Washington and Lee Law Review

Volume 38 | Issue 1 Article 11

Winter 1-1-1981

Industry-Wide Liability: Solving the Mystery of the Missing Manufacturer in Products Liability Law

INDUSTRY-WIDE LIABILITY: SOLVING THE MYSTERY OF THE MISSING MANUFACTURER IN PRODUCTS LIABILITY LAW

The theory of industry-wide liability[1] is a recent conceptual hybrid of products liability[2] and joint and several liability.[3] Industry-wide liability predicates liability on a manufacturer's adherence to a deficient industry-wide standard of safety.[4] The theory is tailored to allow

[1] Courts and commentators have addressed the theory of industry-wide liability under various names, including "enterprise liability," "joint liability," and the "synthetic drug industry liability." Sindell v. Abbott Labs, 26 Cal. 3d 588, 607, 607 P.2d 931, 933, 163 Cal. Rptr. 132, 141, *cert. denied* 49 U.S.L.W. 3270 (Oct. 14, 1980); Abel v. Eli Lilly & Co., No. 74-030-070 NP, slip op. at 7 (Mich. Cir. Ct., filed May 16, 1977); Note, *Industry-Wide Liability*, 13 SUFFOLK L. REV. 980, 982 (1979) [hereinafter cited as *Industry-Wide Liability*]. The leading law review article on the subject labeled the theory "enterprise liability." Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 974 (1978) [hereinafter cited as *Proposed Theory*]. The phrase "enterprise liability," however, describes at least two distinct theories. "Enterprise liability" has described an economic theory in which the manufacturer rather than the consumer bears the risk of loss from a defective product, since the manufacturer is best able to spread the risk of loss. Klimas v. ITT, 297 F. Supp. 937, 941 n.4 (D.R.I. 1969). In addition "enterprise liability" has referred to a no-fault products liability system. O'Connell, *Expanding No-Fault Beyond Auto Insurance: Some Proposals*, 59 VA. L. REV. 749, 773 (1973). The DES plaintiffs' proposed theory is broader than the risk of loss theory advanced in *Klimas* but narrower than no-fault products liability. *Industry-Wide Liability*, *supra*, at 982-83 n.15. The term "industry-wide liability" avoids confusion.

[2] The law of products liability evolved from claims for personal injury or property damage caused by the use of a defective product. W. KIMBLE AND R. LESHER, PRODUCTS LIABILITY, § 1 at 1 (1979). Traditionally, a plaintiff must show a defective product, an injury, and a causal relationship between the defect and the injury to state a cause of action. *Id.*

In America, products liability originally was based on the concept of fault. 3B A. AVERBACH, HANDLING ACCIDENT CASES § 18 at 29 (1971); *see* MacPherson v. Buick Motor Co., 217 N.Y. 382, 386, 111 N.E. 1050, 1053 (1916) (plaintiff must show product malfunction caused by hidden flaw attributable to negligence of manufacturer). The subsequent development of strict liability, with the increased imposition of responsibility on manufacturers for harm inflicted regardless of fault, reflects the shift towards consumer protection. *See* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 60, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1962) (plaintiff need not prove negligent conduct but only that product was defective).

[3] Generally courts impose joint and several liability under four different theories: concerted action, alternative liability, vicarious liability, or indivisible injury. Prosser, *Joint Torts and Several Liability*, 25 CAL. L. REV. 413, 429-42 (1937). Concerted action recognizes that active participants in a wrongful act will be liable equally with the wrongdoer. *Id.* at 429-30. Courts apply alternative liability where all defendants acted tortiously and independently but only one unidentifiable defendant caused the injury. *Id.* at 441. Vicarious liability holds a master liable for the acts of his servant, or a principal for acts of his agent acting within the scope of employment or agency. *Id.* at 430. Where the acts of two defendants combine to cause an indivisible injury, courts may hold both defendants liable for the entire damage under an indivisible injury theory. *Id.* at 433. Of these theories, only concerted action and alternative liability are relevant to the development of industry-wide liability theory. *Proposed Theory*, *supra* note 1, at 978-79 n.68.

[4] *Proposed Theory*, *supra* note 1, at 995. Industry-wide liability can result in the joint

recovery under products liability law for injuries with latent manifestations.[5] Commentators advanced the theory in specific response to difficulties of proof confronting plaintiffs in litigation involving diethylstilbestrol[6] (DES),[7] a hormonal drug given to pregnant mothers from the late 1940's to the 1960's to prevent miscarriage. Although few of the estimated 1000 DES cases[8] have come to trial, no reported decisions

---

and several liability of all industry members that manufactured an identically defective product. *Id.*

[5] *Id.* A plaintiff must prove seven elements to succeed under a theory of industry-wide liability. *Id.* The plaintiff cannot be at fault for his inability to identify the actual causative agent and must prove that all defendants manufactured a generically similar defective product. *Id.* The plaintiff must show further that the defect in the product caused his injury and must prove by clear and convincing evidence that at least one of the manufacturers caused the injury. *Id.* In addition, the plaintiff must show that all defendant manufacturers owed a duty to the class of which the plaintiff was a member and must demonstrate that the manufacturers adhered to a deficient industry-wide standard of safety in the manufacturing or marketing of the product. *Id.* Finally, the plaintiff must show that all manufacturer defendants are tortfeasors under the requirements of the proposed cause of action, whether negligence, warranty, or strict liability. *Id.*

[6] *Id.* at 995-1000. DES plaintiffs encountered difficulties of proof due to the latent nature of injuries resulting from DES. *Id.* at 972.

A court first suggested a related form of industry-wide liability in Hall v. E.I. Du Pont De Nemours & Co., 345 F.Supp. 353 (E.D.N.Y. 1972). The *Hall* opinion covered two related cases in which blasting caps injured children. *Id.* at 358. The court first addressed the issue of whether a group of manufacturers and their trade association, comprising vitually the entire blasting cap industry of the United States, could be held jointly liable for injuries that their products caused. *Id.* at 358. The explosion of the cap made precise identification of the responsible manufacturer impossible. *Id.* at 358. The court discussed the application of various forms of joint and several liability. *Id.* at 371-80. The *Hall* court appeared to merge general elements of concerted action and alternative liability to relieve plaintiffs of the burden of proving a causal connection between their injuries and a particular manufacturer. *Id.* at 378-80. The court held that plaintiffs must establish by a preponderance of the evidence that one unidentified party defendant produced the injury-causing caps. *Id.* at 380. Further, plaintiffs must show that each named defendant breached a duty of care owed to plaintiffs and that the breaches were substantially concurrent in time and of a similar nature, before the court will shift the burden of proof of causation to the defendants. *Id.* The *Hall* rule is based on an unusual modification of concerted action and alternative liability. The court allowed the burden of causation to shift to the defendants upon a showing of industry-wide standards or practices that could support a finding of joint control of risk. *Id.* at 374. The *Hall* court stretched traditional rules of joint and several liability by grafting elements of the alternative liability theory into the concerted action theory to allow a shift of the burden of proof.

[7] DES is a synthetic estrogen that the Food and Drug Administration (FDA) approved in 1947 to prevent miscarriages during pregnancy. *See Proposed Theory, supra* note 1, at 963. In 1971, the FDA barred the use of DES during pregnancy. *Id.* at 963 n.2. DES is still marketed in the United States for vaginal disturbances, functional uterine bleeding and other genito-urinary tract problems. *Id.* Until recently, drug manufacturers used DES as an ingredient in post-coital contraceptives. *See* M. DIXON, DRUG PRODUCT LIABILITY § 11.27 (1980) [hereinafter cited as DIXON]; *Proposed Theory, supra* note 1, at 963 n.2. Doctors prescribed DES for an estimated 3 million pregnant women. Wall St. J., Dec. 30, 1980, at 13, col. 1.

[8] Podgers, *DES Ruling Shakes Products Liability Field*, 66 A.B.A.J. 827, 827 (July 1980) [hereinafter cited as Podgers]. Some of the DES cases have arisen as class actions, joining more than 1,000 plaintiffs. *Industry-Wide Liability, supra* note 1, at 999 n.94.

have accepted the theory of industry-wide liability.[9]

The DES plaintiffs' difficulties in identifying the manufacturer of the specific injury-causing dosage has necessitated an innovative approach to products liability law.[10] Plaintiffs in DES cases are the daughters of mothers who took DES during pregnancy. Plaintiffs contend that the ingestion of the drug by their mothers resulted in their affliction with clear-cell adenocarcinoma of the vagina and uterus[11] as well as precancerous abnormalities.[12] The afflicted daughters[13] seek to hold manufacturers[14] of the drug liable, despite the plaintiffs' inability to prove which manufacturer actually produced the specific injury-causing dosage of DES.[15] Lapse of time, the many brand names under which manufacturers marketed the drug, and the destruction of pertinent pharmaceutical records often make identification of a particular manufacturer impossible for either party.[16] Joinder of all original manufacturers is impossible

---

[9] DES plaintiffs' inability to identify the particular manufacturer of the injury causing dosage has resulted in summary judgment for defendant manufacturers. *See* Gray v. United States, 445 F. Supp. 337, 338 (S.D. Tex. 1978); Lyons v. Premo Pharmaceutical Labs. Inc., 170 N.J. Super. 183, 184, 406 A.2d 185, 186 (1979).

In cases which have survived summary judgment, no court has adopted the theory of industry-wide liability. *See, e.g.*, Abel v. Eli Lilly & Co., 94 Mich. App. 59, 77, 289 N.W.2d 20, 27 (1980) (allegations of concerted action defeat summary judgment); Sindell v. Abbott Labs., 26 Cal. 3d 588, 611, 607 P.2d 924, 936, 163 Cal. Rptr. 132, 144 (1980) (modified rule of alternative liability used to defeat summary judgment); Ferrigno v. Eli Lilly & Co., 175 N.J. Super. 551, 566-70, 420 A.2d 1305, 1313-15 (1980) (presumption that all potential defendants before court allowed alternative liability theory to defeat summary judgment).

[10] *See* text accompanying notes 14-17 *infra*.

[11] Adenocarcinoma is a potentially fatal form of cancer of the vagina or cervix. *Proposed Theory, supra* note 1, at 965. Clear-cell adenocarcinoma was rare before doctors began to prescribe DES. Only three cases of clear-cell adenocarcinoma of the vagina had been recorded before the onslaught of DES related cases. *See* Ulfelder, *The Stilbestrol-Adenosis-Carcinoma Syndrome*, 38 CANCER 426, 428 (1976).

[12] Adenosis, abnormally placed tissue on the cervix or vagina, is the most consistently reported abnormality. *Proposed Theory, supra* note 1, at 965.

[13] Estimates of the number of pregnant women who took DES range up to 3 million. Wall St. J., Dec. 30, 1980, at 13, col. 1. Because some women took DES during more than one pregnancy, DES manufacturers may have exposed as many as 4 million "DES daughters" to cancer risks. Henderson, *Products Liability*, 3 CORP. L. REV. 143, 143 (1980). A recent study has indicated that males exposed to DES in utero may suffer from a higher incidence of sterility than other men. *See* Wash. Post, Oct. 12, 1980, at 18, col. 3. Currently, more than 1,000 lawsuits involving DES are estimated to be in litigation. Podgers, *supra* note 8, at 827.

[14] Since 1941, at least 287 drug manufacturing companies marketed at least seven different synthetic estrogen preparations for use during pregnancy. *See* Abel v. Eli Lilly & Co., 94 Mich. App. 59, 73, 289 N.W.2d 20, 23 (1980); Ferrigno v. Eli Lilly & Co., 175 N.J. Super. 551, 565, 420 A.2d 1305, 1312 (1980). Manufacturers marketed DES under at least 70 brand names. *Industry-Wide Liability, supra* note 1, at 999 n.96.

[15] Proof of causation is not the only legal problem facing DES plaintiffs. Class action certification, statutes of limitations, recovery for fetal injury prior to viability, and appropriate standards of care in drug testing and manufacturing may also hinder the plaintiffs' attempts to recover. *See Proposed Theory, supra* note 1, at 968-71 nn.22-25. *Accord*, DIXON, *supra* note 7, at § 11.27.

[16] Many DES plaintiffs are unable to identify which brand of DES their mothers ingested. *Proposed Theory, supra* note 1, at 972. Therefore, the plaintiffs are unable to iden-

because many manufacturers have merged, have been bought-out, or are no longer in business.

In order to recover under traditional products liability law, a plaintiff must show that a product is defective, that a particular party is responsible for the defective product, and that the defect in the product caused the plaintiff's injury.[17] If the plaintiff is unable to identify the specific responsible manufacturer, no liability will attach.[18] In DES litigation, the identification requirement presents a prohibitive burden of proof which would bar recovery in most cases. The industry-wide liability theory would extend the scope of products liability claims by eliminating the identification requirement and allowing recovery in cases analogous to the DES cases.[19] Industry-wide liability would obviate the identification requirement by shifting the burden of proof of causation to the defendants.[20] Incorporation of elements of joint and several liability into products liability law would avoid the identification requirement.

Under traditional law of joint torts, only the theories of concerted action or alternative liability could defeat the cause-in-fact problems inherent in DES and similar cases.[21] Under a concerted action theory, a plaintiff must prove that each defendant engaged in a group action or joint venture.[22] A plaintiff must show that all defendants actively participated in a common plan to commit or further a tortious act by cooperation or encouragement.[23] An express agreement among the defendants is unnecessary if a plaintiff can demonstrate a "tacit understanding" among the defendants.[24] Evidence of the defendants'

---

tify the specific company which manufactured the injury-causing dosage. *See* Gray v. United States, 445 F.Supp. 337, 338 (S.D. Tex. 1978); Sindell v. Abbott Labs., 26 Cal. 3d 588, 611-12, 607 P.2d 924, 931, 163 Cal. Rptr. 132, 145 (1980); Abel v. Eli Lilly & Co., 94 Mich. App. 59, 73, 289 N.W.2d 20, 24 (1980).

[17] W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 103 at 671-72 (4th ed. 1971) [hereinafter cited as PROSSER].

[18] *See* Wetzel v. Eaton Corp., 62 F.R.D. 22, 31 (D. Minn. 1973) (plaintiff must advance evidence from which jury reasonably could infer which of two companies manufactured defective product); R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY, §§ 1.41, 4.31 (2d ed. 1974) (identification of manufacturer of product required). Products liability law has required identification of the product manufacturer whether the action has been under a negligence, breach of warranty or strict liability theory. PROSSER, *supra* note 17, at 671-72.

[19] *Industry-Wide Liability*, *supra* note 1, at 982-83.

[20] *Proposed Theory*, *supra* note 1, at 995.

[21] *See* PROSSER, *supra* note 17, § 52, at 314-19.

[22] PROSSER, *supra* note 17, § 46, at 292; *see* Annot., 13 A.L.R.3d 431 (1967) (collecting cases).

[23] PROSSER, *supra* note 17, § 46, at 292.

[24] *Id.* The California Supreme Court found that a drug manufacturer's reliance on tests performed by other manufacturers did not constitute "tacit understanding." Sindell v. Abbott Labs., 26 Cal. 3d 588, 604-05, 607 P.2d 924, 932, 163 Cal. Rptr. 132, 140 (1980). *But see* Abel v. Eli Lilly & Co., 94 Mich. App. 59, 74, 289 N.W.2d 20, 25 (1980). In *Abel*, the plaintiffs' allegations that defendants acted in concert in producing and marketing defective drugs without adequate testing or warnings were sufficient to state a cause of action under a concerted action theory. *Id.* at 74; 289 N.W.2d at 25.

parallel behavior alone cannot support an inference of a tacit understanding.[25] The joint action of the defendants becomes the cause-in-fact of a plaintiff's injury.[26] Joint and several liability results.[27]

Courts have used the theory of alternative liability to shift the burden of proof on the issue of causation to defendants.[28] Courts have applied alternative liability where all defendants acted tortiously, but only one unidentifiable defendant could have caused the plaintiff's injury.[29] In contrast to the concerted action theory, all alternatively liable defendants are independent tortfeasors.[30] If a plaintiff can join all possible wrongdoers, the court will shift the burden of proof on causation to the defendants.[31] The rationale for imposing alternative liability is the

[25] *See* Hall v. E.I. Du Pont De Nemours & Co., 345 F. Supp. 353, 373-74 (E.D.N.Y. 1972); *Proposed Theory, supra* note 1, at 996. A court may infer a "tactic understanding" among defendants from parallel behavior if their behavior also evidences a spoken or unspoken agreement among them. *Id.* at 979. The illegal road race, in which the drivers decide to race their cars without consultation, presents the typical case in which courts will infer a "tacit understanding." PROSSER, *supra* note 17, at § 46, at 292; *see* Bierczynski v. Rogers, 239 A.2d 218, 221 (Del. 1968).

[26] *See* Hall v. E.I. Du Pont De Nemours & Co., 345 F. Supp. 353, 372 (E.D.N.Y. 1972).

[27] *See* note 3 *supra*.

[28] Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948), established the rule of alternative liability. Under *Summers*, if all possible wrongdoers are before the court, the court will shift the burden of proving causation to the defendants. *See id.* at 83, 199 P.2d at 4. The *Summers* court recognized the injustice of permitting wrongdoers to escape liability, reasoning that the nature of their conduct makes proof of cause-in-fact difficult or impossible. *Id.* Therefore, a court can provide an innocent plaintiff a recovery despite uncertainty regarding which defendant inflicted the injury. *See id.* (by implication); *accord*, RESTATEMENT (SECOND) OF TORTS § 433 B, Comment b (1965), PROSSER, *supra* note 17, § 41, at 243.

In shifting the burden of proof to the defendants, the *Summers* court created the fictitious presumption that each defendant was the actual causative agent. *See* 33 Cal. 2d at 82, 199 P.2d at 2 (negligence of both defendants was legal cause of injury). Since the plaintiff joined all possible tortfeasors, collective causation was a certainty. *Id.* at 83, 199 P.2d at 3. Even with only two defendants, however, the probability of each being the actual cause of the injury is no greater than 50%. *Proposed Theory, supra* note 1, at 986.

[29] Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948), exemplifies the traditional fact pattern in which courts have applied alternative liability. In *Summers*, two hunting companions negligently shot in the plaintiff's direction, injuring him. *Id.* at 81, 199 P.2d at 2. The injured plaintiff could not identify which hunter fired the shot. *Id.* Nevertheless, the *Summers* court held both defendants jointly and severally liable for the whole of the damages. *Id.* at 83, 199 P.2d at 4. The court reasoned that the plaintiff should not be denied a remedy because he was unable to identify which of two wrongdoers inflicted the injury. *Id.* at 82, 199 P.2d at 3.

An implied basis of the *Summers* court's analysis was that the plaintiff joined all wrongdoers before the court. *Accord*, RESTATEMENT (SECOND) OF TORTS, § 433 B, Comment h (1965). Under an industry-wide liability theory the plaintiff need not join all possible wrongdoers. *See Proposed Theory, supra* note 1, at 995. The plaintiff must show by clear and convincing evidence that an unidentified party defendant manufactured the defective product. *Id.* The proponent of the industry-wide liability theory suggests that a plaintiff could meet the standard of clear and convincing evidence by joining manufacturers accounting for 75% to 80% of the product market. *Id.* at 996.

[30] *See* RESTATEMENT (SECOND) OF TORTS, § 433 B, Comment g (1965).

[31] *Id.* at § 433 B, Comment h. A recent New Jersey DES case, Ferrigno v. Eli Lilly & Co., 175 N.J. Super. 551, 420 A.2d 1305 (1980), applied the alternative liability theory to shift

courts' unwillingness to deny an injured plaintiff a recovery when the plaintiff can join all possible wrongdoers before the court.[32] Joint and several liability results, unless particular defendants can demonstrate that they did not cause the injury.[33]

Traditionally, courts have not applied either the concerted action or the alternative liability theory to cases with the complexity inherent in the DES cases.[34] Strict application of these two theories would not allow the inference of causation necessary to satisfy the identification requirement under products liability law.[35] In cases where plaintiffs cannot demonstrate a tacit understanding or join all possible wrongdoers, the traditional forms of concerted action or alternative liability should not sustain a products liability action. The industry-wide liability theory combines elements of concerted action and alternative liability into a coherent theory in order to obviate the identification requirement and allow a products liability action.[36]

The industry-wide liability theory would be available to each plaintiff who is unable to identify the manufacturer of the particular injury-

---

the burden to prove causation to the defendants, even though the defendants claimed that all potential wrongdoers were not before the court. *Id.* at 570, 420 A.2d at 1315. The New Jersey court recognized a strong state policy favoring recovery by innocently injured plaintiffs who could be denied a recovery because of an inability to identify the source of their injuries. *Id.* at 569-70, 420 A.2d at 1314-15. The court created the presumption that the plaintiff had joined all potential defendants. *See id.*

[32] RESTATEMENT (SECOND) OF TORTS, § 433 B, Comment f (1965).

[33] In the DES case defendant manufacturers encounter the same difficulties as the plaintiffs in constructing the causative link between an injured plaintiff and the particular brand of DES that she took. *Industry-Wide Liability*, *supra* note 1, at 1000-01. Therefore, the defendant manufacturers would have difficulty exculpating themselves unless they could show that their particular product was unavailable at a given time or place. *Proposed Theory*, *supra* note 1, at 996.

[34] *Proposed Theory*, *supra* note 1, at 973-74.

[35] Application of alternative liability to DES cases requires a modification of the *Summers* rule. In *Summers* all possible tortfeasors were before the court. *See* 33 Cal. 2d 80, 83, 199 P.2d 1, 4. DES plaintiffs have not been able to join all possible manufacturers. *Proposed Theory*, *supra* note 1, at 991. *See* Sindell v. Abbott Labs., 26 Cal. 3d 588, 610-11, 607 P.2d 924, 936, 163 Cal. Rptr. 132, 144 (1980) (where all manufacturers cannot be joined, modification of *Summers* rule warranted). *But see* Ferrigno v. Eli Lilly & Co., 175 N.J. Super. 551, 570, 420 A.2d 1305, 1314 (1980) (allegations that all potential wrongdoers not before court will not prevent alternative liability).

DES cases may not present the "tacit understanding" necessary for a concerted action. *See* Sindell v. Abbott Labs., 26 Cal. 3d 588, 606, 607 P.2d 924, 933, 163 Cal. Rptr. 132, 141 (1980) (no "tacit understanding" absent allegations that defendants assisted and encouraged one another to market DES with inadequate testing and inadequate warnings). In Hall v. E.I. Du Pont De Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972), the court found six manufacturers of blasting caps, representing almost the entire industry, liable for injuries under a theory of concerted action. *Id.* at 358; *see* note 6 *supra*. The *Hall* court based the conclusion that the defendants jointly controlled the risk of harm upon allegations that the manufacturers had delegated safety functions to a trade association. 345 F. Supp. at 372. Plaintiffs did not advance similar allegations in *Sindell*.

[36] *Proposed Theory*, *supra* note 1, at 996.

causing product.[37] Under the industry-wide liability theory, the plaintiff must demonstrate that all defendants manufactured a generically similar product.[38] The plaintiff must show that the defendant manufacturers owed a duty of care to consumers.[39] Finally, the plaintiff must show that the manufacturers adhered to an insufficient industry-wide standard of safety in the manufacture or maketing of the product.[40] If the plaintiff succeeds in proving these factors, the burden of proof on the identification requirement would shift to the defendants.[41]

The industry-wide liability theory focuses on the activities of the industry as a whole.[42] Plaintiffs would not have to show either an express agreement or the tacit understanding among the defendants necessary for recovery under a concerted action theory.[43] Unlike the alternative liability theory, the theory of industry-wide liability would not require a plaintiff to join all possible wrongdoers. The plaintiff would have to show by clear and convincing evidence that the product of one unidentified party defendant caused the injury.[44] If the plaintiff satisfied the clear and convincing test, the burden on the issue of causation would shift to the defendants.[45] The plaintiff would be relieved of the prohibitive burden of proving causation under traditional products liability law. Each defendant manufacturer could exculpate itself and escape joint liability by proving that it could not be responsible for the plaintiff's injury.[46]

The theory of industry-wide liability is premised on the rationale that courts should enhance an injured plaintiff's chances of recovery, even at the expense of a possibly innocent party.[47] Application of an industry-wide liability theory would result in a collateral expansion of liability under products liability law.[48] Manufacturers could be held liable for harm caused by a defective product produced in adherence to an in-

---

[37] The plaintiff's inability to identify the particular manufacturer cannot be the fault of the plaintiff. *Proposed Theory*, *supra* note 1, at 995-96.

[38] *See id.* at 995 (delineating elements of industry-wide liability).

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.* at 996.

[43] *Id.*

[44] *Id*; *see* note 28 *supra*.

[45] *Proposed Theory*, *supra* note 1, at 996.

[46] *Id.* A member of an industry could escape joint liability by showing nonadherence to the deficient industry-wide standard of safety. *Id.* Alternatively, a defendant manufacturer could prove that its product could not have caused the injury. *Id.*

[47] *See* Roundhouse v. Owens-Illinois Inc., 604 F.2d 990, 994 (6th Cir. 1979) *citing* Hall v. E.I. Du Pont De Nemours & Co., 345 F. Supp. 353, 376-78 (E.D.N.Y. 1972) (fair under some circumstances to enhance recovery possibilities of injured victim even at expense of possibly innocent party).

[48] *See Industry-Wide Liability*, *supra* note 1, at 1001 (liability expanded collaterally by imposing liability on parties whose only relationship to product is manufacturing similar product).

sufficient industry-wide standard of safety. Liability would attach to any manufacturer regardless of whether the manufacturer's product caused the injury, or whether the actual injury-causing manufacturer was before the court.[49]

Neither the courts nor commentators have accepted the concept of industry-wide liability.[50] Few of the DES cases have reached a final verdict.[51] Therefore, the applicability of the theory to DES cases or cases with similar fact patterns remains uncertain. Courts appear reluctant to accept the theory of industry-wide liability given the possibility of far-reaching and unpredictable results.[52] Nevertheless, courts have been reluctant to deny a chance for recovery to afflicted DES daughters.[53] Consequently, recent decisions have modified both concerted action and alternative liability to allow plaintiffs the possibility of recovery without adopting the industry-wide liability theory.

In a recent DES decision, the Michigan Court of Appeals overturned a state court grant of partial summary judgment for the defendant drug companies.[54] In *Abel v. Eli Lilly & Co.*, the court expressly declined to adopt an "enterprise liability" theory.[55] Plaintiffs alleged that all defendants acted wrongfully in producing and marketing the defective drug.[56] Each plaintiff alleged that DES caused her injuries.[57] The court found these allegations sufficient to state a cause of action and defeat summary judgment under a concerted action theory.[58] The court recognized that

---

[49] *Id.* at 1000.

[50] *See Proposed Theory, supra* note 1, at 963.

[51] *See, e.g.*, Abel v. Eli Lilly & Co., 94 Mich. App. 59, 289 N.W.2d 20 (1980); Diamond v. E.R. Squibb & Sons, Inc., 366 So. 2d 1221 (Fla. Dist. Ct. App. 1979); Gray v. United States, 445 F. Supp. 337 (S.D. Tex. 1978); Katz v. Eli Lilly & Co., Inc., 84 F.R.D. 378 (E.D.N.Y. 1979); Keil v. Eli Lilly & Co., No. 75-70997, slip op. (E.D. Mich., filed Nov. 6, 1980); Lyons v. Premo Pharmaceutical Labs., Inc., 170 N.J. Super. 183, 406 A.2d 185 (1979); McCreery v. Eli Lilly & Co., 87 Cal. App. 3d 77, 150 Cal. Rptr. 730 (1978); Mink v. Univ. of Chicago, 460 F. Supp. 713 (N.D. Ill. 1978); Morrissey v. Eli Lilly & Co., 76 Ill. App. 3d 753, 394 N.E.2d 1369 (1979); Sindell v. Abbott Labs., 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, (1980); Thomas v. Ferndale Labs., 97 Mich. App. 718, 296 N.W.2d 160 (1980).

[52] For cases refusing to adopt a theory of industry-wide liability, *see* Sindell v. Abbott Labs., 26 Cal. 3d 588, 609, 607 P.2d 924, 935, 163 Cal. Rptr. 132, 143 (1980); Abel v. Eli Lilly & Co., 94 Mich. App. 59, 77, 289 N.W.2d 20, 27 (1980); Ferrigno v. Eli Lilly & Co., 175 N.J. Super. 551, 570, 420 A.2d 1305, 1315 (1980).

[53] *See* Sindell v. Abbott Labs., 26 Cal. 3d 588, 610-11, 607 P.2d 924, 936, 163 Cal. Rptr. 132, 144 (1980) (negligent defendants rather than innocent plaintiff should bear cost of injury); Abel v. Eli Lilly & Co., 94 Mich. App. 59, 75-76, 289 N.W.2d 20, 26 (1980) (burden of apportionment of damages shall fall on wrongdoer, rather than innocent plaintiff).

[54] Abel v. Eli Lilly & Co., 94 Mich. App. 59, 77, 289 N.W.2d 20, 27 (1980).

[55] *Id.*

[56] *Id.* at 71-72, 289 N.W.2d at 24.

[57] *Id.* at 66-67, 289 N.W.2d at 22.

[58] Under Michigan law, summary judgment only tests the sufficiency of the pleadings. MICH. CT. G.C.R. 117.2(1). Therefore, the court of appeals did not address defendants' contention that no evidence supported allegations that the defendants had acted in concert in producing and marketing DES. *See* 94 Mich. App. at 74, 289 N.W.2d at 25.

the burden of proof facing the plaintiff would be heavy, if not insurmountable.[59] The *Abel* court required the plaintiffs to establish by a preponderance of the evidence that one or more of the named defendants manufactured the DES taken by a particular plaintiff's mother.[60] If the plaintiffs failed to carry their burden of proof as to any or all defendants, no liability would attach.[61] The court refused to shift the burden to disprove causation to the defendants.[62]

The *Abel* dissent noted that the theory of industry-wide liability raised constitutional problems.[63] If the court relieved plaintiffs of the burden of proving that one of the named defendants caused or participated in causing the harm, the named defendants might be denied equal protection of the law.[64] Furthermore, establishing fault only on the basis of a manufacturer's position as a member of an industry might violate the named defendants' due process rights.[65] The dissenting opinion failed to recognize that the theory of industry-wide liability creates only an inference of causation. Under the doctrine of res ispa loquitur, courts have inferred negligence and causation without constitutional challenges.[66]

A California court also has refused to apply the theory of industry-wide liability in a DES case.[67] In *Sindell v. Abbot Laboratories*, the California Supreme Court addressed the issue of whether a plaintiff could recover damages if she were unable to identify the manufacturer of the injury-causing product.[68] The *Sindell* court modified the traditional rule of alternative liability rather than setting new precedent by adopting the industry-wide liability theory.[69] The court recognized that the traditional theory of alternative liability was inappropriate absent proof that one of the five defendants manufactured the specific injury-

---

[59] *See* 94 Mich. App. at 76, 289 N.W.2d at 26.

[60] *Id.*

[61] *Id.* at 77, 289 N.W.2d at 27.

[62] *See id.* (plaintiff must show that one or more of defendants manufactured injury-causing dosage).

[63] *Id.* at 92, 289 N.W.2d at 33.

[64] *Id.*

[65] *See id.* (due process required that state action which deprives one of property must have rational basis).

[66] *See, e.g.*, Ybarra v. Spangard, 25 Cal. 2d 486, ____, 154 P.2d 687, 689-90 (1944) (burden on causation shifted to six defendant doctors and nurses for injury to unconscious patient); Dement v. Olin-Mathieson Chem. Corp., 282 F.2d 76, 82-83 (5th Cir. 1960) (in dynamite cap injury, res ipsa loquitur applies to both of two manufacturers because components used in one combination); *see* Comment, *The Application of Res Ipsa Loquitur In Suits Against Multiple Defendants*, 34 ALBANY L. REV. 106, 121 (1969) (res ipsa loquitur generally applied to multiple defendants where some form of joint liability already exists). The Supreme Court's recent denial of certiorari for Sindell v. Abbott Labs., 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 49 U.S.L.W. 3270 (Oct. 14, 1980), appears to have mooted the possible constitutional issues raised by the industry-wide liability theory.

[67] Sindell v. Abbott Labs., 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980).

[68] *Id.* at 597, 607 P.2d at 928, 163 Cal. Rptr. at 136.

[69] *Id.* at 609, 607 P.2d at 935, 163 Cal. Rptr. at 143.

causing product.[70] The *Sindell* court expressly rejected the customary requirement of alternative liability that all possible tortfeasors be joined in the action.[71] According to the *Sindell* court, a plaintiff need only join as defendants the manufacturers representing a substantial share of the DES market at the time the mother ingested the DES.[72] The "market share" liability theory constitutes a significant dilution of traditional alternative liability theory. No longer must plaintiffs join all possible wrongdoers to rely on the theory of alternative liability.

The *Sindell* court expressly declined to adopt the label of industry-wide liability.[73] The court refused to expand products liability law by predicating liability on adherence to an unacceptable industry-wide standard of safety.[74] The court expressed concern that a manufacturer might be held liable for injury caused by a drug it did not supply despite the fact that the manufacturer followed government prescribed safety standards.[75] The court did accept the premise that plaintiffs unable to join all possible manufacturers should not be denied a remedy.[76] This premise also is the basic assumption underlying industry-wide liability.[77] Rather than adopt the industry-wide liability theory, however, the court diluted the traditional rule of alternative liability by formulating a "market share" liability theory to allow a products liability action.[78] The Supreme Court recently denied certiorari of the *Sindell* opinion.[79]

Modified theories of concerted action and alternative liability can effect the same result as the industry-wide liability theory. All three theories can provide DES plaintiffs an opportunity for recovery from manufacturers that the plaintiffs can locate and join.[80] Nevertheless, a manufacturer's adherence to a deficient industry-wide standard pro-

---

[70] *Id.* at 603, 607 P.2d at 931, 163 Cal. Rptr. at 139; note 35 *supra.*

[71] In Ferringno v. Eli Lilly & Co., 175 N.J. Super. 551, 570-71, 420 A.2d 1305, 1314-15 (1980), the court found that New Jersey precedent did not require that a plaintiff join all possible tortfeasors before the court could apply an alternative liability theory.

[72] Sindell v. Abbott Labs., 26 Cal. 3d 588, 612, 607 P.2d 924, 937, 163 Cal. Rptr. 132, 145 (1980). The *Sindell* court did not define "substantial share." The court noted that plaintiff urged the court to define substantial share at 70% to 80% of the market, as suggested by the proponent of the industry-wide liability theory. *Id.* (citing *Proposed Theory, supra* note 1, at 996). The court, however, expressly declined to set a more specific standard than a "substantial percentage." 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

[73] 26 Cal. 3d at 609, 607 P.2d at 935, 163 Cal. Rptr. at 143.

[74] *Id.*

[75] *Id.* The court noted the active role of the Food and Drug Administration in defining standards of safety for the drug industry. *Id.*

[76] *Id.*

[77] *Proposed Theory, supra* note 1, at 1000.

[78] Sindell v. Abbott Labs., 26 Cal. 3d at 611-12, 607 P.2d at 936-37, 163 Cal. Rptr. at 144-45. The *Ferrigno* court did not have to consider the applicability of either the *Sindell* "market share" liability theory or the industry-wide liability theory, because the court found that existing precedent resolved the identification issue. Ferrigno v. Eli Lilly & Co., 175 N.J. Super. 551, 570-71, 420 A.2d 1305, 1314-15 (1980).

[79] 49 U.S.L.W. 3270 (Oct. 14, 1980).

[80] *See* text accompanying notes 35-41, 58, 67-73 *supra.*

vides a compelling basis for liability. By adopting the industry-wide liability theory, courts will avoid the confusion of straining traditional rules of joint and several liability.

Commentators have criticized the theory of industry-wide liability, arguing that the theory would affect industry adversely by increasing insurance costs and the number of products liability claims.[81] Imposition of industry-wide liability would represent a dramatic extension of products liability law. Nevertheless, economic arguments support the industry-wide liability theory.[82] Tort law has recognized that manufacturers are better able to bear the cost of injury from a defective product than are consumers.[83] Arguably an industry, rather than the injured consumer, should bear the risk of injury from defective products produced within the industry.[84] The drug or chemical industries should not be immune from liability simply because of the latent nature of injuries caused by defective products.[85]

Adoption of the theory of industry-wide liability also could encourage product safety. Courts have recognized that holding manufacturers liable for defective products or failure to warn of harmful effects fosters product safety.[86] The collateral expansion of products liability law might provide greater safety incentives. Manufacturers may no longer be satisfied with adherence to a minimum level of safety set by

---

[81] *See Industry-Wide Liability*, *supra* note 1, at 1003 (increased number of products liability claims substantial factor in higher cost of insurance). After the *Sindell* decision, the insurance industry joined the drug companies in an unsuccessful petition to the Supreme Court for a writ of certiorari. Wash. Post. Oct. 15, 1980, at 8, col. 2. The insurance companies argued that the *Sindell* decision could make the issuance of commercial liability policies to drug companies impossible. *Id.*

Rapid increases in product liability insurance premiums, combined with the difficulty of obtaining such insurance, has encouraged pharmaceutical companies to establish "captive" insurance companies and become self-insurers. *Proposed Theory*, *supra* note 1, at 1004, *citing* Comment, *Federal Taxation Concepts in Corporate Risk Assumption: Self-Insurance, The Trust, and the Captive Insurance Company*, 46 FORDHAM L. REV. 781 (1978).

[82] *Proposed Theory*, *supra* note 1, at 1005-06.

[83] Sindell v. Abbott Labs., 26 Cal. 3d 588, 611, 607 P.2d 924, 936, 163 Cal. Rptr. 132, 144 (1980).

[84] *See* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 61, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962) (manufacturers best able to allocate costs and risks of injuries by redistributing loss among consumers).

[85] Sindell v. Abbott Labs., 26 Cal. 3d 588, 610, 607 P.2d 924, 936, 163 Cal. Rptr. 132, 144 (1980) (advances in science and technology will result in new, potentially hazardous products which consumers will be unable to trace to a specific manufacturer).

Recent studies have explored the connection between exposure to certain chemical substances and particular cancers, focusing on the potential legal ramifications. *See generally* D. DONIGER, LAW AND POLICY OF TOXIC SUBSTANCE CONTROL (1978) [hereinafter cited as DONIGER]; M. SHAPO, A NATION OF GUINEA PIGS (1979) [hereinafter cited as SHAPO]. Because the effects of exposure to toxic chemicals may remain latent for twenty years, the victims may be able to identify the actual injury-causing chemical but not the responsible chemical manufacturer. DONIGER, *supra*, at 11. Therefore, victims of exposure to toxic chemicals may encounter the same difficulties of proof as the DES plaintiffs. SHAPO, *supra*, at 173.

[86] 26 Cal. 3d at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144.

the government. The expansion of liability might result in industry adoption of strict self-regulatory controls. Effective self-regulation might help to minimize intrusive government regulations.

Ultimately the risks associated with technological advancement will have to be allocated in some manner. Arguably, courts should await legislative action before judicially delegating the risk of injury.[87] Absent legislative action, some courts will refuse for policy reasons to deny recovery to plaintiffs in cases with complex causation elements.[88] Industry-wide liability provides a coherent and consistent theory to overcome the difficulty of proving causation in products liability actions with latent injury manifestation.

W. IAN LAIRD

[87] *See Industry-Wide Liability, supra* note 1, at 1019 (proposing limited version of no-fault products liability termed "latent technological injury compensation").

[88] *See generally* Sindell v. Abbott Labs., 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980); Abel v. Eli Lilly & Co., 84 Mich. App. 59, 289 N.W.2d 20 (1980); Ferrigno v. Eli Lilly & Co., 175 N.J. Super. 551, 420 A.2d 1305 (1980).