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## SINDELL V. ABBOTT LABORATORIES: A NEW AVENUE FOR DES LITIGATION

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Michael H. Wells\*

In 1980, the California Supreme Court decided *Sindell v. Abbott Laboratories*.<sup>1</sup> The decision advanced important medico-legal rights for women by significantly developing California product liability law.<sup>2</sup> *Sindell* introduced the concept of "market share liability"—a potential avenue of recovery for DES<sup>3</sup> plaintiffs seeking redress for injuries resulting from drug exposure before birth.<sup>4</sup>

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1. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980) (per Mosk, J.; Bird, C.J., Newman and White, J.J., concurring. Richardson, J., dissenting; joined by Clark and Manuel, J.J.), *cert. denied*, 101 S. Ct. 286 (1980).

2. See notes 90-124 *infra* and accompanying text.

3. Diethylstilbestrol, commonly known as DES, is a synthetic nonsteroidal estrogen. MODERN DRUG ENCYCLOPEDIA 309 (A. Lewis ed. 1975).

4. DES was first synthesized in England in 1938, but was never patented. Because DES was less expensive than natural estrogens and could be administered orally, DES quickly became popular with the medical community. Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 963 n.1 (1978) [hereinafter cited as FORDHAM Comment]. A common formula of DES was widely manufactured and prescribed in the United States between 1947 and 1971 as a miscarriage preventive. B. SEAMAN, WOMEN AND THE CRISIS IN SEX HORMONES 16 (1977). For a comprehensive discussion of DES, see *id.*, at chs. 1-3.

The effects of DES have been detected in both sons and daughters of women who took the drug during pregnancy. A discussion of the important and distinctive effects of DES on males is beyond the scope of this Note. Nevertheless, the procedural aspects of a DES claim (see notes 90-124 *infra* and accompanying text) should apply to DES sons as well as daughters.

There are two known forms of DES injury in women. The more common, and less severe, is vaginal adenosis. Vaginal adenosis is characterized by "tissues placed abnormally on the cervix or vagina." B. SEAMAN, *supra* note 4, at 3. Vaginal adenosis is a precancerous condition. The cancer potential of this tissue in each patient is unknown, thus warranting continual monitoring. "The treatment for adenosis is cauterization, surgery, or cyro-surgery. Women who suffer from this condition must be monitored by biopsy or coliscopic examination twice a year, a painful and expensive procedure. Thousands of women whose mothers received DES during pregnancy are unaware of the effects of the drug." *Sindell*, 26 Cal. 3d 588, 594, 607 P.2d 924, 925, 163 Cal. Rptr. 132, 133 (1980).

Because a plaintiff's mother ingested the particular dosage of DES a full generation ago, information about the specific manufacturer is most likely unknown or unavailable. Therefore, DES suits brought under traditional products liability law have universally been rejected for failure to establish causation, due to lack of manufacturer identity.<sup>5</sup>

In view of the identical formula<sup>6</sup> used by defendant manufacturers, the California Supreme Court recognized the plaintiff's insurmountable burden in identifying the precise tortfeasor, and modified traditional tort doctrine.<sup>7</sup> *Sindell* adopts market share liability and thereby relieves the DES plaintiff of the requirement of identifying precisely which manufacturer caused the injury.<sup>8</sup>

*Sindell* allows the DES plaintiff to state a cause of action<sup>9</sup> by joining a substantial share of the appropriate market of drug manufacturers;<sup>10</sup> any damages would then be apportioned on the

The second type of DES injury is clear-cell adenocarcinoma. This condition occurs when vaginal adenosis has become cancerous. Before 1971, this form of cancer was practically unknown in vaginal form. Vaginal adenocarcinoma is generally considered to be caused by DES. Herbst, Robbay, Scully & Poskanzer, *Clear-cell adenocarcinoma of the vagina and cervix in girls: Analysis of 170 Registry Cases*, 119 AM. J. OBSTETRICS & GYNECOLOGY 713, 713 (1974). "It is a fast-spreading and deadly disease, and radical surgery is required to prevent it from spreading." 26 Cal. 3d at 594, 607 P.2d at 925, 163 Cal. Rptr. at 133. DES, as well as natural estrogens, has also been implicated in the development of cancer of the womb. M. DIXON, DRUG PRODUCT LIABILITY § 11.27[1] (1980).

5. "An essential element of the plaintiff's cause of action for negligence, or for that matter for any other tort, is that there be some reasonable connection between the act or omission of the defendant and the damages which the plaintiff has suffered." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 41, at 236 (4th ed. 1971).

Application of black letter causation law in the DES context commonly led to summary judgments for defendants. See, e.g., *Gray v. United States*, 445 F. Supp. 337 (S.D. Tex. 1978); *McCreery v. Eli Lilly & Co.*, 87 Cal. App. 3d 77, 150 Cal. Rptr. 730 (1978); *Abel v. Eli Lilly & Co.*, 94 Mich. App. 59, 289 N.W.2d 20 (1979).

6. 26 Cal. 3d at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144. "[T]he various manufacturers of DES used the same formula, and as a result, pharmacists apparently had a practice of substituting one brand for another. . . ." Kroll, *Intra-Industry Joint Liability: The Era of Absolute Products Liability*, 1980 INS. L.J. 185, 187.

7. 26 Cal. 3d at 611, 607 P.2d 936, 163 Cal. Rptr. at 144.

8. *Id.*

9. See notes 90-124 *infra* and accompanying text.

10. See 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. The appropriate manufacturers appear to be those companies which can be shown to have produced and marketed DES at the time and place in which plaintiff's mother purchased the drug. Drug companies would be permitted to remove themselves from the class of potential

basis of each manufacturer's share of the DES market at the time plaintiff's mother took the drug.<sup>11</sup> In response, a vigorous dissent denounced market share liability as a "wholly new theory"<sup>12</sup> which "abandons the traditional requirement of some causal connection between defendants' act and plaintiffs' injury. . . ."<sup>13</sup>

Plaintiff Judith Sindell<sup>14</sup> filed suit<sup>15</sup> against eleven drug companies<sup>16</sup> alleging, under several theories,<sup>17</sup> that she was injuriously exposed to DES before birth as a result of the testing, marketing, and promotion of the drug by defendants.<sup>18</sup> Each cause of action attempted to shift the burden of proof from plaintiff to defendant and to establish a basis for finding joint

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defendants if they could demonstrate they did not manufacture the particular dosage in question. *Id.* at 596 n.4, 607 P.2d at 927 n.4, 163 Cal. Rptr. at 135 n.4. A declaration that one company did not manufacture DES until after plaintiff was born enabled one of the *Sindell* defendants to be dismissed from the action. *Id.* at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. The opinion itself, however, does not specifically define "appropriate market."

11. *Id.* at 614, 607 P.2d at 938, 163 Cal. Rptr. at 146.

12. *Id.*

13. *Id.* at 615, 607 P.2d at 925, 163 Cal. Rptr. at 133.

14. Judith Sindell's action was consolidated on appeal with that of plaintiff Maureen Rogers. Upon trial court dismissal, Rogers amended her complaint to identify one of the defendants, Eli Lilly & Co., as the precise manufacturer of the dosage taken by her mother. The court noted that the discussion of market share liability would, therefore, apply to Rogers only if she failed to establish causation by Eli Lilly & Co. at a subsequent trial on the merits. The entire opinion is therefore directed toward plaintiff Sindell. *Id.* at 597, 607 P.2d at 927, 163 Cal. Rptr. at 135.

15. Ms. Sindell sued both on her own behalf and as a class representative for all women similarly situated. *Id.* at 593, 607 P.2d at 925, 163 Cal. Rptr. at 133.

16. Defendant pharmaceutical companies included E.R. Squibb & Sons, Upjohn Co., Abbott Laboratories, Eli Lilly & Co., and Rexall Drug Co. *Id.* at 596 n.4, 607 P.2d at 927 n.4, 163 Cal. Rptr. at 135 n.4.

17. Ms. Sindell sued on the basis of negligence, insufficient industry-wide standards, strict liability, violation of express and implied warranties, false and fraudulent representation, drug misbranding in violation of federal law, conspiracy, and "lack of consent." *Id.* at 595, 607 P.2d at 926, 163 Cal. Rptr. at 134.

18. Plaintiff's injuries included vaginal adenosis and a malignant bladder tumor which had to be surgically removed. For the rest of her life, Ms. Sindell will require constant monitoring by biopsy and calposcopy to insure early warning of further malignant growth. *Id.* at 594-95, 607 P.2d at 926, 163 Cal. Rptr. at 134.

A 1974 study of 154 persons previously treated for clear-cell vaginal adenocarcinoma found that 24% had had recurrences and that 16% had died. In 33% of the cases the follow-up period was less than two years after discovery of the condition. A 16% death rate within two-years illustrates how quickly DES-related cancer develops and how fatal it can be. For a complete analysis of this problem, see Herbst, Robbay, Scully & Poskanzer, *supra* note 4, at 713.

and several liability.<sup>19</sup> Nevertheless, the trial court granted defendants' demurrers on the basis of plaintiff's failure to allege causation.<sup>20</sup>

On appeal, the California Supreme Court reversed, holding that Ms. Sindell sufficiently identified the wrongdoer by joining, as defendants, those who represented "a substantial share of the appropriate market . . . ."<sup>21</sup> The court stated that this satisfied plaintiff's burden of proof.<sup>22</sup> The defendants may then cross-complain against other DES manufacturers that have not been joined, in an effort to match liability with each manufacturer's responsibility for the injuries caused by its own products.<sup>23</sup> Any damages awarded would then be apportioned on the basis of California doctrines of partial indemnity and comparative fault, as modified by market share liability.<sup>24</sup>

This reduction of the level of plaintiff's burden of proof lies

19. Telephone interview with Jason G. Brent, Attorney for Appellant Judith Sindell (Nov. 18, 1980) [hereinafter cited as Brent interview].

20. The trial court sustained the demurrers without leave to amend on the ground that plaintiff admitted she could not identify which defendant manufactured the drug that caused her injury and, therefore, dismissed the action. 26 Cal. 3d at 596, 607 P.2d at 926, 163 Cal. Rptr. at 134.

21. *Id.* at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

22. *Id.*

23. *Id.* See note 104 *infra* and accompanying text.

24. In *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975), California adopted the comparative fault system. In *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978), the California Supreme Court held that negligence damages may be apportioned on a percentage-of-fault basis between one or more defendants and a negligent plaintiff—a system of implied partial indemnity. The jury may make special findings to indicate which theory of liability was relied upon (*e.g.*, negligence or strict liability), and the percentage of fault attributable to each party. *Li*, 13 Cal. 3d 804, 823-24, 532 P.2d 1226, 1240, 119 Cal. Rptr. 858, 872 (1975).

In *Safeway Stores v. Nest-Kart*, 21 Cal. 3d 322, 332, 579 P.2d 441, 446, 146 Cal. Rptr. 550, 555 (1978), the California Supreme Court stated that "the comparative indemnity doctrine may be utilized to allocate liability between a negligent and a strictly liable defendant."

In *Nest-Kart*, plaintiff was injured by a shopping cart manufactured by defendant A and sold to supermarket B. The trial court found equitable indemnity did not apply to the comparative fault facts. The supreme court reversed, finding no distinction between strict liability and negligence actions which would disqualify strict liability from implied partial indemnity apportionment. This indicates that in DES liability cases, strictly liable and negligent defendants may all be responsible under the court's market share theory. For further discussion of market share liability, see notes 90-124 *infra* and accompanying text.

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at the core of market share liability. By recognizing that rigid adherence to prior doctrine controverted traditional goals of tort law, the California Supreme Court in *Sindell* significantly expanded product liability law in the area of injurious fungible goods.<sup>25</sup>

## I. EARLY FDA REGULATIONS AND THE QUESTIONABLE UTILITY OF DES

Before an effective ban on DES use went into effect in 1971,<sup>26</sup> doctors prescribed DES for a variety of obstetrical purposes, primarily to prevent premature childbirth.<sup>27</sup> DES is still marketed, however, for uses that do not implicate fetal development.<sup>28</sup>

DES was never patented. To capitalize quickly on a rapidly developing market, and to avoid the expense of creating variants of DES, a group of twelve drug companies jointly submitted clinical data and a "new drug application" to the Food and Drug Administration (FDA) in 1941.<sup>29</sup> At that time, FDA regulations

25. 26 Cal. 3d 588, 610, 607 P.2d 924, 936, 163 Cal. Rptr. 132, 144.

26. In 1971 the Federal Drug Administration effectively banned the use of DES by requiring companies marketing the drug to place a warning label on DES containers indicating that DES appeared related to an increasing incidence of vaginal cancer in daughters of women who took the drug. At that time the FDA also began studies to determine the relationship between mothers who used DES and daughters who suffered vaginal cancer. The FDA studies began as a result of the alarming increase in the incidence of vaginal adenocarcinoma. See generally U.S. FOOD & DRUG ADMIN., DEP'T OF H.E.W. DRUG BULLETIN, DIETHYLSTILBESTROL CONTRAINDICATED IN PREGNANCY (1971). For a good discussion of the regulatory history of DES, see FORDHAM Comment, *supra* note 4, at 963-66.

27. Prescription of DES became so popular that many doctors considered DES as somewhat of a reproductive tract cure-all. Doctors prescribed DES to decrease the incidence of late toxemias, to decrease prematurity and stillbirth, and to increase the size of babies born prematurely. Dieckmann, Davis, Rynkiewicz & Pottinger, *Does the Administration of Diethylstilbestrol During Pregnancy Have Therapeutic Value?*, 66 AM. J. OBSTETRICS & GYNECOLOGY 1062, 1074 (1953). Toxemia is defined as an abnormal condition associated with the presence of toxic substances in the blood. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2419 (1976).

28. Such uses include the suppression of lactation, post-coital contraception, menopausal disturbances, and treatment for prostrate cancer, among others. *Diethylstilbestrol (DES): Hearings on Title I of S. 963 Before the Subcomm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess. 10* (1975). See also FORDHAM Comment, *supra* note 4, at 963.

29. FORDHAM Comment, *supra* note 4, at 976. A new drug application consists of an application for approval of a new drug accompanied by reports of drug safety, efficacy, formula, and ingredients. A list of suggested controls for marketing and manufacture was also submitted. Joint submission of a new drug application was attractive because, in

did not require an affirmative showing of drug efficacy.<sup>30</sup>

An affirmative showing of DES efficacy would have proved difficult because, as early as 1942, and somewhat regularly thereafter, scientific studies criticized and rejected the earlier studies favorable to DES use as a miscarriage preventive.<sup>31</sup>

By 1971, DES had been termed only "possibly effective" by the FDA for the prevention of "accidents of pregnancy," a regulatory stage which indicates the presence of known dangers.<sup>32</sup> As a "possibly effective" drug, manufacturers were permitted, and indeed continued, to market DES for these purposes for several years.<sup>33</sup>

## II. PLAINTIFFS' ARGUMENTS

In *Sindell*, plaintiffs based their arguments on three theories of product liability: alternative liability; concerted action; and enterprise, or industry-wide, liability.<sup>34</sup>

These three theories are similar in that they allow plaintiffs to shift the burden of proof.<sup>35</sup> If defendants are unable to prove

cases where a drug was already patented or a licensing arrangement was unavailable, a company would have been forced to finance the creation of formulas which varied little from the patented drug. Therefore, the joint submission of a new drug application saved a substantial amount of money. The initial FDA approval of DES was limited to treatment regarding estrogen problems. Not until 1947 was DES initially approved for use in pregnancy complications. For a general discussion of the new drug application, see *id.*

30. "A new drug application became 'effective' automatically if the Secretary of Health, Education and Welfare failed within a certain period of time to disapprove the application. . . . Since 1962, affirmative approval of an application has been required before a new drug may be marketed." 26 Cal. 3d at 604 n.19, 607 P.2d at 932 n.19, 163 Cal. Rptr. at 140 n.19.

In 1962, 21 U.S.C. § 355 was amended to improve the effectiveness of drug licensing requirements. After that time, former applicants with FDA-approved drugs were required to provide the FDA with new reports and records of drug efficacy and safety. See Act of October 10, 1962, Pub. L. No. 87-781, § 102(d), 76 Stat. 781-85.

31. See, Kranaky, *The Use of Stilbestrol for the Treatment of Threatened and Habitual Abortion and Premature Labor: A Preliminary Report*, 35 S. MED. J. 838 (1942); Smith, *Diethylstilbestrol in the Prevention and Treatment of Complications of Pregnancy*, 56 AM. J. OBSTETRICS & GYNECOLOGY 821 (1948).

32. 36 Fed. Reg. 21,537 (1971). This development occurred as a result of the 1962 amendments discussed at note 30 *supra*.

33. The marketing of "possibly effective" drugs was prohibited in 1973. 38 Fed. Reg. 26,824 (1973).

34. 26 Cal. 3d at 598, 607 P.2d at 928, 163 Cal. Rptr. at 136.

35. See notes 36-89 *infra* and accompanying text.

they did not manufacture the drug which caused the injury, each theory allows imposition of joint and several liability. The origin and rationale underlying each theory, however, varies greatly.

#### A. ALTERNATIVE LIABILITY

Alternative liability arose as a cure for plaintiff causation problems.<sup>36</sup> Under an alternative liability theory defendants may act independently and yet be held liable for plaintiff's injury. Introduced in *Summers v. Tice*,<sup>37</sup> and incorporated in the Restatement of Torts,<sup>38</sup> alternative liability is illustrated by the classic hypothetical involving plaintiff and two hunters. Both hunters simultaneously and negligently fired their guns in plaintiff's direction, causing injury. Because it is impossible to determine which hunter fired the shot that struck plaintiff, the court required each hunter to bear the burden of proving innocence.<sup>39</sup>

The rule of *Summers v. Tice* requires that in cases where all defendants are equally culpable, and their negligence precludes an innocent plaintiff from identifying them, basic considerations of fairness demand that the burden of proof shift from plaintiff to defendant.<sup>40</sup> Defendants unable to meet the burden of proof are found jointly and severally liable.<sup>41</sup>

In *Summers*, the court employed alternative liability and found fairness to demand that, as between unascertainable negligent defendants and an innocent plaintiff, defendants should bear the burden of proof.<sup>42</sup> The *Sindell* court analyzed an alternative liability theory on the basis of *Summers v. Tice*<sup>43</sup> and *Ybarra v. Spangard*.<sup>44</sup> The court found *Sindell* to be similar to

36. W. PROSSER, *supra* note 5, at 243.

37. 33 Cal. 2d 80, 199 P.2d 1 (1948).

38. RESTATEMENT (SECOND) OF TORTS § 433(b)(3) (1965). The facts of *Summers v. Tice* form the basis of Illustration (9).

39. 33 Cal. 2d at 80, 88, 199 P.2d at 5.

40. *Id.* "To hold otherwise would be to exonerate both [defendants] from liability, although each was negligent, and the injury resulted from such negligence." 33 Cal. 2d at 85, 199 P.2d at 3 (quoting with approval *Oliver v. Miles*, 144 Miss. 852, 854, 110 So. 666, 668 (1927)).

41. *Id.* at 88, 199 P.2d at 5.

42. *Id.*

43. *Id.* at 80, 199 P.2d 1 (1948).

44. 25 Cal. 2d 486, 154 P.2d 687 (1944). *Ybarra* involved a plaintiff who, while unconscious during surgery, was injured by one of the doctors or nurses attending him. The court found that, because the defendants controlled the instruments which caused the



*Summers* and *Ybarra* because in each case, through no fault of the plaintiff, the circumstances of the injury rendered identification of the wrongdoer impossible. Nevertheless, a sufficient factual dissimilarity between the three cases led the *Sindell* court to decline to shift the burden of proof to defendants under the alternative liability theory.<sup>45</sup>

The court distinguished the cases factually on two main issues. Unlike the product liability context of *Sindell*, alternative liability as established in *Summers* involved a pure claim of negligence.<sup>46</sup> The fairness concerns stressed in *Summers* were therefore not as compelling in the product liability situation, where certain proof requisites are relaxed.<sup>47</sup> Application of a theory of alternative liability could also be questioned because, in *Summers*, all potential defendants were present and ascertainable; one of the two hunters clearly caused the injury. *Sindell*, on the other hand, involved a large number of possible, yet not ascertainable, defendants.<sup>48</sup> On such facts, application of alternative liability could cause a company which did not manufacture the injury-producing dosage of DES to be held jointly and severally liable.<sup>49</sup> While all possible defendants were joined in *Summers*, only five of 200 possible defendants remained joined by the time

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injury, they were better able to identify the wrongdoer than was the unconscious plaintiff. For that reason, the court shifted the burden of proof to defendants. *Id.*

45. 26 Cal. 3d at 603, 607 P.2d at 931, 163 Cal. Rptr. at 139.

46. 33 Cal. 2d at 83, 199 P.2d at 2.

47. Strict product liability differs from actions in negligence in that product liability requires no proof of a duty of due care to the injured plaintiff. The commercial context renders this showing unnecessary; the duty is implied. The elements of plaintiff's cause of action include causation, defect, and a showing the defect existed when the product left the manufacturer. W. PROSSER, *supra* note 5, at 671-72.

48. Of the eleven drug companies originally joined as defendants in *Sindell*, the court noted, "[h]ere, by contrast, there are approximately 200 drug companies which made DES, any of which might have manufactured the injury-producing drug." 26 Cal. 3d at 602, 607 P.2d at 931, 163 Cal. Rptr. at 139. Increase in the number of defendants who may have produced the DES which injured plaintiff proportionately reduces the chance that any one defendant sold plaintiff's mother the harm-causing drug. For example, where there are two defendants, there exists a 50% chance of causation each; if 20 defendants, a 5% chance each. Application of alternative liability where there is a 95% chance of innocence for each defendant may strain the concept beyond logic. See FORDHAM Comment, *supra* note 4, at 994-95, for further discussion of chances of causation.

49. One commentator considered this problem with alternative liability critical. "First, if even one tortfeasor is absent, and it was he who actually caused the plaintiffs' injury, then only the [non-injuring] defendants may be held liable." FORDHAM Comment, *supra* note 4, at 991.

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of trial in *Sindell*.<sup>50</sup> As a result, the court found the possibility that the joined defendants supplied DES to plaintiff's mother to be "so remote that it would be unfair to require each defendant to exonerate itself."<sup>51</sup> The Summers theory was rejected, however, only "as previously applied."<sup>52</sup>

## B. CONCERTED ACTION

Plaintiffs also attempted to ground a claim of defendant liability in a theory of concerted action. The nature of the drug industry and the early FDA regulation under which DES was marketed<sup>53</sup> could arguably have served as the basis for a claim of concerted action.

The theory of concerted action derives from vicarious liability.<sup>54</sup> Courts require that a plaintiff show a tacit agreement

50. 26 Cal. 3d at 602-03, 607 P.2d at 931, 163 Cal. Rptr. at 139. Some estimates of the possible number of DES-producing companies run as high as 300. FORDHAM Comment, *supra* note 4, at 964. *Sindell* plaintiffs originally joined eleven of the largest domestic drug companies in an effort to join enough defendants to satisfy causation at the trial court level. By the time the case came before the California Supreme Court only five defendants remained. 26 Cal. 3d at 596, 607 P.2d at 927, 163 Cal. Rptr. at 135.

The strength of the distinguishing factor mentioned in the text is diminished because plaintiff joined five drug companies which constituted 90% of the possible defendants. As a result it was highly probable that one of the joined defendants supplied the DES taken by Sindell's mother. *Id.* at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. This factor adds weight to the view held by some that the real purpose behind the court's imposition of market share liability was a limitation of defendant's possible joint and several liability. Brent interview, *supra* note 19.

If the court imposed market share liability, each defendant would be responsible for damages based on their share of DES sales rather than, as in joint and several liability, the entire judgment. To illustrate: only A and B are joined as defendants. A has a 20% share of the market and B has a 10% share of the market. Both A and B share 100% of the responsibility for plaintiff's injury. If A goes bankrupt or is immune from process, B bears full responsibility for 100% of the damages (if in both examples plaintiff is not negligent). This is the problem addressed by the *Sindell* court's substantial percentage requirement of market share liability. See notes 111-124 *infra* and accompanying text, for further discussion.

51. 26 Cal. 3d at 603, 607 P.2d at 931, 163 Cal. Rptr. at 139. It is possible that the court sought to avoid imposing strict product liability on the defendant. In strict product liability, plaintiff must prove fewer requisites for a finding of liability than in negligence. See note 47 *supra*.

52. 26 Cal. 3d at 603, 607 P.2d at 931, 163 Cal. Rptr. at 139. This phrase may indicate that the California Supreme Court considers market share liability to be a new application of alternative liability.

53. See notes 26-33 *supra* and accompanying text.

54. W. PROSSER, *supra* note 5, at 291. A finding of vicarious liability in turn requires a showing of joint enterprise. *Id.*

among defendants to perform a tortious act.<sup>55</sup> Plaintiff's showing that a certain defendant helped plan and facilitate a tortious act with other defendants would support a finding of a tacit agreement.<sup>56</sup> However, mere knowledge of the tortious acts of others will not suffice; some element of planning is required.<sup>57</sup> The rationale for the theory lies in the deterrence of dangerous group conduct.<sup>58</sup>

The *Sindell* plaintiffs alleged a tacit agreement on the basis of mutual reliance on inadequate "testing, marketing, methods, lack of warnings, . . . and other acts and omissions" by the drug companies.<sup>59</sup> Plaintiffs argued that such imitative parallel conduct was tortious and therefore actionable as concerted action.<sup>60</sup>

Nevertheless, even though plaintiffs may have correctly described the common practices of the drug industry, the court stated that the allegations failed to describe a tacit agreement to conduct inadequate tests, to give insufficient warnings, or to engage in other tortious conduct.<sup>61</sup> The court appeared to require that the conduct at issue be recognizably tortious, or that it be directly connected with the plaintiff over a short period of time, in order to find liability under a concerted action theory.<sup>62</sup> Otherwise, the doctrine "would render virtually any manufacturer

55. *Id.* at 292.

56. One commentator provides the following example of concerted action: "Assume A, B, and C participate in [an automobile] race and P, a bystander, is injured by A's car. P may sue A or B or C or any combination thereof, and each of the three is jointly and severally liable for P's injury. P need only allege that each defendant he has joined helped plan and facilitate the race, that the participation of each was tortious, and that his injury resulted from the race." FORDHAM Comment, *supra* note 4, at 979.

57. W. PROSSER, *supra* note 5, at 292. The Restatement requires a showing that a defendant:

(a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

RESTATEMENT (SECOND) OF TORTS § 876 (a)-(c) (1979).

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

59. 26 Cal. 3d at 604-05, 607 P.2d at 932, 163 Cal. Rptr. at 140.

60. *Id.*

61. *Id.*

62. *Id.* at 605-06, 607 P.2d at 933, 163 Cal. Rptr. at 141.

liable for the defective products of an entire industry, even if it could be demonstrated that the product which caused the injury was not made by the defendant.”<sup>63</sup>

The rationale behind concerted action and alternative liability differ greatly. One seeks the deterrence of tortious group conduct; the other is basically a method of establishing causation.<sup>64</sup> Because the *Sindell* facts fell squarely into neither theory, the court rejected both.<sup>65</sup>

### C. INDUSTRY-WIDE LIABILITY

Industry-wide liability is a hybrid of elements of alternative liability and concerted action.<sup>66</sup> While similar to concerted action in that it requires plaintiff to prove defendants engaged in tortious conduct, this element is greatly modified.<sup>67</sup> Industry-wide liability is also similar to alternative liability,<sup>68</sup> as it may be invoked to alleviate causation problems in cases involving multiple negligent but unascertainable defendants.<sup>69</sup>

A theory of industry-wide liability involves more than a merger of the elements mentioned above. The unique aspect of industry-wide liability is the proof of imitative practices which may pervade an entire industry.<sup>70</sup> In *Sindell*, plaintiff alleged that defendants individually relied on the testing, manufactur-

63. *Id.* at 605, 607 P.2d at 933, 163 Cal. Rptr. at 141. Nevertheless, the dissent states that, by adopting market share liability, the majority arrives at precisely this result. *Id.* at 616, 607 P.2d at 939, 163 Cal. Rptr. at 147.

64. For a discussion of alternative liability see notes 36-52 *supra* and accompanying text. “The legal theory of concert seems to have evolved in order to deter hazardous group behavior rather than because the actual injury-producing party could not be identified . . . . FORDHAM Comment, *supra* note 4, at 979.

65. See notes 51 & 63 *supra* and accompanying text.

66. Industry-wide liability is discussed in the context of DES as “enterprise liability” in FORDHAM Comment, *supra* note 4, at 995-1006. For the suggested seven part model, see note 83 *infra*. Enterprise liability is the term under which *Sindell* plaintiffs alleged a cause of action. 26 Cal. 3d at 607, 607 P.2d at 934, 163 Cal. Rptr. at 142. The court itself, however, preferred the term “industry-wide liability.” *Id.*

67. See notes 70-75 *infra* and accompanying text.

68. See notes 36-52 *supra* and accompanying text.

Both alternative liability and industry-wide liability derive from the doctrine of respondeat superior. For a discussion of these theories in the context of the employer’s willingness to engage in high risk conduct, see FORDHAM Comment, *supra* note 4, at 996-99.

69. FORDHAM Comment, *supra* note 4, at 995.

70. *Sindell*, 26 Cal. 3d at 608, 607 P.2d at 934, 163 Cal. Rptr. at 142.

ing standards, labeling, and product literature of the entire DES industry,<sup>71</sup> much as in a concerted action claim.<sup>72</sup> The distinguishing factor between the two theories lies in the type of evidence plaintiff must bring forward. A concerted action claim requires an explicit or implicit agreement to engage in tortious conduct.<sup>73</sup> The type of evidence in an industry-wide liability claim, on the other hand, does not rest on proof of any agreement, implied or otherwise. Rather, the injury arises out of "an insufficient industry standard."<sup>74</sup>

This focus on the joint activities of industry members is analogous to the "agreement" requirement in concert cases, and also reflects the purpose of those cases—to deter similar behavior in the future. Unlike concert, however, the parallel behavior of defendants, absent any understanding among them, is sufficient to prove this element.<sup>75</sup>

This theory conceives of the existence of insufficient industry standards and practices as the source and cause of the injury.

As a second distinguishing feature, industry-wide liability introduces risk allocation into product liability.<sup>76</sup> This concept is based on the idea that accidents and injuries are an inevitable aspect of any manufactured product, and, as such, represent a foreseeable cost to defendants as a part of the manufacturing process and product exploitation.<sup>77</sup> The more control the manufacturer has over risks caused by its products, the more foreseeable and accountable the manufacturer is for the harm, and the more likely a finding of liability.<sup>78</sup> If the injury was foreseeable by

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71. *Id.*

72. See text accompanying note 59 *supra*.

73. W. PROSSER, *supra* note 5, at 292.

74. FORDHAM Comment, *supra* note 4, at 997.

75. *Id.*

76. F. HARPER & F. JAMES, *THE LAW OF TORTS* § 26.7, at 1377 (1956).

77. *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). *Greenman* indicates that where there are inherent public risks in the process of creating a marketable product from an inchoate idea, manufacturers rather than consumers should bear the costs created by those risks. "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." *Id.* at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

78. W. PROSSER, *supra* note 5, at 644.

virtue of the insufficient industry standard, defendants must individually prove their product could not have caused the harm suffered by plaintiff.<sup>79</sup>

Industry-wide liability and risk allocation are discussed in *Hall v. E. I. Du Pont De Nemours Co.*,<sup>80</sup> in which several children were injured by blasting caps.<sup>81</sup> *Hall* holds that when defendants act independently in adhering to an inadequate industry-wide product safety standard, joint liability will not automatically be imposed, but the burden of proof will shift to defendants.<sup>82</sup> The shift of the burden of proof was critical in *Hall* because, as in *Sindell*, the evidence of the tortious act had been destroyed or lost at the time of injury.

The *Sindell* court considered industry-wide liability in the context of a seven part formula which proposed to apply industry-wide liability to DES cases.<sup>83</sup> Although much of this formula

79. *Sindell*, 26 Cal. 3d at 608-09, 607 P.2d at 934, 163 Cal. Rptr. at 142.

80. 354 F. Supp. 650 (E.D.N.Y. 1972).

81. *Hall* involved 12 separate accidents in which 13 children were injured. Plaintiffs sued six corporations and an industry trade association. The evidence determining which manufacturer caused the alleged harm was destroyed in each incident in which the blasting caps exploded. The accidents occurred over a four year period between 1955 and 1959. *Id.* at 359.

82. "[T]he existence of industry-wide standards or practices alone will not support, in all circumstances, the imposition of joint liability. But where . . . individual defendant-manufacturers cannot be identified, the existence of industry-wide standards or practices could support a finding of joint control of risk . . . a shift of the burden of proving causation to the defendants." *Id.* at 374.

The specific theory upon which *Hall* is based is somewhat unclear. The opinion reversed the dismissal of plaintiff's claim on the basis of defendants' "joint knowledge and action." Although there were allegations that the six corporate defendants had delegated certain safety functions to the trade association, *id.* at 359, *Hall* never discussed allegations or findings of a tacit agreement to engage in tortious conduct. The California Supreme Court stated that industry-wide liability was suggested by *Hall*. 26 Cal. 3d at 607, 607 P.2d at 933, 163 Cal. Rptr. at 141. This would emphasize the insufficient industry standard factor. The FORDHAM Comment, however, on which much of *Sindell's* industry-wide discussion is based, asserts that *Hall* "is the major case . . . where concert has been applied." FORDHAM Comment, *supra* note 4, at 981. This interpretation would emphasize the notion that the tacit agreement factor is paramount. This inconsistency underscores the difficulty in determining the theoretical bases for recovery involved in a given fact situation.

83. The elements of industry-wide liability are:

- 1) Plaintiff is not at fault for his inability to identify the causative agent and such liability is due to the nature of the defendant's conduct.
- 2) A generically similar defective product was manufactured by all the defendants.

is taken from *Hall*,<sup>84</sup> the *Sindell* court decided that the theory, as articulated in *Hall*, could not be extended to the entire DES drug industry.<sup>85</sup> The *Sindell* court rejected industry-wide liability for three basic reasons:

1) The standards relied upon by defendants were mandated by the FDA.<sup>86</sup> Because the FDA played a pervasive role in the drug testing and marketing process, imposition of liability would be unfair.<sup>87</sup>

2) In *Hall*, as opposed to *Sindell*, certain safety functions had been delegated to an industry-wide trade association which was also joined as a defendant.<sup>88</sup>

3) Whereas *Hall* involved only six manufacturers, which represented the entire blasting cap industry, *Sindell* involved only five of a possible 200 DES manufacturers.<sup>89</sup>

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3) Plaintiff's injury was caused by this product defect.

4) The defendants owed a duty to the class of which plaintiff was a member.

5) There is clear and convincing evidence that plaintiff's injury was caused by the product of some one of the defendants. For example, the joined defendants accounted for a high percentage of such defective products on the market at the time of plaintiff's injury.

6) There existed an insufficient, industry-wide standard of safety as to the manufacture of this product.

7) All defendants were tortfeasors satisfying the requirements of whichever cause of action is proposed: negligence, warranty, or strict liability.

26 Cal. 3d at 608-09 n.24, 607 P.2d at 935 n.24, 163 Cal. Rptr. at 194 n.24. This list of elements varies only in order from that suggested in FORDHAM Comment, *supra* note 4, at 995.

84. See FORDHAM Comment, *supra* note 4, at 997 n.194, in which the author traces elements of industry-wide liability to the *Hall* opinion.

85. 26 Cal. 3d at 609, 607 P.2d at 935, 163 Cal. Rptr. at 143.

86. *Id.*

87. *Id.* at 610, 607 P.2d at 935, 163 Cal. Rptr. at 143. Where a large number of manufacturers were unascertained defendants, there would be less than a 50% chance that each defendant caused the harm alleged. In such a case, *Sindell* stated that defendants following industry standards regulated by FDA were unlikely to be sufficiently culpable to justify imposition of joint and several liability.

88. 345 F. Supp. at 378. See also *Sindell*, 26 Cal. 3d at 609, 607 P.2d at 935, 163 Cal. Rptr. at 143.

89. 26 Cal. 3d at 609, 607 P.2d at 935, 163 Cal. Rptr. at 143.

Women's Law Forum

### III. MARKET SHARE LIABILITY

#### A. DISTINGUISHING INDUSTRY-WIDE LIABILITY

Although *Sindell* rejected the specific theories argued by plaintiffs, the court found certain elements of the arguments to be persuasive.<sup>90</sup> A broad policy argument implicit in plaintiff's arguments enabled the court to adopt a market share theory of liability. The court introduced market share theory by noting that fungible goods in modern society can create harm which is not traceable to a particular manufacturer.<sup>91</sup> Citing *Escola v. Coca Cola Bottling Co.*<sup>92</sup> and section 433B of the Restatement of Torts,<sup>93</sup> the *Sindell* court adapted the elements of plaintiff's causes of action to avoid the inequitable results which it had previously found objectionable.<sup>94</sup>

Market share liability is perhaps best illustrated by comparison with industry-wide liability, which the court ostensibly rejected. Viewed in this light, very little of market share theory is entirely new.<sup>95</sup> Nearly all the elements of industry-wide liability are incorporated into market share liability.

1) Plaintiff is not at fault for his or her inability to identify the causative agent when such inability is due to the nature of defendants' conduct. This requirement is plainly adopted in market share by the *Sindell* court.<sup>96</sup>

2) A generically similar defective product was manufactured

90. *Id.* at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144.

91. *Id.*

92. 24 Cal. 2d 453, 150 P.2d 436 (1944). "[I]n an era of mass production and complex marketing methods the traditional standard of negligence [is] insufficient to govern the obligations of manufacturers to consumer . . . ." 26 Cal. 3d at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144. *Sindell* found *Escola* to mandate not only application of a product liability theory but also adaption of the rules of causation and liability. The court further noted that the Restatement would allow modification of a *Summers* rule in a *Sindell*-like situation. *Id.* See RESTATEMENT (SECOND) OF TORTS § 433B, comment (g) (1965).

93. RESTATEMENT (SECOND) OF TORTS § 433B (1965).

94. For the objectionable elements of plaintiff's causes of action, see notes 46-51, 61-63, 86-89 *supra* and accompanying text.

95. The dissent refers to market share liability and "the substantially identical" industry-wide liability as "wholly new." 26 Cal. 3d at 614, 607 P.2d at 938, 163 Cal. Rptr. at 146 (Richardson, J., dissenting; Clark and Manuel, J.J., concurring).

96. "Here, as in *Summers*, plaintiff is not at fault in failing to provide evidence of causation . . . ." *Id.* at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144.



by all of the defendants.<sup>97</sup> The majority notes that the plaintiffs alleged this element in their complaint.<sup>98</sup>

3) Plaintiff's injury was caused by this product defect. The court notes that the plaintiffs alleged this element.<sup>99</sup>

4) The defendants owed a duty to the class of which plaintiff was a member. Because plaintiffs in strict product liability cases are not required to show defendant's duty of due care, and market share liability is a strict product liability theory, a duty of due care is not required.<sup>100</sup>

5) There is clear and convincing evidence that plaintiff's injury was caused by the product of some one of the defendants.<sup>101</sup> Because plaintiffs allegedly joined 90 percent of the possible defendants, the court found that plaintiffs demonstrated this requisite under a market share theory.<sup>102</sup>

6) All defendants are tortfeasors satisfying the requirements of whichever cause of action is proposed: negligence, warranty, or strict liability.<sup>103</sup> The court noted that under market share

97. *Id.* at 593, 607 P.2d at 925, 163 Cal. Rptr. at 133.

98. *Id.* at 605, 607 P.2d at 933, 163 Cal. Rptr. at 141.

99. *Id.* at 593, 607 P.2d at 925, 163 Cal. Rptr. at 133. This element is a requisite for any action in strict product liability. As an evidentiary matter it should present no problem because clear-cell vaginal adenocarcinoma is a rare form of cancer uniquely attributable to the ingestion of DES by pregnant women. See 40 Fed. Reg. 32,773 (1975), for some documentation of the association between DES ingestion and vaginal adenosis.

100. RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965). Although the court mentioned no duty element, market share liability is not restricted to strict product liability. One commentator views the court as certifying a cause of action in DES market share negligence and suggests such a cause of action be pleaded in each new suit. 1 CAL. TORT REP. 106 (1980).

101. Evidence that the joined defendants accounted for a high percentage of the defective products on the market at the time of plaintiffs' injury would be sufficient. 26 Cal. 3d at 609, 607 P.2d at 935, 163 Cal. Rptr. at 143.

102. Plaintiffs alleged joinder of 90% of the possible DES defendants. "If at trial this is established to be the fact, then there is a corresponding likelihood that this comparative handful of producers manufactured the DES which caused plaintiffs injuries . . . ." *Id.* at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. The *Sindell* court finds the joinder of a substantial percentage of the possible defendants equivalent to what is referred to in the text as "clear and convincing evidence." *Id.* This is in contrast to the 75-80% joinder suggested as "clear and convincing" in FORDHAM Comment, *supra* note 4, at 995. See notes 111-124 *infra* and accompanying text, for further analysis of joinder for market share liability.

103. 26 Cal. 3d at 602, 607 P.2d at 930-31, 163 Cal. Rptr. at 138-39.

liability a defendant may avoid liability by showing it could not have manufactured the injury-producing drug.<sup>104</sup>

7) An insufficient industry-wide standard of safety existed for the manufacture of this product.<sup>105</sup> The court rejects only this element of the proposed industry-wide test in its formulation of a market share liability theory. As previously noted, the court found it unfair to impose liability simply because defendants followed standards mandated by the FDA.<sup>106</sup>

Arguably, drug companies may have helped create the standards upon which they rely to avoid liability in *Sindell*.<sup>107</sup> The court's refusal to adopt the final element, however, indicates it believed the *Sindell* facts would not support theories based upon an insufficient industry-wide standard of safety. In fact, the court's reliance on *Summers v. Tice* as support for market share liability<sup>108</sup> indicates the court wished to ground market share causation in traditional tort law. The court's approach, therefore, becomes perplexing in the event of joinder of a low (e.g., sixty-five percent), but still "substantial" percentage of possible defendants.

The court's use of *Summers* invites an investigation which leads to the heart of the *Sindell* controversy: the substantial percentage requirement and the method of damage apportionment.<sup>109</sup> A discussion of these controversial elements of market

104. One *Sindell* defendant successfully demurred on this basis and was dismissed from the action after proving it did not manufacture DES until after plaintiff was born. *Id.*

105. *Id.* at 609, 607 P.2d at 935, 163 Cal. Rptr. at 143.

106. *Id.*

107. The Pharmaceutical Manufacturers Association (PMA) is an extremely powerful drug company lobby which has for years maintained a close working relationship with the FDA. Arguably, the relationship is so close that the FDA may have, under PMA influence, allowed the marketing of drugs which had been inadequately tested for safety and efficacy. "This [close relationship] can be readily seen in the changes which occur after notices of proposed rule making. Often a proposal will be diluted or eliminated after the industry raises objections. Informal meetings between the FDA and PMA are held on a frequent, regular basis." M. DIXON, *supra* note 4, at § 6.01. See notes 26-33 *supra* and accompanying text, for further discussion of the regulatory history of DES.

108. "The most persuasive reason for finding plaintiff states a cause of action is that advanced in *Summers*: As between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury." 26 Cal. 3d at 610-11, 607 P.2d at 936, 163 Cal. Rptr. at 144.

109. One commentator suggests that, in jurisdictions which have adopted compara-

share liability form the heart of the dissent.<sup>110</sup>

#### B. JOINDER OF A SUBSTANTIAL PERCENTAGE

Although the court found alternative liability inapplicable to the *Sindell* facts as the theory existed in its *Summers*-based construct, the court did find it possible to solve plaintiffs' causation problems by use of a "diluted" *Summers* rule.<sup>111</sup> The *Sindell* court held that when a substantial percentage of the possible defendants are joined in an action, the corresponding likelihood that the company which manufactured the particular DES ingested by plaintiff's mother would escape liability is so diminished that it is reasonable to shift the burden of proof from plaintiffs to defendants.<sup>112</sup> In this manner *Sindell* eliminates the *Summers* requirement of joinder of 100 percent of the possible wrongdoers.

Unfortunately, the court did not clarify what would meet the substantial joinder requirement.<sup>113</sup> The opinion reveals only that joinder of ninety percent of the market share defendants, as in *Sindell*, constitutes a substantial percentage.<sup>114</sup> However, the court also suggested that even less than seventy-five percent may be considered a substantial percentage.<sup>115</sup>

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tive negligence, apportionment of damages according to market share is appropriate for a theory of industry-wide liability. "Much of the strength and justice of enterprise liability rests in the suggestion that damages be apportioned among defendants in proportion to their market shares." FORDHAM Comment, *supra* note 4, at 999. The suggestion arises that the *Sindell* court could have avoided a departure from traditional tort theory, yet achieved substantially the same result. Nevertheless, the *Sindell* court creates a system of damages apportionment which, with a high percentage of defendant joinder, is clearly more desirable than industry-wide liability. In such a case market share is closely analogous to a *Summers* or 100% joinder rule.

110. 26 Cal. 3d at 614-22, 607 P.2d at 938-43, 163 Cal. Rptr. at 146-51 (Richardson, J., dissenting; Clark and Manuel, J.J., concurring).

111. *Id.* at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144.

112. *Id.* at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. As a practical matter, it is likely that attorneys will plead against all manufacturers known to have produced DES at any time in history. This would appear to obviate the problem of joinder of a substantial share of potential defendants. Interview with Professor Neil Levy, Editor, *California Tort Reporter*, in San Francisco (Nov. 3, 1980).

113. Because no lower court decisions effectively apply and explain the substantial percentage requirement, practitioners are uncertain of its impact. Levy Interview, *supra* note 112. Appellant's attorney found the court's substantial percentage requirement to be an unclear standard as well. Brent Interview, *supra* note 19.

114. 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

115. The *Sindell* court clearly rejected the 75-80% requirement suggested in FORD-

The dissent vigorously rejected this element of market share liability. Justice Richardson argued that market share liability violates fundamental tenets of tort law by setting a precedent for liability where it is more likely than not that a particular defendant did not cause the alleged harm.<sup>116</sup>

Under market share liability, if defendants fail to meet their burden of proof, plaintiff should prevail and liability will be apportioned on the basis of each defendant's share of the product market.<sup>117</sup> Problems in market share damages arise when considered against a background of apportionment under California doctrines of partial indemnity and comparative fault.<sup>118</sup> For example, suppose plaintiff joins as defendants eighty percent of the possible market, and *B* company is determined to be responsible for sixty percent of *that* market. In such a case what is *B*'s liability in percentage of the judgment?

Does *B* pay sixty percent of the total damages awarded to plaintiff? Or does *B* pay sixty percent of eighty percent (*B*'s percentage of the market joined) of the judgment for plaintiff? The majority opinion seems to support the first position.<sup>119</sup>

Other difficulties arise when considering market share apportionment. Assuming joinder of a substantial percentage of

HAM Comment, *supra* note 4, at 966. 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

116. The dissent reiterates the causation requirement of precise manufacturer identity. Plaintiff must show the defendant "actually was the manufacturer of the product which caused the injury . . ." 26 Cal. 3d at 614, 607 P.2d at 938, 163 Cal. Rptr. at 146.

The dissent states that the court abandons traditional tort doctrine with the adoption of market share liability. The dissent argues that a drug company which only sold a small share of DES (*e.g.*, 10%) is unlikely to have caused plaintiff's injury. In such a case "defendant may be held proportionately liable even though mathematically it is more likely than not that it played no role whatever in causing plaintiffs' injuries." 26 Cal. 3d at 616, 607 P.2d at 939, 163 Cal. Rptr. at 147.

117. "Each defendant will be held liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product which caused plaintiffs' injuries." *Id.* at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. It appears from the court's language that "that market" would refer to the DES market at the time and place in which each DES mother bought and used the drug. Also, the common meaning of "plaintiffs" would indicate that the market must be determined for each individual plaintiff's mother. *Id.*

118. *Id.* at 613, 607 P.2d at 937, 163 Cal. Rptr. at 145.

119. "[E]ach defendant will be held liable for the *proportion of the judgment* represented by its share of *that* market." 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145 (emphasis added).

the possible defendants, the question arises whether the individual defendant's apportioned damages will be limited to its market share, or whether, because of the principle of joint and several liability, it will be liable for the percentage of the total judgment that its share of the market bears to the total market represented by the manufacturers who are joined as defendants. The smaller the percentage of the market joined as defendants, the greater the discrepancy.

For example, will a defendant who has a sixty percent share of the market be liable, where the total market share represented (*i.e.*, a "substantial percentage") is eighty percent, and where the damages award to plaintiff is \$100,000, for \$60,000, (sixty percent) or \$75,000, (seventy-five percent), the portion of the total damages represented by the defendant's market share as compared to the market shares of the defendants as a group?

The majority opinion can be read to suggest either result. The court announced a rule whereby damage apportionment will approximate defendant responsibility. This would indicate the figure of sixty percent. However, the court also assures that, because defendants may implead other drug companies, no prejudice to defendants will result. Such a statement indicates the court would endorse a seventy-five percent result where only eighty percent of the market is joined. The dissenters, by contrast, argue that the defendants will certainly be prejudiced by a rule imposing liability as in the seventy-five percent example.<sup>120</sup>

The most troublesome problems presented by *Sindell* arise with market share apportionment of damages among a very low, yet "substantial," percentage of joined defendants. If the percentage of joined defendants is low enough, the apportioned damages will bear little, if any, relationship to defendant responsibility.<sup>121</sup>

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120. "[U]nder the majority's reasoning those defendants who are brought to trial in this state will bear effective joint responsibility for 100 percent of plaintiffs' injuries despite the fact that their 'substantial' aggregate market share may be considerably less." 26 Cal. 3d at 617, 607 P.2d at 940, 163 Cal. Rptr. at 148.

121. Such an inability to join defendants may occur where defendants are not subject to the court's jurisdiction, are bankrupt or are no longer in operation. Although the *Sindell* court anticipates discrepancy between defendant fault and liability, the court's response indicates that market share is intended to apply only in situations where any

To illustrate, suppose that 1) the "substantial percentage" joined was only sixty percent; 2) defendant A's market share was forty percent of that sixty percent; and, 3) the judgment awarded was \$100,000. In such a case, defendant A must pay forty percent or \$40,000, *plus* 40/60 (two thirds) of that amount of the judgment represented by the wrongdoers who were *not* joined (or \$26,644, again two thirds). This makes A's total responsibility \$66,644, or, sixty-six percent of the total award. This is clearly more than a "minor discrepancy."<sup>122</sup>

The court notes there may be some practical problems in defining and determining the applicable market share.<sup>123</sup> Beyond these threshold practical problems of joinder, however, market share raises two other important questions. How does the practitioner plead a case of market share? And, how do courts use it to fashion equitable results?<sup>124</sup>

### C. A PROPOSED SOLUTION

As indicated above, it is difficult to determine the *Sindell* requirement for joinder of a substantial percentage of the market, when applying market share analysis. The opinion indicates that a substantial percentage should be a high percentage of the available market.<sup>125</sup>

The cornerstone of the court's new market share is the rule of *Summers v. Tice*, which shifted the burden of proof when all

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discrepancy will be minor. See 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

122. "[T]he difficulty of apportioning damages among defendant producers in exact relation to their market share does not seriously militate against the rule we adopt." *Id.*

123. The drug companies argue that accurate market share data for DES does not exist. They assert there are no accurate records of how much DES was sold as a miscarriage preventative. *Id.* at 613, n.29, 607 P.2d at 937 n.29, 163 Cal. Rptr. at 145 n.29.

124. See Birnbaum, *DES Concert-of-Action Theory: New Cases Bring Confusion*, Nat'l L.J., May 4, 1981, at 31, col. 1. Language in *Sindell* suggests market share may also apply to negligence actions for DES injuries. Therefore, DES plaintiffs should plead negligence under market share liability. See generally 1 CAL. TORT. REP. 106 (1980).

125. The court indicates that the share joined is substantial only if the burden of proof may be shifted without injustice to the defendants. 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. Although the court preferred a "substantial" percentage to the 75-80% suggested by FORDHAM Comment, *supra* note 4, at 996, shifting the burden of proof in *Sindell* occurred with a joinder of over 90% of the appropriate DES market. Where plaintiff has joined less than 85%, an alarming discrepancy arises between market share and liability. This level of minimum joinder appears to alleviate the inequitable results which prohibit a shift of the burden of proof. For further discussion, see notes 130-135 *infra* and accompanying text.

(100 percent) of the possible defendants were joined, but were unascertainable.<sup>126</sup> Nevertheless, the court refused to apply an alternative liability theory, as stated in *Summers*, because of the possibility that none of the five defendants joined were personally negligent.<sup>127</sup> Instead, a "diluted" *Summers* rule was applied because the court felt that, by joinder of a substantial percentage of the possible defendants, injustice to defendants could be avoided.<sup>128</sup> The court acknowledged that the *Sindell* plaintiffs met the "substantial percentage" requirement by an allegation of ninety percent joinder.<sup>129</sup>

Clearly, the *Sindell* court sought to achieve two broad policy-oriented goals: that plaintiffs be able to state a cause of action in the DES suits, and that the manufacturers of a product which did not injure a plaintiff be free of liability for plaintiff's injuries. The court seeks joinder of defendants as close to 100 percent as possible, but does not want to preclude a meritorious claim.

The following suggestion may aid cases in which the plaintiffs sue only a small percentage of the possible drug producers, yet reach a large enough share of the market to achieve the ambiguous requirement of "substantial percentage."<sup>130</sup>

The proposed procedure has three stages: complaint, discovery, and pretrial conference. Each stage remains generally consistent with modern pretrial civil practice.

At the complaint stage plaintiff would be required to join any percentage of possible drug company defendants which would meet the undefined substantial percentage articulated in

126. See notes 37-42 *supra* and accompanying text.

127. 26 Cal. 3d at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144.

128. "As we have seen, an undiluted *Summers* rule is inappropriate" *Id.* at 611, 607 P.2d at 935, 163 Cal. Rptr. at 143. The court announced its substantial percentage requirement saying that the court approached causation in DES cases from a different perspective, apparently a "diluted" *Summers* rule of causation. The court will accept less than the 100% joinder of *Summers*, but requires at least that which would avoid unjust results.

129. 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

130. The plural, "plaintiffs" and "defendants," is used in this section because DES suits are class actions in many cases. The proposal would not be altered, however, if only one plaintiff sued.

*Sindell*.<sup>131</sup> The court would at that point refuse to hear defendant motions based upon lack of cause-in-fact due to plaintiff's failure to identify the responsible defendant.<sup>132</sup> Motions on other grounds would be heard as usual.<sup>133</sup>

Immediately after defendants answer plaintiffs' complaint, the joined defendants may attempt to cross-complain against other possibly responsible drug companies, and plaintiffs may begin discovery. By use of discovery, plaintiffs may acquire information as to defendant's market share.<sup>134</sup> Thus, by the time of pretrial conference, plaintiffs should be able to show an eighty-five percent joinder of defendants.

Establishing a requirement of eighty-five percent joinder by the pretrial conference stage would enable plaintiffs to bring meritorious claims as well as limit defendant liability to an approximation of each defendant's responsibility for the harm caused. The eighty-five percent requirement allows plaintiffs to bring meritorious claims because it permits plaintiffs a substantial period of time after the complaint stage in which plaintiffs may, through discovery, gain information of the defendants' market share. The eighty-five percent joinder requirement represents a compromise between the required 100 percent joinder of *Summers* and the unspecified *Sindell* requirement, which could permit joinder of as few as fifty to sixty percent of the possible DES defendants. The advantage of an eighty-five percent joinder requirement is basically mathematical. If eighty-five percent of the available defendants are joined by the time of trial, mathematically it appears that defendant liability will not

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131. Such a procedure is consistent with the court's desire that plaintiff join as defendants a substantial percentage of the possible market. 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

132. Neither demurrer or motion for summary judgment would lie.

133. Permissible motions would include defendants' motions for summary judgment and demurrers based upon the fact that defendants' product could not possibly have caused the harm alleged by plaintiff. See 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

134. It is unlikely defendants will implead other defendants if it would help plaintiff meet joinder requirements to do so. Because plaintiffs may obtain market share information by use of interrogatories, requests for admission, and by requests for production of drug company sales records, plaintiffs should not be at a serious disadvantage. Any settlement negotiations would likely be enhanced by knowledge of plaintiff's potential for securing the requisite 85% joinder, and the likelihood and potential liability of each defendant in a judgment for plaintiff.



vary so greatly from defendant responsibility as to cause substantial inequity.<sup>135</sup>

A pretrial hearing is suggested, at which time the court would require a showing that plaintiff had joined eighty-five percent of the possible defendants, based upon market share, before setting the action for arbitration or trial. If plaintiff is unable to make such a showing the court may then hear motions by defendant concerning plaintiff's inability to show cause-in-fact.

#### IV. INDUSTRIAL AND LEGISLATIVE RESPONSE TO MARKET SHARE LIABILITY

Drug companies and members of the insurance defense bar join the position taken by the *Sindell* dissent: Eased causation requirements and the possibility of high damage awards<sup>136</sup> controvert social policy and guarantee a deleterious effect upon the entire drug industry.<sup>137</sup> While this argument is not without some merit, cost allocation devices will by and large assure continued solvency. Such devices include the use of captive insurers,<sup>138</sup> and price increases to offset the potential of high damages awards.<sup>139</sup>

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135. This procedure, would correct the flaws noted previously at notes 113-124 *supra* and accompanying text. The court should use its discretion here to allow plaintiffs more time in which to join the requisite 85%, if it appears likely that plaintiffs will be able to do so.

136. In one class action suit for DES-related injuries, plaintiffs sought over one billion dollars in damages. N.Y. Times, Mar. 29, 1977, at 16, col. 22.

137. "[C]onsiderable doubts have been expressed regarding the ability of the drug industry, and especially its smaller members, to bear the substantial economic costs (from both damages awards and high insurance premiums) inherent in imposing an industry-wide liability." 26 Cal. 3d at 618-19, 607 P.2d at 941, 163 Cal. Rptr. 149. "Because some small [drug companies] have already found themselves unable to afford products liability insurance, the effect of much higher premiums could be devastating to many small and middle-sized companies." Comment, *Industry-Wide Liability*, 13 SUFFOLK U.L. Rev. 980, 1003 (1979).

138. Where the risks in a certain industry are extremely high, some companies have found it useful to establish and maintain their own insurance company. The use of self-retained drug company insurers may provide guaranteed coverage for extensive damages awards at premium levels which the company can afford. Such systems have already been established in the drug industry. See FORDHAM Comment, *supra* note, 25 at 1004.

139. It is likely that the cost to drug companies of high damages awards will be passed along to the consumer through higher drug prices. The *Sindell* Court preferred market share liability to preemptive DES legislation because such legislation would not address the doctrinal issue of causation but would increase taxes for California citizens. 26 Cal. 3d at 613, n.30, 607 P.2d at 938, n.30, 163 Cal. Rptr. at 146 n.30. Nevertheless, it is clear the cost of DES injuries will most likely be borne by the consumer citizen under market share liability.

The social policy at issue questions the proper role of regulatory and judicial inhibitions upon the research and development of new drugs.<sup>140</sup> Such an inhibition would be distressing if an extensive amount of drug company resources were traditionally committed for socially useful new drug research.<sup>141</sup> Most drug company research, however, is not oriented towards new drugs. Sources indicate that drug company research and development funds are primarily expended to discover patentable variants of existing drugs and alternative cures for common diseases.<sup>142</sup> Initially at least, it is clear the effect of *Sindell* will neither bankrupt the complaining drug companies, nor severely inhibit socially useful new drug research.

In support of the policy interests mentioned above, and to circumvent the effect of *Sindell*, drug company interests have lobbied for legislative changes which would reduce or preclude chances of adverse judgments.<sup>143</sup> In the California state legislative session immediately following the publication of *Sindell*,

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Other factors also contraindicate the policy considerations cited in the dissent. The drug industry, unlike many others, does business in a marketplace of comparatively inelastic demand; an increase in the price of a drug will not substantially lessen the demand. This compounds the excellent economic health of the drug industry in general, and indicates continued post-*Sindell* solvency. See SENATE SUBCOMM. ON MONOPOLY, SELECT COMM. ON SMALL BUSINESS, COMPETITIVE PROBLEMS IN THE DRUG INDUSTRY, 92d Cong., 2d Sess. 33-34 (Comm. Print 1972).

140. "It seems to me that liability in the manner created by the majority must inevitably inhibit, if not the research or development, at least the dissemination of new pharmaceutical drugs." 26 Cal. 3d at 620, 607 P.2d at 942, 163 Cal. Rptr. at 150. (Richardson, J., dissenting).

141. "The bulk of pharmaceutical research is definitely directed toward increasing company profits by developing marketable drugs which will sell in the largest volumes and make the largest profits." M. DIXON, *supra* note 4, at § 6.03. See FORDHAM Comment, *supra* note 4, at 1006.

142. M. DIXON, *supra* note 4, at § 6.03. Creation of patentable drug variants and alternative cures for common diseases allows drug companies to capitalize on drug popularity without the cost of the initial drug research. Because drug manufacturers would rather not research a potentially unprofitable new drug, "there are many seriously debilitating diseases which would justify the idealistic research suggested by industry publicity, but which now are starved for research funds." *Id.*

143. All post-*Sindell* developments occur in a very media-conscious environment. In discussing a defendant's refusal to settle a case concerning noncancerous DES injury, a plaintiff's attorney noted this strategy: "Lilly spent an inordinate amount of money to defend a case, which he did not consider particularly significant, in order to win a victory that the company could trumpet in the mass media." The attorney "said he was surprised when the defense turned down his offer to settle . . . since the legal defense obviously cost much more. . . ." Ranii, *DES Suit Won by Drug Manufacturer*, Nat'l L.J., Dec. 8, 1980, at 11, col. 1.

two bills concerning DES were introduced. To a bill establishing a DES education and screening program,<sup>144</sup> a controversial rider was attached.<sup>145</sup> The rider would have effectively eliminated market share liability by legislatively reinstating traditional pre-*Sindell* concepts of causation.<sup>146</sup> Although the original DES education and screening bill was enacted into law, effective January 1, 1981,<sup>147</sup> the rider died in committee.<sup>148</sup> Almost certainly, this will be an area of continuing controversy.<sup>149</sup>

## V. CONCLUSION

*Sindell* bears great importance for the DES plaintiffs in California. The decision advances traditional principles of tort law. A remedy now exists for the DES plaintiff who is innocently unable to establish precise causation. Nevertheless, a lack of "mathematical exactitude"<sup>150</sup> may lead to defendant's liability for injuries which they did not cause. This can only be remedied

144. S.B. 1392, 1980 Cal. Stats. ch. 776 enacted S.B. 1392 (codified at CAL. HEALTH & SAFETY CODE § 1367.8 (concerning health care and hospital expense contract exclusions of DES coverage); §§ 349-349.5 (establishing a screening program); and CAL. INS. CODE §§ 10119.7, 11512.18 (concerning insurance or hospital exclusions of DES coverage) (West Supp. 1981)). The basic purposes behind the bill included:

- 1) education of the public as to DES hazards;
- 2) establishment of screening programs through private health care providers;
- 3) guarantee that insurance contractors and health care service plans would not be allowed to write provisions excluding DES-related injury coverage; and
- 4) provisions for funding. Senate Bill 1392 was introduced by State Senators Watson, Dills, Marks, Nejedly, Petris, Robbins, Rodda, Roberti, Stiern, Vuich, and Wilson on January 29, 1980.

145. A.B. 3344, 1979-1980 Sess.. A.B. 3344 would have amended CAL. CIV. CODE § 1431 and added CAL. CIV. PROC. CODE §§ 624.1 and 875-877.

146. According to the Legislative Counsel's Digest, the bill "would prohibit liability in product liability cases, unless plaintiff proves by preponderance of the evidence that the seller's own product was a proximate cause of the injury, death, or damage; and would provide that that limitation would apply to all pending claims or actions." A.B. 3344 was introduced by State Representative McAlister.

147. 1980 Cal. Stats., ch. 776.

148. A.B. 3344 died in the Assembly Judiciary Committee, Nov. 11, 1980.

149. There is a reasonably good chance that legislation attempting to negate the effect of *Sindell* will be proposed in the upcoming legislative session. Personnel changes in the Assembly Judiciary Committee may encourage attempts to introduce a bill similar to A.B. 3344, as three members are expected to leave for new posts this year. Interview with Bill George, Consultant to California State Assembly Finance, Insurance, and Commerce Comm. (Oct. 30, 1980).

All attempts to propose new anti-*Sindell* legislation will likely meet with opposition from the California Trial Lawyers Association, as well as from medical and women's rights groups.

150. 26 Cal. 3d at 613, 607 P.2d at 937, 163 Cal. Rptr. at 145.

by examination of specific application of market share liability at various degrees of defendant joinder in all stages of civil procedure before and during trial.

Often the creation of new legal doctrine from elements of the old occurs in response to changing societal needs and represents the best of judicial thought: flexibility with reason. In *Sindell*, the California Supreme Court has established the basis for such doctrinal evolution. By conscientious application of an uncertain standard, the appellate courts may further that judicial goal.