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## Torts - Implied Warranty - Pharmacists' Liability for Use of Manufacturer's Sealed Packets

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types of insanity in which the insane person is not conscious of the consequences of his act. The law, by not inquiring into the nature of the individual decedent's illness when considering the suicide, but imposing an arbitrary rule in all cases is not taking into consideration that knowledge of insanity recognized by courts in other areas.<sup>21</sup>

*Eric Caban*

<sup>21</sup> Lewis v. Lewis, *supra* note 19. See also Blackstone v. Standard Life & Acc. Ins. Co. *supra* note 20.

### TORTS—IMPLIED WARRANTY—PHARMACISTS' LIABILITY FOR USE OF MANUFACTURER'S SEALED PACKETS

John McLeod's physician prescribed for his use a drug known as "Mer/29"<sup>1</sup> to control his body cholesterol. The drug was manufactured by the defendant W. S. Merrell Co., and was sold to retail druggists including International Pharmacies, Inc., and the James Drug Shop, Inc., for resale on a prescription only basis. Both of these drug stores filled McLeod's prescription at some time and the drug was sold in the original sealed packets in which it was received from the manufacturer. McLeod was not warned by either of the retail druggists as to any possible inherent danger from usage of the drug. The drug, when taken in the recommended dosage produced severe side effects, which included the formation of cataracts and other eye damage. McLeod brought suit against W. S. Merrell Co. and joined the two retailers in a count charging breaches of the implied warranties of fitness for intended purpose, merchantability, and wholesomeness or reasonable fitness for human consumption. The trial court ruled that a retail druggist does not warrant the inherent fitness of drugs sold on prescription and dismissed the defendant retail drug stores. On appeal, the appellate court affirmed the finding of the Circuit Court,<sup>2</sup> but on the basis of impelling public interest the question was certified to the Supreme Court of Florida. The supreme court found no evidence of a breach of implied warranty and affirmed the opinions of the lower courts. *McLeod v. W. S. Merrell Co.*, 174 So. 2d 736 (Fla. 1965).

The uniqueness of the *McLeod* case is two-fold. Initially, it restates and reaffirms what previous decisions have held to be the implied warranties made by a druggist filling a prescription, and secondly the theory of strict liability in tort, in relation to the liability of a druggist filling a prescription, was discussed and rejected.

<sup>1</sup> For an interesting medical-legal statement of the history of triparanol, or "Mer/29," see Spangenberg, *Aspects of Warranties to Defective Prescription Drugs*, 37 U. COLO. L. REV. 194 (1965); and Note, 16 W. RESERVE L. REV. 392 (1965).

<sup>2</sup> *McLeod v. W. S. Merrell*, 167 So. 2d 901 (Fla. App. 1964).

The *McLeod* decision reveals that a druggist filling a prescription warrants that he will compound and deliver the drug prescribed,<sup>3</sup> that he has used due and proper care,<sup>4</sup> that the proper methods were used,<sup>5</sup> and that the drug was not adulterated with a foreign substance.<sup>6</sup> This is merely a reassertment of the general liability of a pharmacist who compounds any prescription.<sup>7</sup> This liability, however, must be examined in relation to certain other pertinent factors, such as the general scope of the implied warranty of fitness for particular purpose and the implied warranty of merchantability, and the correlation between the liability imposed upon a retailer of food, drink, and other products intended for human consumption, and that of a retail pharmacist.

As a general statement of law the implied warranty of fitness for particular purpose is conditioned upon the buyer's reliance on the skill and judgment of the seller to supply a suitable commodity.<sup>8</sup> The Supreme Court of Florida was of the opinion that a patient-purchaser does not rely on the skill and judgment of the pharmacist but places his confidence in his physician who prescribed the drug, the physician in turn relying on the representations of the manufacturer.<sup>9</sup> This opinion is diametrically opposed to previous Florida decisions involving non-druggists, such as *Green v. American Tobacco Co.*,<sup>10</sup> in which the Supreme Court of Florida imposed absolute liability on a manufacturer or distributor of cigarettes for breach of the implied warranty of fitness and stated in effect that the buyer was assumed to rely upon the seller's judgment in cases where the buyer neither knows nor has an opportunity to know the fitness or un-

<sup>3</sup> *Corana Coal Co. v. Sexton*, 21 Ala. App. 51, 105 So. 716, cert. denied 213 Ala. 554, 105 So. 718 (1925); *Watkins v. Jacobs Pharmacy Co.*, 48 Ga. App. 38, 171 S.E. 830 (1933); *Henry v. Judge and Dolph Drug Co.*, 211 Mo. App. 166, 245 S.W. 351 (1922); *Highland Pharmacy v. White*, 144 Va. 106, 131 S.E. 198 (1926).

<sup>4</sup> The degree of care required is high, commensurate with the risks involved: *McGahey v. Albritton*, 214 Ala. 279, 107 So. 751 (1926); *Watkins v. Jacobs Pharmacy Co.*, *supra* note 3; *Jones v. Walgreen Co.*, 265 Ill. App. 308 (1932); *Tiedje v. Haney*, 184 Minn. 569, 239 N.W. 611 (1931). However, it is still only that degree of care required of the ordinary pharmacist: *Faulkner v. Birch*, 120 Ill. App. 281 (1905); *Beckwith v. Oatman*, 43 Hun 265 (N.Y. 1887).

<sup>5</sup> *Gottsdanker v. Cutter Laboratories*, 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960).

<sup>6</sup> *Ibid.*

<sup>7</sup> See Annot., 79 A.L.R.2d 301 (1961).

<sup>8</sup> *HAWKLAND, SALES AND BULK SALES* 4 (1958).

<sup>9</sup> *But cf. Wennerholm v. Stanford University School of Medicine*, 20 Cal. 2d 713, 128 P.2d 522 (1942) where the purchaser was held to rely on the representations of the manufacturer even though the drug was prescribed by his physician; *Wechsler v. Hoffman-LaRoche, Inc.*, 99 N.Y.S.2d 588 (1950) where the physician was held to be an agent of the purchaser for purposes of reliance upon the manufacturer's representations.

<sup>10</sup> 154 So. 2d 169 (Fla. 1963). See also, *Green v. American Tobacco Co.*, 325 F.2d 673 (5th Cir. 1963), cert. denied, 377 U.S. 943 (1963).

wholesomeness.<sup>11</sup> It is somewhat difficult to perceive how a purchaser can be held to rely on the seller's skill and judgment when purchasing lipstick, since the ingredients of lipstick cannot be determined without chemical analysis,<sup>12</sup> and yet be held not to rely on the skill and judgment of a druggist filling a prescription.

As to the implied warranty of merchantability, the court defines it as a warranty that the goods are fit for the ordinary uses for which such goods are sold,<sup>13</sup> but conditions such warranty on sales to the general public. Because the drug was sold on a "prescription-only" basis, the merchantability of the drug was held not warranted to a retail purchaser. Such a statement seems to have little or no legal precedent.<sup>14</sup> The cases cited by the court express the traditional definition of the warranty, and while they hold a retailer liable for breach of warranty for the sale of tainted food in sealed containers, they do not condition liability on sales to the general public.<sup>15</sup> It would be analogous to state that a seller of handguns, in a city requiring a permit to purchase, makes no implied warranty of merchantability due to the fact that he does not sell to the general public but only to those having the required permit.

The Court's conclusions as to the law relating to breach of implied warranties are not necessary to support the inarticulated premise that liability in this factual situation would be inequitable. Perhaps a better rationale for rejecting liability based on warranty in the case of a druggist who properly compounds the drug prescribed, but which results in an adverse reaction to the user due to the toxicity of the drug itself, was stated by Professor Sprangenberg as follows:

An example of a drug of this type is triparanol, prescribed under the trade name of Mer/29 and used to reduce blood cholesterol levels. This drug is presently involved in widespread litigation because of the noxious side effects it has produced. The druggist who sold the drug would seem not to be liable under the theory of warranty. Where the purchaser ordered Mer/29 and the druggist supplied it, the only reliance placed on the druggist's skill would be a reliance that the drug was in fact Mer/29 and has not deteriorated or changed in its chemistry by improper storage. The triparanol sold would be as fit for consumption as all other triparanol, and as merchantable. The manufacturer, however, warrants not only that the drug is triparanol, but that triparanol is a substance

<sup>11</sup> *Accord*, *Sperry Rand Corp. v. Industrial Supply Corp.*, 337 F.2d 363 (5th Cir. 1964); *Lambert v. Sistrunk*, 58 So. 2d 434 (Fla. 1952).

<sup>12</sup> *Smith v. Burdine's Inc.*, 144 Fla. 500, 198 So. 223 (1940).

<sup>13</sup> *E.g.*, *Carney v. Sears Roebuck and Co.*, 309 F.2d 300 (4th Cir. 1962); *Sol-o-Lite Laminating Corp. v. Allen*, 223 Ore. 80, 353 P.2d 843 (1960); *Hardman v. Helene Curtis Industries, Inc.*, 48 Ill. App. 2d 42, 198 N.E.2d 681 (1964).

<sup>14</sup> 77 C.J.S. *Sales* 327 (1952, amended by pocket part, 1965).

<sup>15</sup> *Food Fair Stores v. Macurda*, 93 So. 2d 860 (Fla. 1957); *Sencer v. Carl's Markets Inc.*, 45 So. 2d 671 (Fla. 1950).

reasonably useful for reducing blood cholesterol without causing new and independent disease.<sup>16</sup>

In the thirty-five states which have adjudicated the issue of strict liability for the sale of defective products intended for human consumption, at least twenty-three, including Florida, have imposed strict liability. The doctrine of strict liability has also been extended to goods intended for external intimate bodily use, as well as to a wide variety of diverse products. Retailers have been held to liability identical to that of a manufacturer in all states but three.<sup>17</sup> It is considered of no importance that the retailer could in no way know of or discover the defect,<sup>18</sup> or that it was sold in the same sealed packages in which it came from the manufacturer.<sup>19</sup> While it is not mirrored in the case, the petitioner predicated his cause of action on the contention that liability attached to the sale of defective or unwholesome drugs as it does to the sale of defective pre-sealed or pre-canned food, in that both are intended for human consumption, and therefore falls under the doctrine of strict liability without fault.<sup>20</sup> While this theory was rejected in Florida, in *Gottsdanker v. Cutter Laboratories*,<sup>21</sup> this theory was accepted in holding a manufacturer liable for breach of implied warranty as to the fitness of a polio vaccine, and it was stated that due to the fact that the vaccine was intended for injection into the human body, it was intended for human consumption in much the same manner as food and therefore the theory of strict liability must be applied.

The second important facet of this case is its approach to, and rejection of the doctrine of strict liability in tort as propounded in the *Restatement of Torts*.<sup>22</sup> Concededly it would have been much preferred if

<sup>16</sup> Spangenberg, *supra* note 1 at 196.

<sup>17</sup> PROSSER, *TORTS* § 97 (3rd ed. 1964). Florida is one of these three states, and will hold a retailer liable in cases involving unwholesome food, *e.g.*, *Sencer v. Carl's Markets Inc.*, *supra* note 15, or in the case of other products, the retailer will only be held liable if the injured party was a known and intended user; *e.g.*, *McBurdette v. Playground Equipment Corp.*, 137 So. 2d 563 (Fla. 1962).

<sup>18</sup> *Supra* note 10.

<sup>19</sup> *E.g.*, *Food Fair Stores v. Macurda*, *supra* note 15.

<sup>20</sup> Brief for petitioner, pp. 7-13, *McLeod v. W. S. Merrel Co.*, 174 So. 2d 736 (Fla. 1965).

<sup>21</sup> *Gottsdanker v. Cutter Laboratories*, *supra* note 5.

<sup>22</sup> RESTATEMENT (SECOND), *TORTS*, § 402A (1965): "One who sells any product in a defective condition unreasonably dangerous to the use of consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relationship with the seller."

the court had rejected this theory as a change of the law which must be made by the legislature, as other courts have done in the case of liability for the sale of tainted food.<sup>23</sup> The court stated, however that it was invited to impose strict liability in tort "without any basis for implying a warranty."<sup>24</sup> This statement is supported by the case of *Whitely v. Webb's City*,<sup>25</sup> which held that the breach of an implied warranty sounds in contract, and cites the case of *Spencer v. Carl's Markets, Inc.*,<sup>26</sup> binding a retailer of food on his implied warranty in the sale of tainted food. While there is a strong trend to the effect that the breach of an implied warranty gives rise to a cause of action sounding in tort, and not in contract,<sup>27</sup> it is important to note that warranty is of no consideration in the theory of strict liability in tort.<sup>28</sup> The warranty theory has involved many complications and obstacles borrowed from sales law, therefore if the term is to be used in conjunction with the theory of strict liability in tort, the "warranty" used must be of a different kind than the warranty usually found in the law of sales. The solution suggested by the *Restatement of Torts*, that is the non-use of the term warranty, is the most direct and liability under this approach is strict liability in tort.<sup>29</sup>

It is finally stated in the *McLeod* case that even if Florida accepted strict liability in tort the comments to the applicable section of the *Restatement of Torts* exempt retail druggists from this liability. Comment k to section 402A of the *Restatement* sets forth two instances in which a defective drug is not unreasonably dangerous, thereby relieving the seller from strict liability for injuries caused by it. The first case is the drug, use of which is known occasionally to cause serious side effects, however the disease sought to be cured is so dreadful that marketing the drug is justified and the drug is not considered unreasonably dangerous. An example of such a drug is Pasteur's rabies vaccine. The second group of exempted drugs are those new and experimental drugs which, due to lack of time and opportunity for sufficient experience, cannot be assured as being safe; however, such experience as there is justifies marketing it, notwithstanding a recognizable risk.

<sup>23</sup> See PROSSER, *op. cit. supra* note 17.

<sup>24</sup> *McLeod v. W. S. Merrell Co.* 174 So. 2d 736, 739 (Fla. 1965).

<sup>25</sup> 55 So. 2d 730 (Fla. 1951).

<sup>26</sup> *Supra* note 15.

<sup>27</sup> *Chapman v. Brown*, 198 F. Supp. 78 (1961); *Suvada v. White Motor Co.*, 51 Ill. App. 2d 318, 201 N.E.2d 313 (1964); *Jakubowski v. Minnesota Mining and Manufacturing Corp.*, 80 N.J. Super. 184, 193 A.2d 275, *rev. on other grounds* 42 N.J. 177, 199 A.2d 826 (1963); *Goldberg v. Kollsman Instrument Corp.*, 240 N.Y.S.2d 592, 191 N.E.2d 81 (1963).

<sup>28</sup> *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897 (1962); *Vandermark v. Ford Motor Co.*, 37 Cal. Rptr. 896, 391 P.2d 168 (1964). See also, PROSSER, *op. cit. supra* note 17.

<sup>29</sup> See PROSSER, *op. cit. supra* note 17. See also *supra* note 22, comment m.

The above-stated exceptions to strict liability in tort must be considered in light of the fact that the exemption is conditioned on giving proper warning when necessary.<sup>30</sup> Warnings were usually sent with "Mer/29" to the administering physician and the pharmacist. Such warnings did not mention the possibility of formation of cataracts.<sup>31</sup> The record of the case and the briefs of the parties only reveal that McLeod was not warned by either of the retail druggists. Whether such warnings were in fact received by the pharmacists or McLeod's physician is not disclosed. Therefore, any statement in regard to this case would be conjectural.

Of more importance is the fact that "Mer/29" does not fit into either category of exempted drugs under Section 402A. It was not a fully developed drug which had known propensities, so as to fall into the first classification. "Mer/29" fell into the class of a new, experimental drug, but it did not meet the necessary requirements for release to the public. There was no evidence justifying release, and there were known risks from its use. Food and Drug Administration rules requiring disclosure of adverse test results were violated, the original animal test data submitted was falsified, and adverse effects appeared during testing. Clearly it can not be said that available experience justified marketing the drug, in spite of this the drug was released in utter disregard of public health.<sup>32</sup>

In conclusion, it must be pointed out that the *McLeod* decision will make its effect felt on the fledgling doctrine of strict liability in tort in both a general and specific manner. Generally, most courts in recent decisions, when squarely faced with this issue in a products liability case, have decided the case on the basis of the older, confused warranty theory<sup>33</sup> as did the court to some degree in this case. The difference is that while other courts have cited the *Restatement* and the California decisions adopting it<sup>34</sup> in passing, the *McLeod* case rejects the doctrine specifically as few other courts have done, and thereby stands as a reversal of the aims of the drafting members of the American Law Institute and Dean Prosser, the reporter. Needless to say, due to the lack of decisions clearly passing on the doctrine of strict liability in tort, this case will yield weight to its rejection in litigation in other jurisdictions.

Specifically, while it is only dicta, we now have for the first time a

<sup>30</sup> PROSSER, *op. cit.* *supra* note 17; See also, *supra* note 22, comment k.

<sup>31</sup> See Note, *supra* note 1.

<sup>32</sup> *Hearings on Interagency Coordination in Drug Research and Regulation before the Subcommittee on Reorganization and International Organizations of the Committee on Government Operations*, 88th Cong., 1st Sess., pt. 4, at 1955-78 (1963); Flexman, *MER/29 (Triparanol) and Cataract*, *MED. TRIAL TECH. Q.* 11 (Dec. 1963). See also, *supra* note 1.

<sup>33</sup> See Note, 14 *DE PAUL L. REV.* 488 (1965).

<sup>34</sup> *Greenman v. Yuba Power Products, Inc.*, *supra* note 28; *Vandermark v. Ford Motor Co.*, *supra* note 28.

judicial interpretation of comment k to section 402A of the *Restatement*. This interpretation clearly exempts retail druggists who properly fill a prescription from the wide ambit of "sellers" sought to be included in the coverage of section 402A. The court in the *McLeod* case expressed the view that druggists as a generic group are not included within the coverage of section 402A, and therefore it was not necessary to decide whether a druggist performs a service, as claimed by the defendants, or is a seller. However, the fact remains that the court excluded a specific group from the scope of section 402A.

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### TORTS—PARENTAL IMMUNITY DOCTRINE—WILFUL AND NEGLIGENT CONDUCT

An action was brought by an unemancipated eleven year old minor against his father for injuries sustained when he was struck by an auto driven by his intoxicated father. In the trial court, the judge ruled that an unemancipated minor could not sue his parent in tort, and the action was dismissed.<sup>1</sup> The Court of Appeals of Ohio reversed the trial court and held that the minor could recover, since the defendant, who drove while intoxicated and at high speed, was guilty of wilful and negligent conduct. *Teramano v. Teramano*, 1 Ohio App. 2d 504, 205 N.E.2d 586 (1965).

In reversing the trial court, the court of appeals disregarded the defendant's plea of Parental Immunity, a doctrine first established without precedent in *Hewlett v. George*,<sup>2</sup> which involved a wilful tort. In the *Hewlett* case, the Parental Immunity doctrine was established on the basis of the court's interpretation of public policy.<sup>3</sup> The court refused to put family harmony in jeopardy by allowing a daughter, under her parent's control, the right to recover from her parent. Since 1891, courts dealing with suits between parents and children have had to cope with the *Hewlett* doctrine that a child may not sue his parent in tort. Many courts have applied it strictly, some have excused themselves from its scope due to particular circumstances, and a few have almost entirely abrogated it.

<sup>1</sup> *Teramano v. Teramano*, 1 Ohio App. 2d 504, 505, 205 N.E.2d 586, 487. In the Common Pleas Court the defendant was granted judgment after a motion for a Directed Verdict at the conclusion of plaintiff's opening statement.

<sup>2</sup> 68 Miss. 703, 9 So. 885 (1891). Action was on behalf of an unemancipated minor against her mother for having, "Willfully, illegally, and maliciously caused her to be imprisoned for ten days in the East Mississippi insane asylum." (*Id.* at 704, 9 So. at 886.)

<sup>3</sup> *Id.* at 711, 9 So. at 886: "But as long as the parent is under obligation to care for [the minor] the best interests of society forbid to the minor child a right to appear in court." It is of particular interest to note that in this case, the parent publically denounced and rejected the child, and thus, no family harmony existed to be preserved.