Eggshell Skull Doctrine:
Inapplicable to Certain Chemical Exposures
By Dwight A. Kern and Maria C. Carlucci

Typically, the eggshell skull doctrine is a stringent rule that imposes complete liability on defendants. This liability often leaves defendants accountable for injuries caused by the aggravation of a plaintiff’s preexisting condition, which often results in more severe injuries. Yet, in New York, are some defendants escaping from the stringent application of the eggshell skull doctrine?

Over almost four decades ago, the Kaempfe court carved out an exception to the eggshell skull doctrine and held that manufacturers are not liable when a user suffers from an idiosyncratic allergic condition. Throughout the years, the New York courts have continued to apply the Kaempfe exception in the area of chemical exposures. Thus, New York jurisprudence’s continued application of this exception has led to the fragility of the eggshell skull doctrine.

A first year law student is typically taught that under the general rules of torts, a defendant may be held liable in damages for the aggravation of a plaintiff’s preexisting illness or injury. The Restatement (Second) of Torts § 461 states:

The negligent actor is subject to liability for harm to another although a physical condition of the other which is neither known nor should be known to the actor makes the injury greater than that which the actor as a reasonable man should have foreseen as a probable result of his conduct.

This concept is known as the “eggshell skull doctrine” and the defendant must traditionally “take[] the plaintiff as he finds him.” But in New York, the doctrine is not without qualification. For example, if a plaintiff with a preexisting condition is injured, a defendant is only liable for the additional harm or aggravation that he caused. Another limitation on the eggshell skull doctrine in New York is that a defendant “succeeds in establishing that the plaintiff’s preexisting condition was bound to worsen . . . , [then] an appropriate discount should be made for the damages that would have been suffered even in the absence of the defendant’s negligence.” Both of these limitations of the doctrine ensure defendants are not held liable for a plaintiff’s preexisting condition.

A good example of preexisting conditions is an idiosyncratic reaction to a product. Although not expressly stated, there is another exception to the eggshell skull doctrine in New York involving idiosyncratic reactions to chemical exposures. A small, but growing body of case law has been developing since the 1964 decision in the New York State Supreme Court Appellate Division, First Department decision, Kaempfe v. Lehn & Fink Products Corp. This common law—or New York exception—is remarkable because, unlike others, it denies plaintiff recovery for a preexisting physical condition. Thus, a plaintiff with an idiosyncratic allergic condition who suffers physical injuries is not taken as she is found when a substantial amount of the general population does not experience the same reaction.

In Kaempfe, the plaintiff sued the manufacturer of a spray deodorant after suffering an allergic reaction to aluminum sulphate in the product that caused severe dermatitis. The plaintiff had never before experienced an allergic reaction to any other product. The plaintiff’s medical expert admitted that although a small number of people may be sensitive to products containing aluminum sulphate, it is safe for ‘normal skin’ and not normally harmful.

The First Department reasoned that a manufacturer is only required to warn of the dangers of toxic exposure in allergic reaction cases where the manufacturer has actual or constructive knowledge. In order to establish knowledge on behalf of the manufacturer, the product must contain “an ingredient to which a substantial number of the population are allergic” or “an ingredient potentially dangerous to an identifiable class of an appreciable number of prospective consumers.” Thus, in New York, a manufacturer has no duty to warn about an injury that “is due to some allergy or other personal idiosyncrasy of the consumer found only in an insignificant percentage of the population.”

In analyzing duty, in Kaempfe, the First Department focused on foreseeability, that is, “the reasonable foreseeability of harm and reasonable care to guard against the same.” Under this concept, a manufacturer or seller must exercise reasonable care to warn of dangers associated with normal use of the product that it knows about or,
with reasonable diligence, should anticipate. However, a seller or manufacturer is not required “to anticipate and warn against a remote possibility of injury in an isolated and unusual case.” The theory behind this reasoning is that a manufacturer or seller cannot be held liable for an injury resulting from use of a product that is safe for the normal user when that party does not have actual or constructive knowledge of a class of persons who have a propensity to react negatively to a particular product.

Therefore, manufacturers do not owe a duty to a microscopic fraction of potential users who may suffer from an unexpected, rare reaction. That is because neither the class of plaintiffs nor the reaction is foreseeable. The Kaempfe court acknowledged that the even strict liability would be accepted under these circumstances.

Until recently, New York state and federal courts have only dealt sporadically with the Kaempfe rule. However, some recent New York courts recently have affirmed Kaempfe.

In the New York Supreme Court Appellate Division, Second Department case, Pai v. Springs Industries, Inc., a plaintiff alleged that exposure to formaldehyde in bed sheets manufactured and sold by the defendants caused her to suffer severe personal injuries. The manufacturer demonstrated that the plaintiff’s reaction was caused by a rare allergy that no other consumer had experienced. The plaintiff’s toxicologist, in turn, failed to establish that the plaintiff’s allergy was shared by a substantial number of consumers or that a safer, alternative design of the sheets existed. As a result, the Second Department affirmed the decision of the trial court dismissing the negligence causes of action holding that “[a]n injury is not foreseeable if it ‘is due to some allergy or other personal idiosyncrasy of the consumer, found only in an insignificant percentage of the population.’”

The United States District Court for the Southern District of New York granted a summary judgment motion under similar circumstances in Smallwood v. Clairol, Inc. In Smallwood, the plaintiff developed severe anaphylactic-related reactions, typically described as closing of the throat and difficulty breathing, that led to hospitalization after using Clairol Men’s Choice hair color. The District Court found that the plaintiff’s inability to establish that any other product user, let alone an appreciable number of users, had experienced that reaction. In finding for the defendant, the Smallwood court agreed that a manufacturer is required to warn a consumer only of “those dangers that are known or reasonably foreseeable at the time of marketing.”

New York courts have been quick to rule that this exception does not apply in cases where the potential dangers of the substance are known. For example, in Holmes v. Grumman Allied Industries, bus drivers suffered allergic reactions to a chemical, Toluenediisocyanate (“TDI”), a component of the polyurethane foam used in dashboard padding. The New York Supreme Court Appellate Division, Third Department found that there is evidence that TDI is a potentially dangerous substance and the bus manufacturer might have had constructive or actual notice of an unreasonable danger from TDI exposure. Because of this knowledge, the bus manufacturers could not argue that they did not have a duty to warn based upon the relatively small population of individuals likely to become sensitized by TDI.

Another restriction on the application of Kaempfe can arguably be found when a toxic substance is not deliberately placed in a product. The Supreme Court, County of Onondaga recently held in Martin v. Chuck Hafner’s Farmers Market, Inc., the Kaempfe rule inapplicable to respiratory damages allegedly caused by black mold in farm straw.

Distinguishing Martin, the Onondaga court reasoned that the large quantity of mold in the straw rendered the straw non-merchantable. Relying on a case from the Supreme Court of Iowa for guidance, the court found defendant liable as a result of defendant’s breach of the implied warranty of merchantability.

Although the court did not include the defendant’s knowledge in its reasoning of not applying Kaempfe, arguably these facts would place the case outside the realm of Kaempfe because the danger of injury was known in the industry—not an idiosyncratic injury.

The United States District Court for the Southern District of New York has recently ruled that the Kaempfe rule can be applied to such implied warranties under the right circumstances. In Daley v. McNeil Consumer Products Co. the Southern District found that, “the implied warranty will not be breached if only a small number of people relative to the total number of persons using the product suffer an allergic reaction.” The Daley plaintiff alleged an allergic reaction to a drug that caused discomfort from digesting dairy products. The court in Daley relied heavily upon the First Department case, Hafner v. Guerlain, where the plaintiff suffered blotches arising from wearing perfume while sunbathing. The Hafner Court dismissed the case stating, “[w]ith a product such as this one, sold widely as stated, and easily purchased, the mere fact that an infinitesimal number experienced a discomfiting reaction is not sufficient to establish that the product was not fit for the purpose intended.”

The Kaempfe rule has also been accepted by other jurisdictions. The Kaempfe rule also seems to be expanding in New York. One court extended the rule to industrial exposure actions. In Perkins v. AAA Cleaning, a worker brought a negligence action against a cleaning service alleging that she had suffered reactions to carpet cleaning solutions at her workplace causing her hyperactivity to environmental irritants.
In *Perkins*, the Third Department held that the information on the cleaning solution’s Material Safety Data Sheet revealed that the solution was harmless. Therefore, the use of the solution by the service was not negligent because the hazards plaintiff alleged were not foreseeable. The court then went a step further saying that “even if [the chemicals] were not harmless, there is no evidence that defendant had any way of knowing of plaintiff’s hypersensitivity.”22

The application of *Kaempfe* has made the eggshell skull doctrine evermore fragile. The *Kaempfe* rule is a logical solution to the reality that a small percentage of the general population may have the potential to suffer unforeseeable allergic reactions to substances that the ordinary population would not experience. *Kaempfe* emphasizes that foreseeability of harm and reasonable care to guard against the same is the fundamental test of negligence.23 Whether a reaction occurs from exposure to a product placed in the stream of commerce or from an environmental exposure appears to be of no consequence under *Kaempfe*.

The concept of foreseeability, in theory, should have no effect on the eggshell skull doctrine. Nevertheless, those members of a minority population who may experience an allergic reaction to an otherwise safe substance logically can no longer find protection under this basic doctrine of common law.

Endnotes

16. On appeal, the Fourth Department reinstated the negligence claim for failure to warn because plaintiff’s raised a triable issue of fact by submitting an affidavit of a pulmonologist, which defeated summary judgment. *Martin v. Chuck Hafner*, 28 A.D.3d 1065, 443-444 (4th Dep’t 2006).

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More recently, Mr. Kern and Ms. Carlucci co-authored the winning brief to New York’s highest state court regarding the nonexistence of a duty for a premises owner to a member of an employee’s household for secondary exposure to a toxic substance in the precedent setting decision of *Holdampf v. A.C. & S., Inc.* (In re New York City Asbestos Litigation), 5 N.Y.3d 486, 840 N.E.2d 115 (2005).