

**IS THERE SOY IN THIS?!: LAWSUITS AGAINST SELLERS BASED ON PLAINTIFF'S
ALLERGY**

By Anita Dhar

Was Plaintiff Aware of the Allergy?

Mills v. Giant of Maryland, LLC, 508 F.3d 11 (D.C. 2007).

Lactose intolerant individuals brought a class-action lawsuit against nine sellers of milk alleging that they consumed milk before they were aware of their lactose intolerance. As a result, plaintiffs alleged they suffered temporary stomach discomfort. Plaintiffs alleged that the sellers were aware of the effects of milk on consumers who did not yet know they were lactose intolerant but the sellers failed to warn of those effects.

The court noted that in the food context, tort principles foreclosed liability for failure to warn when the risk that some people might have an adverse reaction to the food is "widely known." As the Restatement of Torts states, when "both the presence of an allergenic ingredient in the product and the risks presented by such ingredient are widely known, instructions and warnings about that danger are unnecessary." RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. k; see also RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (Where "the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it...").

Further, the court discussed two main categories of cases in which the risks from food are not considered "widely known": unknown-ingredient cases and unknown-harm cases. The first category, unknown-ingredient cases, encompasses situations where a substantial number of consumers are allergic to a food ingredient that reasonable consumers would not expect to find in the food. See, e.g., Livingston v. Marie Callender's Inc., 72 Cal. Supp. 4th 830 (Cal. Ct. App. 1999). (MSG in fresh vegetable soup); Brown v. McDonald's Corp., 655 N.E.2d 440, 442-44 (Ohio Ct. App. 1995) (seaweed-derived ingredient in hamburger). The parties agreed, however, that this was not an unknown-ingredient case because plaintiffs' complaint related not to an unknown ingredient in milk but rather to the known and inherent qualities of milk.

The second category, unknown-harm cases, encompasses situations where reasonable consumers are not aware of the harm that a food may cause to certain people. In other words, although consumers may know the ingredients in a certain food, they may not know the harm that the food or the food's known ingredients can bring about. The relevant inquiry in an "unknown-harm" case is whether a "reasonable" consumer would know that the food could cause an adverse reaction in some people.

The appellate court held that the risk that milk could cause temporary stomach discomfort to lactose intolerant individuals who did not yet know of their condition could not support a failure to warn claim against sellers of milk.

Was the Allergen Present in the Product?

Moore v. P.F. Changs China Bistro, Inc., 2007 WL 2121240 (Cal. Ct. App. 2007).

Plaintiff appealed from a grant of summary judgment in favor of the defendant restaurant on plaintiff's claim for personal injury allegedly caused by an allergic reaction to a dish eaten at the restaurant. Plaintiff was allergic to shellfish and alleged the beef dish she ordered and ate was tainted with shrimp. Plaintiff informed her waitress that she was allergic to lobster and shrimp when she ordered her meal. The restaurant presented evidence of the detailed procedures the kitchen followed to avoid mixing ingredients from different dishes.

The issue plaintiff encountered in proving her claim was showing the presence of shellfish in the beef dish she ate. The court stated that the generally accepted rule is that the unwholesome character of food is not established and a prima facie case is not made merely by showing that plaintiff became sick after eating the food. Such evidence only shows a sensitivity of plaintiff on the particular occasion and perhaps not even this because something else may have caused the reaction. To be sufficient, the circumstantial evidence must exclude other extrinsic causes of the illness. Plaintiff's expert established that plaintiff had experienced adverse consequences from eating shellfish in the past but failed to provide any basis, explanation, or reasoning for his conclusion that plaintiff's reaction on the day in question was due to an allergic reaction rather than a side effect of blood pressure medication. Further, plaintiff's expert failed to explain why he believed that his diagnosis of an allergic reaction was more likely than plaintiff's treating doctor's diagnosis of an adverse action to medication. Therefore, the court held that plaintiff failed to create a triable issue of fact concerning the presence of shellfish in the beef dish plaintiff ate.

Was the Allergen an Ingredient Which Reasonable Consumers Would Expect to Find in the Product?

Livingston v. Marie Callender's Inc., 72 Cal. Spp. 4th 830 (Cal. Ct. App. 1999).

A customer who experienced a severe adverse reaction after eating homemade fresh vegetable soup which contained MSG brought suit against the restaurant for failure to warn that the soup contained MSG. Plaintiff was aware that he had an allergy to MSG when he order the soup. He told his waitress that he had asthma and asked if the soup contained MSG. The waitress assured him that it did not, when it, in fact, did contain MSG. The trial court struck plaintiff's causes of action with the exception of his negligence claim, because the court concluded that there was nothing wrong with the soup. The negligence claim alone proceeded to the jury and the jury found the restaurant was not negligent.

Plaintiff abandoned his breach of express warrant and implied warranty claims and sought a retrial only on his failure to warn claim. Plaintiff contended that, pursuant to section 402A of the RESTATEMENT SECOND OF TORTS, comment j, a cause of action for strict liability failure to warn exists where a product "contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, [and the seller] has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger."

RESTATEMENT SECOND OF TORTS section 402A, comment j, page 353 states:

Directions or warning. In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use. The seller may reasonably assume that those with common allergies, as for example to eggs or strawberries, will be aware of them, and he is not required to warn against them. Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger. Likewise in the case of poisonous drugs, or those unduly dangerous for other reasons, warning as to use may be required.

RESTATEMENT THIRD OF TORTS section 2, comment k, page 32 similarly states:

Cases of adverse allergic or idiosyncratic reactions involve a special subset of products that may be defective because of inadequate warnings.... [] The general rule in cases involving allergic reactions is that a warning is required when the harm-causing ingredient is one to which a substantial number of persons are allergic."

The court remanded for a limited retrial on the issue of whether defendant was liable for failure to warn of an ingredient to which a substantial number of the population were allergic. The court emphasized that the ruling was not that in every or even, any case, there

was a duty to warn restaurant customers of the presence of MSG but, rather, merely that plaintiff was entitled to a limited retrial on his failure to warn contentions.

Was the Product Defective?

Thompson v. East Pacific Enterprises, Inc., 2003 WL 352914 (Wash. App. Div. 1).

After eating almond chicken from the defendant restaurant, plaintiff experienced a severe allergic reaction. Plaintiff had a known and long standing allergy to peanut products. A co-worker of plaintiff's placed a to-go order with the restaurant. Plaintiff decided to order the almond chicken because she had eaten it before with no problems. Although plaintiff testified that she always tried to make restaurant personnel aware of her allergy and tried to ascertain what was contained in the food she ordered, she did not look at a menu or ask her co-worker who placed the food order to advise the restaurant of her allergy. Of note, the restaurant's recipe for almond chicken did not call for peanuts, although peanut residue had apparently gotten into the dish plaintiff consumed. Plaintiff sued the restaurant alleging a violation of Washington's Product Liability Act and Consumer Protection Act. The trial court granted the restaurant's motion for summary judgment on all counts.

Plaintiff claimed that the restaurant's design of almond chicken was defective because even though the recipe did not call for peanuts, due to the failure of the restaurant to incorporate sterilization procedures for equipment that came into contact with peanuts, the design of the dish did not prevent cross contamination of other dishes with peanuts. In other words, she argued that because the recipe did not call for peanuts, the inclusion of peanut residue in the dish was a construction defect which rendered the almond chicken a defective product because it was not reasonably safe. However, the court stated that

plaintiff failed to provide evidence or legal authority to support her argument that a restaurant dish is not reasonably safe if it contains trace amounts of other foods served by the restaurant or that restaurants are bound to particular recipes. The appellate court held that plaintiff had not established that the almond chicken was not reasonably safe as designed or constructed.

Plaintiff's claim of inadequate warnings failed as well. The Court noted that peanut allergy is a common allergy that affects approximately two million people in the United States and is probably the most common cause of death by allergic reaction. Plaintiff did not inform the restaurant of her allergy and did not obtain an express warranty that the dish did not contain peanut or any trace amount of peanut. The court held that the restaurant did not present evidence or legal authority establishing a duty on the part of the restaurant to warn of the possible inclusion or cross contamination of peanuts or peanut products.

The evidence was undisputed that there was no express warranty. Plaintiff argued that the restaurants' almond chicken was not fit for ordinary purposes because it contained peanut residue, a substance to which a substantial portion of the population was allergic. The court held that the restaurant did not breach an implied warranty of merchantability. Additionally, plaintiff's negligence and strict liability claims failed because plaintiff did not establish a duty on the part of the restaurant to ensure that dishes were free of peanut products absent an express guarantee. Finally the Court held that the restaurant did not engage in an unfair or deceptive practice under Washington's Consumer Protection Act because plaintiff did not support her assertion that a menu must contain warnings about all ingredients which may be contained in a restaurant item.

Did Plaintiff Rely on Information Obtained From the Seller?

Morris v. Pathmark Corporation and Supermarkets General and Posner Laboratories, Inc., 1990 WL 902429, 21 Phila. Co. Rtpr. 55 (Pa. Comm. Pl. 1990).

Plaintiff suffered a severe allergic reaction to a hair setting/extra body lotion. She sued the seller of the lotion, alleging breach of warranty of fitness for a particular purpose. The court held that the seller was not liable pursuant to an implied warranty of fitness for a particular purpose because no employee of the seller assisted in selecting the product purchased nor did plaintiff rely on information obtained from the seller. The product was purchased without a recommendation by the seller. Further, the court held that liability should not be imposed against the seller where the product is harmless to "normal people" and the injury from the use of the product is attributable exclusively to a person's allergy.

Did Plaintiff Have an Unusual Susceptibility?

Barrett v. S.S. Kresge Co., 144 Pa. Super. 516, 19 A.2d 502 (1941 Pa Super. Ct. 1941).

Plaintiff sued the store from which she purchased a dress which contained a dye she was allergic to. Her theory was that the store breached an implied warranty of merchantability. After a jury verdict for plaintiff, defendant moved for and was granted judgement notwithstanding the verdict. The appellate court affirmed the trial court, noting that plaintiff did not present any evidence that the dress would cause irritation to anyone other than plaintiff. Also, defendant presented evidence that the dye would not cause irritation to the skin of a "normal" person. In dicta, the court noted that it is well known that some people cannot eat fish strawberries, eggs, and many other foods without ill effects and

that a vendor thereof could not be liable for a breach of an implied warranty solely because of the harmful effect which come from a buyer's individual idiosyncrasy. The court held that a clothing vendor is not bound by an implied warranty that the merchandise sold, although harmless to the public, does not contain any substance which may injuriously affect some individual purchaser who has a peculiar susceptibility unknown to the vendor.

Bonowski v. Revlon, Inc., 100 N.W. 2d 5 (Iowa 1959).

Plaintiff brought suit against the store where she purchased sun tan lotion, based on breach of an implied warranty. The evidence showed that plaintiff had combined two days of extended sun exposure with use of the lotion and ended up with a skin condition which caused her to have to stay in the hospital for two weeks. Interestingly, when plaintiff purchased the lotion, she had a discussion with a store employee about whether she should purchase the bottle intended for normal skin or the bottle for sensitive skin. Plaintiff stated that she thought her skin was normal and thus purchased the bottle for normal skin. The store's defense was that plaintiff's injuries were not the result of the lotion but a result of plaintiff's super sensitive skin and that she was allergic to the combination of the application of the lotion and sunshine.

As a summary of the decisions in various jurisdictions, 26 A.L.R. 2d at page 966 states: 'Although there are decisions to the contrary, generally it has been held that in an action by the buyer of a product against the seller for *breach of warranty* to recover damages for injuries resulting from the use of the product, there is no liability upon the seller, where the buyer was allergic or unusually susceptible to injury from the product. In an action by the buyer or user of a product, *based on negligence*, against the manufacturer, jobber, or seller for damages resulting after

the use of the product, it has been held that there is no liability upon the manufacturer, jobber, or seller, where the buyer or user was allergic or unusually susceptible to injury from the product.'

Id. at 7. (Emphasis in original).

Defendant presented evidence that one person in five million was allergic to the combination of sun tan lotion and sunshine. The Court decided to follow the majority rule and hold that the seller was not liable for breach of warranty for negligence where an isolated buyer was allergic to the product.

Whitson v. Safeskin Corporation, Inc., 313 F. Supp. 2d 473 (M.D. Pa. 2004).

A registered nurse who alleged she developed a toxic reaction from exposure to latex gloves she wore at work brought an action against the seller of the gloves, alleging breach of implied warranty of merchantability that the gloves were of reasonable quality and fit for the ordinary purpose for which they are sold. The trial court granted summary judgment in favor of the defendant. The appellate court affirmed, stating that Pennsylvania law did not allow for a seller to be held liable for breach of an implied warranty merely because of a harmful effect due to an individual idiosyncrasy on the part of the buyer. The court stated that the ordinary purpose of the gloves was to protect the wearer from transmitting or providing exposure to blood-borne pathogens. Plaintiff did not contend that she was exposed to a blood-borne illness but instead that the use of the gloves caused her latex allergy. The harm that plaintiff complains of was not a harm that she could recover for under a theory of breach of an implied warranty.

Crotty v. Shartenberg's-New Haven, Inc. 162 A.2d 513 (Conn. 1960).

A purchaser of a hair removal cream filed suit against the store she purchased the cream from for breach of implied warranty of fitness. Plaintiff had asked the salesperson at the store for a recommendation and selected the particular product at the salesperson's recommendation.

The trial court directed a verdict for the seller. The Connecticut Supreme Court held that the evidence was sufficient to go to the jury and reversed the trial court. The court stated that authorities agree that a buyer who, having a unique or peculiar sensitivity suffers injury from some innocent substance should not be entitled to recover from the seller. However, the court noted a divergence of opinion as to the rights of people whose susceptibility is not peculiar to them alone. If a buyer has knowledge, either actual or constructive, that he or she is allergic to a particular substance and purchases a product which he or she knows or reasonably should know contains that substance, the person cannot recover damages for breach of an implied warranty. The court held that facts existed from which a jury could have found that the cream contained an ingredient which had a tendency to produce an injurious reaction in persons allergic to it, that plaintiff was one of an appreciable number of persons who could be injuriously affected by its use, and that her injuries were caused by a breach of the implied warranty.

