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LIABILITY FOR NEGLIGENCE OF PHARMACISTS

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INTRODUCTION

The purpose of this article is to discuss the liability of pharmacists for professional negligence.[1] Thus it will be limited to that conduct which arises out of their professional activity and is to be distinguished from liability which may arise out of their activity as a storekeeper or a druggist, using the latter term in the general sense to include all those who operate a drug store or in any fashion engage in the business of supplying drugs, whether licensed pharmacists or not. For example, the pharmaceutical manufacturer may well be classed as a druggist, but his legal responsibilities would be more logically considered with those of other manufacturers.

History

The profession of pharmacy has been practiced in one form or another since the human race originated—or at least as far back as human history has been recorded. Though the Code of Hammurabi,[2] king of Babylonia, 2250 B.C., does not specifically refer to the compounding of medicines, it may be inferred that it existed and that the physician and the pharmacist of that day were one and the same, since, had this not been true, this extremely detailed document would certainly have set out penalties for the pharmacist who blundered as well as for the physician or surgeon guilty of malpractice. An Egyptian papyrus of 3300 B.C.[3] sets out prescription formulae. The early records of China and Japan, The Charaka-Sambita[4] (8th century or earlier) of India all point to the practice of pharmacy during the early period of human history. In fact, reference to a rudimentary form of the "art" may be found in the early history of mankind throughout the world.

The first steps in the development of the profession of the pharmacist came as a natural sequence to civilization's progress. The religious rites and pagan practice of the priest-physician no longer satisfied the

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1. A case involving a wilful tort by a pharmacist in the practice of his profession is White v. McComb City Drug Co., 86 Miss. 498, 38 So. 739 (1905). Defendant was held liable for refusing to return plaintiff's unfilled prescription upon demand following defendant's refusal to fill it until he received assurance of payment.

2. The *Laws of Hammurabi* were found in ruins of ancient Susa, and are the most ancient code of public laws yet discovered; 2250 B.C. (700 years before the time of Moses). Translated and described in 2 RECORDS OF THE PAST EXPLORATION SOCIETY, RECORDS OF THE PAST (1903).

3. PETERS, PICTORIAL HISTORY OF ANCIENT PHARMACY (Netters Transl. 1889).

4. CHARAKA-SAMBITA (WORKS OF CHARAKA) (775 B.C.) Translated into English and published by Avinash Chandra Kaviratna, Calcutta.

people as a cure for their illnesses. Reason overcame superstition and at the end of a long period of struggle the physician, freed from the realm of mysticism, became a self-existing entity apart from the priesthood. Over a long span of time he was both physician and pharmacist just as the surgeon and the barber were still one. The emergence of the pharmacist as a separate entity occurred at widely varying times in the different areas of the world. For instance, as early as the time of Aristotle[5] there existed the physician and the apothecary, and yet, not until 1754 did the code of the College of Physicians of Edinburg prohibit their Fellows and Licentiates from "keeping an apothecary shop." Even as the apothecary took a recognized place as a professional, he also continued to do more or less prescribing which resulted in an antagonism between him and the physician lasting even into the nineteenth century.[6] Finally, as modern science developed and professional ethics rose to a higher standard, the physician began to turn his attention to therapy, and pharmacy became a recognized art.

Early American pharmacy, of course, was but a transplanted English art. Until the opening of the nineteenth century the American physician prescribed from his own stock of drugs, and actually there is no evidence that a pharmacist, as now known, existed in America prior to the American Revolution. No one even ventured to issue an American pharmacopeia before 1778, when William Brown published a little work at Lancaster, Pennsylvania[7] for the use of the military hospital of Washington's army.

One final development occurred beginning in the early 1800's which produced our pharmacist of today. A great reaction against the harsh medicines and the heavy dosages in which they were given produced contention among sects in medicine and factions in pharmacy. As a result of the attempt to sweeten medicines and soften the treatment, factory-made sugar-coated pills appeared. Factory made gelatine capsules and already compounded tablets containing certain amounts of drugs gave evidence that the pharmaceutical factory was here. The mortar and pestle practically disappeared from the realm of the American pharmacist and gradually there emerged the drug store of today with the pharmacist playing a somewhat different, but no less important role. Today he compounds fewer drugs, but he dispenses a great many more, both in kinds and quantity, thus multiplying the opportunities for errors and the damage likely to be done by any errors.

5. WATSON, THE MEDICAL PROFESSION OF ANCIENT TIMES (1856).

6. BELL & REDWOOD, PROGRESS OF PHARMACY (1880).

7. 56 AM. JUR. *Pharmacy* 483-91 (1884); 63 AM. JUR. *Pharmacy* 156-57 (1891).

Basis of Liability

Factually, most of the situations involve supplying the wrong drugs, failing to give adequate warnings as to their use, representing that a substitute is the same thing and errors in the filling of prescriptions.

Even though the Kentucky case of *Fleet v. Hollenkemp*,[8] which appears to be the first American case on the subject, held that the druggist was an insurer of the wholesomeness of the article he supplied, the overwhelming majority of cases predicate the pharmacists' liability on negligence.[9] While recognizing the responsibility of the pharmacist in protecting the health and lives of the people, and acknowledging that the care required of him should be proportioned to the danger involved, the Michigan Court in 1882 could not find "that the authorities [had] gone so far as to dispense with actual negligence as a necessary element in the liability when a mistake has occurred."[10]

Some courts have allowed recovery on the basis of a breach of warranty[11] while others have denied such actions;[12] still others seem to have confused negligence and breach of warranty.[13] There are those who contend that the practical results are the same whether the theory of liability is negligence or that the defendant is an insurer because of the difficulty of reconciling a damaging mistake by a pharmacist with the observance of due care.[14]

This discussion will continue with the general rules applicable to the profession of pharmacy and then examine some of the cases specifically.

NEGLIGENCE

Negligence may be defined as a failure to use due care under the circumstances.[15] Since due care is a relative term it requires knowledge of the circumstances to give it substance.[16] The risks of harm created by the activity engaged in will determine the degree of care required: conduct which creates a risk of great harm requires great care.[17] Since the degree of harm which may be done by a mistake

8. 52 Ky. 175 (1852).
9. See cases cited in Annot., 31 A.L.R. 1336 (1924); 28 C.J.S. *Druggist* § 8 (1941).
10. Brown v. Marshall, 47 Mich. 576, 11 N.W. 392, 395 (1882).
11. Watkins v. Jacobs Pharmacy Co., 48 Ga. App. 38, 171 S.E. 830 (1933); Hendry v. Judge & Dolph Drug Co., 211 Mo. App. 166, 245 S.W. 358 (1922); Jones v. George, 56 Tex. 149, (1882).
12. Brown v. Marshall, 47 Mich. 576, 11 N.W. 392 (1882); Willson v. Faxon, Williams & Faxon, 138 App. Div. 366, 122 N.Y. Supp. 783 (1910); Spry v. Kiser, 179 N.C. 417, 102 S.E. 708 (1920).
13. Highland Pharmacy v. White, 144 Va. 106, 131 S.E. 198 (1926). Compare PROSSER, TORTS 494 (2d ed. 1955).
14. Annot., 31 A.L.R. 1336 at 1336 (1924).
15. Bober v. Southern Ry., 151 S.C. 459, 149 S.E. 257 (1929).
16. Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).
17. PROSSER, TORTS 119 (2d ed. 1955).

by a pharmacist is great,[18] the standard of care imposed on him by the law is a high one.[19] Just as one dealing with high voltage electricity[20] or handling deadly weapons[21] owes a very high degree of care, so does the pharmacist. The slightest mistake may have the most serious consequences.

But not all courts have spoken of the pharmacists' duty in terms of the highest degree of care. Many use the expression "ordinary care."[22] This is a distinction without a difference. To avoid negligence one is required to use the care which a reasonable and prudent man would use under the circumstances.[23] Whether it is described as the "highest," "ordinary," or "that commensurate with the risk," it can be measured only by the circumstances,[24] which include the risk to be guarded against.[25] Any reasonable and prudent person would increase the care with an increased risk. Thus where the risk guarded against may be death, the highest care is in order, whether it be called "ordinary" or "highest."

The standard of care required is objective; it is expressed in terms of the fictitious "reasonable and prudent man."[26] Where one holds himself out to the public as a person with a special competence, then the law imposes on him the duty of acting as a reasonable and prudent man with that particular skill: here, a pharmacist.[27] It is only because of the special learning and skill that is required to engage in the occupation, that it can justifiably be called a profession.[28] As

18. "People trust not merely their health but their lives to the knowledge, care and prudence of druggists, and in many cases a slight want of care is liable to prove fatal to some one." Brown v. Marshall, 47 Mich. 576, 11 N.W. 392, 395 (1882).

19. Watkins v. Jacobs Pharmacy Co., 48 Ga. App. 38, 171 S.E. 830, 831 (1933); Highland Pharmacy v. White, 144 Va. 106, 131 S.E. 198 (1926).

20. Fox v. Keystone Tel. Co., 326 Pa. 420, 192 Atl. 116 (1937).

21. Jensen v. Minard, 44 Cal. 2d 325, 282 P.2d 7 (1955).

22. "Ordinary skill is the test of qualifications, and ordinary care is the test of the application of it." Tremblay v. Kimball, 107 Me. 53, 77 Atl. 405, 407 (1910). Dunlap v. Oak Cliff Pharmacy Co., 288 S.W. 236 (Tex. Civ. App. 1926).

23. " '[W]hat is ordinary care, however, depends upon the circumstances of the particular transaction. In the case of a druggist selling drugs, it is care to give the medicine asked for, and not some other medicine likely to cause injury.' " As quoted in Taugher v. Ling, 127 Ohio St. 142, 187 N.E. 19 (1933).

24. Wadsworth v. McRae Drug Co., 203 S.C. 543, 28 S.E.2d 417 (1943).

25. PROSSER, TORTS 120 (2d ed. 1955).

26. "Instead, therefore, of saying that the liability for negligence should be coextensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule, which requires in all cases a regard to caution such as a man of ordinary prudence would observe." Vaughan v. Menlove 3 Bing. 468, 475 (N.C. 1837). For a different view as to what this case held see GREEN, TRAFFIC VICTIMS: TORT LAW AND INSURANCE 23 (1958), and for a very interesting answer to the different view see James, Book Review, 11 J. LEGAL ED. 419 (1959), particularly the argument in f.n. 8 at p. 420.

27. PROSSER, TORTS 132 (2d ed. 1955).

28. "The learning required, which makes the occupation a profession, pertains to the preparation of the medicines, and not to the naked act of selling." State v. Wood, 51 S.D. 485, 215 N.W. 487, 489 (1927).

a result of his special training in pharmacy, he is charged with knowledge of the risks involved—many of which the average person would not appreciate—and his conduct must be reasonable in the light of such risks. This does not, however, mean that he will be charged with all the information available in his field.[29]

The fact that a particular pharmacist lacked knowledge as to the dangerous qualities of a particular drug, may relieve him of liability or it may not. If it was his duty to know as a reasonably skillful pharmacist, then he would be negligent in not knowing.[30] Whether he had a duty to know would be affected by the locality in which he practiced. If the information was that which pharmacists in his or a similar community knew generally, he would be responsible for such information.[31] His duty in this respect is analogous to that of a physician or other professional man. He must maintain a reasonable competence in his field as long as he holds himself out as one having such qualifications.[32]

As would be expected, most of the negligence charged to pharmacists in the cases involves poisons in one way or another. Many medicines which have beneficial effects when properly administered in the right doses are poisonous when taken under different circumstances. The following cases illustrate the types of situations which have resulted in suits against pharmacists, although all of them were not successful. For convenience they will be grouped under the types of negligent conduct.

Wrong Drug Unconsciously Supplied

More often than not in the earlier cases, the defendant supplied poison by mistake in answer to an oral request by the customer for a named drug. In the frequently cited Michigan case of *Brown v. Marshall*,[33] the defendant sold sulphate of zinc to the plaintiff for epsom salts with the explanation that it was a little dark from exposure. Another case in the same year in Louisiana involved another sale of sulphate of zinc for epsom salts.[34] Two early Kentucky cases involved morphine. In the first, *Smith's Adm'x v. Middleton*,[35] the plaintiff gave defendant's clerk a box marked "¼ grain calomel" and asked that he refill it. Instead he gave her morphine which she administered to her child thinking it calomel. The child died as a

29. In the words of the Supreme Judicial Court of Maine: "He is only required to have that reasonable degree of learning and skill which is ordinarily possessed by other druggists in good standing as to qualifications in similar communities." Tremblay v. Kimball, 107 Me. 53, 77 Atl. 405, 407 (1910).
30. Tucker v. Graves, 17 Ala. App. 602, 88 So. 40 (1920).
31. Tremblay v. Kimball, 107 Me. 53, 77 Atl. 405 (1910).
32. PROSSER, TORTS 132 (2d ed. 1955).
33. 47 Mich. 576, 11 N.W. 392 (1882).
34. Walton v. Booth, 34 La. Ann. 913 (1882).
35. 112 Ky. 588, 66 S.W. 388 (1902).

result. In the second, *Sutton's Adm'r v. Wood*,[36] the defendant's clerk, whose name was Mudd (literally, and no doubt figuratively), supplied a bottle of strychnine when a bottle of morphine had been requested. The plaintiff's decedent was administered a dose of the strychnine and died as a result.

In *Knoefel v. Atkins*,[37] the defendant was held liable for supplying "aectanilide" in filling a request for "10¢ worth of phosphate of soda." Both are white powdery drugs easily distinguishable by a trained person. The former is a dangerous poison when taken in the quantities usually used for a dose of the latter. Other examples of the mistakes involved are the supplying of a poison in filling a request for paregoric,[38] witch-hazel containing 10% silver nitrate for pure witch-hazel,[39] and a poison for Jamaica ginger (a prohibition era substitute for liquor),[40] Coco quinidine for coco quinine,[41] "Roachsault" (roach poison) for "Rochelle salts" (mild purgative)[42] and carbon tetrachloride for tetrachlorethylene.[43]

In the case of *Edelstein v. Cook*,[44] the Ohio court held that there was no distinction in principle between a case in which a deadly poison was substituted for a harmless drug and one in which a harmful and injurious medicine, but not deadly, was substituted. The plaintiff requested a pound of epsom salts and was given citric acid which, in the quantities usually used for a dose of epsom salts, was injurious.

Different Drug Supplied with Purchaser's Consent

In a number of cases the action was brought against the defendant who supplied a substitute for the drug requested by the plaintiff with assurances that the substitute was the same thing or just as good. In the first case, *Willson v. Faxon, Williams & Faxon*,[45] the plaintiff requested liquid cascara segrada and the defendant supplied "Kascara Kathartics" tablets which contained calomel. The defendant had at-

36. 120 Ky. 23, 85 S.W. 201 (1905).
37. 40 Ind. App. 428, 81 N.E. 600 (1907).
38. Tucker v. Graves, 17 Ala. App. 602, 88 So. 40 (1920).
39. Highland Pharmacy v. White, 144 Va. 106, 131 S.E. 198 (1926).
40. Taugher v. Ling, 127 Ohio St. 142, 187 N.E. 19 (1933).
41. Peavy v. Hardin, 288 S.W. 588 (Tex. Civ. App. 1926).
42. Hendry v. Judge & Dolph Drug Co., 211 Mo. App. 166, 245 S.W. 358 (1922).
43. Martin v. Bartell Drug Co., 155 Wash. 317, 284 Pac. 96 (1930). *Cf.* Cody v. Toller Drug Co., 232 Iowa 475, 5 N.W.2d 824 (1942); Boeck v. Katz Drug Co., 155 Kan. 656, 127 P.2d 506 (1942) (both supplied atropine, which is poison, for a harmless drug).
44. 108 Ohio St. 346, 140 N.E. 765 (1923).
45. 63 Misc. 561, 117 N.Y. Supp. 361 (1909). The court said "indifference plus good luck does not equal prudence," when referring to defendant's failure to know the analysis of the drug. *Id.* at 362. *Rev'd on other grounds*, 138 App. Div. 366, 122 N.Y. Supp. 783 (1910), *aff'd*, 131 N.Y. Supp. 1151 (1911), but *rev'd again and sent to the jury*, 208 N.Y. 108, 101 N.E. 799 (1913).

tached its own label representing the drug to be a harmless vegetable remedy. The court held that there was evidence of negligence to go to the jury, even though defendant contended that it had purchased the tablets from a reputable supplier and did not know the analysis. The court said that the word cathartic should have suggested to a pharmacist the presence of calomel and that he should have made an analysis or inquiry. In *Dunlap v. Oak Cliff Pharmacy*,[46] plaintiff requested Seilers antiseptic tablets and the defendant sold her bichloride of mercury with representations that it was practically the same thing and without having any knowledge of plaintiff's purpose for the medicine. Plaintiff inserted two tablets into her vagina to relieve a menstrual condition and almost died as a result. These facts were held to be sufficient to go to the jury on the question of negligence.

In *Tiedje v. Haney*,[47] the defendant represented that his own brand, "Superior Cold Tablets," was better than the one plaintiff had requested and which defendant didn't have. When plaintiff used defendant's tablets he became violently ill. The jury's finding of negligence was affirmed. It was held in *Wilcox v. Butt's Drug Stores*,[48] that where the pharmacist was notified of plaintiff's purpose for the medicine and he sold him a substitute, the pharmacist impliedly represented that it was suitable for the purpose. Plaintiff's dog was killed when administered defendant's substitute laxative containing strychnine.

In the interesting case of *Fuhs v. Barber*,[49] plaintiff, who was a twenty-eight year old woman, went to defendant to fill a prescription for sugar of lead to apply on poison ivy which was "under her chin and extended well down upon her chest."[50] The defendant suggested she use his skin cure which she purchased and used instead. It made her skin turn black and on each of the next several visits when she went back to complain, he sold her an additional jar and told her to apply it freely. When she finally got alarmed enough to go to a physician, she learned she was seriously and permanently damaged. No question seems to have been raised as to the ethics of a pharmacist inducing a customer to substitute his remedy for that contained in the prescription he was asked to fill.[51]

46. 288 S.W. 236 (Tex. 1926).

47. 184 Minn. 569, 239 N.W. 611 (1931).

48. 38 N.M. 502, 35 P.2d 978 (1934).

49. 140 Kan. 373, 36 P.2d 962 (1934).

50. *Id.* at 962.

51. "After making the purchase of the sugar of lead and while Mr. Barber was wrapping it up, he inquired what she was using it for, and when the plaintiff told him, he remarked that he had a remedy that was better than sugar of lead. After telling her how to apply it, she was induced to purchase his skin cure and told to use it freely. He told her not to use any more sugar of lead." *Id.* at 962.

Error in Filling Prescriptions

The cases involving errors by the pharmacist in filling prescriptions start with the New York case of *Beckwith v. Oatman*[52] in 1887, in which defendant supplied the wrong compound for the treatment of bronchitis. The leading case of *Tremblay v. Kimball*,[53] decided in 1910, affirmed a judgment of $1400 for the plaintiff when corrosive sublimate containing bichloride of mercury and muriate of ammonia was inadvertently substituted in a prescription calling for chlorodyne tablets. Defendant testified the tablets furnished came out of a bottle with the chloradyne label. The court said that if this were so, the fact that they were a different color should have excited defendant's curiosity enough to make him check. In the case of *Tombari v. Connors*,[54] the pharmacist misread calumba (a harmless tonic) for calomel in filling the plaintiff's prescription. The court stated the pharmacist's duty as follows:

> The defendant contends the prescription was written in Latin, illegible, and doubtful as to what drug was really intended. Assuming this to be true, it did not lessen the duty of the clerk [pharmacist] to be alert to avoid a mistake.[55]

In *Watkins v. Jacobs Pharmacy*[56] the court was not willing to relieve the defendant of liability for supplying a three per cent solution when the prescription was for a one per cent solution of gentian violet even though the prescription indicated it was to be used as a mouth wash and plaintiff's damage was from using it as an eyewash. Plaintiff had acted on the oral instructions of his physician to use it for an eyewash.

Furnishing the patient a greater amount of the drug than the prescription called for proved to be the error which made the defendant liable in *Johnson v. Smolinsky*.[57] Defendant supplied one ounce of medicine instead of one dram which the prescription called for. Even though defendant had put one dram as the dosage on the label on the bottle, the plaintiff consumed the full contents at one time as his physician had directed him orally. Nor was the defendant saved in *Marigny v. Dejoie*[58] by the fact that the bichloride of mercury tablets with which he had erroneously filled the plaintiff's prescription, had

52. 43 Hun. 265, 5 N.Y. St. Rep. 445 (1887).
53. 107 Me. 53, 77 Atl. 405 (1910). "But while, as has been seen, the legal measure of the duty of druggists towards their patrons, as in all other relations of life, is properly expressed by the phrase 'ordinary care,' yet it must not be forgotten that it is 'ordinary care' with reference to that special and peculiar business." *Id.* at 407.
54. 85 Conn. 231, 82 Atl. 640 (1912).
55. *Id.* at 642.
56. 48 Ga. App. 38, 171 S.E. 830 (1933).
57. 229 Mo. App. 652, 81 S.W.2d 434 (1935).
58. 172 So. 808 (La. App. 1937).

a skull and cross bones and "poison" stamped on each one and the box was marked "for external use only." The prescription label directions said, "two at bedtime."

In the recent case of *Bean v. Dempsey,*[59] plaintiff's prescription called for aluminum acetate which plaintiff used after heating it as her physician had instructed her, to saturate a bandage on a sprained ankle. Very shortly thereafter the bandage ignited while she was holding her foot about twelve inches from a stove and burned plaintiff seriously. Defendant acknowledged that aluminum acetate was a nonflammable drug. The court reversed judgment for defendant on an error in charging on contributory negligence (in plaintiff's putting foot by stove).

A case closely analogous to those wherein the pharmacist has erroneously filled the prescription but which was based on defendant's failure to fill a prescription is *Andreotalla v. Gaeta,*[60] when the court held that the following facts raised a question of negligence for the jury. Plaintiff had sent the prescription to the defendant with a message that he was to fill it unless it was the same medicine as plaintiff had obtained earlier from defendant (a cough syrup). Defendant replied that it was the same and returned the unfilled prescription as a result of which plaintiff lost the benefit of the codeine which the prescription called for, but which was not in the medicine obtained earlier.

Miscellaneous Error

The next group of cases includes miscellaneous acts of negligence charged to the pharmacists and includes one or two novel situations. In *Watkins v. Potter,*[61] the defendant had given plaintiff a bottle of cheracol to deliver to another customer on the plaintiff's way home from having a prescription for his infant filled by defendant. Plaintiff confused the packages and delivered the wrong one and administered the cheracol to the infant thinking he was using the prescription medicine. The infant died and plaintiff sought to recover on the grounds that defendant had failed to properly identify the packages for plaintiff. The court affirmed a verdict for the defendant finding that there was no proof that the cheracol had in fact caused the death.

The plaintiff suffered injuries from taking capsules which contained one fourth of a grain of strychnine and which had been supplied by defendant in filling correctly a prescription for plaintiff, in *People's Service Drug Stores, Inc. v. Sommerville.*[62] The court said there was no duty on defendant to inquire about the prescription

59. 313 Ky. 717, 233 S.W.2d 417 (1950).
60. 260 Mass. 105, 156 N.E. 731 (1927).
61. 219 Ala. 427, 122 So. 416 (1929).
62. 161 Md. 662, 158 Atl. 12 (1932).

because the doses of strychnine were heavier than usual. The court did not agree that one fourth of a grain per capsule was sufficient, in the light of the evidence, to bring it within the statute prohibiting the sale of poisons except under specified conditions. Plaintiff contended that the provision excepting sale on prescription "in not unusual quantities" was not applicable because this was an unusual quantity. The verdict for plaintiff was reversed.[63]

Violation of Statute

All states have statutes prohibiting the sale of adulterated or misbranded drugs;[64] furthermore, the Federal Food, Drug and Cosmetic Act[65] prohibits adulteration or misbranding and in addition imposes other restrictions on the dispensing of drugs. Many statutes also require certain labelling and/or other restrictions on the sale of poisons.[66]

The precise effect which will be given to a violation of criminal statutes in a suit for damages resulting from violation is not clear from the cases.[67] As in other areas of tort law the effect given the violation of a statute is not always consistent nor even logical.[68] An examination of the cases supports the conclusion that the violation of a drug statute by a pharmacist will be conclusive as to negligence in

63. The case of McClardy v. Chandler, 3 Ohio Dec. Reprint 1 (Super. Ct. 1858) is cited in 28 C.J.S. *Druggists* § 9, at 516 (1941) to support the following propositions: "Where a prescription is illegible, so that it is doubtful what drug is really intended, and the druggist, notwithstanding the exercise of ordinary care, makes such a mistake in mixing the ingredients as to cause or hasten the death of the patient, he is not liable in damages." This writer has no access to this case, but if it is to be understood as saying that the ordinary care on the part of a pharmacist does not require him to ascertain definitely what ingredients are called for by an illegible prescription, he challenges the accuracy of it as sound law—or policy. The date of the case is not given and no doubt it was before the day of the telephone, but it seems there could be no more careless conduct by a pharmacist than to fill a prescription of which he was doubtful. At least without giving ample warning if it contained dangerous ingredients; if it did not, it would not do any damage anyway.

In the case of Ray v. Burbank, 61 Ga. 506, (1878), the defendant druggist recommended a prescription he had filled for someone else, to treat plaintiff's horse. "At all events, the owner of a horse is entitled to choose his medicine, and if he chooses it on the mere recommendation of a druggist, and the druggist is guilty of no bad faith, the failure of the medicine is simply a misfortune." *Id.* at 512. For a case involving failure to properly dilute aromatic spirits of ammonia supplied to a woman for which she recovered $3,000.00 and husband $2,000.00, see Butterfield v. Snellenburg, 231 Pa. 88, 79 Atl. 980 (1911).

64. VERNON & DEPEW, GENERAL STATE FOOD AND DRUG LAWS ANNOTATED (1955).

65. 52 Stat. 1040 (1938), 21 U.S.C. §§ 301-81 (1952).

66. VERNON & DEPEW, GENERAL STATE FOOD AND DRUG LAWS ANNOTATED (1955).

67. PROSSER, TORTS 156 (2d ed. 1955).

68. MORRIS, STUDIES IN THE LAW OF TORTS 141-81 (1952).

spite of the particular language used by the court to describe the result.[69]

Most of the cases involving an alleged breach of a statute involve the failure of the defendant to comply with the statute regulating the sale of poisons. The majority involve a failure to affix the prescribed poison label to the drug, others involve the failure to ascertain the purpose of the purchase of the poison and/or the failure to record specific information about the sale as required.[70]

Illustrative of the former group, in addition to those cases already discussed under other headings is the early case of *Wohlfahrt v. Beckert.*[71] The defendant had supplied the plaintiff with "black drops" which he asked for, but warned him carefully that they were deadly poison and that ten or twelve drops was a maximum dose. In spite of this, on the advice of someone else plaintiff took a dose about ten times that amount. The court said that if the warning was given to the plaintiff orally then a poison label, which had been omitted, would have added nothing.

Illustrative of the second group of cases, *Trambaturi v. Katz & Besthoff, Ltd.*[72] held that defendant's failure to ascertain the intended use of poison purchased by plaintiff's demented adult daughter was negligence where a statute required such inquiry; defendant could have readily ascertained her condition and known not to supply her the poison with which she had committed suicide.

The case of *Eckerd's, Inc. v. McGhee*[73] supports the same conclusion as to the negligence of the defendant in violating a statute prohibiting sale of poisons to persons under sixteen years of age. The fifteen year old plaintiff who had attempted suicide with the poison had her action dismissed, as was that of her father, because the proximate cause of her injury was her own voluntary act.

In *Goodwin v. Rowe,*[74] the Oregon court said that the violation by

69. Taugher v. Ling, 127 Ohio St. 142, 187 N.E. 19 (1933); Goodwin v. Rowe, 67 Ore. 1, 135 Pac. 171 (1913); Scott v. Greenville Pharmacy, Inc., 212 S.C. 485, 48 S.E.2d 324 (1948). "As the legislation was to enhance the public's protection, the duties imposed on the druggists were intended as statutory tests of care, in so far as the statutes went. Their nonobservance is per se neglect of duty, as well as neglect of care. When special damage flows from it, there exists prima facie a case of actionable negligence." Sutton's Adm'r v. Wood, 120 Ky. 23, 85 S.W. 201, 202 (1905).

70. It seems surprising indeed that violation of the federal statute is not more often alleged, particularly when it is more restrictive than some state statutes. Although many cases involving the enforcement of the federal act are noted, only one involving a private suit was found. In it the court indicates the rapidly accelerating trend towards expanded liability, and thus found it unnecessary to apply the statute. Martin v. Bengue, Inc., 25 N.J. 359, 136 A.2d 626 (1957).

71. 92 N.Y. 490, (Ct. App. 1883).

72. 180 La. 915, 158 So. 16 (1934).

73. 19 Tenn. App. 277, 86 S.W.2d 570 (1935).

74. 67 Ore. 1, 135 Pac. 171 (1913).

the defendant pharmacist of the statute prohibiting anyone but a licensed pharmacist from dispensing drugs was sufficient to support plaintiff's verdict where he suffered damages as a result. Defendant's unlicensed clerk had given plaintiff full strength trikresol instead of a one per cent solution.

The case of *Scott v. Greenville Pharmacy, Inc.*[75] held that the violation of a statute prohibiting the sale of barbiturates without a prescription is negligence per se, but this did not help the plaintiff whose husband had committed suicide by hanging, after having become despondent from the habitual use of the barbiturate obtained from the defendant without a prescription. The court found that decedent's voluntary act was the proximate cause of his death and not the negligence of defendant.

Proof of Negligence

Some courts have held that the proof of the delivery of a dangerous drug for a harmless one raises a presumption of negligence, thus throwing the burden on the pharmacist to explain how the mistake could happen without negligence.[76] Other courts place the defendant in the same position through the application of the doctrine of res ipsa loquitur, finding that the mistake would not ordinarily occur without negligence and that the instrumentality was within the exclusive control of the defendant.[77] It would seem that in the vast majority of the situations which arise involving the negligence of a pharmacist, the proof of the fact of injury caused by defendant's conduct would be sufficient circumstantial evidence of negligence to justify a verdict if he fails to reconcile the conduct with due care.[78] As has already been pointed out earlier, most courts have little difficulty in finding the violation of a drug statute conclusive on the question of negligence, and usually call it negligence per se. One proved guilty of the violation of a statute would do well to accept the fact of his negligence and concentrate his attack and the court's attention on the lack of proximate cause, the absence of damages, or the plaintiff's contributory negligence.

Privity of Contract

Even before the case of *McPherson v. Buick Motor Co.*[79] accelerated the erosion of the misconceived rule requiring privity of contract be-

75. 212 S.C. 485, 48 S.E.2d 324 (1948).
76. Highland Pharmacy v. White, 144 Va. 106, 131 S.E. 198 (1926). Some courts say that it is a prima facie case of negligence. Knoefel v. Atkins, 40 Ind. App. 428, 81 N.E. 600 (1907).
77. Edelstein v. Cook, 108 Ohio St. 346, 140 N.E. 765 (1923). As to whether the doctrine of res ipsa loquitur is of any assistance, see King, *Evidence and Presumptions in Food Products Liability,* 5 FOOD DRUG COSM. L.J. 513 (1950).
78. PROSSER, TORTS 200 (2d ed. 1955).
79. 217 N.Y. 382, 111 N.E. 1050 (1916).

tween the injured plaintiff and the negligent supplier, drugs had become a well known exception.[80] Today, when the last vestiges of the rule requiring privity of contract are being rooted out by the courts in areas which have long enjoyed immunity,[81] there is no indication in the cases that pharmacists will be relieved of their duty to anyone who lawfully uses the product he supplies.

Proximate Cause

In every action for negligence the plaintiff has to establish that the defendant's negligence was a proximate cause of the injury of which he complains.[82] Actions against negligent pharmacists are no exception. In the majority of cases the proximate cause question would be determined by medical proof of the cause of the injury or death and by tracing the offending chemical into the drug obtained from the defendant. To determine the precise effect on the patient when the defendant has supplied the wrong drug, may in some instances be simple indeed: as where the drug was poison and killed the patient forthwith.[83] In other cases it may be very difficult to establish the part played by the wrong drug in causing the damages: as where the patient's illness was a protracted one.[84] The extent to which the wrong drug prolonged an illness would be significant; of course, if it accelerated death, it could be found to be the proximate cause.

In the case of *Riesbeck Drug Co. v. Wray*,[85] plaintiff obtained a judgment of $5,000 for the death of her husband who committed suicide by drinking carbolic acid. Decedent had sent his eight year old son to the defendant to get the drug for him "to wash feet." The court found no violation of law in the sale of the properly labelled poison to a minor in the absence of a statute prohibiting such sales. It held the voluntary act of the decedent in drinking the poison was the proximate cause of his death and reversed the judgment. Likewise in *Eckerd's Inc., v. McGhee*,[86] and *Scott v. Greenville Pharmacy, Inc.*,[87] the former involving attempted suicide with poison obtained from the defendant, and the latter involving suicide accomplished by hanging, allegedly because of decedent's despondency

80. Thomas v. Winchester, 6 N.Y. 397, 57 Am. Dec. 455 (Ct. App. 1852).
81. Moran v. Pittsburgh-Des Moines Steel Co., 166 F.2d 908 (3d Cir. 1948); Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693 (1946); Inman v. Binghampton Housing Authority, 152 N.Y.S.2d 79 (App. Div. 3d Dep't 1956).
82. Prosser, Torts 252 (2d ed. 1955).
83. As in Sutton's Adm'r v. Wood, 120 Ky. 23, 85 S.W. 201 (1905) where the decedent was given a dose of strychnine for morphine.
84. As in Jones v. Damtoft & Son, 109 Conn. 350, 146 Atl. 490 (1929) where plaintiff was suffering from a rheumatic heart and contended that the discovery of ground glass in the medicine caused him to suffer a relapse.
85. 170 N.E. 862 (Ind. 1930).
86. 19 Tenn. App. 277, 86 S.W.2d 570 (1935).
87. 212 S.C. 485, 48 S.E.2d 324 (1948).

brought on by the habitual use of barbiturates obtained from defendant without a prescription, where the courts held the plaintiff's acts were the respective causes of the damages.

DAMAGES

A necessary element of a cause of action for negligence is that the plaintiff have suffered actual damages as a result of the negligence complained of.[88] All too often plaintiffs feel that they should be entitled to a reward for having discovered defendant's negligent conduct. The law offers no such reward. No matter how flagrantly negligent[89] the defendant's conduct may happen to be, the plaintiff's recovery rests on the proof of his damages.[90] In a proper case there may be recovery of punitive damages as well.[91]

In the case of *Jones v. Damtoft & Son*[92] the plaintiff after taking medicine from a bottle found broken bits and flakes of glass both in his mouth and in the bottom of the bottle. He sued for physical damages resulting from the fear and fright which he suffered after discovery of the glass. The court upheld a directed verdict for the defendant finding no evidence to support a verdict as to any physical damage suffered by plaintiff.

CONTRIBUTORY NEGLIGENCE

Of course, the contributory negligence of the plaintiff will bar a recovery in any case where the defendant's liability is predicated on negligence.[93] There is no exception to this general rule in the case of pharmacists. If it can be established that the defendant's conduct is so flagrant as to justify characterizing it as wilfullness or recklessness, then the plaintiff's contributory negligence would not bar his recovery.[94]

In the case of *Wilcox v. Butt's Drug Stores*,[95] it was held that the plaintiff was not guilty of contributory negligence in relying on the advice of the defendant in purchasing a laxative for his dogs instead of procuring the services of a veterinarian. And in the recent case of *Bean v. Dempsey*,[96] the court held that a charge on the question of contributory negligence was error when the only alleged act of such

88. PROSSER, TORTS 165 (2d ed. 1955).
89. Or perhaps a better phrase, not yet found in the cases but received by the writer on a Torts examination paper, would be "profound and prolific negligence."
90. Laturen v. Bolton Drug Co., 16 N.Y. Anno. Cas. 267, 93 N.Y. Supp. 1035 (1905).
91. Smith's Adm'x. v. Middleton, 112 Ky. 588, 66 S.W. 388 (1902).
92. 109 Conn. 350, 146 Atl. 490 (1929).
93. PROSSER, TORTS 283 (2d ed. 1955).
94. *Id.* at 150.
95. 38 N.M. 502, 35 P.2d 978 (1934).
96. 313 Ky. 717, 233 S.W.2d 417 (1950).

negligence on plaintiff's part was in placing her bandaged foot near a stove after having saturated the bandage with what the defendant had supplied her for aluminum acetate, which the defendant acknowledged was nonflammable.

Conclusion

Perhaps the most significant conclusion to be drawn from a study of the cases involving negligent liability of the pharmacist is that there are relatively few such cases. It is impossible to know whether this is due to the superb job being done by pharmacists in avoiding mistakes, whether it is due to difficulty in tracing the cause of damage back to an error by the pharmacist, or whether the plaintiffs are now bringing the majority of their suits against the manufacturers. Perhaps all these elements are involved. No doubt the adoption of the Federal Food, Drug and Cosmetic Act of 1938 and its systematic enforcement since that time has had some effect.

So far as the liability of the pharmacists for negligence is concerned, we have seen that the law imposes on him a high standard of care and that the tendency is in the direction of expanding liability although most courts still require some showing of negligence.[97] It should not be overlooked that the facts of a case often speak louder than the words of the court's opinion. Not many courts are bold enough to impose an increased measure of responsibility in clearcut language until the principle is rather thoroughly established by new meaning given to old terms.

97. "The courts, of course, set the outer boundary to what a man may reasonably be held to foresee. But a judgment upon this question, in the nature of things, may be exercised within wide limits, and this is one of the focal points where the concept of negligence is being expanded. Not only have the scientific advances noted above enlarged the scope of what a jury may find to be foreseeable, but a quickening social conscience and the general trend towards wider liability have led the courts to perceive risks in ordinary activities of men where not so long ago they ruled them out of the permissible range of what might be found." 2 Harper & James, Torts 916 (1956).