] Worly v. Procter & Gamble Mfg. Co., 241 Mo. App. 114, 253 S. W. 2d 532 (1953).

plaint, declaring that even were the plaintiff successful in proving a substance present in the product injurious to an allergic class, the "warranty in question is limited . . . to the absence in the preparation . . . of ingredients injurious to the skin of normal persons using the soap in a normal manner and the burden was upon the plaintiff to bring herself within the class contemplated." [14]

Summary

The ever increasing number of detergent products on the market has caused an ever higher degree of competition among the manufacturers. As a consequence of this, manufacturers have been inclined to promote their products as (1) making washdays the happiest day of the week, (2) being the stuff to clean your house inside and out, or (3) giving you "added" pleasure in washing dishes . . . etcetera, all for the longer and more beautiful life of your hands!

Fortunately, however, the courts are prone to adjudicate facts and not promotional proclamations, and have concluded in the majority of jurisdictions that knowledge or reason to know (by the manufacturer) of ingredients in its product injurious to a known class of users will render the manufacturer liable for injuries sustained therefrom, unless adequate warning is provided.

As mentioned previously, one may notice the general lack of warning on most detergent products, which may lead us to think that the manufacturers have come to believe in their own slogans, or, perhaps more reasonably, that they are reluctant to chance losing a considerable amount of the market by warning susceptible users * * * since what woman is not concerned over her "highly sensitive hands"! In line with this, mention might be made concerning this author's knowledge of one international insurance company which offers $35.00 to anyone who makes a complaint about a certain world famous detergent manufacturer.

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[14] *Id.* at p. 538. In Procter & Gamble Mfg. Co. v. Superior Court, 124 Cal. App. 2d 157, 268 P. 2d 199 (1954), the court seemed to infer in dictum that allergic users might recover on the basis of breach of warranty if the manufacturer knew or should have known that a product sold by him was dangerous to "some" persons, even though few in number as compared with the number of users of the product, where he failed to warn the ignorant of the hidden danger.