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Pharmacy, Law, the U.C.C., and Patent Medicines

John J. Kuchinski*

WARRANTY UNDER THE UNIFORM COMMERCIAL CODE appears at present to be similar to some scientific discoveries. By the time they can be useful they are made obsolete by newer discoveries. The doctrine of liability without fault makes the warranty doctrine ineffective. Those favoring such a doctrine consider warranty as something of an obstacle since it generally requires privity¹ and a sale.² Since 1950 the doctrine of strict liability has been applied to more than only food products,³ on the theory that by putting a product in the market, public policy demands that the manufacturer or seller stand behind his product, as a cost of doing business.

The primary legal concern of the pharmacist has been and continues to be in the field of negligence. With the increasing legal awareness of society, however, it becomes imperative to examine what liabilities may arise under the U.C.C. The main objective of this paper is to explore the possible areas of liability that may arise under the Code in the sale of patent medicines by the pharmacist.

Brief History and Development

A classic example of negligence by a pharmacist was stated in *Thomas v. Winchester*,⁴ where a dangerous drug was sold clearly labeled as a harmless one. The landmark case of *MacPherson v. Buick Motor Co.*⁵ extended liability beyond that of the immediate user where a dan-

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¹ 2 Frumer-Friedman, *Products Liability* 479 (1968); privity requirements; rejecting privity is discussed in Prosser, *The Fall of the Citadel*, 50 *Minn. L. Rev.* 791 (1966). The Uniform Commercial Code, sec. 2-318 removes privity as to members of the purchaser's family, his household and guests if it is reasonable to assume such person may use or consume such product. Some states have deleted the section as too restrictive: e.g., California. Other jurisdictions have abolished privity in regard to food, cosmetics and drug products.

² Lack of a sale has been held a proper defense to a warranty action. *Perlmutter v. Beth David Hospital*, 308 N.Y.S. 2d 100, 123 N.E. 2d 792 (1954); held blood transfusion as incidental to service. Similar cases are *Goelz v. Wadley Research Center*, 350 S.W. 2d 573 (Tex. Civ. App. 1961); *Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc.*, 132 N.W. 2d 805 (Minn. 1965). Contra: article discussing those cases holding a contra view is discussed in 24 *Business Lawyer* 847 (April 1969).

³ *Greenman v. Yuba Powers Products, Inc.*, 27 Cal. Rptr. 697, 377 P. 2d 897 (1963); purchaser hit by power tool while operating it. *Wright v. Massey-Harris, Inc.*, 68 Ill. App. 2d 70, 215 N.E. 2d 465 (1966); defect in design, however, rather than in manufacture, caused the injury. *Schonfeld v. Norton*, 391 F. 2d 420 (10th Cir. 1968); no privity required if foreseeable harm from defective product marketed.

⁴ 6 N.Y. 397, 57 Am. Dec. 455 (1852).

⁵ 217 N.Y. 382, 111 N.E. 1050 (1916).

gerous article was involved. *Rylands v. Fletcher*⁶ had set the early standards of liability without fault.

As a result of the difficulties encountered in successfully sustaining a suit based upon negligence, the warranty doctrine began to be frequently employed as a basis for liability. While negligence is a concept based upon fault, warranty arises where there is injury as a result of a failure of a product to measure up to the express or implied warranties of the manufacturer or seller. No negligence need be proved.⁷ Breach of warranty, as a result, is the preferred method of pleading.⁸ Ordinarily in a breach of warranty the buyer must prove the existence of the warranty,⁹ breach of the warranty,¹⁰ loss or injury resulting from the breach, and that the breach was the proximate cause of the loss.¹¹ While under the Uniform Sales Act reliance was deemed necessary for a warranty action, the U.C.C. no longer considers it essential¹² except for the warranty of fitness for a particular purpose.¹³

What does the U.C.C. do about the field of product liability? Three things are apparent: (1) it gives statutory definitions to the terms *express* and *implied warranties*, (2) it defines the scope of such warranties, and (3) it has substantial impact upon the efficacy and scope of the disclaimer itself.¹⁴

Justice Jackson prophetically described in 1953 the present apparent philosophy concerning product liability. He said,

This is a day of synthetic living, when to an ever increasing extent our population is dependent upon mass producers for its food and drink, its cures and complexions, its apparel and gadgets. There no longer are natural or simple products but complex ones whose compositions and qualities are often secret. Such a dependent society must exact greater care than in more simple days and must require from the manufacturer or producers increased integrities and caution as the only protection of its safety and well being. Purchasers cannot try our drugs to determine whether they kill or cure. Consumers cannot test the youngster's cowboy suit or the manufacturer's sweaters to see if they are apt to burst into fatal flames. Carriers by land or by sea cannot experiment with the combustibility of

⁶ L.R. 1 Exch. 265 (1868).

⁷ *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A. 2d 69 (1960); *Bailey v. Montgomery Ward & Co.*, 431 P. 2d 108 (Ariz. 1967).

⁸ Hursh, *American Law of Product Liability*, sec. 3:1 (1961).

⁹ Uniform Commercial Code, sec. 2-314, Comment B.

¹⁰ *Kepling v. Schlueter Mfg. Co.*, 378 F. 2d 5 (6th Cir. 1967); *Jacobson v. Ford Motor Co.*, 427 P. 2d 621 (Kan. 1967).

¹¹ *Borowicz v. Chicago Mastic Co.*, 367 F. 2d 751 (7th Cir. 1966).

¹² *Ingalls v. Meissner*, 11 Wis. 2d 371, 105 N.W. 2d 748 (1960); however, now only bare proof of reliance is needed. *Kasey v. Suburban Gas Heat Co.*, 60 Wash. 2d 468, 474 P. 2d 549 (1962).

¹³ Uniform Commercial Code, secs. 2-315, 2-316.

¹⁴ *Disclaimer of Warranty & Products Liability*, 1 UCC Law J. 178 (1968).

goods in transit. Where experiment or research is necessary to determine the presence or the degree of danger, the product must not be tried out on the public, nor must the public be expected to possess the facilities or technical knowledge to learn for itself of inherent but latent dangers. The claim that a hazard was not foreseen is not available to one who did not use foresight appropriate to his enterprise.¹⁵

The Pharmacist

The importance of the pharmacist as a member of the health team is well recognized, even though attempts have been made to license those unqualified.¹⁶ Since the pharmacist does have a unique position in the community, what is usually referred to as reasonable care under the circumstances is actually the highest degree of care.¹⁷ The care required must be commensurate with the danger involved. An example, while in the field of medicine and not pharmacy, is the tendency to abolish the "locality" rule which once existed in determining due care. The urban or rural rule which once prevailed no longer exists.¹⁸ The pharmacist, no matter where he practices, must keep abreast of the latest medical as well as legal developments that affect him.

Express Warranties

Ordinarily an express warranty might not present a burdensome problem except that the U.C.C. tends to increase the possibility of an express warranty rather than limit it and creates a reliance by the community on the pharmacist as an expert in the field of drugs.¹⁹ By definition the Code states:

Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmations or promise.²⁰

Usually when dealing with the retailer it is difficult to determine whether the language used constituted an express warranty or was mere

¹⁵ *Dalehite v. U.S.*, 346 U.S. 15, 51-52 (dissent) (cert., 5th Cir. 1953).

¹⁶ An example of this is discussed in *Maine Pharmacy Ass'n v. Board of Commissioners*, 245 A. 2d 271 (Me. 1968); *State Board of Pharmacy enjoined from permitting unqualified applicants to take examination. National Ass'n of Retail Druggists*, Jan. 1969, *Subprofessionals Cannot Do the Job*.

¹⁷ *Krueger v. Knutson*, 261 Minn. 144, 111 N.W. 2d 526 (1961); potassium chlorate sold by druggist without appropriate warnings.

¹⁸ *Avey v. St. Francis Hospital & School of Nursing, Inc.*, 442 P. 2d 1013 (Kan. 1968); implies that due to the standard licensing by the State by way of statutes and regulations, and the availability of literature, mass communications etc., a geographic area should not impede one's knowledge per se.

¹⁹ *Infra* note 59.

²⁰ Uniform Commercial Code, sec. 2-313(1) (a); for discussion see *Collins, Warranty of Sale Under the Uniform Commercial Code*, 42 Ia. L. Rev. 63 (1956).

opinion. The Code further states that while no specific language or intent is needed,

any affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warrant.²¹

There is little case law regarding a pharmacist's express warranty of patent medicine. The reason for this is that pharmacists seldom utter definite statements concerning a product, other than their opinion. However, in the field of health, and with the adoption of the U.C.C., it is increasingly important for the pharmacist to be careful of what he says while making a sale. A loose tongue may unintentionally create liability.

Whenever the only evidence to an express warranty is wholly or partly oral, the creation of a warranty has been held to be a jury question.²² However, statements as to the safety and suitability, if stated as more than mere opinion and untrue can be actionable.²³ The trend has been to construe the statements of the seller as warranties if reasonable.²⁴ The affirmations by the seller may be such that there arises both an express warranty as well as a warranty of fitness for a particular purpose.

Statements like "good" or "used by others" have consistently been held to be mere opinion or sales talk. Where the clerk told a customer that while she did not stock the dress requested, but she did have one similar and even better, it was held to be puffing.²⁵ A salesgirl's statement that the product (artificial fingernail kit) was "wonderful" was held to be seller's talk.²⁶ A contrary view was held in *Brown v. Shelton*,²⁷ where a statement about a hair dye, that she had no complaints and everyone liked it, was held to be an express warranty. This seems to be the minority view. In *Bel v. Adler*²⁸ the court stated, "to charge a dealer with an express warranty of the goods the circumstances must be sufficient to show not only the buyer relied upon the dealer's statement as being an express warranty, but that the dealer intended them as such and knew that the buyer was so relying or would be justified

²¹ *Id.* (2).

²² *Compton v. M. O'Neil*, 101 Ohio App. 378, 139 N.E. 2d 635 (1955); 46 Am. Jur. 502 (1943); 77 C.J.S. 1306 (1952).

²³ *Jeffery v. Hanson*, 39 Wash. 2d 855, 239 P. 2d 346 (1952); even with good intentions and belief of truthfulness if statement is false, liability may arise.

²⁴ CCH, sec. 1080, Products Liability Rptr.

²⁵ *Ross v. Porteous, Mitchell & Braunt Co.*, 136 Me. 118, 3 A. 2d 650 (1939).

²⁶ *Jacquot v. Wm. Filene's Sons Co.*, 337 Mass. 312, 149 N.E. 2d 635 (1958).

²⁷ 391 P. 2d 259 (Okla. 1964); a strong dissent was made by Vice Chief Justice Hully, stating that no warranty existed.

²⁸ 63 Ga. App. 473, 11 S.E. 2d 495 (1940); *Wood v. Hub Motor Co.*, 110 Ga. App. 101, 137 S.E. 2d 674 (1964); the only warranty by the retailer is that the goods were purchased from a reputable manufacturer.

in so doing." Under the Code, however, it seems the requirements may be substantially less.

In the absence of bad faith, the recommendation of a reputable manufacturer's product in general or broad language is nothing more than an opinion even if it concerns a *legend*²⁹ drug.³⁰ If the pharmacist adopts the warranties on the label as his own or sells it under his own label,³¹ he will be held liable for injuries caused by the drug having injurious components.³² When the pharmacist sells a patent medicine and is reading the information from the label of the product, he should make known to the customer that it is the manufacturer's advice and not his own.

The labeling requirements on patent medicines must meet stringent Federal³³ and State³⁴ regulations. The label contains particular information needed by the consumer to safely use the product³⁵ as a means of self-treatment. It is apparent that some confusion might arise between the general statements made by the pharmacist and the particular indications on the label. In the absence of negligence or of any express warranty (assuming the language used is mere opinion) it would appear that the customer is relying on the labeling rather than the pharmacist's talk. This is, of course, important when showing a warranty for a particular use which is implied by law. This nevertheless creates a difficult situation. The Code states that the intention of the parties is of primary concern.³⁶

The buyer may contribute to or cause his own injury by using the product under conditions specifically warned against.³⁷ Sometimes this can present an easy defense.³⁸ However, in warranty, contributory negligence may not be a proper defense and some jurisdictions will not inquire into those actions.³⁹

²⁹ A definition of *legend* is given in *Lawyers' Medical Encyclopedia*, sec. 3A.4 (curr. Rev. ed.); potent and dangerous if not taken under the direction of a physician.

³⁰ *Ray v. Burbank & Jones*, 61 Ga. 506, 34 Am. Rep. 103 (1878).

³¹ *Tiedje v. Haney*, 184 Minn. 569, 239 N.W. 611 (1931).

³² *Willson v. Faxon, Williams & Faxon*, 208 N.Y. 108, 101 N.E. 799 (1913).

³³ *Food, Drug & Cosmetic Act*, 21 U.S.C.A., sec. 352.

³⁴ Patent medicines are subject to regulation under the police powers of the state to protect the public health. *Liggett v. Baldridge*, 278 U.S. 105, 73 L. Ed. 204 (1928); *State Board of Pharmacy v. Matthews*, 197 N.Y.S. 353, 90 N.E. 966 (1910).

³⁵ *Id. supra* note 34(f) (1).

³⁶ *Uniform Commercial Code*, sec. 2-316.

³⁷ *Fredendall v. Abraham & Strauss, Inc.*, 279 N.Y.S. 146, 18 N.E. 2d 11 (1938).

³⁸ *Ibid.*

³⁹ *Young v. Aeroil Products Co.*, 248 F. 2d 185 (9th Cir. 1957).

Implied Warranty of Merchantability

This part of warranty under the Code appears less complex. Generally, the U.C.C. permits the warranty of merchantability to arise in any sale by a merchant. It has been defined as meaning that the thing sold is reasonably fit for the general purpose for which it is manufactured and sold.⁴⁰ The Code sets up six standards for merchantability;⁴¹ among them; that the goods must be such as conform to the promise of affirmations of fact on the container or label.⁴² It is imposed by law to promote higher standards by the manufacturer and retailer, and to protect the public as a matter of public policy. The retailer is in a better position to determine and select the products he will sell, and the consumer relies on his selection.⁴³ Even for latent defects the retailer may be held liable, since, under warranty, no proof of negligence or notice or knowledge of the defect is required.⁴⁴ Under the doctrine of public policy, protection for the consumer seems of prime importance. While the consumer might have an action against the manufacturer, it is easier to bring suit against the retailer with whom he deals directly. In modern practice however, suit is initiated against all persons who might be responsible for the injury, and the retailer can join the manufacturer responsible for the injury, as a party.⁴⁵

It is quite clear that if the retailer purchases his goods from a reputable manufacturer or dealer, he is under no duty to inspect or analyze each package.⁴⁶ If an injury results from such a sale, the retailer is not guilty of negligence.⁴⁷ He is under a duty to exercise reasonable care to prevent injury due to a known danger. But in *Ryan v. Progressive Grocery Stores, Inc.*,⁴⁸ where a loaf of bread was sold containing a pin inside it, the court stated that one of the hazards of being in the retail business was that the seller must hold out merchandise as being reasonably fit for the purpose for which it is required, or that the article is of merchantable quality or both. The retailer here was allowed to recoup his losses from the manufacturer.

A main difficulty in this area is the adverse reaction or allergy response. This is usually the responsibility of the manufacturer or one

⁴⁰ *Henningsen v. Bloomfield Motors, Inc.*, *supra* note 7; *Davidson v. Wee*, 93 Ariz. 191, 379 P. 2d 744 (1963).

⁴¹ Uniform Commercial Code, sec. 2-314 (2).

⁴² *Id.* (f).

⁴³ *Sams v. Ezy-Way Foodliner Co.*, 170 A. 2d 160 (Me. 1961).

⁴⁴ 1 Williston 617 (curr. Rev. ed.) (Personal Property Law) sec. 96, subd. 3.

⁴⁵ *Davis v. Radford*, 233 N.C. 283, 63 S.E. 2d 822 (1951).

⁴⁶ *West v. Emanuel*, 198 Pa. 188, 47 A. 965 (1901).

⁴⁷ *Ibid.*, *Howard v. Jacobs Pharmacy Co.*, 55 Ga. App. 163, 189 S.E. 373 (1937).

⁴⁸ 255 N.Y.S. 388, 175 N.E. 105 (1931).

who holds himself out as such.⁴⁹ This should pose no problem to the pharmacist unless he should by express warranty or by warranty for a particular purpose acquire greater liability for himself. He would be guaranteeing the results, for such liability to attach. This is certainly true under the former Uniform Sales Act. The Code may be different, however, as pertaining to the warranty for a particular purpose.

Warranty of Fitness for a Particular Purpose

A warranty of fitness for a particular purpose arises by operation of law whenever a buyer can establish that he has relied upon the judgment or skill of the seller who has reason to know the particular purpose for which the product is sold.⁵⁰ However, if examination by the buyer should have disclosed the defect, there is no liability. Under the Uniform Sales Act,⁵¹ as well as the Code, ordinarily no warranty for a particular purpose arises when the product is sold by its brand name.⁵² However, under the Code the fact that an item is purchased by its trade name does not eliminate such a warranty if selected⁵³ or recommended⁵⁴ by the seller. While some cases hold contra,⁵⁵ the majority maintain that the retailer may still be liable under the warranty for a particular purpose while selling a trade name product.⁵⁶

It has been held that often the two implied warranties coincide,⁵⁷ especially concerning food products. The difficulty for the retailer is that such a theory extends liability to him. The writer fails to understand such a rationale in certain circumstances. Let us examine the pharmacist and see how it relates to his duties in selling patent medicines.

⁴⁹ Tiedje v. Haney, *supra* note 31.

⁵⁰ Uniform Commercial Code, *supra* note 13.

⁵¹ Uniform Sales Act, sec. 15(4) states that in the case of a contract to sell or a sale of a specified article under its patent or trade name there is no implied warranty as to fitness for any particular purpose.

⁵² *Ibid.*; Beckett v. F. W. Woolworth & Co., 376 Ill. 470, 34 N.E. 2d 427 (1941); mascara purchased by trade name.

⁵³ Buchanan v. Dugan, 82 A. 2d 911 (D.C. Mun. Ct. App. 1951); hearing aid selected by the seller.

⁵⁴ Ireland v. Liggett & Co., 243 Mass. 243, 137 N.E. 371 (1922); cold cream recommended by clerk; Haney v. Radio Corp. of America, 390 P. 2d 980 (Wash. 1964); TV set purchased; Handy v. Holland Furnace Co., 11 Wis. 2d 151, 105 N.W. 2d 299 (1960); thermostat recommended by the seller.

⁵⁵ William v. S. H. Kress & Co., 48 Wash. 2d 88, 291 P. 2d 662 (1955); Howe Searle Co. v. Furst, 23 Cambria 84 (Cambria County Ct. of Pa., 1960); held under the Uniform Commercial Code where an experienced buyer did not rely on seller, especially since there was no sales talk.

⁵⁶ Reynolds v. Sun Ray Drug Co., 135 N.J.L. 475, 52 A. 2d 666 (1947); lipstick as sold; Brown v. Shelton, *supra* note 27; Howard v. Avon Products, 395 P. 2d 1007 (Colo. 1964).

⁵⁷ *Ibid.*

The drugstore itself is devoted to selling literally thousands of different items. The pharmacist generally acts as manager for such operations. He is qualified professionally,⁵⁸ however, by education and training, to compound and fill prescriptions⁵⁹ from a licensed physician. The practice of pharmacy comprehends the compounding and preparing of drugs that are usually dangerous when handled by those not qualified in the properties of drugs. As well qualified as he may be in the field of drugs, he nevertheless cannot practice medicine.⁶⁰ He does not possess the skill or judgment to diagnose a particular illness. The main function of the pharmacist then is not to act as an intermediary for the doctor for less serious diseases (although in practice many people may feel this is so).

As a result when a person asks for something good for a cough and is given something that is reasonably fit for such a purpose, it would appear that the pharmacist is warranting nothing other than merchantability. A breach under these circumstances would indicate an action in negligence⁶¹ primarily. It is important to distinguish what action may arise since the defenses available will be limited in warranty cases. To imply that a request for a cough syrup gives rise to a warranty for a particular purpose is not altogether conclusive. As a matter of fact, it appears to be nothing more than a general purpose. The distinction may seem slight but the liability that arises under each can be substantial.

The Code specifically states that to qualify under the particular purpose warranty it cannot be a general request.⁶² While under the Uniform Sales Act a hypersensitive reaction was a good defense to any warranty action, the Code does not mention this qualification. Under the warranty of merchantability, this would be the manufacturer's responsibility. However, under the warranty for a particular purpose, it is possible for a pharmacist to sell a product free from any defect (thereby eliminating any liability on the manufacturer), reasonably fit for the general purpose required, and still be liable for some injury resulting from such product due to an allergic response. This is true even in the absence of any negligence.

⁵⁸ 28 C.J.S. 57 (1941).

⁵⁹ An example of the skill required for the practice of pharmacy in Ohio can be found in Ohio Rev. Code sec. 4729.08 (1953). It requires graduation from a recognized college of pharmacy, internship for a period of one year under the supervision of a registered pharmacist, and passing an examination by the State Board to obtain a certificate.

⁶⁰ Underwood v. Scott, 43 Kan. 714, 23 P. 942, 943 (1890); the practice of medicine may be said to consist of three things: first, in judging the nature, character and symptoms of the disease; second, in determining the proper remedy for the disease; and third, in giving or prescribing the application of the remedy to the disease.

⁶¹ Thomas v. Winchester, *supra* note 4.

⁶² Regula v. Gerber, 47 Ohio L. Abs. 196, 70 N.E. 2d 662 (1946); distinguished particular and general purpose. This is distinguishable, however, in Kurriess v. Conrad, 312 Mass. 670, 46 N.E. 2d 12 (1942); selection from a merchant's general stock may still imply a warranty of fitness for a particular purpose.

There seems to be quite a difference in requesting an item such as a thermostat⁶³ to function properly in a furnace and in asking for some patent medicine for a cough or cold. The former can easily be ascertained by precise measurements, while the latter could not be ascertained to any great degree even by a qualified physician. This appears to the writer to be one distinction between a general and particular purpose.

The buyer must in fact rely upon the seller's superior skill or judgment.⁶⁴ It is at least questionable whether one can rely upon facts which do not exist when considering the warranty for a particular purpose. The fact that the consumer *thinks* that the pharmacist can suggest some patent medicine for a particular illness because of his training should not create greater liability for the pharmacist. A secret reliance, I suppose, would include a mistaken reliance, and this is insufficient to give rise to a warranty for a particular purpose.⁶⁵ Usually in interpreting a code a rather narrow construction is given. That is one of the purposes of a code.

The definition of *patent medicine*⁶⁶ itself indicates that the public can treat themselves if they so desire. The druggist has no duty to speak at all when he sells a requested trade name product *unless the circumstances would indicate otherwise*. This would be true in the sale of poisons, where, by state law, the seller must inquire into the use or purpose of acquisition and so designate it in the appropriate book of record. It would also seem prudent in the sale of dangerous items to minors or aged people where the likelihood of misuse would be greater. His duty increases, however, when he recommends a product, since the purchaser may very well be considered to be relying upon the judgment and skill of the seller.

The pharmacist can state that a certain patent medicine is good for a particular purpose, and may thereby become an insurer,⁶⁷ a very foolish thing to do. The labeling requirements⁶⁸ should be taken into consideration in determining whether reliance is actually upon the pharmacist in making the sale.⁶⁹ *Fuhs v. Barber*⁷⁰ states that no liability arises to a druggist for lack of instructions as to the safe method of handling

⁶³ *Handy v. Holland Furnace Co.*, *supra* note 54.

⁶⁴ *Frumer-Friedman*, *supra* note 1, sec. 19.03(4) (b).

⁶⁵ *McCormick v. Hoyt*, 53 Wash. 2d 338, 333 P. 2d 639 (1959); a secret reliance does not meet the requirements of warranty of fitness for a particular purpose.

⁶⁶ The term used in this article indicates that the product can be purchased without a physician's prescription and is similar to over-the-counter products that may be bought at retail stores. Specifically it indicates that the manufacturer has the exclusive right to manufacture and sale of an invention or patented item.

⁶⁷ Otherwise the druggist is not an insurer; Traynor, *The Ways & Means of Defective Products and Strict Liability*, 32 Tenn. L. Rev. 363 (1965).

⁶⁸ *Supra* note 33, 34; *Albert Food Products v. U.S.*, 194 F. 2d 463 (9th Cir. 1952).

⁶⁹ *McCormick v. Hoyt*, *supra* note 65.

⁷⁰ 140 Kan. 373, 36 P. 2d 962 (1934).

articles called for by the customer, where the dangerous qualities are generally known and nothing would indicate to the seller that the buyer could not be entrusted with such a product. *Cullinan v. Tetrault*⁷¹ stated that no liability resulted when a customer relied upon a seventeen year old boy, obviously inexperienced, to get a certain patent medicine, and was given the wrong one clearly labeled as to its true content. Section 2-317 of the U.C.C. states that adequate warning through product labeling and instructions accompanying the sale discharges the manufacturer's duty. The pharmacist should draw attention to those instructions in every sale.⁷²

While the complexities of chemicals are great, the consumer should be aware of the dangers and be required to read labels, especially in an age of universal education. This is important nowadays, since in our earlier history one would assume that the population could not understand the dangers involved. That is certainly not true today, even though some choose to ignore it. A pharmacist is not necessarily liable for an error of judgment consistent with ordinary care and skill.⁷³ Where the danger is evident, as a matter of common knowledge, no liability arises for the retailer.⁷⁴ However, it has also been held that even though a person may be guilty of contributory negligence, if, by reason of his age or lack of information or experience, he does not understand the risk involved, he will not be deemed to assume the risk.⁷⁵ It would appear to be quite an extension of law to hold the pharmacist liable under the warranty for a particular purpose in some of these circumstances, and yet that possibility seems feasible.

Conclusion

Public policy should not forget the retailer. The risk of proprietorship, while great, is not endless. Should a pharmacist carry a sign or play a tape recorder disclaiming any implied warranties every time he makes a sale of a patent medicine? The law seems to be approaching this conclusion.

To complicate matters, there is pending legislation to introduce a reclassification of drugs⁷⁶ that would permit a pharmacist to sell certain

⁷¹ 123 Me. 302, 122 A. 770 (1923); court relied on the purchaser buying from a boy rather than from not reading the label.

⁷² *Marcus v. Specific Pharmaceutical*, 82 N.Y.S. 2d 194 (Sup. Ct. 1948); failure to give adequate warnings during the sale of a suppository.

⁷³ *Jones v. Walgreen*, 265 Ill. App. 308 (1932), *Tremblay v. Kimball*, 107 Me. 53, 77 A. 405 (1910).

⁷⁴ *Wilkinson v. Rich's Inc.*, 77 Ga. App. 239, 48 S.E. 2d 552 (1948).

⁷⁵ *Frumer-Friedman supra* note 1, sec. 16A(5)(f).

⁷⁶ *American Druggist*, Jan. 13, 1969; *What to Watch for in Congress*; discusses the chances and hopes of a reclassification of drugs.

drugs formerly requiring a physician's prescription. Reliance in these sales would be evident. The question that immediately arises here is whether it is governed by the Code as a sale, or might it be only incidental to a service?

There is one direction that seems to take all these factors into consideration. Instead of a strict liability doctrine,⁷⁷ one resembling *comparative negligence* seems prudent. The U.C.C. Law Journal⁷⁸ describes such a theory as comparative fault. The "do or die" doctrine⁷⁹ and the "all or nothing" philosophy certainly seem barbaric in an age of increasing education and intelligence. Certainly no one system is perfect or inclusive, but when comparing their relative merits, the strict liability-without-fault doctrine is not appealing (especially to the retailer). The doctrine of *Rylands v. Fletcher*⁸⁰ can be extended too far. A Texas court said, "What pressing reasons clamor for adoption of the rule of liability without fault, and the abandonment of the rule of negligence? In our opinion, there is no need for the rule of liability without fault. In fact, there was no such need even in the case of *Rylands v. Fletcher*."⁸¹

⁷⁷ Restatement of Torts 2d, sec. 402A (1965).

⁷⁸ Note, Comparative Fault in Warranty, 1 U.C.C. Law Journal 59 (1968).

⁷⁹ *Ibid.*

⁸⁰ *Supra* note 6.

⁸¹ *Klosterman v. Houston Geophysical Co.*, 315 S.W. 2d 664 (Tex. Civ. App. 1958).