traditions and habits apply only to particular groups or classes of people. Nationalities are frequent dividing lines for customs, traditions and habits.

Displays expressing the spirit of the various holidays are probably the most frequent way in which appeals to customs, traditions and habits are made. A large group of people are interested in St. Patrick's day. They are therefore attracted to and interested in displays which express the spirit of St. Patrick's day, and the hope is that this interest will carry over to the merchandise which is shown in this display because its purchase will make the celebration of the holiday more enjoyable.

There is a danger in carrying to extremes this tie-up of various kinds of merchandise with the celebration of various holidays. "Give Mother a carpet beater for Christmas," or "Give Dad a snow shovel" makes not only that display ridiculous, but tends to discount and weaken the effectiveness of all holiday displays.

Mother's day, June weddings, graduations are all customs to which appropriate merchandise displays may be joined.

There is an old saying that appeals to the heart are quicker and surer than appeals to the head. In the light of the discoveries of modern science, this statement is entirely correct if appeals to the heart are considered to be appeals to instincts and emotions; to customs, traditions and habits; and to imagination and to memory. Appeals to the head may be defined as logical reasoning.

The reason that in window and store displays these so-called appeals to the heart far outweigh in importance and effectiveness appeals to the head is that window and store displays get at best in most cases but hurried and casual attention. Logical reasoning involves deliberation, weighing of arguments and choice. Window and store displays, by the very nature of the quick and casual attention they receive and hold, are but rarely likely to receive any such analysis and logical unfoldment of conclusions. A display, if it is to succeed at all, must appeal quickly and directly, and these quick, direct appeals are, as mentioned, appeals to instincts and emotions; customs, traditions and habits; and imagination and memory.

THE COMMON-LAW OBLIGATIONS OF THE PHARMACIST.*

BY WILLIAM J. HUSA.**

The work of the pharmacist is so regulated by law that to the casual observer it may seem that every aspect of the drug business is covered by some national, state or local law or regulation. But in addition to the statutes and regulations, which have their origin in the action of legislative bodies, there are the less explicit, though no less binding, obligations of the pharmacist at common law. These obligations are enforceable by civil suits for damages. In case of injury caused by some alleged neglect of duty on the part of the pharmacist or his agent, any situation which is not covered by a statute must be decided according to the rules of common law, which are to be found in the decisions of the highest courts in similar cases previously tried.

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One question which frequently arises is in regard to the degree of skill and diligence required of pharmacists. It is well established that the legal measure of the duty of a druggist toward his patron is properly expressed by the phrase "ordinary care" when considered with reference to that special business. (19 *Corpus Juris* 778.) This point was elucidated by Judge Cooley in the case of Brown *vs.* Marshall (41 *Am. Rep.* 728) in the following words:

> "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. It is, therefore, proper and reasonable that the care required shall be proportional to the danger involved."

In the case of Tremblay *vs.* Kimball (77 *Atlantic Rep.* 405) the Supreme Judicial Court of Maine ruled that the pharmacist "need not possess the highest degree of knowledge and skill known in his profession; it being sufficient that he have that reasonable degree of learning and skill ordinarily possessed by other druggists in good standing as to qualifications in similar communities." This is a well-established point of law applicable to all trades and professions. Thus if a physician is sued for malpractice he would ordinarily have a good chance to prove that he had exercised the ordinary care and skill demanded of physicians. However, my study of numerous cases shows that the pharmacist who has made an error in filling a prescription does not have an equally good chance to evade the consequences by claiming that he exercised ordinary care as known to pharmacists. The reason for the difference lies in the fact that in making his diagnosis and prescribing treatment, the physician is working on a patient who is more or less of an unknown quantity, and no one can say with certainty just what his reaction will be to any certain treatment. The pharmacist who sets out to fill a prescription, however, has a definite written document, signed by the physician, and if he is in doubt as to the correct reading he is supposed to make inquiries of the physician, and the courts are inclined to hold the pharmacist fully responsible for any error in reading the ingredients or quantities.

This point is illustrated by a Connecticut case, Tombari *vs.* Conners (82 *Atlantic Rep.* 640). A physician wrote a prescription for powders to be taken three times a day, each powder to contain five grains of calumba, with other ingredients. The drug clerk used calomel instead of calumba in making up the powders. The Court of Common Pleas held that the clerk, by the exercise of due care, should have read the prescription as calling for calumba, or at least that there was such doubt as to the correct reading as should have led him to inquire of the doctor.

It is a well-known fact that in cases of gross negligence, punitive damages may be awarded in addition to the actual damages. Thus during the influenza epidemic a few years ago, a pharmacist in Kentucky used formaldehyde instead of paraldehyde in filling a certain prescription. When he was sued for damages caused by this error, the pharmacist sought to introduce evidence, by way of mitigation of punitive damages, that heavy demands were made on him owing to the severe epidemic, and that he was unable to secure additional help, and that his clerks were worn out and nearly exhausted. The trial judge would not permit this, and partly as a result, the plaintiff recovered a judgment of $3000, part of which was for punitive damages. However, the pharmacist appealed to a higher court, which

ruled that the trial judge was in error in refusing to permit this defense; the judgment was reversed and the case remanded for another trial. The higher court ruled that such a defense could be offered in mitigation of punitive damages, though it would not excuse the mistake, so as to relieve the defendant from liability for compensation.

Ordinarily, a person who sues a pharmacist for damages has the burden of proving that the pharmacist was negligent. An example of this is found in a case (77 *Atlantic Rep.* 406) in which a druggist furnished corrosive sublimate tablets instead of the chlorodyne tablets called for in the prescription. The burden of proof was on the plaintiff to show that the druggist failed to use the degree of care required by law, and this, in the case cited, was not a difficult matter. "But where a mistake consisting of the furnishing of a harmful for a harmless drug is shown, defendant has the burden of explaining the mistake and showing that under the circumstances it was consistent with the exercise of due care on his part." (19 *Corpus Juris* 784.) Thus in a Virginia case, a bottle sold and labeled as "witch hazel" was found to contain 10 per cent of silver nitrate. The defendants failed to rebut the presumption of negligence and thus lost the case.

The plaintiff, as a rule, also has the burden of proving that the defendant's negligence was the proximate cause of the alleged loss or injury.

Furthermore, it is well established (19 *Corpus Juris* 783) that a person claiming to be injured by the negligence of a druggist cannot recover damages if he himself was negligent in using the medicine. This is the well-known principle of contributory negligence. The druggist and customer, however, are not held to the same degree of care. The customer's duty is to exercise ordinary care for his own safety, while the pharmacist should employ the highest degree of care known to practical men for the safety of the public dealing with him.

In one instance a druggist, by mistake, sold common salt to a dairyman instead of Epsom salts. The common salt was given to a cow, which died as a result. In the damage suit which followed, it was brought out that the dairyman was familiar with both common salt and Epsom salts, and was able to distinguish between the two. It was therefore held that the dairyman was guilty of contributory negligence, and he could not recover against the druggist. (185 *Ala.* 653, 64 *S* 350.) In another case, in which the plaintiff had carried off the wrong package from the druggist's counter by mistake, it was held that this was contributory negligence. (78 *Conn.* 719, 62A, 661.)

An interesting example of contributory negligence is the case of Cullinan *vs.* Tetrault (122A, 770), which was passed on by the Supreme Judicial Court of Maine in 1923. The defendant, Tetrault, a druggist in Augusta, had occasion to be absent from his store on July 20, 1921, from about 6:05 in the evening for about an hour and a half. During that period the store was open and left in charge of a boy, who for about three years had worked at times for the defendant, sweeping the store, doing errands, selling cigars, soda and ice cream, on an average for about two hours a week. This boy was manifestly incompetent to be left in charge of the store. The court held this to be plainly negligent, notwithstanding that the defendant had instructed the boy not to sell medicines and drugs.

Cullinan and a man named Freeman met at a regimental reunion in Augusta and after leaving the muster field went to the drug store. Cullinan remained on

the sidewalk while Freeman entered the store. The subsequent testimony of Freeman to the county attorney was that he had asked the boy if he had any checkerberry. The boy answered that he was not sure, but he pointed to a bottle and reached for it and handed it to Freeman and asked him to smell of it to see if that was what he wanted. Freeman smelled the bottle, passed it back to him, and said it was what he wanted. Four ounces were purchased. The bottle from which it was poured was labeled methyl salicylate, which of course has the checkerberry or wintergreen odor. Freeman's testimony established that they purchased it for use as a beverage, "for the alcohol in it." The young men drank some of the methyl salicylate after mixing it with ginger ale; both became ill and Cullinan died the next morning.

On being sued for damages, the defendant pleaded contributory negligence. In upholding this contention, the Supreme Court made the following statement: "The incompetency of the clerk was evident to Freeman; the latter told the County Attorney, 'He (the boy) didn't appear to know much concerning the checkerberry or anything regarding the things in the store.' To purchase anything in a drug store from a boy who did not know what he was selling, had no realization of the dangerous qualities of the article, and appealed to the purchaser to know if it was what he wanted, and to accept the article offered solely upon the evidence of the sense of smell, disregarding the label on the bottle, is the height of negligence. If Freeman in purchasing the poison relied upon the knowledge of the boy, as he now says, he was negligent, because the boy's ignorance was apparent to him. If he relied upon his own judgment, he was negligent, because the bottle was plainly marked 'Methyl Salicylate' and he should not have relied solely upon the odor of the contents. His negligence is too evident to require further discussion." It should perhaps be mentioned that there was a conflict in the testimony in regard to whether Freeman had asked for "checkerberry" or "essence of checkerberry," but this point did not have any bearing in this particular case, because Freeman's subsequent actions were negligent. The Court further held that the deceased and Freeman were engaged in a joint enterprise and that the conduct of Freeman in the store was imputable to the deceased. Because of the contributory negligence of the plaintiff, the case was thus decided in favor of the defendant, although the druggist had plainly been negligent in the conduct of his store.

The fact that damage suits against pharmacists occur rather infrequently is a tribute to the skill and honesty of purpose of our profession taken as a whole. A very little delving into the law books, however, is sufficient to convince one that a pharmacist should exercise due care not merely most of the time but at all times. One mistake made out of 10,000 prescriptions filled makes an apparently high average of accuracy when compared with the batting or fielding average of a baseball player, but for that one mistake the pharmacist is apt to pay dearly in damages and loss of business. A pharmacist who has a high reputation for integrity and reliability has a jewel of great price, worth more than all the clever merchandising schemes ever concocted.

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