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## Louisiana Products Liability: The Allergic Consumer

David S. Willenzik

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## LOUISIANA PRODUCTS LIABILITY: THE ALLERGIC CONSUMER

Plaintiff suffered an acute allergic reaction to the defendant's hair relaxant, "Curl Free," causing her scalp, forehead, and neck to erupt in blisters and her hair to fall out in tufts. Her claim for relief, based on the combined theories of manufacturer's strict products liability and negligent failure to warn of the dangerous propensities of the product, was denied by the trial court. On appeal, the Louisiana Court of Appeal for the Third Circuit, though finding that the plaintiff's condition was at least in part due to an allergic reaction to the defendant's product, affirmed the lower court's decision on the grounds that no vice or defect could be found in the product and that the possibility of danger from an allergic reaction to "Curl Free" was so remote that defendant was under no duty to warn of such a possibility. The Louisiana Supreme Court subsequently denied certiorari. *Thomas v. The Gillette Co.*, 230 So.2d 870 (La. App. 3d Cir. 1970); *cert. denied* 255 La. 810, 233 So.2d 249 (1970).

All kinds of food, drug, and cosmetic products intended for human use can and do produce unintended side effects. Regardless of how beneficial and desirable these products may be, there will be some persons who will be allergic to an ingredient or ingredients therein.<sup>1</sup> Such products may be completely harmless to those who are not allergically susceptible to injury from their use, and yet, these same products may have deleterious effects on others who are unknowingly allergic.

Louisiana courts have had but a single occasion prior to the *Thomas* case to adjudicate the complaints of one suffering an allergy related injury resulting from use of a consumer product. In *Moran v. Insurance Co. of North America*<sup>2</sup> recovery was denied by the Fourth Circuit Court of Appeal to a consumer who had suffered severe skin injuries over her body as the result of an application of defendant's sun tan lotion. Suit was brought under the theory of manufacturer's strict products liability. The court held that her injuries were non-compensable since they were the result of an allergic condition or a psychological idiosyncrasy. They concluded that it would be both "illegal and inequitable" to impose liability for such an unforeseeable occurrence.<sup>3</sup> The court cited as persuasive authority the

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1. Keeton, *Product Liability—Problems Pertaining to Proof of Negligence*, 19 Sw. L.J. 26, 27 (1965).

2. 146 So.2d 4 (La. App. 4th Cir. 1962).

3. *Id.* at 7.

opinions of the United States Court of Appeals for the Fifth Circuit in *Bish v. Employers Liab. Assur. Corp.*<sup>4</sup> and the Utah Supreme Court in *Bennett v. Pilot Prod. Co.*,<sup>5</sup> and quoted with approval the language of 26 A.L.R.2d at page 966. Denying plaintiff recovery in *Bish*, the Fifth Circuit stated that a manufacturer of a product innocuous to normal (non-allergic) persons need give no warning of the possibility of allergy produced injuries to those so susceptible.<sup>6</sup> In *Bennett*, the Utah Supreme Court employed similar reasoning in affirming a lower court's opinion that appellant's allergy produced injuries were non-compensable as a matter of law because they were the unforeseeable result of using the product.<sup>7</sup> The excerpt from 26 A.L.R.2d 966, quoted in the *Moran* opinion, states that as a general rule there is no manufacturer's warranty liability where the buyer was allergic or unusually susceptible to injury from the product.

In *Thomas*, plaintiff asserted her claim for recovery on the theories<sup>8</sup> of manufacturer's strict products liability without fault and the negligent failure to warn of the inherent danger in the product.<sup>9</sup> The court rejected the plaintiff's strict products liability argument by its own interpretation of existing Louisiana jurisprudence. Citing *Penn v. Inferno Mfg. Corp.*,<sup>10</sup> *Arnold v. United States Rubber Co.*,<sup>11</sup> and *Doyle v. Fuerst & Kraemer*,

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4. 236 F.2d 62 (5th Cir. 1956).

5. 120 Utah 474, 235 P.2d 525 (1951).

6. 236 F.2d 62, 69 (5th Cir. 1956), cited at 230 So.2d 870, 875 (La. App. 3d Cir. 1970). The *Bish* court cited the Australian case of *Levi v. Colgate-Palmolive Proprietary, Ltd.*, 41 New So. W. St. 48, 58 New So. W.W.N. 63 (1941) as persuasive authority.

7. 120 Utah 474, 235 P.2d 525, 528 (1951), cited at 230 So.2d 870, 875 (La. App. 3d Cir. 1970).

8. More than one theory of recovery may be urged in the same cause of action under products liability: e.g., *McCauley v. Manda Bros. Provisions Co.*, 202 So.2d 492 (La. App. 1st Cir. 1967), 252 La. 528, 211 So.2d 637 (1968), in which recovery was sought under negligence and implied warranty. See also *Arnold v. United States Rubber Co.*, 203 So.2d 764 (La. App. 3d Cir. 1967), in which recovery was sought under warranty and manufacturer's negligent failure to warn.

9. *Doyle v. Fuerst & Kraemer, Ltd.*, 129 La. 838, 56 So. 906 (1911) and *LeBlanc v. Louisiana Coca-Cola Bottling Co.*, 221 La. 919, 60 So.2d 873 (1952) are the leading cases in Louisiana products liability. Other major cases include *Lartigue v. R. J. Reynolds Tobacco Co.*, 317 F.2d 19 (5th Cir. 1963); *McCauley v. Manda Bros. Provisions Co.*, 202 So.2d 492 (La. App. 1st Cir. 1967), 252 La. 528, 211 So.2d 637 (1968); *Penn v. Inferno Mfg. Corp.*, 199 So.2d 210 (La. App. 1st Cir. 1967); *Meche v. Farmers Drier & Storage Co.*, 193 So.2d 807 (La. App. 3d Cir. 1967); *Gilbert v. John Gendusa Bakery, Inc.*, 144 So.2d 760 (La. App. 4th Cir. 1962); *Lescher v. Great Atlantic & Pacific Tea Co.*, 129 So.2d 96 (La. App. 2d Cir. 1961); *McAvin v. Morrison Cafeteria Co.*, 85 So.2d 63 (La. App. 4th Cir. 1956).

10. 199 So.2d 210 (La. App. 1st Cir. 1967).

11. 203 So.2d 764 (La. App. 3d Cir. 1967).

*Ltd.*,<sup>12</sup> the court held that there must be some finding of fault on the part of the manufacturer which may be implied by a showing of the defectiveness of the product.<sup>13</sup> Here, the court could find "no vices or defects in the hair relaxer which the plaintiff used"<sup>14</sup> even though it was convinced that the plaintiff's injuries were due to allergic reaction to defendant's product alone or in combination with the use of another product.<sup>15</sup> The court also rejected the plaintiff's argument of negligent failure to warn holding that "the possibility of danger from an allergic reaction . . . was so remote and unlikely that defendant was under no duty to warn purchasers or users of such a possibility."<sup>16</sup> The court relied heavily on the previous opinion of the Fourth Circuit Court of Appeal in *Moran* as authority for its denial of plaintiff's right to recovery under this theory. The *Thomas* court, therefore, perpetuated the language of the *Bish* and *Bennett* opinions and A.L.R.2d as cited in *Moran*.<sup>17</sup>

Judge Tate, in his dissenting opinion, urged that plaintiff be granted relief under the doctrine of strict manufacturer's products liability,<sup>18</sup> maintaining that a consumer suffering allergy related injuries should not be barred from recovery merely because he is not "normal."<sup>19</sup> He argued that a manufacturer could not limit the reasonable fitness of his product to a pre-determined group of normal buyers.<sup>20</sup> Judge Tate proposed that relief be granted under the doctrine of strict manufacturer's products liability "in light of the seriousness of the harm that could have been foreseen to the allergic user, and considering the usefulness to society of the defendant's product."<sup>21</sup> He stated that the majority's interpretation of existing Louisiana products liability jurisprudence would so limit the prerequisite finding

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12. 129 La. 838, 56 So. 906 (1911).

13. 230 So.2d 870, 873-74 (La. App. 3d Cir. 1970).

14. *Id.* at 874.

15. *Id.* at 873.

16. *Id.* at 875.

17. Cited in *Moran* at 146 So.2d 4, 6-7 (La. App. 4th Cir. 1962), and in *Thomas* at 230 So.2d 870, 874-75 (La. App. 3d Cir. 1970). See notes 7-9 *supra*, and accompanying text.

18. 230 So.2d 870, 879 (La. App. 3d Cir. 1970).

19. *Id.* Judge Tate was referring to the specific language cited from *Bish* in the instant case at 875, *i.e.*: "Nor is a warning required as to a product where the injury results from the sensitivity or allergy of a person in the use of a product which would be innocuous to normal people."

20. *Id.* at 873, citing *Howard v. Avon Prod., Inc.*, 155 Colo. 444, 395 P.2d 1007 (1964), and *Crotty v. Shartenberg's—New Haven, Inc.*, 147 Conn. 460, 162 A.2d 513 (1960).

21. *Thomas v. Gillette Co.*, 230 So.2d 870, 879 (La. App. 3d Cir. 1970).

of fault as to include only willful harm and personal negligence.<sup>22</sup> This interpretation would exclude those susceptible to allergic injuries from the protection afforded under the law.<sup>23</sup> Judge Tate maintained that, through a proper interpretation of the law of Louisiana in this area, it is evident that under certain circumstances (as in the instant case) fault must be presumed notwithstanding the apparent clean hands of the defendant.<sup>24</sup>

The *Moran* and *Thomas* courts reached similar holdings (non-foreseeability) in denying recovery for allergy related injuries. However, the *ratio decidendi* for each holding remains unclear from a reading of the courts' respective opinions.<sup>25</sup> These somewhat ambiguous opinions could lead to two inferences as to what rationale the courts used in denying recovery. It is submitted that these courts may have been unwilling to recognize allergic injuries as foreseeable harmful consequences of using consumer products.<sup>26</sup> This inference may be drawn from the *Thomas* court's continuation of *Moran's* use of specific language of the *Bish*<sup>27</sup> and *Bennett*<sup>28</sup> cases and 26 A.L.R.2d 966.<sup>29</sup> Under this reading of *Thomas*, it is doubtful that the allergic consumer would recover in Louisiana. However, it may be equally inferred that the two courts reached their holdings through a comparison of the number of complaints of similar allergic reaction to defendants' products with the total units produced.<sup>30</sup>

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22. *Id.* See notes 13-18 *supra*, and accompanying text.

23. In actions seeking relief for allergy related injuries, it seems unfair to hinge liability *solely* upon a finding of a fault or a defect in the defendant's product. It is extremely difficult, if not impossible, to show a fault or defect in a product which is harmless to the non-allergic user, but dangerous to one unknowingly allergic to it.

24. Citing *Lartigue v. R. J. Reynolds Tobacco Co.*, 317 F.2d 19, 30-31 (5th Cir. 1963), which quotes Stone, *Tort Doctrine in Louisiana: The Concept of Fault*, 27 TUL. L. REV. 1, 14, 19 (1952).

25. Neither the *Thomas* nor the *Moran* court explicitly state the exact criteria on which they based their holdings of non-foreseeability.

26. It is questionable if the cited language of *Bish* and *Bennett* retain their persuasiveness in light of the holdings to the contrary in those common law jurisdictions where the claims of the allergic consumer have been adjudicated. The persuasive value of A.L.R. is questionable.

27. 230 So.2d 870, 875 (La. App. 3d Cir. 1970: "Nor is a warning required as to a product 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."

28. *Id.*: "[A]ppellant's ailment, being the result of an allergy, was not compensable as a matter of law. . . . Every substance . . . occasionally becomes anathema to him particularly allergic to it. To require insurability against such an unforeseeable happenstance would weaken the structure of common sense, as well as present an unreasonable burden on channels of trade."

29. *Id.* at 874-75: "[T]here is no liability upon the seller, where the buyer or user was allergic of unusually susceptible to injury from the product."

30. In *Moran*, 146 So.2d 4, 8 (La. App. 4th Cir. 1962) (one out of 433,047).

Both courts, deeming the likelihood of such an occurrence improbable, held that under the facts of the respective cases, the possibility of allergic injury was unforeseeable.<sup>31</sup> This reading of the cases would allow the allergic consumer to obtain relief if he were able to convince the trier of fact that injuries such as his occur with such regularity that they are foreseeable, hence compensable. These opinions do not lend clarity to the Louisiana position on recovery for allergic injuries. It is submitted that the vagueness of these decisions will be of little assistance to Louisiana courts faced with similar claims for recovery.

The second inference discussed above is not inconsistent with the method of dealing with the claims of allergic consumers developed by a number of Anglo-American courts.<sup>32</sup> There, recovery has been allowed only when plaintiff has shown that the danger of allergic injury was so widespread, serious, and predictable that the defendant manufacturer was placed under a duty to warn potential users of his product of such a possibility of harm, which he failed to do.<sup>33</sup> These courts have generally required the injured plaintiff to produce evidence which would support a reasonable finding that: "(a) the product involved contains a harmful ingredient; (b) such ingredient is

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In *Thomas*, 230 So.2d 870, 873 (La. App. 3d Cir. 1970) (two out of over a million).

31. See notes 4 and 19 *supra*, and accompanying text.

32. The leading decisions in those common law jurisdictions which have been called to adjudicate the issue of recovery for allergic injuries have been: *Wright v. Carter Prod. Inc.*, 244 F.2d 53 (2d Cir. 1957); *Howard v. Avon Prod., Inc.*, 155 Colo. 444, 395 P.2d 1007 (1964); *Crotty v. Shartenberg's—New Haven, Inc.*, 147 Conn. 460, 162 A.2d 513 (1960); *Esbrog v. Bailey Drug Co.*, 61 Wash. 2d 347, 378 P.2d 298 (1963); *Alberto-Culver Co. v. Morgan*, 444 S.W.2d 770 (Texas App. Beaumont 1969); *Cudmore v. Richardson-Merrell, Inc.*, 398 S.W.2d 640 (Texas App. Dallas 1965).

33. Noel, *Products Defective Because of Inadequate Directions or Warnings*, 23 Sw. L.J. 256, 290 (1969), referring to *Wright v. Carter Prod. Co.*, 244 F.2d 53 (2d Cir. 1957). See also Noel, *Duty To Warn Allergic Users of Products*, 12 VAND. L. REV. 331 (1959).

Prosser states the general law in this area at W. PROSSER, *LAW OF TORTS* 669 (3d ed. 1964): "The situation may be quite different where there is an allergy, more serious in character, to some chemical of which the ordinary man in the street has never heard. The question becomes the familiar one of balancing the probability and gravity of the harm against the value of the product and the defendant's convenience. Where the allergy is an infrequent one, found in only an insignificant percentage of the population, the tendency has been to hold that the seller need not even give warning. But if it is one common to any substantial, even though relatively small, number of possible users, the tendency has been to require a warning, and without it to find negligence or a breach of warranty. It would, however, be an oversimplification to attempt to draw an arbitrary line, since other factors will affect the decision, including the seriousness of the harm to be expected to the allergic user, and the expert knowledge which the defendant has or should have as the maker of such a product."

harmful to a reasonably foreseeable and appreciable class or number of potential users of the products; and (c) plaintiff has been innocently injured in the use of the product in the manner and for the purpose intended."<sup>34</sup> The courts have further held that it is not only incumbent on the injured plaintiff to establish that the product involved was capable of producing such allergic injuries ((a) above), but also that the defendant-manufacturer knew<sup>35</sup> or had constructive knowledge<sup>36</sup> of his products' dangerous propensity. The highest expert knowledge of all that is scientifically discoverable about the product, especially its allergy producing potentiality,<sup>37</sup> has been imputed to food, drug, and cosmetic manufacturers because of their particular relationship to the public.<sup>38</sup> The burden has been placed upon the injured consumer to prove that he is a member of an appreciable class of similarly affected persons ((b) above), whom the manu-

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34. *Esbrog v. Bailey Drug Co.*, 61 Wash. 2d 347, 358, 378 P.2d 298, 304 (1963). For cases in accord see *Alberto-Culver Co. v. Morgan*, 444 S.W.2d 770 (Texas App. Beaumont 1969) and Keeton, *Product Liability—Problems Pertaining to Proof of Negligence*, 19 Sw. L.J. 26, 27 (1965), referring to *Kaempfe v. Lehn & Fink Prod. Corp.*, 21 App. Div. 2d 197, 249 N.Y.S.2d 840, 846 (1964). See also Note, 46 CORN. L.Q. 465, 475-76 (1961), referring to *Crotty v. Shartenberg's—New Haven, Inc.*, 147 Conn. 460, 467, 162 A.2d 513, 516 (1960) and *Esbrog v. Bailey Drug Co.*, *supra*.

35. A manufacturer may become aware of latent defects in his product through consumer complaints of injuries received. Continued failure to give adequate warning after reasonable notification of the dangerous propensities of the product will render the manufacturer liable. "The result has been to require the manufacturer to follow his product into the hands of the consumer and to warn of dangers later discovered." Comment, 1967 WASH. U.L.Q. 206, 208 referring to *Comstock v. General Motors Corp.*, 358 Mich. 163, 99 N.W.2d 627 (1959) and *Moberly v. Sears Roebuck & Co.*, 4 Ohio App. 2d 126, 211 N.E.2d 839 (1965).

36. The main issue of concern has been the existence and the extent of scientific knowledge dealing with the dangers associated with the use or the misuse of a given product. At issue have been: (1) the extent of available scientific knowledge; (2) the manufacturer's actual knowledge of the dangerous propensities of his product; and (3) the extent that the manufacturer is chargeable with such knowledge. See Keeton, *Product Liability—Problems Pertaining to Proof of Negligence*, 19 Sw. L.J. 26 (1965).

In the past most courts have held that the defendant manufacturer must have actual knowledge of the dangerous nature of his product. "But more recent cases hold the defendant to a duty to warn of a danger he should know about as an expert, regardless of his actual knowledge." Noel, *Products Defective Because of Inadequate Directions or Warnings*, 23 Sw. L.J. 256, 291 (1969), referring to *Sterling Drugs, Inc. v. Cornish*, 370 F.2d 82 (8th Cir. 1966); *Wright v. Carter Prod. Inc.*, 244 F.2d 53 (2d Cir. 1957); *Howard v. Avon Prod., Inc.*, 155 Colo. 444, 395 P.2d 1007 (1964); *Braun v. Roux Distributing Co.*, 312 S.W.2d 758 (Mo. 1958) and *Kaempfe v. Lehn & Fink Prod. Corp.*, 21 App. Div.2d 197, 249 N.Y.S.2d 840 (1964).

37. See Keeton, *Products Liability—Proof of Manufacturer's Negligence*, 49 VA. L. REV. 675 (1963); Whitmore, *Allergies and Other Reactions Due to Drugs and Cosmetics*, 19 Sw. L.J. 76 (1965); Note, 37 COLO. L. REV. 305, 307 (1965).

38. See 3 L. FRUMEN & M. FRIEDMAN, *PRODUCTS LIABILITY* §§ 27, 28 (1968).

facturer could have foreseen as susceptible to allergic injuries from the use of his product.<sup>39</sup> Most courts have required plaintiff to quantitatively establish<sup>40</sup> the existence of a "substantial" or "appreciable" class<sup>41</sup> of persons similarly affected of which he is a member; others have disregarded this strictly quantitative approach in favor of finding merely "some" or "a few" others similarly affected.<sup>42</sup> It is also incumbent on the injured plaintiff

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39. *Ray v. J. C. Penney Co.*, 274 F.2d 519, 521 (10th Cir. 1959), quoted in Note, 46 CORNELL L.Q. 465, 475 (1961): "The law requires a person to reasonably (sic) guard against probabilities, not possibilities, and one who sells a product on the market, knowing that some unknown few, not in an identifiable class which could be effectively warned, may suffer an allergic reaction . . . , need not respond in damages." See also RESTATEMENT (SECOND) OF TORTS § 395, comment k, at 331 (1965) and Noel, *Products Defective Because of Inadequate Directions or Warnings*, 23 Sw. L.J. 256, 291, 297 (1969). For further reference see *Cudmore v. Richardson-Merrell, Inc.*, 398 S.W.2d 640, 644 (Texas App. Dallas 1965): "We believe and we hold that in such cases the manufacturer of a drug intended for human consumption or intimate bodily use should be held liable on the grounds of implied warranty for injurious results only when such results or some similar results ought reasonably to have been foreseen by a person of ordinary care in an appreciable number of persons in light of the attending circumstances."

See also Note, 21 Sw. L.J. 678 (1967); *Crotty v. Shartenberg's—New Haven, Inc.*, 147 Conn. 460, 467, 162 A.2d 513, 516 (1960); *Esbrog v. Bailey Drug Co.*, 61 Wash. 2d 347, 358, 378 P.2d 304 (1963); *Alberto-Culver Co. v. Morgan*, 444 S.W.2d 770, 776 (Texas App. Beaumont 1969).

40. The basic undertaking has been mathematically to compare the number of similarly susceptible persons to the total number of consumers of the given product. It is incumbent on the plaintiff to introduce scientific and clinical data in order to come forth with such information. The product must be analyzed and its possibly harmful ingredients isolated and studied in order to anticipate what percentage of the population may be affected. A second method has been to compare the number of previously reported incidents of allergic injury associated with the use of the particular product with the total units produced. Discovery rules provide a method of obtaining such information. Once computed, the resulting ratios are offered into evidence to support the plaintiff's contention of the existence of an "appreciable" class of similarly susceptible persons of which he is a member. See Note, 37 *COLO. L. REV.* 305, 306-07 (1965).

There seems to be no way to predict accurately what size these ratios must be before the court will find the class affected to be "appreciable." *Id.* See also Noel, *Products Defective Because of Inadequate Directions or Warnings*, 23 Sw. L.J. 256, 292 (1969).

41. The "identifiable class" or "appreciable number of similarly susceptible persons" concept has been dealt with by numerous courts with minor semantic variation. For a more thorough discussion see *Howard v. Avon Prod., Inc.*, 144 *COLO.* 444, 452, 395 P.2d 1007, 1010 (1964).

42. In *Wright v. Carter Prod. Inc.*, 244 F.2d 53, 56 (2d Cir. 1957), the court allowed recovery even though the plaintiff was unable to establish the existence of an "appreciable" class of similarly affected persons. "We believe that duties to warn are not, in all cases, measured by solely quantitative standards." Probably, the court was unable to justify the defendant's continued failure to give warning even after having received repeated complaints of allergic injuries even though the number of persons so affected was not significant. *Accord*: *Hungerhold v. Land O'Lakes Creameries*, 209 F. Supp. 177 (D. Minn. 1962).

In *Esbrog v. Bailey Drug Co.*, 61 Wash. 2d 347, 358, 378 P.2d 298, 304 (1963), the court stated: "What constitutes, in a given case, a reasonably

to prove a causal connection between his allergic injuries and his proper use of the defendant's products ((c) above). Such proof is easily established and has been uniformly treated.

The application of this burden of proof has left little opportunity for courts to be vague or arbitrary in stating the reasons for their decisions. The courts have denied recovery on the grounds of foreseeability only where the injured consumer has not established to their satisfaction the requisite burden of proof.

Unfortunately, Louisiana courts have failed to be as explicit in expressing their position where this issue has been presented. One susceptible to allergic injuries is not an abnormal person to be deprived of protection under law. He should be entitled to seek redress for the harms caused him. It is submitted that the Louisiana products liability law on recovery for allergic injuries could be best clarified through an express adoption of this Anglo-American burden of proof discussed above. It is urged that this approach be presented to a Louisiana court as a preferable method of adjudicating the claims of the allergic consumer.

*David S. Willenzik*

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foreseeable and appreciable class or number of potential users, is incapable of precise or quantitative definition."

Other courts have gone so far as to allow recovery where plaintiff has shown just "some" or "only a small proportion" of the users of the product were similarly affected without specifically defining this number as a given percentage. Noel, *Products Defective Because of Inadequate Directions and Warnings*, 23 Sw. L.J. 256, 294-95 (1969), referring to *Blanchi v. Denholm & McKay Co.*, 302 Mass. 469, 19 N.E.2d 697 (1939); *Reynolds v. Sunray Drug Co.*, 135 N.J.L. 475, 52 A.2d 666 (Ct. Err. & App. 1947); *Zirpola v. Adam Hat Stores*, 122 N.J.L. 21, 4 A.2d 73 (Ct. Err. & App. 1939).

"If there is a substantial likelihood that even a small number will be subjected to a substantial probability of injury, even in cases involving very rare allergies, the injury is held to be foreseeable." Comment, 1967 WASH. U.L.Q. 206, 219, referring to *Gober v. Revlon, Inc.*, 317 F.2d 47 (4th Cir. 1963); *Wright v. Carter Prod. Co.*, 244 F.2d 53 (2d Cir. 1957); *Braun v. Roux Distrib. Co.*, 312 S.W.2d 758 (Mo. 1958); *Martin v. Bengue, Inc.*, 25 N.J. 359, 136 A.2d 626 (1957); *Proctor & Gamble Mfg. Co. v. Superior Ct.*, 124 Cal. App. 157, 268 P.2d 199 (1954). See also W. PROSSER, *THE LAW OF TORTS* 669 (3d ed. 1964).