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Thomas M. Schmitz

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Retail Druggist's Warranty of Drugs

Thomas M. Schmitz*

SHORTLY AFTER THE TURN OF THE CENTURY homemakers were shocked by public disclosures of filthy, fraudulent, and dangerous products being sold for general human consumption. Use of these products resulted in tragic consequences when people believed in the cure-all promises of some of the "patent" medicines. Such conditions led to the enactment of the Pure Food and Drug Law of 1906.¹ In 1938 there was great public outcry for public protection following the Elixir Sulfanilamide disaster which resulted in 107 deaths due to the use of that drug. This tragic episode resulted in the greatly revised Food, Drug and Cosmetic Act of 1938.² Currently the United States government, the drug industry, and the medical profession are in the midst of an all-out drive against medicines that can hurt as well as heal.³ This vigorously stepped-up drive for drug safety began three years ago following America's close brush with disaster involving the sedative drug, Thalidomide.⁴ While the William S. Merrell Company's application to market the drug was still pending before the Food and Drug Administration (FDA), a dreadful tragedy was developing in Europe. Germany alone reported 5,000 to 6,000 phocomelic births (malformed arms and legs) within a period of three to five years.⁵ Public clamor again grew for strengthened protection, and this resulted in the Kefauver-Harris Drug Amendments of 1962.⁶

In recent months the FDA and the drug industry have become the subjects of front page news.⁷ One outspoken article

* B.S., Case Inst. of Tech.; Registered Professional Engineer in Ohio; Third-year student at Cleveland-Marshall Law School of Baldwin-Wallace College.

¹ U. S. Department of Health, Education, and Welfare, Food and Drug Admin., Publication No. 1, revised 1965, p. 1.

² U. S. Department of Health, Education, and Welfare, Food and Drug Admin., Student Reference Sheet—3, 1964, p. 1.

³ David, "Drug Detectives," *The Cleveland Plain Dealer, This Week Magazine* (Oct. 25, 1965), p. 6.

⁴ *Ibid.*

⁵ U. S. Department of Health, Education, and Welfare, Food and Drug Admin., *op. cit. supra* note 2.

⁶ *Ibid.*

⁷ "Birth Control Pills to Undergo Full Probe," *The Cleveland Press, Home Edition* (Nov. 18, 1965), p. 1.

(Continued on next page)

charged that the drug companies market laboratory "failures" as new products to make quick profits, thus abusing the trust of prescribing physicians. This same article concludes that if the physicians are hoodwinked, individually or collectively, it remains for the patient to pay and to suffer.⁸

In light of the current controversy and public interest, serious study should be afforded as to whether "it remains for the patient to pay." All individuals closely connected with the manufacturing, retailing, or prescribing of drugs should have responsible knowledge of the legal liability of injurious after-effects of public consumption of harmful drugs.

Drug manufacturers must maintain high standard of care in conforming to stringent FDA specifications in the marketing of all drugs⁹ and in providing adequate warnings in the sale of new drugs.¹⁰ Manufacturers are generally considered to have absolute liability to the ultimate consumer, thus negating a contractual privity requirement.¹¹ Due to the dangerous propensities of drugs, the physician is required to adhere to a high standard of care in prescribing them for his patients.¹²

The retail druggist occupies the precarious position of being closest in privity to the ultimate consumer, but very often he is devoid of negligence in contributing to an injury. He merely serves as a conduit in the channels of commerce in drug retailing. The standard of care required of the retail druggist is that of the highest degree and must be maintained in order to prevent injuries to the public resulting from the necessary use of

(Continued from preceding page)

"Phoney-Pill Laws Gather Cobwebs," *The Cleveland Plain Dealer* (Oct. 26, 1965), p. 1.

"Drug Snafus Blamed on FDA Mishandling," *The Cleveland Press, Home Edition* (Oct. 25, 1965), p. A4.

"The Nightmare Drug," *The Cleveland Plain Dealer, This Week Magazine* (Jan. 9, 1966), p. 7.

⁸ Seitz, "The Drug Nightmare They Don't Talk About," *The Cleveland Press, Home Edition* (Nov. 19, 1965), p. 15.

⁹ U. S. Department of Health, Education, and Welfare, *Food and Drug Admin.*, Publication No. 5, 1963, p. 1.

¹⁰ Rheingold, "Products Liability—The Ethical Drug Manufacturer's Liability," 18 *Rutgers L. Rev.* 947 (1964).

¹¹ Jaeger, "Warranties of Merchantability and Fitness for Use: Recent Developments," 16 *Rutgers L. Rev.* 493 (1962).

¹² Haggins, "Due Care by Physicians in Use of New Drugs," 14 *Clev.-Mar. L. Rev.* (3) 506 (1965).

drugs.¹³ When lack of due care is evident, an action may lie in negligence.¹⁴

Liability for negligence is predominantly superseded by liability for breach of warranty. A forerunner of contemporary warranty liability for the sale of defective drugs was recognized as early as 1852.¹⁵ In this early case it was held that a wholesaler who carelessly labels deadly poison as a harmless medicine is liable to any person injured thereby, even though it has passed through other hands by intermediate sales.¹⁶ Warranty gradually came to be regarded as a term of contract of sale within the Sales Acts.¹⁷

Reliance on Retailer's Judgment

Actionable causes were usually based on a representation by the seller inducing the sale, and a reliance on that representation by the buyer.¹⁸ A retail druggist representing sweet oil to be of good quality when, in fact, the oil was rancid, was held liable for breach of an express warranty in contract.¹⁹ Liability for a poisonous lipstick selected and recommended for the intended purpose by a sales clerk was dependent upon reliance on the retailer's judgment and skill.²⁰ An allergy did not preclude recovery if it was evident that the purchaser relied on the retailer's judgment.²¹ A sealed package containing a defective cosmetic would not except a retail druggist from liability if, in fact, there was reliance.²² A cosmetic used in accordance with written instructions brought liability on a retail druggist due to

¹³ *Knoefel v. Atkins*, 40 Ind. App. 428, 81 N. E. 600 (1907).

Willson v. Faxon, 208 N. Y. 108, 101 N. E. 799 (1913).

¹⁴ *Commissioners of State Ins. Fund v. City Chemical Corp.*, 290 N. Y. 64, 48 N. E. 2d 262 (1943).

Willson v. Faxon, *supra* note 13.

Johnson v. Primm, *Rexall Drug*, 74 N. Mex. 597, 396 P. 2d 426 (1964).

¹⁵ *Thomas v. Winchester*, 6 N. Y. 397 (N. Y. App. 1852).

¹⁶ *Ibid.*

¹⁷ *Spry v. Kiser*, 179 N. C. 417, 102 S. E. 708 (1920).

¹⁸ Uniform Sales Act, secs. 12, 15 (1).

Unif. Commercial Code 2-313, 2-315.

¹⁹ *Spry v. Kiser*, *supra* note 17.

²⁰ *Reynolds v. Sun Ray Drug Co.*, 135 N. J. L. 475, 52 A. 2d 666 (1947).

²¹ *Kurriss v. Conrad and Co.*, 312 Mass. 699, 46 N. E. 2d 12 (1942).

Reynolds v. Sun Ray Drug Co., *supra* note 20.

²² *Bel v. Adler*, 63 Geo. App. 473, 11 S. E. 2d 495 (1940).

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

Griggs Canning Co. v. Josey, 139 Tex. 623, 164 S. W. 2d 835 (1942).

his representation that the cosmetic was safe when however, it contained a harmful chemical.²³ There is some authority that minimizes reliance on the retail druggist's judgment and skill if the drug was sold by trade name.²⁴ This view has been narrowly limited and distinguished on the basis that there must be reliance on the manufacturer's reputation, as opposed to reliance on the retail druggist.²⁵ One interesting case held that a trade name cosmetic recommended by a retailer was merely warranted to be a product of a reputable manufacturer.²⁶ A recent case relieved a retail druggist from liability for unknown and unforeseen side effects due to the ingestion of a prescription drug since the purchaser-patient relied on the physician's judgment and knowledge and did not rely on the retailer.²⁷ A retail druggist who sells a prescription drug warrants that he has compounded the drug prescribed, that proper methods were used in the compounding process, that he has used due and proper care in filling the prescription, and that the drug has not been affected with some adulterating substance.²⁸

Fitness and Merchantability

A phase of retailer's warranty of drugs has often been expressed as a contractual warranty of "fitness for a particular purpose,"²⁹ and a warranty of "merchantable quality in a sale by description."³⁰ A cosmetic containing a known skin irritant was impliedly warranted by a retail druggist to be fit for the particular purpose intended,³¹ namely, human use.³² Sale of a patented salt substitute sold in the original package brought liability upon a retail druggist for breach of implied warranty of wholesomeness of a product for human consumption.³³ It appears, however, that liability is not necessarily confined to human

²³ Schilling v. Roux Distributing Co. Inc., 240 Minn. 71, 59 N. W. 2d 907 (1953).

²⁴ Williams v. S. H. Kress Co., 48 Wash. 2d 88, 291 P. 2d 662 (1955).

²⁵ Esborg v. Bailey Drug Co., 61 Wash. 2d 347, 378 P. 2d 298 (1963).

²⁶ Bel v. Adler, *supra* note 22. The opinion neglected to cite a standard for identifying reputable manufacturers.

²⁷ McLeod v. W. S. Merrell Co., 174 S. 2d 736 (Sup. Ct. of Fla. 1965).

²⁸ *Ibid.*

²⁹ Unif. Sales Act, sec. 15; Unif. Commercial Code 2-315.

³⁰ Unif. Sales Act, sec. 15; Unif. Commercial Code 2-314.

³¹ Bianchi v. Denholm & McKay Co., 302 Mass. 469, 19 N. E. 2d 697 (1939).

³² Crotty v. Shartenberg's—New Haven, Inc., 147 Conn. 460, 162 A. 2d 513 (1960).

³³ Davis v. Radford, *supra* note 22.

use or consumption. A retail druggist breached a warranty of fitness for the purpose intended by selling a drug which caused the death of a dog.³⁴ A retailer's lack of knowledge of unfitness or unwholesomeness appears to be irrelevant.³⁵ A lipstick causing a skin infection was impliedly warranted by a retail druggist to be reasonably fit for the intended use.³⁶ It seems rather certain that courts are not inclined to find liability where adequate warnings have been given,³⁷ or where only an isolated few are allergic.

A retail druggist warrants the merchantability of potentially harmful drugs and cosmetics which are available for general human use.³⁸ A recent case, however, held that a warranty of merchantability did not apply to a prescription drug because the drug was not available to the general public; and a warranty of fitness was not applicable because the patient relied on his physician's judgment rather than the retail druggist's advice.³⁹

Inequities of Contractual Warranty

Since most of the early cases were based on contractual warranty, contract defenses have been interjected with some success. A retail druggist was held to have no duty to open and inspect a sealed package even though its contents may be deleterious and unfit for human consumption.⁴⁰ Lack of fore-

³⁴ *Wilcox v. Butt's Drug Stores, Inc.*, 38 N. Mex. 502, 35 P. 2d 978 (1934).

³⁵ *Bianchi v. Denholm & McKay Co.*, *supra* note 31.

Green v. American Tobacco Co., 325 F. 2d 673 (5th Cir. 1963).

³⁶ *Smith v. Burdine's Inc.*, 144 Fla. 500, 198 S. 223 (1940).

Reynolds v. Sun Ray Drug Co., *supra* note 20.

³⁷ *Webb v. Sandoz Chemical Works Inc.*, 85 Geo. App. 405, 69 S. E. 2d 689 (1952). There was no liability for a proprietary drug since there was a warning printed on the label.

Crotty v. Shartenberg's—New Haven Inc., *supra* note 32.

Casagrande v. F. W. Woolworth, Inc., 340 Mass. 552, 165 N. E. 2d 109 (1960).

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

³⁸ *Casagrande v. F. W. Woolworth*, *supra* note 37. Drugs mislabelled by the wholesaler have occasionally excused the retail druggist from liability, unless he held himself out as the manufacturer.

Commissioners of State Ins. Fund v. City Chemical Corp., *supra* note 14. A retailer attaching his own label to a drug still in the wholesaler's original container assumed a responsibility equivalent to that of a manufacturer.

Tiedje v. Haney, 239 N. W. 611 (Sup. Ct. of Minn. 1931).

³⁹ *McLeod v. W. S. Merrell Co.*, *supra* note 27.

⁴⁰ *In Howards v. Jacobs' Pharmacy Co.*, 55 Geo. App. 163, 189 S. E. 373 (1937).

Bel v. Adler, *supra* note 22.

seability relieved a retailer from liability for the sale of a harmful cosmetic which caused dermatitis.⁴¹ A purchaser having an equal opportunity to inspect precluded recovery for a defective douche tube.⁴² Lack of timely notice required by the Sales Acts has precluded recovery for breach of warranty.⁴³ A defense that the one injured was not the purchaser and therefore, lacked privity with the retailer has been sustained.⁴⁴ A decedent's representative could not sustain an action for wrongful death caused by a prescription drug. The opinion stated that wrongful death statutes were designed to support actions *ex delicto* and not *ex contractu*.⁴⁵

Strict Liability

The current trend in product liability cases is to distinguish between liability in tort and liability in contract.⁴⁶ Implied warranty in contract is increasingly becoming superseded by strict liability in tort,⁴⁷ without resort to the laws or restrictions of contractual warranty.⁴⁸ The warranty in tort concept is very much supported by strong argument advanced by the courts which have extended product warranties from the manufacturer to the ultimate consumer, in absence of any privity of contract.⁴⁹ Public interest in human life and safety demands the maximum possible protection against dangerous defects in products which consumers must buy.⁵⁰ Public policy demands that

⁴¹ *Bennett v. Pilot Products Co.*, 120 Utah 474, 235 P. 2d 525 (1951).

⁴² *Harrington v. Montgomery Drug Co.*, 111 Mont. 564, 111 P. 2d 808 (1941).

⁴³ *Perry v. Thrifty Drug Co.*, 186 Cal. App. 2d 410, 9 Cal. Rptr. 50 (1960).
Whitfield v. Jessup, 183 P. 2d 133 (Cal. App. 1947). On appeal, held that notice within the Sales Acts was applicable to products for human consumption, but reversed the lower court holding that the notice given was not within a reasonable time. 31 Cal. 2d 826, 193 P. 2d 1 (1948).

⁴⁴ *Burgess v. Sanitary Meat Market*, 121 W. Va. 605, 5 S. E. 2d 785 (1939).
Hanback v. Dutch Bakery Boy, Inc., 107 F. 2d 203 (D. C., D. C. 1939).

⁴⁵ *Whiteley v. Webb's City Inc.*, 55 S. 2d 730 (Sup. Ct. of Fla. 1951). An amendment to the Florida statute in question was held in a subsequent case to include *ex contractu*, but not to include a right of action by a parent for the wrongful death of a minor.

Latimer v. Sears Roebuck, 285 F. 2d 152 (5th Cir. 1960).

⁴⁶ *Reed v. Swift Co.*, 14 F. R. D. 145 (W. D. Mo. 1953).

⁴⁷ Prosser, *Law of Torts*, 681 (3rd ed., 1964).

⁴⁸ Restatement (Second), *Torts*, sec. 402 A, Comment M (1965).

⁴⁹ Jaegar, *supra* note 11.

⁵⁰ Restatement (Second), *Torts*, sec. 402 A, Comment C (1965).
 Prosser, *op. cit. supra* note 47, p. 673.

the burden of accidental injuries caused by products intended for consumption be placed upon those who market them.⁵¹

As indicated above, the inception of strict liability is an outgrowth of the food laws and is based on the human consumption theory.⁵² There is no reason why this theory of strict liability should not include drugs.⁵³ This would tend to make the retail druggist an insurer of the safety of the product, even though he had exercised all reasonable care.⁵⁴ This liability without fault has been criticized in the past as putting small business men in the constant jeopardy of being run out of business.⁵⁵ This argument, however, is very weak in comparison to the opposite result of "leaving the patient to pay."⁵⁶ Strict liability has not made small food dealers extinct, but it has forced all food retailers to exert the highest duty of care expected of them. Thus, placing a similar strict liability on the retail druggist will likewise urge him to exercise the highest duty of care commensurate with his superior knowledge and justify the trust placed in him by the public.⁵⁷

It is settled law in most jurisdictions that retailers may transfer the real liability to the manufacturer responsible⁵⁸ by proper joinder.⁵⁹

Retailers are in a position to transfer their losses to the public in general as part of their cost of doing business.⁶⁰ The public should not be required to individually bear the hardships of unfortunate adverse reactions to drugs.⁶¹

⁵¹ Restatement, *ibid.*

⁵² *Griggs Canning Co. v. Josey*, *supra* note 22. Leading case on food retailed in sealed containers. Liability is inferred from public policy demanding the protection of public health.

⁵³ *Frumer and Friedman, Products Liability* sec. 32.02, at 229 (1965).

⁵⁴ *McLeod v. W. S. Merrell*, *supra* note 27.

⁵⁵ *Sencer v. Carl's Markets, Inc.*, 45 S. 2d 671 (Sup. Ct. of Fla. 1950). *Rheingold*, *op. cit. supra* note 10, p. 1016-1017. The idea is expressed that it is hard to imagine any drug company whose financial situation is so marginal so as to be unable to purchase insurance. If a particular retailer should fall into financial difficulty, it would be difficult to show that the public would thereby be the loser.

⁵⁶ *Seitz*, *op. cit. supra* note 8.

⁵⁷ Restatement, *op. cit. supra* note 50. (1965).

⁵⁸ *McSpedon v. Kunz*, 271 N. Y. 131, 2 N. E. 2d 513 (1936).

⁵⁹ *Davis v. Radford*, *supra* note 22;

Monks v. Jaxon Corp., 17 Conn. Supp. 32 (1950);

Brown v. Hersch Chemists Inc., 305 N. Y. 755, 113 N. E. 2d 151 (1953).

⁶⁰ *Prosser*, *op. cit. supra* note 47, p. 509.

⁶¹ *Rheingold*, *op. cit. supra* note 10 at p. 1017. "Clearest of all is the proposition that the ultimate loss should not be borne by the individual who suffers a devastating reaction to a drug."

In this age when it seems fashionable for the retail druggist to advertise the lowest discount prices in town, there is a constant threat of fraudulent and counterfeit drug peddling to the retailers at reduced wholesale prices.⁶² These drugs are potentially dangerous because they are not manufactured under rigid FDA controls.⁶³ Thus, it behooves a drug retailer to deal only with legitimate wholesalers⁶⁴ and wholesalers who may be properly joined in event of a damage suit against the retailer.⁶⁵ It would seem that retail druggists should be put on notice of a wholesaler's reputation if an individual wholesaler is prone to marketing unsafe drugs⁶⁶ or prone to dishonest dealing with the FDA.⁶⁷ This should be, if the public health is to be protected from exploitation by those who, for the profit motive, undertake to supply products for human consumption.⁶⁸ From the nature of the industry the primary motive for marketing a drug should be to further public health. Thus, the Restatement's requirement of retailers to deal with reputable wholesalers⁶⁹ is very much applicable to drug retailing.

The phase of drug retailing described as "new drugs" raises a particularly difficult problem. New drugs are defined as "drugs not generally recognized as safe and effective by qualified experts."⁷⁰ Most new drugs are released for prescription sale only, and the labeling of the consumer package must then contain adequate directions and warnings.⁷¹

⁶² David, *op. cit. supra* note 3, p. 7.

⁶³ *Ibid.*

⁶⁴ Restatement (Second), Torts, Sec. 401, Comment C (1965).

⁶⁵ Sencer v. Carl's Market, *supra* note 55.

⁶⁶ McLeod v. W. S. Merrell Co., *supra* note 27. W. S. Merrell Company was also responsible for distributing Thalidomide in the United States, *op. cit. supra* note 5. Consider that W. S. Merrell Company marketed "Mer/29" which caused serious side effects.

⁶⁷ Haggins, *op. cit. supra* note 12 at p. 511. "In March 1964, the Merrell Company went on trial with three of its executives, and its parent company, Richardson-Merrell Inc., on twelve counts of supplying the Food and Drug Administration with false, fictitious and fraudulent data. The company and its executives pleaded nolo contendere on eight counts."

⁶⁸ Green v. American Tobacco Co., *supra* note 35.

Seitz, *op. cit. supra* note 8. "This is an age in which manufacturers are tempted to get to the market first with a new drug, however inadequately it has been tested for safety and efficacy, or to rush an imitation into the pharmacies when a competitor seems to have a good thing going."

⁶⁹ Restatement, *op. cit. supra*, note 64.

⁷⁰ *Op. cit. supra* note 9, p. 1.

⁷¹ *Id.*, p. 2.

A definite distinction must be made between new drugs and experimental drugs. Experimental drugs are not released for marketing, but they are distributed to specified physicians under very strict supervision of FDA laws.⁷² The 1962 amendment requires the physician to inform the patient of the experimental nature of the drug.⁷³ In all probability, there is no strict liability for the injurious effects of an experimental drug if an appropriate warning has been given to the patient.⁷⁴ Thus, the law recognizes that medical research must progress.

The Restatement accepts "a medically recognizable risk" involved in the marketing of experimental and new drugs⁷⁵ and uses the Pasteur vaccine treatment of rabies as an illustration. The disease itself leads invariably to a dreadful death; thus, the use of the vaccine on a person imminently threatened with rabies is fully justified notwithstanding the unavoidable high degree of risk involved.⁷⁶ The interpretation of the Restatement must be construed within the FDA requirement that the usefulness of the drug must outweigh its hazards.⁷⁷ The Restatement requires further that the experimental or new drug must contain proper warnings of potential dangers as required by FDA laws.⁷⁸ This warning in conjunction with usefulness outweighing hazards may then be construed as relieving the retail druggist of liability based on the patient-consumer "assuming the risk." An assumption of risk defense is generally sustained in an action for strict liability.⁷⁹

A recent case considered the liability of a retail druggist for the sale of a prescription drug, "Mer/29," which inadvertently resulted in injurious side effects.⁸⁰ A physician prescribed the drug for the control of body cholesterol. Upon using the drug, however, the patient developed cataracts of his eyes. Dictum in-

⁷² *Id.*, p. 6-8. Each physician must keep complete records and case histories of his use of the experimental drug and file a report.

⁷³ *Id.*, p. 8.

⁷⁴ Prosser, *op. cit. supra* note 47, p. 683. *Id.*, p. 6. Due to the strict controls on experimental drugs, a retail druggist will essentially not be confronted with liability arising from their use.

⁷⁵ Restatement (Second), Torts Sec. 402A, Comment K (1965).

⁷⁶ *Ibid.*

⁷⁷ David, *op. cit. supra* note 3.

⁷⁸ Restatement, *op. cit. supra* note 75. *op. cit. supra* note 9, p. 2.

⁷⁹ Prosser, *op. cit. supra* note 47, p. 539.

⁸⁰ McLeod v. W. S. Merrell, *supra* note 27.

dictated the court considered the strict liability theory in arriving at its decision within the Florida law of construing product liability within the contractual warranty concept. The court supported its decision by quoting the American Law Institute's strict liability rule.⁸¹ The opinion cites as an exception from the strict liability concept various new or experimental drugs which, because of lack of time and opportunity to obtain sufficient medical experience, cannot be considered as being absolutely safe for human consumption although available experience justified the marketing and use of the drug notwithstanding a medically recognizable risk.⁸²

It is worthy to note that the court neglected to weigh all factors related to this section of the Restatement. The Restatement distinctly qualifies the suggested exception to strict liability by requiring that proper warnings be given, that the injuries incurred were within a reasonable risk,⁸³ and that the retail druggist purchased the drugs from a reputable dealer.⁸⁴ The court did not consider whether the drug's usefulness outweighed its hazards.⁸⁵

All these factors must be considered in balancing the equities of a patient's injuries against the justification of retailing a drug which has a medically recognizable risk.

Conclusion

Jurisdictions retaining a contractual warranty theory hold that a retail druggist warrants the wholesomeness, fitness, and merchantability of his products. This warranty applies to all drugs whether they are prescription drugs, proprietary drugs, brand name drugs, or drugs sold in the original sealed containers.

⁸¹ Restatement, *op. cit. supra* note 75.

⁸² McLeod v. W. S. Merrell, *supra* note 27.

Restatement, *op. cit. supra* note 75. "Because of lack of time and opportunity for sufficient medical experience" is an unfortunate sequence of words since it suggests a minimum of testing is all that is required to justify marketing a drug. This phrase must be narrowly construed in light of subsequent passages in the same sentence. "Absolute safeness" and a "medically recognizable risk" implies a remote and minor injury, rather than serious injuries affecting many users.

⁸³ Restatement, *op. cit. supra* note 75.

⁸⁴ Restatement, *op. cit. supra* note 64.

⁸⁵ *Op. cit. supra* note 76. The threat of elevated body cholesterol seems rather minor and the danger remote compared with a side effect of cataracts of the eyes. Consider "usefulness outweighing its hazards" within the Restatement's example of the Pasteur vaccine, where the disease itself leads to a dreadful death.

Liability for the sale of a prescription drug may be exempted if the patient relies on the physician's judgment, and liability for the sale of a brand name drug may be relieved if there is reliance on the manufacturer's reputation.

Jurisdictions construing product warranty as a strict liability in tort will invariably hold a retail druggist liable for side effects incurred by the use of drugs. The good expected to be accomplished must not be overshadowed by harmful side effects, not reasonably expect to incur. Adequate warnings properly made known to the patient may exempt the retailer from liability and the side effects must not be of a nature that a patient would on the basis of the patient assuming the risk.