INTO THE QUAGMIRE*: WASHINGTON ADOPTS MARKET SHARE LIABILITY IN DES CASES

I. INTRODUCTION

In *Martin v. Abbott Laboratories*,[1] the Washington Supreme Court became the second state court to adopt a form of market-share liability to apply against pharmaceutical companies that produced and marketed diethylstilbestrol (DES) for use by pregnant women.[2] In *Martin*, the court was confronted with a problem common to many of the DES cases—the inability of the plaintiff to identify the specific manufacturer of the DES taken by her mother. While courts have not responded uniformly, the majority of courts have dismissed a plaintiff's cause of action when she could not identify the brand of DES taken by her mother.[3] However, as Naomi Sheiner stated:

---

* 1. soft, wet, miry ground that shakes or yields under the foot 2. a difficult position, as of one sinking or stuck in a quagmire. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 1473 (2d ed. 1983).

1. 102 Wn. 2d 581, 689 P.2d 368 (1984).

2. Although the opinion states that both California and South Dakota recognize market share liability, this is not accurate. A *federal* district court in South Dakota adopted the market share theory of Sindell v. Abbott Laboaratories, *see infra* note 5 in McElhaney v. Eli Lilly & Co., 564 F. Supp. 265 (D.S.D 1983). However, the South Dakota Supreme Court has not adopted a market share theory. Thus, California and Washington are the only state courts to do so.

Recently, the federal district court in Massachusetts interpreted Massachusetts law and held that a market-share theory of liability is available to plaintiffs in DES cases. McCormack v. Abbott Laboratories, No. 76-4564-6 (D. Mass. Sept. 30, 1985). The court cited to both *Sindell* and *Martin* and concluded: "Upon review of the case law concerning market-share liability, the court believes that the theory developed by the Washington Supreme Court in *Martin* offers the most useful framework for fashioning a market-share theory of liability in Massachusetts . . . ." *McCormack*, slip op., at 6.

3. *See, e.g.*, Schneider v. Eli Lilly & Co., 556 F. Supp. 809 (E.D. La. 1983); Tidler v. Eli Lilly & Co., 95 F.R.D. 332 (D.D.C. 1982); Morton v. Abbott Laboratories, 538 F. Supp. 593 (E.D. Fla. 1982); Ryan v. Eli Lilly & Co., 514 F. Supp. 1004 (D.S.C. 1981); Gray v. United States, 445 F. Supp. 337 (S.D. Tex. 1978); Lyons v. Premo Pharmaceutical Labs Inc., 170 N.J. Super. 183, 406 A.2d 185 (1979); Namm v. Charles E. Frosst & Co., 178 N.J. Super. 19, 427 A.2d 1121 (App. Div. 1981).

> The DES cases are only the tip of an iceberg. As technology and science advance, there will be more products liability and analogous cases in which the injured party will be unable to identify the specific cause of his injury. Society faces a choice in these cases: it can either leave the injury where it falls as the price of modern technology; provide sporadic compensation through the application of current tort theories; or adopt a new legal theory which enables it to compensate uniformly.[4]

Recently, some courts have permitted the plaintiffs' suits to continue either by straining to fit their cases into already accepted tort doctrine or by modifying that doctrine to accommodate the unusual circumstances created by DES.[5]

The Washington Supreme Court has chosen to modify tort doctrine by dispensing with identification of the specific cause of the plaintiff's injury and adopting what it characterized as the "market-share alternate liability theory."[6] The court rejected the four other theories of liability commonly raised by DES plaintiffs in favor of modifying the market-share theory announced by the California Supreme Court in *Sindell v. Abbott Laboratories.*[7] *Sindell*'s theory is highly controversial,[8] and its creation stirred a flurry of academic commentary, much of it unfavorable.[9] Further-

---

4. Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 1007 (1978).

5. *See e.g.*, Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980); Bichler v. Eli Lilly & Co., 55 N.Y.2d 571, 450 N.Y.S.2d 776, 436 N.E.2d 182 (1982); Abel v. Eli Lilly & Co., 418 Mich. 311, 343 N.W.2d 164 (1984), *cert denied*, 105 S. Ct. 123 (1984); Ferrigno v. Eli Lilly & Co., 175 N.J. Super. 551, 420 A.2d 1305 (1980); Collins v. Eli Lilly & Co., 116 Wis. 2d 166, 342 N.W.2d 37 (1984), *cert. denied*, 105 S. Ct. 107 (1984).

6. 102 Wn. 2d at 602, 689 P.2d at 381.

7. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980).

8. As stated by the dissent in *Sindell*:

> The "market share" thesis may be paraphrased. Plaintiffs have been hurt by *someone* who made DES. Because of the lapse of time no one can prove who made it. Perhaps it was not the named defendants who made it, but they did make some. Although DES was apparently safe at the time it was used, it was subsequently proven unsafe as to some daughters of some users. Plaintiffs have suffered injury and defendants are wealthy. There should be a remedy. Strict products liability is unavailable because the element of causation is lacking. Strike that requirement and label what remains "alternative" liability, "industry-wide" liability, or "market share" liability, proving thereby that if you hit the square peg hard and often enough the round holes will really become square, although you may splinter the board in the process.

Sindell, 607 P.2d at 939 (Richardson, J., dissenting).

9. *See, e.g.*, Fischer, *Products Liability — An Analysis of Market Share Liability*, 34 VAND. L. REV. 1623 (1981); Comment, *Sindell v. Abbott Laboratories: A Market Share Ap-*

more, only one court has subsequently applied the market-share theory of *Sindell* in a DES context.[10] Thus, it is not surprising that the Washington Supreme Court rejected the *Sindell* market-share theory of liability. However, by fashioning a method of recovery that modifies the market share theory, the Washington Supreme Court opened itself to many of the same criticisms that were hurled at *Sindell*. Unfortunately, the opinion of the court does not adequately address the concerns raised by many commentators and courts.

This Comment will first provide a history of the development and marketing of DES. Then, it will summarize the factual background of *Martin* and the court's decision. Next, the Comment will examine the four theories that have been advanced to support dispensing with the cause-in-fact requirement and the reasons the Washington court rejected them. Finally, the theory of "market-share alternate liability" adopted in *Martin* will be evaluated.

II. DES: THE DEVELOPMENT AND MARKETING OF A TIME BOMB

A. *The History*

Diethylstilbestrol (DES), stilbestrol, and dienestrol are all generic names for synthetic estrogens. Estrogen is a hormone naturally produced in all women which is vital to sexual development and fertility, and which plays a critical role during pregnancy.[11]

The development of the synthetic estrogens represented a significant scientific advance. Prior to their development, natural estrogens had been used to treat many symptoms of menopause.

---

proach to DES Causation, 69 CAL. L. REV. 1179 (1981); Comment, *Market Share Liability for Defective Products: An Ill-Advised Remedy for the Problem of Identification*, 76 NW. U.L. REV. 300 (1981); Comment, *Refining Market Share Liability: Sindell v. Abbott Laboratories*, 33 STAN. L. REV. 937 (1981); Note, *Market Share Liability and DES — Sindell v. Abbott Laboratories: Square Pegs in Round Holes*, 13 CONN. L. REV. 777 (1981); Note, *Market Share Liability for DES (Diethylstilbestrol) Injury: A New High Water Mark in Tort Law*, 60 NEB. L. REV. 432 (1981); Note, *California Expands Tort Liability Under the Novel "Market Share" Theory: Sindell v. Abbott Laboratories*, 8 PEPPERDINE L. REV. 1011 (1981); Note, *Market Share Liability — The California Roulette of Causation Eliminating the Identification Requirement*, 11 SETON HALL L. REV. 610 (1981).

10. *See* McElhaney v. Eli Lilly & Co., 564 F. Supp. 265 (D.S.D. 1983).

11. Roberts & Royster, *DES and the Identification Problem*, 16 AKRON L. REV. 447 (1983).

However, the use of natural estrogens had two serious disadvantages. First, natural estrogen therapy was very expensive because of the high cost of the hormone isolation process. Second, since the natural estrogens were not effective orally, they could only be administered by injection into the buttocks. These injections resulted in painful abscesses.[12] The synthetic estrogens were significantly less expensive, costing 1/300 as much as the natural estrogens. Futhermore, since DES could be administered orally, there was no longer any need for the painful injections.[13]

DES was first synthesized in 1937 in England by Dr. E.C. Dodds. It was a revolutionary breakthrough because it was one of the first synthetic substances that duplicated the physiological action of natural estrogens in the human body.[14] Because Dr. Dodds did not patent his discovery, DES was available to any company that wanted to market it.

To market DES in the United States, a drug company had to comply with Section 505 of the since revised Federal Food, Drug, and Cosmetic Act.[15] Section 505 required that a New Drug Application (NDA) be filed and become effective before a drug could be marketed.[16] The NDA was required to include safety studies, clinical data, chemical composition, manufacturing process, and proposed labeling of the drug.[17]

---

12. *Id.* at 448.

13. Ferrigno v. Eli Lilly & Co., 174 N.J. Super. 551, ___, 420 A.2d 1305, 1310 (1980).

14. Ryan v. Eli Lilly & Co., 514 F. Supp. 1004, 1009 (D.S.C. 1981).

15. Federal Food, Drug and Cosmetic Act, ch. 5, § 505, 52 Stat. 1052 (1938) (current version at 21 U.S.C. § 355 (1982)).

16. Roberts & Royster, *supra* note 11, at 451.

17. Federal Food, Drug and Cosmetic Act, ch.5, § 505, 52 Stat. 1052 (1938) (current version at 21 U.S.C. § 355 (1982)). Section 505 provides:

> (a) No person shall introduce or deliver for introduction into interstate commerce any new drug, unless an application filed pursuant to subsection (b) is effective with respect to such drug.
>
> (b) Any person may file with the Secretary an application with respect to any drug subject to the provisions of subsection (a). Such person shall submit to the Secretary as a part of the application (1) full reports of investigations which have been made to show whether or not such drug is safe for use; (2) a full list of the articles used as components of such drug; (3) a full statement of the composition of such drug; (4) a full description of the methods used in, and the facilities and controls used for, the manufacture, processing, and packing of such drug; (5) such samples of such drug and of the articles used as components thereof as the Secretary may require; and (6) specimens of the labeling proposed to be used for such drug.

The first NDA for DES was filed in 1939; by the end of 1940, ten pharmaceutical companies had applied to market DES in up to five milligram doses for the treatment of post-menopausal symptoms, senile vaginitis, gonorrheal vaginitis, and suppression of lactation.[18] None of the drug companies sought approval for the use of DES in conditions involving pregnancy.

In December of 1940, the FDA summoned all of the drug companies that had filed NDAs for DES to a meeting. At this meeting, the FDA announced that it wanted the DES applicants to follow the application procedure that had been used for the drug sulfathiazole. In that procedure, the FDA had directed all interested sulfathiazole manufacturers to file their individual clinical studies together as a single "master file." The master file was used to avoid duplication of time and effort in evaluating the new drug.[19] In the case of DES, the FDA was not only concerned with expediting the application process. It was also concerned that the NDAs filed by the individual drug companies were insufficient to demonstrate the safety of DES.[20] Consequently, the FDA directed the DES applicants to withdraw their pending NDAs in favor of filing their individual studies at one time in a master file. The drug companies complied and withdrew their individual applications. At that time, a committee of four companies (the "small committee") was formed to gather, coordinate, and collate the individual studies.[21]

The FDA made three further demands of the drug companies that promoted uniformity. First, the FDA required the drug companies to use the same United States Pharmacopoeia standard to ensure that the chemical characteristics of all DES products were identical.[22] Second, the FDA insisted that the drug companies' labeling on packaging and accompanying product literature be substantially uniform. Finally, the FDA suggested that each drug company include a "permission clause" in its NDA which permitted

---

Section 505 was amended in 1962 to require that the applicant show that the drug is effective. Federal Food, Drug and Cosmetic Act, Pub. L. No. 87-781, 76 Stat. 781 (1962) (current version at 21 U.S.C. § 355 (1982)).

18. Payton v. Abbott Laboratories, 512 F. Supp. 1031, 1033 (D. Mass. 1981).

19. Ryan v. Eli Lilly, 514 F. Supp. at 1009.

20. *Martin*, 102 Wn. 2d. 581, 588, 689 P.2d 368, 374 (1984).

21. Ryan v. Eli Lilly, 514 F. Supp. at 1009. This "small committee" was comprised of Eli Lilly, Squibb, Upjohn, and Winthrop Chemical Company.

22. *See* 21 U.S.C. §§ 321(j), 351(b) (1982).

any company to refer to the clinical data in the master file in support of a DES application[23]

In May of 1941, the master file was formally submitted to the FDA and the "small committee" was disbanded. However, because the master file only contained the clinical studies of DES, it did not constitute an *application* by any company for authorization to market DES. Each drug company was still required to file separate NDAs; however, these individual NDAs relied on the master file for the clinical data to support their application. In 1941, the FDA approved the marketing of DES in the United States for the four non-pregnancy related symptoms previously noted.[24]

After 1941, physicians independent of the drug companies were researching DES for use in treating problems of pregnancy. Among the more prominent researchers in this area was a husband and wife team on the faculty at Harvard Medical School, Dr. George Smith and Dr. Olive Watkins Smith. Their research focused on the use of DES as a miscarriage preventative in "high risk" pregnancies.[25] They concluded, on the basis of research covering 632 high risk pregnancies, that untreated high risk pregnancies ran twice the risk of problems as those treated with DES.[26] The Smiths' research was duplicated by Dr. Priscilla White at the Joslin Clinic in Boston between 1938 and 1952. Dr. White was an authority on the treatment of pregnant diabetics, who often have difficult pregnancies. Her study indicated that high risk pregnancies treated with DES resulted in nearly double the number of live births.[27] These studies were later criticized for inadequate controls. Several subsequent studies failed to substantiate the claims of DES's effectiveness.[28]

---

23. *Martin*, 102 Wn. 2d at 588, 689 P.2d at 374.

24. *Ferrigno*, 174 N. J. Super. at ___, 420 A.2d at 1311.

25. Respondents' Joint Brief at 12, *Martin*.

26. *Id.* at 13. This research was reported in Smith, *Diethylstilbestrol in the Prevention and Treatment of Complications of Pregnancy*, 56 AM. J. OBSTET. & GYNEC. 821 (1948).

27. Respondents' Joint Brief at 12, *Martin*.

28. Comment, 46 FORDHAM L. REV. at 963 n.2. The studies which discredit DES's effectiveness as a miscarriage preventative include Davis & Fugo, *Steroids in the Treatment of Early Pregnancy Complications*, 142 J.A.M.A. 778 (1950); Dieckmann, Davis, Rynkiewicz & Pottinger, *Does the Administration of Diethylstilbestrol During Pregnancy Have Therapeutic Value?* 66 AM. J. OBSTET. & GYNEC. 1062 (1953); Robinson & Shettles, *The Use of Diethylstilbestrol in Threatened Abortion*, 63 AM. J. OBSTET. & GYNEC. 1330 (1952). Respondents' Joint Brief in *Martin* claims that the Dieckmann, *et al.* study did not discredit DES

Based on the Smith, White, and other studies, several drug companies filed supplemental NDAs seeking permission to market DES for use in treating problems of pregnancy. These new NDAs were prepared and filed independently and did not refer to the master file of clinical data that had been submitted in 1941. However, it was the FDA's practice, when evaluating a supplemental NDA, to consider the data in support of the original NDA.[29] The new NDAs relied on the independent research done by physicians at medical schools, particularly the Smith study.[30] Most importantly, no tests were conducted to determine the effect of DES on pregnant laboratory animals.[31] This omission is cited by many plaintiffs as proof of inadequate testing.[32]

The FDA began approving DES for treatment of high risk pregnancies in July of 1947, and it was then prescribed as a miscarriage preventative. DES was marketed both generically and under a trade name, depending on the marketing method of the drug company. Because the FDA required the drug companies to use the United States pharmacopeia standard, the DES produced by the companies was chemically identical. Thus, many pharmacists filled prescriptions from whatever DES compound was in stock, rather than adhering to a single brand.[33]

In 1952, the FDA declared that DES was no longer a "new drug," but was "generally recognized as safe" under the Federal Food, Drug, and Cosemetic Act.[34] As a result, a drug company could enter the DES market without prior testing and without filing an NDA with the FDA. This prompted a number of drug companies to enter the market. By 1954, 267 companies were marketing DES in the United States; ultimately, there were close to 300.[35]

---

as a miscarriage preventative because the DES in that study was given to women who were having *normal* pregnancies. Respondents' Joint Brief at 15, *Martin*.

29. *Martin*, 102 Wn. 2d at 589, 689 P.2d at 374.

30. Roberts & Royster, *supra* note 11, at 452.

31. *Martin*, 102 Wn. 2d at 589, 689 P. 2d at 374.

32. *See, e.g.*, Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980); Morrissy v. Eli Lilly & Co., 76 Ill. App. 3d 753, 394 N.E.2d 1369 (1979); Payton v. Abbott Laboratories, 386 Mass. 540, 437 N.E.2d 171 (1982); Zafft v. Eli Lilly & Co., 676 S.W.2d 241 (Mo. 1984).

33. *See supra* note 32.

34. Roberts & Royster, *supra* note 11, at 452-53.

35. *Ferrigno*, 420 A.2d at 1312.

Between 1947 and 1971, DES was widely prescribed as a miscarriage preventative. It has been estimated that between 500,000 and six million pregnant women used DES.[36]

In 1971, Dr. Arthur Herbst and other physicians on the faculty at Harvard Medical School published a study which disclosed a statistical association between the use of DES in pregnancy and the development of clear cell adenocarcinoma, a rare form of cancer, in the daughters of DES users.[37] Dr. Herbst reported, in the *New England Journal of Medicine*, the existence of eight cases of clear cell adenocarcinoma of the vagina in young women, *seven* of whom were exposed to DES in utero.[38] The majority of "DES daughters" also suffer from a condition known as vaginal adenosis, considered to be a possible pre-cancerous condition.[39]

Following the Herbst study, the FDA banned the sale and use of DES for the prevention of miscarriages.[40] Drug companies manufacturing DES were ordered to warn physicians and the public that DES should not be used by pregnant women because of the risk to their unborn children.[41]

Although DES has been banned for use by pregnant women, it is still prescribed for other uses. DES is approved as a replacement for estrogen, as therapy for menopausal symptoms, as treatment for some types of cancer, and as a suppressant of lactation.[42] DES is also the main ingredient of the post-coital "morning-after pill," a contraceptive commonly used in cases of rape or incest.[43]

This is the history of DES, a drug that doctors once prescribed to save lives. The estrogen synthesized in 1937 in the form of DES was hailed as a significant scientific breakthrough. The women facing high-risk pregnancies in the 1950's may have applauded the wonder of technology when they delivered healthy babies. Unfortunately, in the 1970's and 1980's these women and their daughters

---

36. Comment, *Market Share Liability and DES — Sindell v. Abbott Laboratories: Square Pegs in Round Holes*, 13 CONN. L. REV. 777, 781 n.23 (1981).
37. *Martin*, 102 Wn. 2d at 589-90, 689 P.2d at 374.
38. 1 DIXON, DRUG PRODUCT LIABILITY § 4A.05[8] (1985).
39. Comment, 46 FORDHAM L. REV. at 965.
40. 36 Fed. Reg. 21, 537-38 (1971).
41. *Martin*, 102 Wn. 2d at 590, 689 P.2d at 374.
42. Comment, 46 FORDHAM L. REV. at 963 n.2.
43. 1 DIXON, DRUG PRODUCT LIABILITY § 4A.05[8] (1985).

were forced to confront the horrors that may accompany the wonder.

B. *Rita Renee Martin, A DES Daughter*

Whether DES was actually effective as a miscarriage preventative is an issue that divides plaintiffs and defendants.[44] However, what is clear is that the DES that once may have made a life possible, later threatens to take that life. The story of Rita Renee Martin is the typical tragedy of a "DES daughter."

Shirley Ann Martin became pregnant in early 1962. Because a previous pregnancy had ended in a stillbirth, Mrs. Martin's physician prescribed DES in 100 milligram doses to prevent the placental insufficiency which had occurred in the prior pregnancy.[45] Mrs. Martin took the prescribed DES until she gave birth to her daughter, plaintiff Rita Renee Martin, on October 4, 1962.[46] Seventeen years later, on January 4, 1980, Rita was diagnosed as having clear cell adenocarcinoma of the vagina. Shortly after the diagnosis, Rita Martin underwent radical cancer surgery that included a complete hysterectomy, a pelvic node dissection, and a partial vaginectomy.[47]

On March 19, 1981 Rita Martin and her mother filed suit in Pierce County Superior Court against twenty-two drug companies, alleging causes of action under negligence, strict liability, and warranty for personal injuries, pain and suffering, and damage to the parent-child relationship. Twenty-two companies were named because no one, including Shirley Martin, the prescribing physician, and the pharmacist, could remember which drug company manufactured the particular DES taken by Shirley Martin. However, the complaint alleged that *all* of the named defendants were legally liable for Rita's injuries because of the companies' "concerted or joint action to gain FDA approval and to market DES."[48]

---

44. The effectiveness of DES in preventing miscarriages is a hotly contested issue in DES litigation, with the plaintiff discrediting DES as a miscarriage preventative and the defendant asserting that without DES, the plaintiff would not be alive.

45. Respondents' Joint Brief at 32, *Martin*.

46. *Martin*, 102 Wn. 2d at 583, 689 P.2d at 371. Respondents' Joint Brief and the Brief of E.R. Squibb & Sons put the date of birth at December 4, 1962. Respondents' Joint Brief at 33; Squibb Brief at 20.

47. *Martin*, 102 Wn. 2d at 583-84, 689 P.2d at 371.

48. *Id.* at 584, 689 P.2d at 372.

The defendants moved for summary judgment, claiming that the Martins' inability to identify the specific manufacturer was fatal to their complaint and precluded defendants' liability. Judge Verharen filed a Memorandum Opinion on December 15, 1982. He dismissed those defendants who proved that they did not market DES for pregnancy-related causes, those who proved that they did not market a 100 milligram size of DES, and those who proved that their product was not sold in Washington.[49] As a result of these dismissals, only Kirkman Laboratories and Stanley Drug Products remained as defendants. The trial judge refused to dismiss them even though the Martins could not identify either one as the responsible party. Judge Verharen rejected the concerted action theory advanced by the plaintiffs, choosing to apply a theory of "alternate liability" to deny summary judgment. Both sides appealed, and the appeals were consolidated for supreme court review.

In an opinion written by Justice Dore, the Washington Supreme Court unanimously rejected the trial court's application of alternate liability and applied a theory of recovery labeled "market share alternate liability." The court acknowledged that "traditional products liability has always required a reasonable connection between the injured plaintiff, the injury-causing product, and the manufacturer of the injury-causing product."[50] The court then examined and rejected the four theories that have been proposed by DES plaintiffs to circumvent the cause-in-fact element: alternative liability, concert of action, enterprise liability, and market share liability. The rejection of these four theories left the court with "a choice of either fashioning a method of recovery for the DES case which will deviate from traditional notions of tort law, or permitting possibly tortious defendants to escape liability to an innocent, injured plaintiff."[51] The court concluded that it could not permit tortious defendants to escape liability on a "technicality," and the court announced the "market-share alternate liability" theory.

Most of the *Martin* opinion is devoted to an examination of the four theories that DES plaintiffs have relied on to circumvent

49. *Id.* at 585, 689 P.2d at 372; Appellants' Brief at 8, *Martin.*
50. *Martin,* 102 Wn. 2d at 590, 689 P.2d at 375.
51. *Id.* at 602, 689 P.2d at 380.

the identification requirement. Because none of the theories withstood the critical glare of the court, they were all rejected. The following sections explore the four theories rejected by the Washington Supreme Court and the theory of "market-share alternate liability" adopted by the court.

III. Suspending the Identification Requirement

In 1976, the Washington Supreme Court stated a truism: "Not every act which causes harm results in legal liability."[52] This had always been true in products liability law, where a plaintiff was required to prove three elements: that the product was defective, that the particular defendant was responsible for the defect, and that the defect in the product caused the plaintiff's injury.[53] These basic elements of proof were largely the same, whether the plaintiff's theory was negligence, breach of warranty, or strict liability.[54]

The second element, the identification or "cause-in-fact" element, requires that the plaintiff show a nexus between the product and the defendant, such as evidence that the defendant manufactured or designed the product. The identification requirement has two purposes. First, it limits potential liability by requiring the plaintiff to identify the party responsible for the particular product. The plaintiff will not be permitted to recover from everyone who manufactured the same product, only the particular one that manufactured the product that injured her. Second, the identification requirement ensures that blame is placed on the party actually responsible for the injury-causing product. Thus, the "guilty" party is actually punished.[55]

The requirement that the plaintiff identify the defendant as the party responsible for the product is fundamental to the law of products liability. In a chapter entitled "Indispensable Elements," Robert Hursh and Henry Bailey discuss the identification requirement.

> It is clear that any holding that a producer, manufacturer, seller, or

52. Hunsley v. Giard, 87 Wn. 2d 424, 434, 553 P.2d 1096, 1102 (1976).

53. W. Prossor, Law of Torts § 103, at 671-72 (4th ed. 1971).

54. *Id.*

55. Fischer, *Products Liability — An Analysis of Market Share Liability*, 34 Vand. L. Rev. 1623 (1981).

> a person in a similar position, is liable for injury caused by a particular product, must necessarily be predicated upon proof that the product in question was one for whose condition the defendant was in some way responsible. *If recovery is sought from a manufacturer, it must be shown that he actually was the manufacturer of the product which caused the injury.* . . .[56]

It is not enough for the plaintiff to prove that the defendant *might have been* responsible for the product. Dean Prosser states that a "mere possibility of such [causation in fact] is not enough, and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, *it becomes the duty of the court to direct a verdict for the defendant.*"[57] Proof of the causation in fact element is so integral to the plaintiff's case that the American Law Reports could, without qualification, report just a little more than ten years ago:

> Regardless of the theory which liability is predicated upon, whether negligence, breach of warranty, strict liability in tort, or other grounds, it is obvious that to hold a producer, manufacturer, or seller liable for injury caused by a particular product, there must first be proof that the defendant produced, manufactured, sold, or was in some way responsible for the product, and this rule is supported in *all* of the cases examined in this annotation.[58]

Consistent with these recognized principles, Washington law had always required that a defendant manufacturer or seller be identified before it could be subjected to liability. For example, in *Nigro v. Coca-Cola Bottling Co*,[59] the Washington Supreme Court reversed a jury verdict in favor of the plaintiff because he offered no evidence that the defendant had supplied the Coke bottle in which a foreign object had been found. The court held that evidence to support a finding that this particular defendant had supplied the Coke was an "essential element of [plaintiff's] case."[60]

Thus, until the *Martin* decision, Washington embraced traditional tort law and required the plaintiff to identify the defendant who was responsible for her injury. Occasionally, the plaintiff was

---

56. 1 HURSH & BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 1.41 (2d ed. 1974) (emphasis added).

57. W. PROSSER, LAW OF TORTS 41, at 241 (4th ed. 1971) (emphasis added).

58. Annot., 51 A.L.R.3d 1344, 1349 (1973) (emphasis added).

59. 49 Wn. 2d 625, 305 P.2d 426 (1957).

60. *Id.* at 626, 305 P.2d at 426.

incapable of making that identification. The courts, recognizing that "not every act which causes harm results in legal liability,"[61] would deny recovery to those plaintiffs.

While the identification requirement can be difficult for any products liability plaintiff, for a DES daughter, the identification requirement may be an impenetrable barrier to recovery. DES plaintiffs cannot identify the manufacturer of the particular brand of DES taken by their mother for three reasons: First, all manufacturers of DES were required by the FDA to use an identical chemical formula and uniform labeling. To compound this similarity, many of the manufacturers produced DES in a generic form, with no identifiable shape, color, or markings. As a consequence, DES was highly fungible and many pharmacists filled their prescriptions with whatever was in stock. Second, since nearly 300 companies manufactured and marketed DES in the United States, the plaintiff is confronted with the overwhelming task of limiting these potential defendants to one party. Third, almost thirty years have passed since DES was first prescribed to prevent miscarriages. Many of the drug companies are no longer in business or their medical records have been lost or destroyed. In many cases, there is no record of the type of DES that they sold, the time period in which they sold it, or the geographic market in which they operated.[62] The plaintiffs are similarly ill-prepared to recall the specific brand of DES taken or to produce medical records that might identify the manufacturer of the drug taken by the mother.

When Rita Martin came to court seeking recovery for her injuries, she could not identify the company that manufactured the DES taken by her mother. The law of Washington, at that time, required dismissal for failure to prove an element of her case—that the defendants did, *in fact, cause* her injury. The Washington Supreme Court confronted a dilemma.

> We are presented with a conflict between the familiar principle that a tortfeasor may be held liable only for damage that it has caused, and the sense of justice which urges that the victims of this tragedy should not be denied compensation because of the impossibility of identifying the individual manufacturer of these generic tablets if their manufacture

---

61. *Hunsley*, 87 Wn. 2d at 434. *See also* Clift v. Nelson, 25 Wn. App. 607, 608 P.2d 647 (1980).

62. *Martin*, 102 Wn. 2d at 603, 689 P.2d at 381.

and distribution were otherwise culpable.[63]

The majority of courts that have faced the conflict have adhered to recognized principles of products liability law and have found no cause of action when the plaintiff cannot satisfy the identification requirement.[64] These courts are not unsympathetic to the plaintiffs and their tragedy. Rather, they are dissatisfied with all of the theories that plaintiffs offer to justify abandoning the identification requirement.

The Washington Supreme Court shared the concern of those courts and found the theories relied on by DES plaintiffs, including Rita Martin, to be unworkable. These four theories and the Washington court's reasons for rejecting them are explored next.

A. *Alternative Liability*

Rita Martin urged the Washington Supreme Court to adopt the doctrine of alternative liability. This theory was first announced in the 1948 decision of *Summers v. Tice*[65] and later adopted in Section 433B of the Restatement (Second) of Torts.[66] Alternative liability allows a plaintiff who is unable to single out the wrongdoer responsible for his injury to recover from two or more defendants, each of whom independently acted negligently, even though only one of the defendants could have caused the injury.

In *Summers*, two hunting companions of the plaintiff simultaneously and negligently fired their shotguns in his direction. Only one shot struck plaintiff in the face, so only one of the negligent hunters could have fired the shot responsible for the plaintiff's injuries. However, the plaintiff could not trace the bullet to either party.[67] Rather than dismiss plaintiff's action for failure to identify the responsible party, the California Supreme Court shifted the burden of proving causation in fact to the defendants. Unless either defendant could absolve himself by proving that his bullet was not the cause of the injury, both defendants would be held

63. *Id.* at 603, 689 P.2d at 381.
64. *Id.* at 590, 689 P.2d at 375.
65. 33 Cal. 2d 80, 199 P.2d 1 (1948).
66. RESTATEMENT (SECOND) OF TORTS § 433B (1965). *See infra* note 70.
67. 199 P.2d at 2.

jointly and severally liable for plaintiff's injury.[68] The court rationalized its application of joint and several liability by emphasizing the culpable behavior of both defendants. Fairness dictated that an innocent plaintiff should not go remediless because the negligent acts of defendants made it impossible for the plaintiff to identify the cause of his injury.[69]

The solution announced in *Summers* was novel; however, it was subsequently incorporated into the Restatement (Second) of Torts[70] and was adopted by many states.

Most of the DES daughters who have been unable to identify the DES brand taken by their mothers have relied on the theory of alternative liability. Nevertheless, the vast majority of courts have refused to apply alternative liability, insisting that it is unworkable in DES litigation.[71] The courts that have rejected alternative liability have generally raised four objections to its application. The court in *Martin* expressed two of these concerns. The *Martin* court's primary objection was that the theory of alternative liability requires that all tortious actors be joined as defendants.[72] In *Summers,* where alternative liability was born, all of the possible tortfeasors were before the court. When the plaintiff has not joined as defendants all the parties who could have caused her injury, then the court has no assurance that the party who actually caused the injury is even before it. For example, in *Sindell v. Abbott Lab-*

---

68. 199 P.2d at 4-5.

69. 199 P.2d at 4.

70. RESTATEMENT (SECOND) OF TORTS § 433B(3), at 441-42 (1965):

> Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm.

71. The courts which have rejected the theory of alternative liability include: Schneider v. Eli Lilly & Co., 556 F. Supp. 809 (E.D. La.,1983); Tidler v. Eli Lilly & Co., 95 F.R.D. 332 (D.D.C. 1982); Morton v. Abbott Laboratories, 538 F. Supp. 593 (M.D. Fla. 1982); Gruseth v. Eli Lilly & Co., Civ. 77-4051 (D.S.D. August 13, 1982); Ryan v. Eli Lilly & Co., 514 F. Supp. 1004 (D.S.C. 1981); Gray v. United States, 445 F. Supp. 337 (S.D. Tex. 1978); Martin v. Abbott Laboratories, 102 Wn. 2d 581, 689 P.2d 368 (1984); Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980), *cert. denied,* 449 U.S. 912 (1980); Keune v. Eli Lilly & Co., No. 822-01482 (Cir. Ct. St. Louis, Mo., November 24, 1982); Namm v. Charles E. Frosst & Co., 178 N.J. Super. 19, 427 A.2d 1121 (App. Div. 1981); Collins v. Eli Lilly & Co., 116 Wis. 2d 166, 342 N.W.2d 37 (1984).

72. *Martin,* 102 Wn. 2d at 595, 689 P.2d at 377.

oratories,[73] the court noted that the plaintiffs were suing only five manufacturers out of over 200 possible, any one of which may have supplied the DES taken by their mothers. The court acknowledged the unfairness of applying alternative liability when so many manufacturers are involved: "[Since] any one of 200 companies . . . might have made the product which harmed plaintiff, there is no rational basis upon which to infer that any defendant in this action caused plaintiff's injuries, nor even a reasonable possibility that they were responsible."[74] Similarly, in *Martin*, plaintiffs joined only twenty-two of the more than 200 manufacturers of DES. The *Martin* court recognized that there was no certainty that the responsible party was even before it.

The second rationale used by the *Martin* court to reject alternative liability was that it does not "provide a fair way to apportion damages among the defendants."[75] The *Summers* court held the defendants jointly and severally liable for the plaintiff's damages. *Martin* found this unacceptable in the DES context since the drug companies did not have equal shares of the market. The court refused to approve of a theory that would hold companies with market shares as diverse as ten percent and ninety percent equally liable. For the two preceding reasons, *Martin* concluded that "strict application of alternate liability theory does not present a viable theory for DES cases."[76]

Although not discussed in *Martin*, two additional reasons for rejecting alternative liability have been offered by other courts. The third reason is that, since alternative liability is premised on the idea that "ordinarily defendants are in a far better position to offer evidence to determine which one caused the injury,"[77] applying the theory to DES defendants would be unfair because they are not in a better position to prove causation.

> The manufacturers of DES typically supplied their products to wholesalers, drug stores or pharmacies. If the drugs were purchased from wholesalers, the pharmacists had complete freedom of choice on whose products to select and could simultaneously select a range of such prod-

73. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980).
74. *Sindell*, 607 P.2d at 931.
75. *Martin*, 102 Wn. 2d at 595, 689 P.2d at 377.
76. *Id.*
77. *Summers*, 199 P.2d at 4.

> ucts to stock. The physician had the same freedom to select among brands when prescribing DES as a miscarriage preventative. No records relating to individual prescriptions or patients were kept by, or even sent to, the drug companies. No person under the control of the drug companies had access to such information.[78]

If the defendant is in no better position to prove causation than the plaintiff, the defendants in DES cases will not be able to meet the burden that has been shifted to them.

Finally, alternative liability has been interpreted to require that the plaintiff prove that all the manufacturers who could have caused her injury were "negligent" and were "wrongdoers."[79] The culpable behavior of the defendants in *Summers* was a critical factor in the court's decision to break from traditional tort law and require the defendants to exculpate themselves. However, in *Martin*, and all of the DES cases, the plaintiffs have not limited themselves to allegations of negligence; instead, they have relied on multiple theories of recovery, including strict liability and warranty. When the court is considering the blameworthiness of the product rather than the culpability of the defendants, the *Summers* theory of alternative liability may be inappropriate. Applying alternative liability in the strict liability or warranty setting extends the theory beyond its foundation that, between an innocent plaintiff and multiple *negligent* defendants, the defendants should prove causation if the plaintiff cannot.[80]

These objections have convinced most courts to reject alternate liability in DES cases. On the other hand, two courts have adopted what they characterize as "alternative liability." However, in both *Abel v. Eli Lilly & Co.*[81] and *Ferrigno v Eli Lilly & Co.*,[82] the courts acknowledged the differences between *Summers* and the DES cases by modifying alternative liability to more appropriately fit the facts of DES litigation. In *Abel*, the Michigan Supreme Court rejected an unmodified theory of alternative liability because

---

78. Respondents' Joint Brief at 64-65, *Martin*.

79. *Summers*, 199 P.2d at 4.

80. Even though alternative liability was incorporated into the Restatement (Second) of Torts without expressly requiring that the defendants have acted negligently, RESTATEMENT (SECOND) OF TORTS § 433B(3), courts have been reluctant to relieve plaintiffs of the burden of proving causation unless the defendants were negligent.

81. 418 Mich. 311, 343 N.W.2d 164 (1984), *cert. denied*, 105 S. Ct. 123 (1984).

82. 175 N.J. Super. 551, 420 A.2d 1305 (1980).

it viewed the situation in *Summers* as "substantially and significantly distinguishable from this DES litigation."[83] The court noted: "Perhaps the most fundamental, and arguably the most important, factual difference between *Summers* and this case is that . . . in *Summers,* each defendant was negligent toward *the* plaintiff; here, each defendant was negligent toward *a* plaintiff, but each defendant was not negligent toward *each* plaintiff."[84]

The Michigan court compensated for this "fundamental" difference by requiring the plaintiffs to meet a three-part test before the burden of disproving liability would shift to the defendants.

> First, it must be shown that all the defendants have acted tortiously; second, that the plaintiffs have been harmed by the conduct of one of the defendants (in order to support this second requirement, *the plaintiffs must bring before the court all the actors who may have caused the injury in fact);* third, that the plaintiffs, through no fault of their own, are unable to identify which actor caused the injury.[85]

If the plaintiffs satisfied the foregoing requirements, those defendants who could not absolve themselves of liability were held jointly and severally liable for plaintiff's entire damages. In *Abel,* the plaintiffs alleged in their complaint that all the manufacturers who marketed DES in Michigan for use during pregnancy between 1947 and 1964 were before the court.[86] The plaintiffs' allegation that all possible tortfeasors were joined as defendants addressed the major concern of courts who usually reject alternative liability in the DES context. The allegation was at least sufficient to get the plaintiffs beyond summary judgment and into litigating the merits of their claims.

The second case that adopted "alternative liability" was *Fer-*

---

83. 343 N.W.2d at 172. The court noted:

> We observe . . . that the reasoning of *Summers,* the polestar case for alternative liability, does not define a theory of recovery that provides a neatly fitting analytical template for application to this case. The situation in *Summers* is substantially and significantly distinguishable from this DES litigation, although it is not sufficiently so to make the theory of alternative liability inapplicable. The requirements of the alternative liability theory in *Summers* must be modified, however, to accommodate the unique facts of this unusual litigation.

Id.

84. *Id.*

85. *Id.* at 173 (citations omitted) (emphasis added).

86. *Id.* at 168.

rigno v. Eli Lilly & Co.[87] *Ferrigno* rejected the *Summers* theory of alternative liability because of the two objections that the *Martin* opinion would raise a few years later. *Ferrigno* modified the theory of alternative liability to overcome each objection. First, the court addressed the possibly insurmountable difficulty of joining all responsible or potentially responsible parties by simply dispensing with the joinder requirement. The court stated that this was consistent with existing New Jersey law and preferable to leaving the plaintiff without a remedy.[88] Second, *Ferrigno* modified the apportionment of damages under alternative liability. The court, although recognizing that New Jersey precedent indicated a preference for joint and several liability, rejected it in favor of a *Sindell*-type of "percentage share" liability.[89] Consequently, under the *Ferrigno* test, each defendant who fails to exculpate itself "will be held liable for the proportion . . . represented by its share of that market."[90] As will be made clear later, *Martin* also dispensed with the joinder requirement and adopted percentage share liability. Thus, although *Ferrigno* characterized its theory as "alternative liability," and *Martin* called its theory "market share alternate liability," they are largely indistinguishable.

B. Concert of Action

The second theory commonly relied on by DES plaintiffs is the theory of concert of action. Concert of action imposes joint and several liability on two or more parties who have performed a tortious act pursuant to a common plan or who have given substantial encouragement or assistance to each other in furtherance of the tortious act.[91] It is unnecessary for the parties to expressly agree to

---

87. 175 N.J. Super. 551, 420 A.2d 1305 (1980).

88. 420 A.2d at 1314-15.

89. *Id.* at 1316.

90. *Id.* (*quoting* Sindell v. Abbott Laboratories, 163 Cal. Rptr. at 132, 607 P.2d at 924). By rejecting joint and several liability for a "percentage share" liability a la *Sindell*, *Ferrigno* and *Sindell* are distinguishable in two minor ways. *Sindell* requires that a "substantial share" of the DES market be joined by the plaintiff in the case. *Ferrigno* has no similiar threshold requirement. *Sindell* calls its theory "market share" liability. *Ferrigno* simply labels its theory alternative liability. It appears that the *Ferrigno* and *Sindell* courts, despite having rejected the other's "theory," adopted ones substantially similar.

91. W. PROSSER, *supra* note 53, pp. 291-92. Prosser summarizes concert of action in the following way:

> All those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid

perform the tortious act; all that is required is that the parties share a tacit understanding.[92]

The typical concert of action case is the illegal drag race, in which the plaintiff, an innocent bystander, is injured by one of the participant's cars.[93] If Axel, Basil, and Cecil all participate in the illegal race, and Axel's car injures Pavel, a bystander, Pavel is not limited to suing only Axel. He may sue Axel or Basil or Cecil, a combination of the three, or all three under the theory of concert of action. Each of them is jointly and severally liable for Pavel's injuries. Pavel must only allege that each of the defendants acted together to promote the race, that participation in the race was tortious, and that the race was the proximate cause of his injuries. A tacit agreement can be inferred from the parallel conduct of the participants.[94]

The concert of action theory has been seized upon by DES plaintiffs to avoid the causation issue.[95] The argument is that the manufacturers of DES were acting in concert to produce and market DES. Thus, the companies should be jointly and severally liable for plaintiff's injuries, and there should be no need to trace the DES to a particular manufacturer.

The plaintiffs in *Martin*, like plaintiffs in most of the DES litigation, alleged that the defendant drug companies were jointly liable because of their concerted activities in manufacturing and marketing DES. The plaintiffs alleged that all of the defendants

---

or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit, are equally liable with him.

Id. at 292 (footnotes omitted). The Restatement (Second) of Torts sets forth the following elements to prove concerted action:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
>
> (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 so to 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 (1977).

92. *Martin*, 102 Wn. 2d at 596, 689 P.2d at 377-78 (citing PROSSER at 291-92).

93. *See, e.g.*, Bierczynski v. Rogers, 239 A.2d 218 (Del. 1968).

94. Comment, 46 FORDHAM L. REV. at 963.

95. *Id.* at 980.

failed to adequately test DES, that they relied on inadequate safety studies, and that they all "aided and abetted the climate which caused DES to be dispensed to pregnant women."[96] The primary basis of plaintiffs' concert allegations is the 1941 formation of the "small committee" and the ensuing joint submission of clinical data to the FDA.[97] In addition, plaintiffs usually allege that DES was produced according to an agreed upon formula, marketed under uniform labeling, and promoted by the joint and parallel efforts of the drug companies. The plaintiffs in *Martin* argued in their brief: "Promoting DES benefitted them all. Collective refusal to disclose the cancer-producing properties of DES and negligent failure to test the drug for in utero use furthered the common enterprise and was a vital factor in establishment of an anonymous national DES market."[98]

This theory, like alternative liability, has been rejected by the overwhelming majority of courts that have considered it.[99] *Martin* is in accord with this majority.

> The pleadings and supporting affidavits do not support the theory that the defendants tacitly agreed to produce and market DES for accidents of pregnancy without adequately testing the drug or warning of its potential dangers. Although there was a substantial amount of parallel activity by the defendants, this does not rise to the level of concerted action.[100]

The primary weakness of the concert of action theory in the DES cases is that much of the parallel behavior of the drug compa-

---

96. Appellants' Brief at 48, *Martin*.

97. *Id.*

98. *Id.* at 49.

99. Concert of action was rejected in: Schneider v. Eli Lilly & Co., 556 F. Supp. 809 (E.D. La. 1983); Tidler v. Eli Lilly & Co., 95 F.R.D. 332 (D.D.C. 1982); Morton v. Abbott Laboratories, 538 F. Supp. 593 (E.D. Fla. 1982); Gruseth v. Eli Lilly & Co., Civ. 77-4051 (D.S.D. August 13, 1982); Payton v. Abbott Laboratories, 512 F. Supp. 1031 (D. Mass. 1981); Ryan v. Eli Lilly & Co., 514 F. Supp. 1004 (D.S.C. 1981); Gray v. United States, 445 F. Supp. 337 (S.D. Tex. 1978); *Martin*, 102 Wn. 2d at 581, 689 P.2d 368 (1984); Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980), *cert. denied*, 449 U.S. 912 (1980); Sheffield v. Eli Lilly & Co., 144 Cal. App. 3d 583, 192 Cal. Rptr. 870 (1983); Keune v. Eli Lilly & Co., No. 822-01482 (Cir. Ct. St. Louis, Mo., November 24, 1982); Namm v. Charles E. Frosst & Co., 178 N.J. Super. 19, 427 A.2d 1121 (App. Div. 1981); Lyons v. Premo Pharmaceutical Laboratories, 170 N.J. Super. 183, 406 A.2d 185 (1979); Collins v. Eli Lilly & Co., 116 Wis. 2d 166, 342 N.W.2d 37 (1984), *cert denied*, 105 S. Ct. 107 (1984).

100. 102 Wn. 2d at 598-99, 689 P.2d at 379.

nies was directed by the FDA. The FDA ordered the formation of the small committee and the joint submission of the clinical data in the form of a "master file."[101] Furthermore, the small committee was formed and the data was pooled to gain the approval of DES for use in *non*-pregnancy situations. Because all of these uses for DES are still acceptable today, even if this pooling of resources did rise to the level of concerted activity, it would not constitute tortious conduct.[102] The other allegations of uniformity in formula and labeling have succumbed to the same argument: the FDA ordered the drug companies to use the formula set out in the United States Pharmacopeia and to market DES under uniform labeling and packaging.[103] Thus, while there is evidence of similar behavior, plaintiffs have been unsuccessful in proving that the similarities resulted from a tacit understanding or a common design.

Only one court, in *Bichler v. Eli Lilly & Co.*,[104] has permitted a plaintiff relying on concert of action to recover damages for her injuries.[105] The plaintiff in *Bichler* sued only Lilly. The jury found that the plaintiff had not proved that Lilly was the manufacturer of the DES taken by her mother. Rather than dismissing plaintiff's cause of action, the jury held Lilly liable on a concert of action theory. The New York Supreme Court, Appellate Division[106] affirmed the jury verdict against Lilly, finding that "the evidence implicating Lilly in this concerted action was overwhelming."[107]

The New York Court of Appeals also affirmed the verdict. However, the court's rationale for upholding the verdict was largely procedural. Lilly had not properly objected to the judge's concert of action instructions during the trial, and they became the

---

101. *See supra* Section II. A.

102. *Lyons*, 170 N. J. Super. 183, 406 A.2d at 190-191, uses this argument.

103. *Sindell*, 26 Cal. 3d at 605, 607 P.2d at 933, 163 Cal. Rptr. at 141.

104. 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982).

105. *Martin* states that the the court in Abel v. Eli Lilly & Co., 418 Mich. 311, 343 N.W.2d 164 (1984), *cert. denied*, 105 S. Ct. 123 (1984), adopted concert of action. 102 Wn.2d at 596-97. This is not accurate since, as *Martin* indicates, the court did not address the merits of concert of action. Rather, the court simply ruled that plaintiffs' allegations of concerted action were sufficient to withstand summary judgment. "In order to withstand a motion for summary judgment based on a failure to state a cause of action, a plaintiff need only allege that the defendants were jointly engaged in tortious activity as a result of which the plaintiff was harmed." *Abel*, 343 N.W.2d at 176.

106. 79 A.D.2d 317, 436 N.Y.S.2d 625 (1981).

107. 79 A.D.2d 317, 436 N.Y.S.2d at 633.

law of the case.[108] The court of appeals held that, in light of the broad jury instructions, a proper verdict was reached. A New York Appellate Division judge recently commented on *Bichler*'s "adoption" of a concert theory:

> In affirming the *Bichler* judgment, the Court of Appeals found that the defendant had not preserved for its consideration the essential issues of liability presented in the case, and was explicit that the affirmance was not to be taken as an acceptance either of that theory of liability or indeed of any other that had been advanced in DES cases.[109]

Thus, *Bichler*'s value for other DES plaintiffs is limited.

C. *Enterprise Liability*

The third theory relied on by DES plaintiffs would hold all manufacturers of DES jointly liable even when their conduct has

---

108. The trial court's total instructions on concert of action were as follows:

> [B]y "concerted action," we mean one of two things. First, action taken jointly by the drug companies as a result of an express or an implied understanding. In this case, other than in connection with the original new drug application submitted in 1941 by some twelve companies, in which they expressly agreed to joint submission of clinical data, plaintiff contends that the joint action of the defendant and other drug companies, in testing and marketing D.E.S. for use in accidents of pregnancy was by implied or tacit agreement or understanding. That is, it was unspoken, and that this was reflected by the consciously parallel conduct of the companies in these activities.
>
> By the second definition of concerted action, we mean persons acting independently of each other in committing the same wrongful act, but although acting independently, their acts have the effect of substantially encouraging or assisting the wrongful conduct of the other, which, in this case, was the alleged failure to adequately test.
>
> Thus, if you find that defendant and the other drug companies either consciously paralleled each other in failing to test D.E.S. on pregnant mice, as a result of some implied understanding, or that they acted independently of each other in failing to do such testing, but that such independent actions had the effect of substantially aiding or encouraging the failure to test by the others, then you should find that the defendant wrongfully acted in concert with the other drug manufacturers in the testing and marketing of D.E.S. for use in accidents of pregnancy. Of course, you must also have found that it was wrongful for the defendant and the other drug companies not to have tested DES in pregnant mice because of the state of knowledge that was available to them in 1953.

55 N.Y. 2d 581-82, 436 N.E. 2d 187, 450 N.Y.S. 2d at 780-81. Lilly argued in its brief that the jury should have been instructed that some "plus factor" was needed in addition to conscious parallelism to support a finding of agreement. *Id.* This is essentially the objection of *Martin* — that parallel activity does not equal concerted activity.

109. Kaufman v. Eli Lilly & Co., 471 N.Y.S. 2d 830, 831 (A.D. 1 Dept. 1984) (Sandler, J., dissenting).

not risen to the level of concerted activity. Enterprise liability was first suggested in *Hall v. E.I. DuPont de Nemours & Co.*[110] In *Hall*, thirteen children were injured by blasting caps in twelve unrelated accidents between 1955 and 1959. These children sued six manufacturers of blasting caps and their trade association, the Institute of Makers of Explosives (I.M.E.). The plaintiffs could not identify a particular manufacturer of the product that caused their respective injuries. Therefore, plaintiffs' complaint alleged an "industry-wide" practice of not placing any warning on individual blasting caps and failing to adopt other safety measures.[111] The court stated:

> The question posed is whether a group of manufacturers and their trade association, comprising virtually the entire blasting cap industry of the United States, can be held jointly liable for injuries caused by their product. Our answer is that there are circumstances, illustrated by this litigation, in which an entire industry may be liable for harm caused by its operations.[112]

The court concluded that industry-wide liability was justified on the basis of the manufacturers' joint conduct, which created an unreasonable risk of injury to innocent parties. The court permitted the burden of proof as to causation to shift to the defendants because the court deemed that the defendants all exercised collective control over a risk-creating product. In *Hall*, the manufacturers, although independent, had adhered to industry-wide safety standards and had created a trade association to handle many of the safety issues. Because the manufacturers had a joint capacity to reduce the risk, the court said they should bear joint liability when the product produced the injury at risk.

DES plaintiffs argue that *Hall*'s enterprise liability theory should be adopted to permit them to shift the causation burden to defendants. However, every court that has considered enterprise liability in DES litigation has rejected it, including the Washington Supreme Court in *Martin*.[113] Enterprise liability has been rejected

---

110. 345 F. Supp. 353 (E.D.N.Y. 1972).

111. *Id.* at 358-59.

112. *Id.* at 358.

113. Schneider v. Eli Lilly & Co., 556 F. Supp. 809 (E.D. La., 1983); Tidler v. Eli Lilly & Co., 95 F.R.D. 332 (D.D.C. 1982); Morton v. Abbott Laboratories, 538 F. Supp. 593 (M.D. Fla. 1982); Gruseth v. Eli Lilly & Co., Civ. 77-4051 (D.S.D. August 13, 1982); Ryan v. Eli Lilly & Co., 514 F. Supp. 1004 (D.S.C. 1981); Gray v. United States, 445 F. Supp. 337 (S.D.

for four reasons.

First, and most importantly, there is a significant disparity between the number of manufacturers involved in *Hall* and the number involved in the DES controversy. The blasting cap industry is small. There were only six defendants joined in *Hall*. There were over 200 manufacturers who produced and marketed DES as a miscarriage preventative. Moreover, the *Hall* court expressly cautioned against applying enterprise liability to industries comprised of a large number of manufacturers.

> Plaintiffs . . . will have to demonstrate defendants' joint awareness of the risks at issue . . . and their joint capacity to reduce or affect those risks. By noting these requirements we wish to emphasize their special applicability to industries composed of a small number of units. *What would be fair and feasible with regard to an industry of five or ten producers might be manifestly unreasonable if applied to a decentralized industry composed of thousands of small producers.*[114]

Second, the presence of the I.M.E., the trade association, was a critical factor in finding that the defendants in *Hall* jointly controlled the risk. The blasting cap manufacturers deliberately delegated functions relating to safety to the I.M.E.; there is no counterpart to this trade association in the drug industry.

Third, the drug industry is so intertwined with the federal government through the FDA that most of its safety standards are compelled by the government. Thus, the warning labels and packaging materials used on DES were required and approved by the government. Because of the extent of government involvement in the manufacturing and marketing of drugs, the imposition of enterprise liability would be unfair.[115]

Finally, the *Hall* court expressly singled out the drug industry as an industry which would be inappropriate for enterprise liability: "In cases where manufacturers have more experience, more in-

---

Tex. 1978); *Martin*, 102 Wn. 2d at 600, 689 P.2d at 380; Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980), *cert. denied*, 449 U.S. 912 (1980); Keune v. Eli Lilly & Co., No. 822-01482 (Cir. Ct. St. Louis, Mo., November 24, 1982); Namm v. Charles E. Frosst & Co., 178 N.J. Super. 19, 427 A.2d 1121 (App. Div. 1981); Lyons v. Premo Pharmaceutical Laboratories, 170 N.J. Super. 183, 406 A.2d 185 (1979); Collins v. Eli Lilly & Co., 116 Wis. 2d 166, 342 N.W.2d 37 (1984), *cert. denied* 105 S. Ct. 107 (1984).

114. 345 F. Supp. at 378 (emphasis added).

115. *Martin*, 102 Wn. 2d at 600, 689 P.2d at 380.

formation, and more control over the risky properties of their products *than do drug manufacturers,* courts have applied a broader concept of foreseeability which approaches the enterprise liability rationale."[116]

The enterprise liability suggested by *Hall* may be limited to the factual situation in that case. Although DES plaintiffs unable to identify the responsible manufacturer consistently argue for the application of enterprise liability, no court has yet adopted it.

D. Market Share Liability — Sindell v. Abbott Laboratories

The California Supreme Court, in *Sindell v. Abbott Laboratories,*[117] originated the theory of market share liability. It is a modification of the *Summers* theory of alternative liability. Like *Summers, Sindell* held that: "as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury."[118]

Sindell was a class action seeking damages for injuries allegedly caused by DES. Once again, the plaintiffs were unable to identify a specific manufacturer of the DES that caused the injuries, and the trial court dismissed the complaint. The supreme court, by a bare four-to-three majority, reversed, permitting the case to proceed by shifting the causation burden to the DES manufacturers joined in the suit.

The court rejected the theories proposed by the plaintiffs — alternative liability, concert of action, and enterprise liability. However, Justice Mosk, writing for the majority, refused to bar the plaintiffs' action and altered the rules of causation by fashioning the theory of market share liability.

> Just as Justice Traynor in his landmark concurring opinion in *Escola v. Coca Cola Bottling Co.* recognized that in an era of mass production and complex marketing methods the traditional standard of negligence was insufficient to govern the obligations of manufacturer to consumer, so should we acknowledge that some adaptation of the rules of causation and liability may be appropriate in these recurring circumstances[119]

---

116. 345 F. Supp. at 370 (emphasis added).
117. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied,* 449 U.S. 912 (1980).
118. 607 P.2d at 936.
119. *Id.* (citation omitted).

Under *Sindell*'s market share theory, once a plaintiff joins a "substantial share" of the DES market, the burden of proof shifts to the defendants to demonstrate that they could not have manufactured the DES responsible for the injuries. Each defendant that fails to exculpate itself "will be held liable for the proportion of the judgment represented by its share of that market."[120] The court realized that this theory did not achieve an exact correlation between actual responsibility and liability; however, by measuring a defendant's liability by its market share, the court sought to limit a defendant's liability to the amount of harm it statistically could have caused.[121]

The academic reaction to *Sindell* was mostly unfavorable. Commentators criticized *Sindell* for singling out compensation as the sole goal of products liability law, for ignoring the adverse consequences the decision might have on drug research and development, for failing to define the relevant market and what constitutes a "substantial share" of the market, for imposing liability inequitably, and for entering a field better left to legislation.[122]

The market share theory has been considered by many courts in DES litigation, but expressly adopted by only one.[123] In *McEl-*

---

120. *Id.* at 937.

121. *Id.*

122. *See supra* note 9.

123. Courts in California subsequently have considered *Sindell*'s market share theory on three separate occasions in non-DES cases. In 1983, a federal district court applied *Sindell* in an action for injuries allegedly suffered in reaction to a DPT (diptheria-pertussis-tetanus) vaccination. Morris v. Parke, Davis & Co., 573 F. Supp. 1324 (C.D. Cal. 1983). The plaintiffs could not identify the manufacturer of the DPT so they joined a substantial share of the companies that marketed DPT when they were vaccinated. The novel aspect of this case was that plaintiffs were seeking compensatory and *punitive* damages; the defendants argued that *Sindell* only permits compensatory damages. The court rejected defendants' interpretation of *Sindell* and held that plaintiffs were entitled to recover punitive damages.

The next two cases refused to apply *Sindell*. In *In re* Related Asbestos Cases, 543 F. Supp. 1152 (N.D. Cal. 1982), a federal court sitting in California held that the plaintiffs, who were seeking damages for injuries allegedly caused by asbestos exposure, were precluded from relying on market share theory. The court listed several factors which "would make it exceedingly difficult to ascertain an accurate division of liability along market share lines." *In re* Related Asbestos Cases, at 1158. These factors included the fact that asbestos is not fungible; that the fibers are of different varieties; that the asbestos was put to numerous different uses; and that some plaintiffs were exposed over many different time periods.

The other case rejecting the plaintiffs' attempt to use market share liability is Sheffield v. Eli Lilly & Co., 144 Cal. App. 3d 583, 192 Cal. Rptr. 870 (1983). This was a suit against five drug companies to recover for permanent disability allegedly resulting from defective

haney v. Eli Lilly & Co.,[124] a federal district court in South Dakota applied *Sindell*'s market share theory, claiming that South Dakota law would not require the plaintiff to identify the responsible party. Because the opinion is short and from a federal court sitting in diversity, it is questionable that a second state has followed *Sindell*'s market share theory.

Two other courts have adopted market share theory in cases that do not involve DES. The plaintiffs in *Hardy v. Johns-Manville Sales Corp.*[125] and *Copeland v. Celotex Corp.*[126] were suing for asbestos related injuries. Both courts, while acknowledging the differences between DES and asbestos, adopted the reasoning and market share theory announced in *Sindell*. Ironically, a federal district court sitting in California refused to permit a plaintiff alleging asbestos-related injuries to rely on *Sindell*'s market share theory because of the significant differences between asbestos and DES.[127]

In *Martin*, the Washington Supreme Court acknowledged that the "*Sindell* market-share theory is conceptually attractive," but rejected it because of its "inherent distortion of liability."[128] The *Martin* court was most disturbed that the defendants in *Sindell*, although representing only a "substantial share" of the market, were liable for 100 percent of the plaintiff's damages.[129] The court explained:

> The inherent distortion of defendants' actual liability under the market-share liability theory is best illustrated by a hypothetical. Assume that plaintiff's damages are $100,000, and she joins enough DES

---

anti-polio vaccine. The plaintiff could not identify the responsible manufacturer. However, the court held that *Sindell*'s market share liability did not apply because the anti-polio vaccine was not intrinsically defective for the purpose for which it was used. Thus, *Sindell* only applies when there is a *design* defect in a product; a manufacturing defect is not sufficient.

124. 564 F. Supp. 265 (D.S.D. 1983).

125. 509 F. Supp. 1353 (E.D. Tex. 1981), *rev'd on other grounds*, 681 F.2d 334 (5th Cir. 1982). The court concluded that "the Texas courts would adopt some form of *Sindell* liability in the asbestos-related cases." *Id.* at 1359.

126. 447 So. 2d 908 (Fla. App. 1984).

127. *In re* Related Asbestos Cases, 543 F. Supp. 1152 (N.D. Cal. 1982). *See supra* note 123.

128. *Martin*, 102 Wn. 2d at 601, 689 P.2d at 380.

129. *Id.* at 601-02, 689 P.2d at 381. *Martin*, like most commentators on *Sindell*, is also critical of *Sindell*'s failure to define what constitutes a "substantial share" of the market.

> manufacturers to represent 60 percent of the relevant market. Defendant X occupies 20 percent of the relevant market and one-third of the market that all joined defendants represent. If defendant X is liable only for its share of the relevant market, it would be liable for 20 percent of the damages, or $20,000. If defendants are required to pay 100 percent of the judgment, however, then defendant X must pay one-third of the market that all the joined defendants represent. In other words, defendant X would have to pay 67 percent ($13,333) more than its share of the relevant market.[130]

In finding *Sindell*'s market share theory unacceptable, the Washington Supreme Court rejected the last of the four theories commonly relied on by DES plaintiffs. The court in *Martin*, unwilling to let the defendants escape liability because of the causation issue, fashioned its own theory — market share alternate liability.

IV. MARKET SHARE ALTERNATE LIABILITY - *Martin v. Abbott Laboratories*

Although the Washington Supreme Court rejected both alternative liability and market share liability, it stated that "a modification of the alternate liability theory somewhat along the lines of the *Sindell* market-share approach [was] warranted."[131]

Under *Martin*'s "market share alternate liability," a plaintiff must allege four elements:

(1) the plaintiff's mother took DES;

(2) the plaintiff's injuries resulted from exposure to DES;

(3) the defendant produced or marketed the type of DES taken by the plaintiff's mother; and

(4) in producing or marketing DES as a miscarriage preventative, defendant breached a legal duty to plaintiff.[132]

Martin's market share alternate liability altered the original market theory adopted by *Sindell* in two ways. First, the Washington court rejected *Sindell*'s requirement that a "substantial share" of the DES market be joined as defendants. The court reasoned

---

130. *Id.*
131. *Id.* at 603, 689 P.2d at 381.
132. *Id.* at 604, 689 P.2d at 382.

that joinder of a substantial share "does not alter the probability . . . that a particular defendant caused the injury."[133] The *Sindell* "substantial share" requirement has been subject to widespread attack. Courts and commentators were critical because the California Supreme Court declined to define "substantial share," holding only that it was met in *Sindell* because ninety percent of the market was joined.[134] Moreover, the requirement has been criticized as being unnecessary.

> Contrary to the *Sindell* opinion, there is no reason to insist that a substantial share of the causal agents be before the court. Such joinder in no way affects the strength of the presumed causal responsibility in respect to any tortfeasor, and each tortfeasor should be liable only for its individual contribution to the risk.[135]

Because *Martin* limits a particular defendant's potential liability to its share of the DES market, that defendant's liability should be the same regardless of how many other defendants are joined. Thus, *Martin* holds that a plaintiff need commence suit against only one defendant.

The second way in which *Martin* modified *Sindell*'s market share theory was by denying a plaintiff her entire damages if the defendants can prove that their combined market share does not equal 100 percent. In *Sindell*, although the defendents' market share was used to apportion liability, the defendants were liable for the plaintiff's entire judgment.[136] *Martin* condemned this as an "inherent distortion of liability."[137] Consequently, under the *Martin* test, if each defendant is able to prove its actual market share, the plaintiff will only recover the portion of her damages that equals the proved market share of the defendants. Because *Martin* permits the named defendants to exculpate themselves, it is in the plaintiff's interest to join as many defendants as possible.

> Individual defendants are entitled to exculpate themselves from liability by establishing, by a preponderance of the evidence, that they did not produce or market the particular type DES taken by the plaintiff's mother; that they did not market the DES in the geographic market area

---

133. *Id.* at 605, 689 P.2d at 382.

134. *Sindell*, 607 P.2d at 936.

135. Robinson, *Multiple Causation in Tort Law: Reflections on the DES Cases*, 68 VA. L. REV. 713, 768 (1982).

136. *Martin*, 102 Wn. 2d at 601-02, 689 P.2d at 381.

137. *Id.*

> of plaintiff's mother's obtaining the drug; or that it did not distribute DES in the time period of plaintiff's mother's ingestion of the drug.[138]

Those that fail to exculpate themselves will be presumed initially to have equal shares of the DES market, measured by geographic area, time of ingestion, and type of DES. Consequently, if two defendants remain and plaintiff's damages are $100,000, the two defendants are "presumed to have equal shares of the market and are liable respectively for fifty percent of the total judgment."[139] Each would be liable for $50,000.

A defendant may rebut the presumption of equal market shares and reduce its potential liability. For example, if Drug Company A can establish that its market share was only twenty percent of the total DES market, then A will be liable for only twenty percent of the damages, or $20,000. If Drug Company B cannot establish its market share, it will have to bear the liability for the remaining eighty percent of the damages, or $80,000. But, if B is able to establish its market share, B will only be liable to that extent. Thus, if B establishes a market share of sixty percent, B must pay sixty percent of the damages, or $60,000.[140] Therefore, it is possible that a plaintiff with a $100,000 judgment against two drug companies will not recover her entire judgment.

The Washington Supreme Court could have avoided the difficulty of reworking *Sindell*'s market share theory by following traditional products liability law, rationalizing its decision on the basis of the unworkability of all the theories offered by plaintiffs to evade the causation issue. However, the court refused to fit the DES tragedy into traditional tort law. Rather than viewing the DES cases as the typical courtroom scenario of attempting to match an injured plaintiff with a responsible defendant, *Martin* saw the DES cases as an example of *industry-wide* liability.

> Because certain manufacturers and distributors produced or marketed an allegedly defective drug for accidents of pregnancy, those manufacturers and distributors all contributed to the risk of injury, even though they may not have contributed to the actual injury of a given plaintiff. Although the defendants in this case have not acted in concert under the concert of action theory, all participated in either gaining ap-

---

138. *Id.* at 605, 689 P.2d at 382.
139. *Id.* at 606, 689 P.2d at 383.
140. *Id.*

> proval of DES for use in pregnancy or in producing or marketing DES in subsequent years. Each defendant contributed to the *risk* of injury to the public and, consequently, the risk of injury to individual plaintiffs. Thus, each defendant shares in some measure, a degree of culpability in producing or marketing DES.[141]

By recognizing an industry-wide culpability for the DES tragedy, the Washington Supreme Court adopted the rationale of the "risk contribution" theory announced by the Wisconsin Supreme Court in *Collins v. Eli Lilly & Co.*[142] This theory is useful in avoiding traditional causation requirements. The *Collins* court acknowledged that only one defendant actually sold the DES taken by an individual plaintiff's mother; however, *all* defendants who sold DES as a miscarriage preventative contributed to an aggregate risk that daughters of DES users would develop cancer. This "risk contribution" theory was first proposed in a law review article by Glen Robinson.[143] He argued that it is fair to make the manufacturers of DES liable when the plaintiff cannot identify the responsible manufacturer because "the critical point is the *creation of a risk* that society deems to be unreasonable."[144]

The Washington Supreme Court, in *Martin,* embraced the rationale of the risk contribution theory to justify its theory of market share alternate liability. All manufacturers of DES produced and marketed a defective product; all of them created a risk that Rita Martin would develop vaginal cancer. Therefore, the court concluded that it was fair to hold a manufacturer of DES liable on

---

141. *Id.* at 604, 689 P.2d at 382 (emphasis in original).

142. 116 Wis. 2d 166, 342 N.W.2d 37 (1984), *cert. denied,* 105 S. Ct. 107 (1984).

143. *See supra* note 135.

144. *Id.* at 739 (emphasis in original). Robinson analogizes to criminal law to support his argument:

> [T]here [is] no proof of a causal link between the actions of any DES manufacturer and the plaintiff's injuries. But does fairness require such a link? In the criminal context, it is considered fair to impose liability for some crimes — for instance, reckless driving or attempted crimes — even though no specific harm results. Similiarly, fairness in the civil context seems to require only that a defendant's liability be related to his conduct, and that liability where imposed, be roughly proportional to the seriousness of the *risks* that he has created. Despite Cardozo's insistence that liability not be imposed for "negligence in the air," considerations of fairness do not forbid it. From the standpoint of fairness, the critical point is the creation of risk that society deems to be unreasonable, not whether anyone was injured by it.

Id.

the basis that it manufactured a product which *could* have caused Rita's injury.[145]

Because the situation of Rita Martin and other DES daughters is so tragic, there is tremendous pressure on the courts to find ways to compensate them. The Washington Supreme Court found a way by dispensing with the "indispensable element" of-cause-in-fact. When the court ventured into the highly complex world of DES litigation and emerged with a market share theory, it should have prepared a thoughtful analysis that addressed and resolved the problems inherent in any market share approach. The *Martin* decision is not a thoughtful analysis. It neither sets forth a clear theory nor resolves the questions triggered by *Sindell*. The four major issues left unresolved by the *Martin* opinion will be examined next.

A. Does a Market Share Theory Further the Goals of Products Liability Law?

One of the critical elements missing in the *Martin* opinion is an identification and discussion of the goals of products liability law. Because it ignored the whole issue of *why* courts impose liability on the manufacturers of defective products, *Martin* failed to build a foundation to support its theory. There is no standard by which to evaluate market-share alternate liability.

Although *Martin* ignored this issue, two goals may be inferred

---

145. Naomi Sheiner's theory of "enterprise liability" also focuses on the industry rather than on a particular manufacturer:

> Enterprise liability can be justified on the same policy grounds as respondeat superior and strict liability. Where an entire industry, engaged in a predictably dangerous enterprise and following similar safety practices, places an identically defective product in the stream of commerce, the industry rather than the individual manufacturer should be the focal point for liability because it can best allocate risks, distribute costs, and take preventive measures . . . .
>
> The DES cases are ideal for this first application of enterprise liability because the drug industry rather than the individual manufacturer is so clearly the proper focal point for liability. It was the industry, and not individual manufacturers, which did not meet the "normal expectations" of society in manufacturing DES. Through imitative drug research, joint submission of clinical data, and parallel, possibly imitative, marketing practices, the industry adhered to an industry-wide inadequate safety standard.

Comment, 46 FORDHAM L. REV. at 1002-03. However, enterprise liability utilizes joint and several liability rather than market share.

from the opinion. First, the court implied that *compensation of an injured victim* is a goal of products liability law. Compensation is widely recognized as one of the goals for imposing liability for a defective product.[146]. However, it is not the only goal.

> A major problem in the law of products liability is the failure of courts to account for the effect of excessive liability on potential defendants. While the goal of compensating injured accident victims is worthwhile, it cannot be regarded as the sole objective of tort law. The adversary system was designed to resolve disputes among individuals in an impartial manner, and any attempt to convert it into a compensation system will fail because of the enormous cost to society. The market share liability theory is a dangerous step towards just such a conversion, and courts in the future should reject it as a method for imposing liability in civil cases.[147]

Washington would be unique if it held compensation to be the only consideration in a products liability suit. Furthermore, the market share alternate theory does not adequately serve the purpose of compensation. Under the theory, it is possible, even likely, that the plaintiff will not recover her entire damages. Does *partial* compensation further products liability law? The court does not address this question.

The second goal that may be inferred from the opinion is allocation of damages to the party in the best position to absorb them. *Martin* holds that the drug companies are in a better position to absorb the costs of the injury through insurance coverage or higher product prices.[148] Once again, this goal is not met if the plaintiff leaves the courtroom without full compensation. If the drug companies are in a better position to spread the cost of Rita Martin's injury, why not have them spread the whole cost?

Another goal underlying products liability law, one *Martin* did not discuss, is deterrence. The courts seek to reduce the number of product-related injuries and their costs by structuring the system of recovery so that manufacturers of defective products pay for the injuries caused by their products.[149] Liability for manufacturing a

---

146. *See, e.g.*, Robinson, *supra* note 135, at 736; Note, *Industry Wide Liability*, 13 SUFFOLK U. L. REV. 980, 996 (1979).

147. 34 VANDERBILT L. REV. at 1662.

148. *Martin*, 102 Wn. 2d at 604, 689 P.2d at 382.

149. 13 SUFFOLK U. L. REV. at 996.

defective product is intended to deter the production of future defective products and promote the development of safe products. The traditional theory of products liability law furthered this deterrence goal because the party responsible for the injury suffered the consequences. Does a market share theory of liability promote deterrence? Once again, the *Martin* opinion is silent. However, Glen Robinson, the author of the risk-contribution theory, argued that deterrence is furthered by a *Martin*-type of liability: "To insist that a particular injury be linked to a particular manufacturer's product is to invite underdeterrence of the *risk* in every case where there is no proof of specific causation. There is no question of causal responsibility for the risk."[150] Thus, Robinson would argue that market share alternate liability theory promotes deterrence in DES cases much more effectively than traditional products liability law. *Martin* deters manufacturers from engaging in enterprises that create *risks* of injury.

The countervailing consideration is whether the new theory might result in *overdeterrence*. One concern about the market share theory is that, while it may deter the manufacture of defective products, it will also inhibit the development of new, safe drugs.[151] Under market share liability, drug companies must bear higher litigation costs as well as risk enhanced liability.[152] Many of the courts that rejected market share liability were concerned about the theory's impact on the research and development of new drugs; they were unwilling to risk overdeterrence.[153] *Martin* does

---

150. Robinson, *supra* note 135, at 740.

151. "Imposition of such broad liability could have a deleterious effect on the development and marketing of new drugs, especially those marketed generically." Payton v. Abbott Laboratories, 437 N.E.2d at 190.

152. *See infra* notes 171, 172 and accompanying text.

153. DPT, the vaccine given to immunize children against diptheria, pertussis, and tetanus, promises to be the next "star" on the products liability scene. Nearly 150 lawsuits have been filed against DPT manufacturers. The response of DPT manufacturers is relevant to the issue of deterrence and what a fine line separates over and under-deterrence. The following was recently reported in the National Law Journal:

> Nearly a dozen companies made [DPT] vaccine after it was introduced, but over the years most of them discontinued it, mainly for business reasons.
>
> By last year, the number of DPT makers had dwindled to three. Then last June, Wyeth, a major DPT manufacturer — *citing the high cost of defending DPT suits* — sold its distribution rights to Lederle.
>
> And in July, DPT supplies were cut back significantly when Connaught Laboratories of Swiftwater, Pa., refused to pay new, increased liability premiums and

not address the issue of deterrence and the role market share alternate liability theory will play in promoting (or inhibiting) the development of newer, safer drugs.

A judge of the California Supreme Court, dissenting in *Sindell*, described market share theory as a "new high water mark in tort law."[154] When a court raises the water mark, it should do so deliberately, thoughtfully, and in a way that furthers the goals of tort law. Because *Martin* neither identifies nor discusses the goals of products liability law, we do not know which of these goals, or what other goals, the court was serving. More importantly, we cannot say if the goals are being served well.

B. What is the Defendants' Market and How Can it be Proven

Under market share alternate liability theory, a defendant drug company's share of liability depends upon its share of the market. *Martin* criticized the *Sindell* court for failing to define "substantial share"; yet, *Martin* used "market share" as if the term was easily understood and easily proven. It is not, for a number of reasons.

First, it is difficult to define the boundaries of a "market." Does the pharmacist who sold the DES to the plaintiff's mother constitute the market? Or is it the city where plaintiff's mother lived? Is it the state of Washington? Or is it the whole nation? Or can the market change from case to case?[155] By failing to clearly

---

began filling only existing orders for the vaccine . . . .

Lederle currently is the only remaining drug company that both manufactures and distributes DPT.

DPT Vaccine Injuries: Who Should Pay, Nat'l L.J., Apr. 1, 1985, at 1 (emphasis added).

154. *Sindell*, 607 P.2d at 938 (Richardson, J., dissenting).

155. Respondents argued in their joint brief that the failure of the court to clearly define which market was to be adopted in all cases could seriously distort a company's liability.

> If a national market is adopted in one Washington case, a regional market in another, and a local pharmacy in a third, the manufacturer included in the narrower market definitions will pay a figure many times its actual market share because it will always be in the market, while other defendants will not.
>
> For example, assume that Company X is a defendant in four cases in different Washington cities, and that Company X had 15 percent of the nationwide market for DES sold for prevention of accidents of pregnancy. In Washington, however, that company had 20 percent of sales for that purpose, while in the Seattle-Tacoma area, that company had 40 percent. Moreover, in one Seattle case, the pharmacy involved carried only DES made by Company X and two other companies

state what the market is to be, *Martin* left a glaring hole that may be filled by different markets in different cases. Plaintiffs, who are trying to join all potential defendants, and defendants, who are trying to establish their share of the market, will find their tasks far more difficult because the court failed to state the perimeters of the market.

Second, the most serious problem in a market share theory is the difficulty of reconstructing a 200-manufacturer market after nearly thirty years. Yet, this is what a manufacturer of DES must do. The problems of defining the market and apportioning market share in antitrust cases are notorious; the problems faced by defendants in the DES cases may be worse. The Wisconsin Supreme Court, in *Collins v. Eli Lilly & Co.*,[156] rejected *Sindell's* market share theory primarily because of the "the practical difficulty of defining and proving market share."

> There are several reasons for this: The DES market apparently was quite fluid, with companies entering and leaving the market over the years; some companies no longer exist and some that still exist may not have relevant records; and apparently there are no accurate nationwide records pertaining to the overall production and marketing of DES. We view defining the market and apportioning market share as a near impossible task if it is to be done fairly and accurately in order to approximate the probability that a defendant caused the plaintiff's injuries.[157]

Further, a company must also isolate the sales of DES for use as a miscarriage preventative from the sales for non-pregnancy related uses. Many manufacturers have not kept records of the reasons for which the DES was prescribed.

Defining and proving a company's share of the DES market will also be costly, both in dollars and judicial resources. Often,

---

who are out of business. Thus, assuming a $100,000 judgment in each case and that 100 percent of the market was represented, the selection of simply a different geographic market in each case would result in the following allocation of damages to Company X:

Case 1: Nationwide market 15% or $15,000
Case 2: Washington market 20% or $20,000
Case 3: Seattle-Tacoma market 40% or 40,000
Case 4: One Pharmacy 100% or $100,000
Total: $175,000 or nearly 44% of the total judgments.

Respondents' Joint Brief at 79-80, *Martin*.

156. 342 N.W.2d at 37, 48 (1984), *cert. denied*, 105 S. Ct. 107 (1984).

157. *Id.*

determining market share requires a "mini-trial" on this issue alone, which may occupy a significant amount of courtroom time.[158] Moreover, this mini-trial must be preceded by time-consuming and expensive discovery.

Despite the costs of proving market share, a defendant will work hard to prove it because failure to do so will likely result in enhanced liability. The court stressed that a defendant is liable only to the extent of its market share. However, this is true only when a defendant is able to *prove* its market share. The court states: "*In the case where each party carries its burden of proof,* no defendant will be held liable for more harm than it statistically could have caused in the respective market."[159] The distortion occurs when a defendant cannot prove its market share. For example, suppose a plaintiff sues only one manufacturer of DES, X Company. Under the *Martin* test, the court would initially presume that X had 100 percent of the relevant DES market. If X could not overcome the obstacles to proving its market share, X will be liable for the full amount of the plaintiff's damages. Thus, although the Washington court criticized the "inherent distortion of liability" in *Sindell,* the theory of market share alternate liability can also seriously distort a company's liability.

Defining and proving market share sounds simple on paper, but it may prove to be overwhelmingly difficult in practice. Commentators and courts criticized *Sindell* for adopting a complex theory and then failing to provide sufficient guidance to make it workable.[160] *Martin* fails in the same way. Defendants must prove their share of a market, which the court does not define, which existed thirty years ago, and which comprised over 200 manufacturers. If a company's records do not document its share, the company will be presumed liable for 100 percent of the plaintiff's damages. Thus, liability can attach and a plaintiff can recover because of a lack of evidence. It is little wonder one commentator described the market share theory as a "lottery based on the fortuity of the availability of evidence in a particular case."[161]

---

158. *Id.* at 49.

159. *Martin,* 102 Wn. 2d at 606, 689 P.2d at 383. (Emphasis added).

160. *See supra* note 9.

161. Fischer, *Analysis of Market Share Liability,* 34 VANDERBILT L. REV. 1623, 1643 (1981).

C. *Does Market Share Alternate Liability Distribute Liability Equitably?*

The Washington Supreme Court implied that its theory is equitable because it both *enhances* a defendant's liability, by eliminating the requirement of causal responsibility, and *limits* liability, by apportioning a defendant's liability according to its market share. However, as demonstrated in the preceding section, if a defendant cannot prove its market share, this theory leads to extremely inequitable results. The same may be true even when a defendant establishes its market share.

New theories of liability must co-exist with old ones. For example, when California adopted its market share theory in *Sindell*, it applied it only to plaintiffs who cannot identify the responsible manufacturer. Plaintiffs who know the brand of DES ingested by their mothers cannot shift the burden of proving causation to that defendant; they must still prove the traditional elements of a prima facie case. Thus, two theories that apply to the same product and to the same companies co-exist in California.

One commentator criticized the *Sindell* decision for allowing them to co-exist. "Once matching is abandoned in *some* cases, it should be abandoned in *all* cases involving that particular technological time bomb."[162] When the two systems co-exist, the drug companies that manufactured DES are exposed to double liability. Companies would pay 100 percent of the plaintiff's damages in specific identification cases and their proportionate share of damages in the market share cases.[163]

Furthermore, when the two theories co-exist, a plaintiff who can identify a specific manufacturer may have an incentive to pretend that she cannot. If that manufacturer is out of business, insol-

---

162. Comment, *Refining Market Share Liability: Sindell v. Abbott Laboratories*, 33 STAN. L. REV. 937, 942 (1981). The author proposes a modification of *Sindell*'s market share theory so that it would equitably apply in all DES cases, whether or not the plaintiff can identify the manufacturer. This modification is termed the "causation-culpability share" approach. *Id.* at 944-48.

163. *Id.* at 942. For example, suppose X Company manufactured a red pill that made up twenty percent of the DES market. X will always be the defendant in cases where plaintiff's mother remembered taking a red pill, and if X cannot exculpate itself, it will be liable for twenty percent of plaintiff's damages. However, X will also pay 100 percent of the damages in any case where evidence exists proving that plaintiff's mother took Brand X DES.

vent, or not amenable to suit in California, the plaintiff is in a much better position if she claims inability to identify and sues under a market share theory.[164]

It is clear that the traditional and market share liability theories co-exist in DES litigation that arises in California. The situation in Washington is unclear, however, because the *Martin* opinion did not expressly limit market share alternate liability to plaintiffs who cannot identify a specific manufacturer. *Martin* requires the plaintiff to prove four elements to shift the burden of proof to the defendants; none of these elements is an inability to identify the specific manufacturer. Thus, the court's ruling suggests that any DES plaintiff may rely on market share alternate liability. However, the *Martin* opinion also emphasized that the plaintiff in that case could not "identify the specific manufacturer of the DES ingested,"[165] suggesting that the holding only applies to those types of plaintiffs. Because *Martin* is a drastic change in Washington's products liability law, it is more likely that this ambiguity will be resolved in favor of limiting the *Martin* theory of recovery to plaintiffs who are unable to identify the manufacturer. Then, Washington will be in the same position as California, with two inconsistent theories inequitably co-existing.

D. Does Resolution of the DES Problem Involve a Public Policy Decision More Suited to the Legislative Process?

The obvious refuge for victims injured by defective products is the judicial system; however, the obvious answer is not always the best one. Many of the courts that have refused to abandon traditional tort principles to permit a DES plaintiff to proceed with her case labeled themselves an inappropriate forum. They were not unsympathetic to the plaintiff and did not believe her injuries should go uncompensated. Rather, the courts felt that the questions raised by the DES litigation were too complex to be resolved in a piecemeal fashion by individual state courts.

---

164. *See, e.g.*, Comment, *supra* note 162; Comment, *Sindell v. Abbott Laboratories: A Market Share Approach to DES Causation*, 69 CAL. L. REV. 1179 (1981); Comment, *Market Share Liability for Defective Products: An Ill-Advised Remedy for the Problem of Identification*, 76 NW. U. L. REV. 300 (1981); Note, *California Expands Tort Liability Under the Novel "Market Share" Theory: Sindell v. Abbott Laboratories*, 8 PEPPERDINE L. REV. 1011 (1981).

165. *Martin*, 102 Wn. 2d at 583, 689 P.2d at 371.

> A policy designed to encourage the research, development and marketing of drugs and biologies beneficial to humankind has sound purpose and may outweigh the policy of spreading the risk of loss by imposition of liability. . . . The problems involved in a major declaration of public policy may, in our scheme of government, be more fairly and properly addressed by federal legislative committee hearings leading to more stringent drug regulations and perhaps a scheme of compensation for those injured by side effects of otherwise beneficial drugs and related products.[166]

"[D]rugs are different from other products because every drug known to mankind can be a poison."[167] A delicate balance must be achieved. Research and development of new drugs must be promoted while the dangers of drugs must be confronted and the victims compensated. Failing to achieve a balance may have serious consequences, as we are now seeing with DPT. One in 310,000 children who are vaccinated with DPT suffers serious injury. However, before DPT was developed tens of thousands of children died from diptheria, tetanus, and whooping cough.[168] For 309,999 children, DPT may be a lifesaver; for one child it is a poison. Forty-one states have declared the risk a reasonable one by requiring school children to be vaccinated with DPT. Nevertheless, some courts are holding the manufacturers of the vaccine liable for injuries it allegedly causes.[169] The federal district court in Boise, Idaho, recently awarded $1.2 million to a plaintiff allegedly injured by DPT.[170] As a result of these awards the insurance rates of DPT manufacturers are skyrocketing and companies are ceasing to manufacture DPT. A serious shortage is threatened and the price of DPT is climbing. The whole situation is rife with complex policy considerations.

The same policy considerations are even more insistent in the DES area. Thirty years have passed, the drug industry has changed, and memories have faded. Rather than creating complex new theories to accommodate plaintiffs who cannot satisfy the elements of traditional tort theory, perhaps the courts should "pass the buck" to the legislature. Not only is the legislature the proper body to decide issues of public policy, but it is also a less expensive

166. Feldman v. Lederle Laboratories, 460 A.2d 203, 209 (1983).
167. 2 DIXON, DRUG PRODUCT LIABILITY § 9.01 (1985).
168. Nat'l L.J., *supra* note 153, at 1.
169. *Id.*
170. *Id.* at 26. The case is Toner v. Lederle Laboratories, 84-3906 (D. Idaho 1985).

decision-maker. The costs involved in each DES case are exorbitant. Especially when the plaintiff is relying on a market share theory, the drug companies face far greater costs in *defending* the suit. A drug company with a prominent name and substantial assets could be named in every market share theory suit filed. Even if that company exculpates itself and avoids liability, it must bear the costs of attorneys, discovery, and court time. Thus, although both the California and Washington courts failed to acknowledge it, the litigation *costs* of market share theory and traditional tort theory are not equivalent.[171] And while those costs are imposed on the defendants, they are ultimately borne by all of us in higher drug prices or lessened availability of medicines.

Furthermore, damages paid through a court judgment are possibly the least cost effective way to compensate a victim. A 1977 study documented that it costs 77 cents in legal fees to deliver 65 cents to the injured victim.[172] For each dollar paid to the plaintiff, the defendants spend 42 cents in legal expenses, and 35 cents of the plaintiff's dollar is paid to her attorney.

The advantages of litigation-spawned compensation are not so apparent that courts should automatically favor themselves over the legislative process. The dissenting justices in *Sindell* recognized that DES plaintiffs were victims who deserved compensation. It was their opinion, however, that the judiciary could not fashion a remedy which would, on balance, serve the needs of society.[173] Rather, resolution of these questions should be left to a "deliberative body with the ability to evaluate a morass of data and the flexibility to tailor a program to society's needs."[174] Many commentators have proposed and detailed no-fault schemes for compensating drug-related injuries.[175] Others have suggested schemes similar

171. Note, *Market Share Liability and DES — Sindell v. Abbott Laboratories: Square Pegs in Round Holes*, 13 CONN. L. REV. 777 (1981).

172. *Id.*

173. "Given the grave and sweeping economic, social, and medical effects of 'market share' liability, the policy decision to introduce and define it should rest not with us, but with the Legislature . . . ." *Sindell*, 607 P.2d at 943 (Richardson, J., dissenting).

174. Note, 18 CAL. WEST. L. REV. at 172.

175. *See, e.g.*, O'Connell, *Harnessing the Liability Lottery: Elective First-Party No-Fault Insurance Financed by Third-Party Tort Claims*, 1978 WASH. U.L.Q. 693; Schwartz, *Products Liability and No-Fault Insurance: Can One Live Without the Other?* 12 FORUM 130 (1976-1977); Sandler, *Strict Liability and the Need for Legislation*, 53 VA. L. REV. 1509 (1967).

to the Federal Deposit Insurance Corporation.[176] While these are novel methods to apportion losses from DES injuries, they may be no more complex than market share liability and more equitable in the long run.

Although one cannot fault the Washington Supreme Court for seeking an alternative to the present system of compensating DES plaintiffs, its adoption of the market share alternate liability theory was apparently made without considering non-judicial alternatives. The problems inherent in the market share approach suggest that this type of loss apportionment may exceed judicial competence.

VI. CONCLUSION

Market share alternate liability is an attempt to resolve the question of apportionment of liability when an entire industry has produced and marketed a defective product but no single manufacturer can be identified as the cause of the injury. The *Martin* decision ensures that a plaintiff will not be remediless because of her inability to match specific injuries with specific manufacturers. While the court made an effort to balance the needs of the plaintiffs against the rights of the drug companies, the court failed to articulate a theory that is clear and that addresses the problems inherent in a market share theory.

The court gave considerable thought to the four theories of alternative liability, concert of action, enterprise liability, and *Sindell*'s market share theory before it rejected all of them as unworkable. Unfortunately, the court did not give the same thoughtful attention to the theory it ultimately adopted. The Washington Supreme Court has lifted products liability law to a new high water mark, and it did so without explaining what end was being

176. Note, 60 NEB. L. REV. 432, 446-49 (1981). The author proposes the creation of a Manufacturer's Deposit Insurance Corporation (MDIC). Each manufacturer of a designated product would pay into the fund a percentage of its gross income from sales of that product according to a flexible rate assigned to the product. Plaintiffs could collect from the fund for injuries and losses attributable to defective products without proving that the defect was foreseeable or that the manufacturers had joint control of the risk.

served, whether and how it would work, and whether it was ultimately the fairest and most efficient way to resolve the case.

Sharon Novak