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Illinois Rejects Market Share Liability: A Policy Based Analysis of *Smith v. Eli Lilly & Co.*

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INTRODUCTION

In its long awaited,[1] thorough and thoughtful *Smith v Eli Lilly & Co.*[2] opinion, the Illinois Supreme Court rejected the use of market share liability in pharmaceutical products litigation. The hallmark of the opinion is the court's unwillingness to cast aside a traditional principle of tort law—the requirement that a plaintiff identify the defendant/manufacturer whose product allegedly caused her injury.[3]

Defendant identification is at the foundation of tort law, whether it is characterized formally as causation in fact[4] or, much more

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[1] The Illinois Appellate Court ruled in May of 1988. *See* Smith v. Eli Lilly & Co., 527 N.E.2d 333 (Ill. App. Ct. 1988). It was not until more than two years later, in October of 1990, that the Illinois Supreme Court announced its final decision, reversing the appellate court's holding. *See* Smith v. Eli Lilly & Co., 560 N.E.2d 324 (Ill. 1990).

[2] 560 N.E.2d 324 (Ill. 1990).

[3] *Id.* at 345.

[4] W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS 263 (5th ed. 1984) [hereinafter PROSSER AND KEETON].

colloquially, as the need to know the culprit. As Prosser and Keeton have commented, "An essential element of the plaintiff's cause of action for negligence, or for that matter for any other tort, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered."[5] Seavey has likewise commented that "harm is the tort signature. In general, the action is based upon the theory that one person has caused harm to another."[6] Similarly, Cecil A. Wright stated that one of the purposes of tort law is "to afford compensation for injuries sustained by one person as the result of the conduct of another."[7] Not surprisingly, the Illinois Supreme Court had also recognized the causation-in-fact requirement in product liability litigation many years prior to *Smith v Eli Lilly & Co.*[8]

The primary purpose of this Article is to examine market share liability in all its variations,[9] and to comment on the Illinois Supreme Court's rejection of this doctrine,[10] so short-lived in Illinois. Part I of this Article briefly summarizes market share liability as articulated by various jurisdictions. Market share liability is based on the policy of shifting costs of injury from an innocent plaintiff onto several potentially responsible defendants.[11] Part II establishes that the theory fails to satisfy the underlying policy goals of either a moral or economic approach to tort law [12] Part III applies the same moral and economic policy analysis to the *Smith* decision and concludes that the Illinois Supreme Court correctly rejected market share liability [13] Finally, Part IV focuses on a concept touched upon, but not squarely presented, in *Smith*—alternative liability in its "classic sense."[14] This part inquires whether courts should apply alternative liability to relieve a plaintiff of the defendant identification burden when the plaintiff has joined all potential manufacturers as defendants.[15]

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[5] *Id.*

[6] Seavey, *Principles of Torts*, 56 HARV. L. REV. 72, 73 (1942).

[7] Wright, *Introduction to the Law of Torts*, 8 CAMBRIDGE L.J. 238, 238 (1944).

[8] *See* Schmidt v. Archer Iron Works, Inc., 256 N.E.2d 6, 7 (Ill. 1970), *cert. denied*, 398 U.S. 959 (1970).

[9] *See infra* notes 16-65 and accompanying text.

[10] *See infra* notes 196-261 and accompanying text.

[11] *See, e.g.*, Sindell v. Abbott Laboratories, 607 P.2d 924, 936, 163 Cal. Rptr. 132, 144 (1980) ("[A]s between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury."), *cert. denied*, 449 U.S. 912 (1980).

[12] *See infra* notes 70-193 and accompanying text.

[13] *See infra* notes 196-261 and accompanying text.

[14] *See infra* notes 262-87 and accompanying text.

[15] The reader may observe an example of this question discussed in the Oregon Supreme

I. MARKET SHARE LIABILITY VARIATIONS

In the early 1980's, the California Supreme Court announced a unique theory of causation in *Sindell v Abbott Laboratories*.[16] *Sindell* was one of the early decisions involving litigation that linked the drug diethylstilbesterol ("DES") to cancer in the daughters of women exposed to the drug during pregnancy [17] The litigants presented the court with a difficult and complex problem: May a plaintiff injured by an identifiable drug ingested by her mother during pregnancy, who cannot identify the manufacturer of the injury causing product, hold several manufacturers liable based solely upon the fact that each of the manufacturers produced a similar, fungible product?[18] In effect, the plaintiff asked the court to decide whether she could recover for injuries despite her inability to prove the element of causation-in-fact.[19]

Judith Sindell brought her action against eleven drug companies that manufactured the drug DES between the years 1941 and 1971.[20]

Court's decision, Senn v. Merrell-Dow Pharmaceuticals, Inc., 751 P.2d 215 (Or. 1988). For a more complete discussion of the *Senn* case, see *infra* notes 276-85 and accompanying text.

[16] 607 P.2d 924, 163 Cal. Rptr. 132 (1980).

[17] Some cases involving DES preceded *Sindell*. *See* Gray v. United States, 445 F. Supp. 337 (S.D. Tex. 1978) (granting defendant's summary judgment motion due to the plaintiff's failure to present evidence tending to show that the defendant manufactured the injury causing drug); McCreery v. Eli Lilly & Co., 150 Cal. Rptr. 730 (Cal. Ct. App. 1978) (affirming lower court's decision to grant the defendant's summary judgment motion due to the plaintiff's inability to sustain a cause of action based on concerted action theory); Abel v. Eli Lilly & Co., 289 N.W.2d 20 (Mich. 1979), *modified*, 343 N.W.2d 164 (Mich. 1984) (denying the defendant's motion to dismiss even though the plaintiff could not identify the specific manufacturer of the injury causing product).

[18] Sindell v. Abbott Laboratories, 607 P.2d 924, 928, 163 Cal. Rptr. 132, 136 (1980).

[19] *Id.*

[20] *Id.* at 925, 163 Cal. Rptr. at 133. DES is a synthetic compound of the female hormone estrogen. PHYSICIANS' DESK REFERENCE 1211-12 (44th ed. 1990). In two principal studies, conducted in the 1940's, researchers concluded that DES was an effective treatment to prevent miscarriage and premature delivery. Karnakey, *The Use of Stilbestrol for Treatment of Threatened and Habitual Abortion and Premature Labor: A Preliminary Report*, 35 S. MED. J. 838 (1942); Smith, *Diethylstilbestrol in the Prevention and Treatment of Complications of Pregnancy*, 56 AM. J. OBSTETRICS & GYNECOLOGY 821 (1948). Various sources have estimated that between 100 and 300 companies produced DES between 1941 and 1971. *See Gray*, 445 F Supp. at 338 (estimating that at least 100 companies produced DES); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1072, 541 N.Y.S.2d 941, 944 (N.Y. 1989) (estimates approximately 300 manufacturers produced the drug), *cert. denied*, ____ U.S. ____, 110 S. Ct. 350 (1989). In the early 1970's, the *New England Journal of Medicine* published two articles linking DES to vaginal adenocarcinoma and other diseases in the daughters of women who ingested the drug during pregnancy. Greenwald, Barlow, Nasca & Burnett, *Vaginal Cancer After Maternal Treatment with Synthetic Estrogens*, 285 NEW ENG. J. MED. 390 (Aug. 1971); Herbst, Ulfelder & Poskanzer, *Adenocarcinoma of the Vagina*, 284 NEW ENG. J. MED. 878 (Apr. 1971). In

As a result of her mother's exposure to the drug, Ms. Sindell developed a malignant bladder tumor which was surgically removed.[21] Each of the plaintiff's causes of action[22] alleged that the defendants were jointly liable because they collectively acted through express and implied agreements to exploit one another's various testing and marketing methods.[23] The plaintiff could not, however, identify the specific manufacturer of the product her mother ingested due, in part, to the fact that DES was essentially a generic or fungible product.[24]

1971, following these reports, the Food and Drug Administration required DES manufacturers to list pregnancy as a contraindication for their drug, and also required the manufacturers to include a warning on the product's label indicating that the drug may cause vaginal cancer. Food and Drug Admin., *Diethylstilbestrol Contraindicated in Pregnancy*, U.S. Dep't of Health, Educ. & Welfare Drug Bull. (Nov. 1971).

For a more thorough discussion of the history and development of DES, see Comment, *Market Share Liability: A New Method of Recovery for D.E.S. Litigants*, 30 CATH. U.L. REV. 551, 554-56 (1981) [hereinafter Comment, *Recovery for D.E.S. Litigants*]; Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 963-67 (1978) [hereinafter Comment, *Enterprise Liability*]; Comment, *Overcoming the Identification Burden in DES Litigation: The Market Share Liability Theory*, 65 MARQ. L. REV. 609, 611-13 (1982) [hereinafter Comment, *Overcoming the Identification Burden*].

[21] *Sindell*, 607 P.2d at 926, 163 Cal. Rptr. at 134. Instead of developing vaginal cancer, Ms. Sindell, as in the majority of cases, developed a less severe injury called adenosis. *Id.* Adenosis is a benign but irregular and abnormal placement of tissue on the cervix of the vagina. Herbst, Ulfelder & Poskanzer, *supra* note 20, at 880; Comment, *Enterprise Liability*, *supra* note 20, at 965 n.10.

[22] Ms. Sindell's complaint, in addition to alleging joint liability of all manufacturers under alternative liability, concert of action and enterprise liability, also alleged other causes of action, premised upon theories of strict liability, breach of express and implied warranties, false and fraudulent misrepresentations, misbranding of drugs, civil conspiracy and lack of consent. *Sindell*, 607 P.2d at 926, 163 Cal. Rptr. at 134.

[23] The *Sindell* court provided an analysis of the plaintiff's claim that the defendants should be held jointly liable under theories of alternative liability, *id.* at 928-31, 163 Cal. Rptr. at 136-39, concert of action, *id.* at 931-33, 163 Cal. Rptr. at 139-41, and enterprise liability. *Id.* at 933-35, 163 Cal. Rptr. at 141-43.

[24] *Id.* at 926, 163 Cal. Rptr. at 134. Fungible is defined as "of such a kind or nature that one specimen or part may be used in place of another specimen or equal part in the satisfaction of an obligation: interchangeable." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 499 (9th ed. 1983). Several decisions have discussed whether a particular product is fungible for purposes of market share liability. In Shackil v. Lederle Laboratories, 561 A.2d 511 (N.J. 1989), the New Jersey Supreme Court considered whether the drug Diptheria-Pertussis-Tetanus ("DPT") is a fungible product. In *Shackil*, a child and her parents filed an action against numerous manufacturers of DPT seeking recovery under a market share liability theory. The court provided a detailed discussion of how DPT is prepared and noted that manufacturers may produce the product in three separate manners. *Id.* at 521. In America, however, manufacturers use only two methods, a whole-cell and split-cell vaccine. *Id.* The court found that manufacturers could produce the product in different forms and, therefore, the product was not fungible even though it contained very similar biological formulas. *Id.* at

Until the *Sindell* decision, courts routinely dismissed actions involving fungible products when the plaintiff was unable to identify the manufacturer of the injury causing product.[25] The *Sindell* court, however, following the rationale outlined in a *Fordham Law Review* article,[26] dramatically altered the face of tort law by adopting the theory of market share liability. In short, the court's decision abrogated the requirement that a plaintiff prove that a defendant's conduct was the cause-in-fact of the plaintiff's injury Instead, the plaintiff need only prove that she has joined a substantial percentage of those manufacturers engaged in manufacturing the product during the time of the plaintiff's injury.[27] Each manufacturer is then held liable for a portion of the judgment based on the defendant's share of the product market.[28] To escape liability, a defendant must establish that it did not produce the product that caused the plaintiff's injury.[29]

The *Sindell* court's discussion of market share liability raised more questions than it answered:[30] What is a substantial percentage

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521-22.

In asbestos products litigation, plaintiffs have attempted to argue that asbestos is a fungible product for purposes of market share liability. In Goldman v. Johns-Manville Sales Corp., 514 N.E.2d 691 (Ohio 1987), the court compared the *Sindell* rationale for market share liability in DES cases with the theory's application in asbestos products litigation. The court found that asbestos was not fungible. *Id.* at 700. Several factors affected the court's determination: asbestos is not a product but a generic name for a family of minerals, asbestos is contained in from 2000 to 3000 different product forms, and in the specific product involved in the *Goldman* case, manufacturers used different amounts of asbestos in their similar products. *Id.* at 700-01; *see also* Kinnett v. Massachusetts Gas & Elec. Supply Co., 716 F Supp. 695, 699-701 (D.N.H. 1989) (holding that the evidence indicated that different brands of heat tape were not generic or fungible where the accident was in no way attributable to similar nature of products); Marshall v. Celotex Corp., 651 F Supp. 389, 392 (E.D. Mich. 1987) (holding asbestos not a fungible product); Mullen v. Armstrong World Indus., Inc., 246 Cal. Rptr. 32, 35-37 (Cal. Ct. App. 1988) (same); Case v. Fibreboard Corp., 743 P.2d 1062, 1065-66 (Okla. 1987) (same).

[25] *See Gray*, 445 F Supp. at 337; *Abel*, 289 N.W.2d at 20.

[26] Comment, *Enterprise Liability*, *supra* note 20.

[27] *Sindell*, 607 P.2d at 937, 163 Cal. Rptr. at 145. One of the criticisms courts and commentators have directed against the *Sindell* decision is the court's failure to define what constitutes a "substantial share" of the product market. *See* Martin v. Abbott Laboratories, 689 P.2d 368, 381 (Wash. 1984) (rejecting the *Sindell* version of market share liability due, in part, to the *Sindell* court's failure to define "substantial share"); Fischer, *Products Liability—An Analysis of Market Share Liability*, 34 VAND. L. REV. 1623, 1639 (1981) (criticizing *Sindell* for its failure to define "substantial share" of product market). On this point, the student comment that the *Sindell* court's analysis relied upon suggested that a plaintiff must join at least 75 to 80 percent of the market in order to satisfy the "substantial share" requirement of market share liability. *See* Comment, *Enterprise Liability*, *supra* note 20, at 996.

[28] *Sindell*, 607 P.2d at 937, 163 Cal. Rptr. at 145.

[29] *Id.*

[30] Only eight years after *Sindell*, the California Supreme Court was forced to clarify its

of the product market? How should courts calculate the market share—according to the national, regional or local market? Does the plaintiff or each individual manufacturer have the burden of establishing a defendant's market share? What effect may joint and several liability have on the apportionment of damages under a market share theory?

The Washington Supreme Court's decision in *Martin v. Abbott Laboratories*[31] was one of the first cases to address some of these unresolved issues. The *Martin* case also involved DES litigation. The court faced essentially the same question presented in *Sindell*: May a plaintiff recover from the manufacturer of a fungible product without proving that the specific product manufacturer was the cause-in-fact of the plaintiff's injury?[32] *Martin* also created a theory of causation solely dependent upon a finding that an individual defendant participated in the manufacture and sale of the injury causing product.[33] However, the *Martin* court rejected much of the *Sindell* court's discussion of market share liability [34]

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earlier decision. In Brown v. Superior Court, 751 P.2d 470, 245 Cal. Rptr. 412 (Cal. 1988), the court resolved two issues that arose after *Sindell*. First, the court held that market share liability applied only to strict liability products litigation, not to fraud or breach of warranty theories. *Id.* at 483-84, 245 Cal. Rptr. at 426. Second, the court explained that market share liability gives rise only to several liability, instead of joint liability among all defendants. *Id.* at 485-87, 245 Cal. Rptr. at 426-27.

Although no court, to date, has addressed this concern, an analysis of market share liability leads one to question what effect the theory will have on the issue of a plaintiff's comparative fault. For example, market share liability utilizes a statistical probability that a defendant caused the plaintiff's injury, based on the defendant's market share. On the other hand, comparative fault reduces a plaintiff's recovery in whole or in part based upon the defendant's showing that the plaintiff was in some manner at fault for her own injury. *See, e.g.*, ILL. REV. STAT. ch. 110, para. 21-1116 (1987) (Illinois adopted a modified contributory fault standard). For a more complete discussion of comparative fault application in the products liability context, see Comment, *Modified Contributory Fault and Strict Products Liability: Illinois' Silent Disposal of Misuse and Assumption of Risk Turns Back the Evolution*, 23 J. MARSHALL L. REV. 247 (1990).

How will courts resolve the tension between market share liability's presumption that a defendant is the cause of the plaintiff's injury in proportion to the defendant's market share, and a finding that the plaintiff caused part or all of her own injury? Most likely, some courts will undertake a complex and confusing arithmetical analysis to answer questions concerning respective causation and liability. *See* Collins v. Eli Lilly & Co., 342 N.W.2d 37, 48-51 (Wis. 1984) (court applied several factors to determine relative comparative fault among several defendants in market share context), *cert. denied*, 469 U.S. 826 (1984). Other courts may find that market share liability is unworkable because it creates evidentiary problems regarding causation that are too complex for a jury to resolve. *See* Smith v. Eli Lilly & Co., 560 N.E.2d 324, 344-45 (Ill. 1990) (court rejected market share liability due, in part, to finding that the theory presents unresolvable evidentiary problems).

[31] 689 P.2d 368 (Wash. 1984).

[32] *Id.* at 371.

[33] *Id.* at 382.

[34] The *Martin* court rejected *Sindell*'s requirement that a plaintiff must join a substantial

In fashioning its theory, identified as "Market-Share Alternative Liability,"[35] the court set out to do away with some of the uncertainty it found in the *Sindell* holding. The *Martin* court criticized *Sindell* on two primary grounds: the court's failure to define what constitutes a substantial share of the market, and the distortion in apportionment of damages that results from requiring an incomplete segment of the business market to bear the responsibility for one hundred percent of the plaintiff's damages.[36] As a result, the *Martin* court derived its own theory that allowed the plaintiff to commence suit against only one manufacturer.[37] To recover, the plaintiff must show that the defendant manufactured the type[38] of product that caused her injuries, and that the manufacturing of the product was a breach of the defendant's duty of care.[39] A defendant still may escape liability by proving that it did not produce the type of injury causing product. A manufacturer also may avoid liability by establishing that it neither marketed the product during the time of the plaintiff's injury nor marketed the product in the plaintiff's geographic region.[40]

The *Martin* approach treats those defendants unable to exculpate themselves as equal members of the plaintiff's market.[41] Consequently, each defendant shares equally in the satisfaction of any

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[34] The *Martin* court rejected *Sindell*'s requirement that a plaintiff must join a substantial share of the product market. *See infra* notes 35-39 and accompanying text. In addition, the decision permitted the defendant to present more evidence in order to avoid liability under the market share theory. *See infra* notes 40-45 and accompanying text.

[35] *Martin*, 689 P.2d at 381.

[36] *Id.* The court asked the reader to assume that the plaintiff's damages totalled $100,000. The plaintiff joins as defendants 60 percent of the market. Defendant X produces 20 percent of the total market, but in this case, 33 percent of the substantial market share the plaintiff has joined as defendants. Hence, while defendant X may produce only 20 percent of the actual market, under market share liability the defendant represents 33 percent of a substantial market share the plaintiff has joined. Instead of the defendant paying $20,000 of the plaintiff's damages, under *Sindell* the defendant must pay $33,333 (an increase of $13,333, which has no relation to the defendant's actual market share). Of course, as the substantial share requirement is reduced, a defendant's market percentage, and eventual liability for a plaintiff's injury is increased. *Id.* For example, if the substantial share requirement is only 40 percent of the relevant market, then under *Sindell* defendant X must now pay half ($50,000) of the plaintiff's entire judgment.

[37] *Id.* at 382.

[38] A plaintiff need not prove that a defendant produced the precise tablet her mother ingested. Instead, the plaintiff must show only that the manufacturer produced DES of the same dosage, color, shape, size, etc., as that taken by her mother. *Id.*

[39] *Id.* The plaintiff need not prove that her mother took DES during the time, or in the geographic region, in which a particular manufacturer produced DES. *Id.*

[40] *Id.*

[41] *Id.* at 383.

judgment.[42] A defendant may rebut this presumption by establishing its actual market share;[43] defendants who cannot do so have their presumed market shares adjusted to total 100 percent of the product market.[44] The court went on to illustrate that in those circumstances where all defendants are able to establish their actual market, the plaintiff may recover less than the entire judgment awarded.[45] The court believed that its decision served to balance the competing interests of plaintiffs and defendants. It noted that eliminating a plaintiff's burden of proving causation-in-fact is liability-enhancing, while the court's approach to apportionment of damages is liability-reducing because a defendant is liable according to its actual market share.[46]

Although two available views on market share liability existed, the New York Court of Appeals chose to reject both and created a third alternative in the case of *Hymowitz v Eli Lilly & Co.*[47] *Hymowitz* was factually similar to its predecessors; the case involved litigation concerning injuries caused by *in utero* exposure to DES.[48] The issue also was substantially the same: Does the failure to identify the specific manufacturer of the injury causing product preclude a plaintiff from recovering for her injuries?[49] Although the *Hymowitz* court's decision to adopt market share liability also removed the burden of defendant identification, the New York court's version of the theory was unique in many respects.

Hymowitz took note of the practical difficulties of defining and establishing an appropriate market from which to determine the

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[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.* To illustrate this point, the court asked the reader to assume that the plaintiff has a $100,000 judgment and has named 80 percent of the product market. Defendant X establishes that it represents only 20 percent of the market and defendant Y establishes that it represents only 60 percent of the market. In this case, defendant X must pay $20,000 and defendant Y pays $60,000. Hence, 20 percent or $20,000 of the plaintiff's judgment goes unsatisfied because the entire product market was not joined as defendants. *Id.*

[46] *Id.* In George v. Parke-Davis, 733 P.2d 507 (Wash. 1987), three years after the *Martin* case, the Washington Supreme Court attempted to refine further its market share alternative liability theory. The court's focus in this case was to answer the question of how other courts should calculate the relevant market. The court held that if evidence exists that will establish the relevant market at the specific location the plaintiff's mother purchased DES, then the local market, as opposed to a national or regional market, should form the basis of the relevant geographic market. *Id.* at 512.

[47] 539 N.E.2d 1069, 541 N.Y.S.2d 941 (N.Y. 1989), *cert. denied*, ____ U.S. ____, 110 S. Ct. 350 (1989).

[48] *Id.* at 1071, 541 N.Y.S.2d at 943.

[49] *Id.* at 1072-73, 541 N.Y.S.2d at 944-45.

defendant's market share.[50] The court recognized that other jurisdictions had struggled with the question of whether to measure a product market in local, county, state, or national terms.[51] In most instances, courts have based their determinations on the circumstances in each individual case.[52] Faced with the task of providing guidance to trial courts in over 800 potential DES cases in New York, the *Hymowitz* court decided that the only practical and workable alternative was to measure market share based on a national standard.[53] Consequently, a defendant's liability is not correlative of the likelihood that the defendant caused an injury in a particular geographic region.[54] Instead, the court looks at the defendant's conduct and determines to what extent the defendant has exposed the public at large to a risk of injury [55] Hence, each defendant's liability is apportioned according to its total culpability for marketing DES for use during pregnancy [56] Moreover, liability is based upon the overall risk each defendant creates, and not upon the likelihood that the defendant caused injury in an individual case.[57] Thus, the *Hymowitz* court held that a defendant may not exculpate itself from liability by establishing that it did not market the product (1) in the form that caused the plaintiff's injury, (2) at the time of the plaintiff's injury, or (3) in the plaintiff's geographical region.[58]

The court tempered its decision to eradicate what had been until that time most of the available defenses in a market share liability context by allowing a defendant to assert that it did not market its product for the particular use that later resulted in the plaintiff's injury.[59] In short, the court held that a manufacturer would not be liable if it did not produce or sell DES for use during pregnancy [60]

The *Hymowitz* decision, much like the *Martin* case, also held joint and several liability between tortfeasors inapplicable under

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[50] *Id.* at 1077, 541 N.Y.S.2d at 949.

[51] *See id.* at 1076-77, 541 N.Y.S.2d at 948-49 (citing *Brown*, 751 P.2d at 470, 245 Cal. Rptr. at 412); *George*, 733 P.2d at 507; *Martin*, 689 P.2d at 368; *Collins*, 342 N.W.2d at 37.

[52] *See George*, 733 P.2d at 513 (noting that determination of relevant market depends upon available evidence in each individual case).

[53] *Hymowitz*, 539 N.E.2d at 1077-78, 541 N.Y.S.2d at 949-50.

[54] *Id.* at 1078, 541 N.Y.S.2d at 950.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id. See Martin*, 689 P.2d at 382 (setting forth available defenses to market share liability).

[59] *Hymowitz*, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950.

[60] *Id.*

market share liability:[61] Courts may only find product manufacturers severally liable. Hence, when not all the manufacturers are before the court, the available defendants' respective liabilities are not inflated to account for all of the plaintiff's injury.[62] Consequently, some plaintiffs will not recover 100 percent of their damages because they have not joined 100 percent of the product market.[63]

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[61] *Id.*, *see Martin*, 689 P.2d at 383 (holding that defendants are severally liable in accordance with their established market share).

[62] *Hymowitz*, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950.

[63] *Id.* For commentary favoring the New York court's decision, see Twerski, *Market Share—A Tale of Two Centuries*, 55 BROOKLYN L. REV. 869, 870-75 (1989) (noting *Hymowitz* provides a predictable and calculable market, removes exculpatory evidence, allows only several liability, and relates liability to increased risk of harm rather than actual harm). *But see* Wilner & Gayer, *Hymowitz v. Eli Lilly: New York Adopts a "National Risk" Doctrine for DES*, 25 TORT & INS. L.J. 150, 154-56 (1990) (arguing that the court disregards important element of causation, holds DES manufacturers who did not do business in New York liable for injuries the DES product has caused in that state, denies a defendant's ability to present exculpatory evidence, and will lead to increased litigation).

Several months after *Hymowitz* was decided, the New York Supreme Court released its opinion in Enright v. Eli Lilly & Co., 553 N.Y.S.2d 494 (N.Y. Sup. Ct. 1990), *rev'd*, 1991 WL 18192 (Feb. 19, 1991) (Westlaw). The granddaughter of a woman who had ingested DES while pregnant brought an action against several drug manufacturers for birth defect injuries she allegedly sustained due to her mother's *in utero* exposure to DES. *Id.* at 494. The plaintiff's mother's exposure to DES caused reproductive anatomical abnormalities and deformities that prevented the mother from carrying the plaintiff to full term. The plaintiff was born prematurely, suffering severe disabilities as a result. *Id.* The litigants asked the court to determine whether to apply the *Hymowitz* version of market share liability to the situation where a granddaughter sustains injuries from her grandmother's ingestion of DES. *Id.* at 494-95. In essence, the court had to determine whether it would hold manufacturers liable for the pre-conception injury of a plaintiff. *Id.* Relying on *Hymowitz*, the court chose to extend market share liability to granddaughters of DES recipients. *Id.* at 497.

Judge Weiss's dissent argued that tort law should not permit recovery for pre-conception injuries. *Id.* at 499 (Weiss, J., dissenting). He relied primarily on Catherwood v. American Sterilizer Co., 511 N.Y.S.2d 807 (A.D. 4 Dept. 1987), *appeal dismissed*, 515 N.E.2d 908, 521 N.Y.S.2d 222 (1987), in holding that public policy dictates the need to limit liability for injuries in chemical exposure and ingestion cases. *Enright*, 553 N.Y.S.2d at 499. The dissent also held that the majority's reliance on *Hymowitz* was misplaced. *Hymowitz* created a new version of market share liability but did not open the door to expose defendants to liability for a plaintiff's pre-conception injury. *Id.* at 499.

The New York Court of Appeals, in review of the *Enright* decision, recently held that the Supreme Court erred in extending a cause of action for pre-conception injuries. Enright v. Eli Lilly & Co., 1991 WL 18192 (Feb. 19, 1991) (Westlaw). The court, relying principally on Albala v. New York, 479 N.E.2d 786, 445 N.Y.S.2d 108 (1981), held that public policy did not favor a cause of action for pre-conception tort injuries in strict product liability claims, over a policy of confining liability to only those facts which avoid ascribing liability in an artificial or arbitrary manner. *Id.* at 3. In short, the court of appeals favored the certainty of establishing liability over the plaintiff's right of recovery. While this decision does not focus on the theory of market share liability, its significance remains apparent as other jurisdictions may also consider the application of market share liability in the third-generation liability

Each of these three decisions, and others like them,[64] drastically changed traditional notions of tort law As one might expect, the advent of market share liability generated substantial commentary [65]

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context.

For a further discussion of a defendant's increased exposure to liability for DES granddaughter injuries, see Sherman, *New DES Front*, Nat'l L.J., March 12, 1990, at 1, col. 1.

[64] In *Collins*, 342 N.W.2d at 50, the Wisconsin Supreme Court held that a plaintiff need not join a substantial market share in order to sustain a cause of action under market share liability. Defendants may implead other manufacturers into the case to spread liability. *Id.* at 51. Defendants who prove they did not manufacture the injury causing product may avoid liability. *Id.* at 52. Finally, a jury will assign liability to defendants in proportion to the amount of risk each defendant has created for the general public. *Id.* at 53.

In McCormack v. Abbott Laboratories, 617 F Supp. 1521 (D. Mass. 1985), the plaintiff sought recovery for injuries resulting from her *in utero* exposure to DES. The plaintiff and defendants asked the district court to decide whether the Massachusetts Supreme Court's decision in Payton v. Abbott Laboratories, 437 N.E.2d 171 (Mass. 1982) precluded liability under a market share theory. *McCormack*, 617 F Supp. at 1525. The *McCormack* court held that *Payton* did not preclude the plaintiff's recovery. *Id.* The court's holding allowed a plaintiff to sustain a cause of action without identifying the cause-in-fact of her injury. *Id.* at 1526. Instead, the plaintiff need prove only that her mother ingested injury causing DES, that the defendant marketed the type of DES her mother took, and that the defendant acted negligently in producing the product. To escape liability, a defendant must prove that it did not manufacture the type of DES the plaintiff's mother took, did not market the product in the relevant geographical region, or did not market the product at the time the plaintiff's mother ingested the DES. *Id.* As to apportionment of liability, the court followed the *Martin* approach.

One of the most recent decisions involving market share liability is the Florida Supreme Court's holding in Conley v. Boyle Drug Co., 570 So. 2d 275 (Fla. 1990). In *Conley*, the plaintiff was diagnosed with cervical adenosis resulting from her *in utero* exposure to DES. *Id.* at 279. She brought an action against eleven manufacturers of the drug alleging negligence, strict liability, breach of warranty, and fraud. The Florida Supreme Court was asked to decide whether Florida recognizes a cause of action for the negligent manufacturing and marketing of a product if the plaintiff, after a reasonable effort, is unable to establish that a particular defendant was responsible for the injury. *Id.* The court answered that question in the affirmative and chose to adopt the Washington Supreme Court's version of market share liability as articulated by *Martin*. *Id.* at 283. Consequently, the plaintiff need only join one of the product manufacturers and allege the following: (1) the plaintiff's mother took DES that caused the plaintiff's injuries, (2) the defendant produced the type of product plaintiff's mother ingested, and (3) the defendant's conduct was a breach of a legally recognized duty to the plaintiff. *Id.* at 282 (citing *Martin*, 689 P.2d at 382).

As a slight modification to the *Martin* version of liability, the *Conley* court held that the market share theory was available only to those plaintiffs that, after the exercise of due diligence, are not able to satisfy the element of causation-in-fact. *Conley*, 570 So. 2d at 286. Consequently, due diligence became the first element under the Florida Supreme Court's version of market share liability. *Id.* While the addition of the due diligence standard is a notable attempt to cure the problems that market share liability creates, as this Article shows, the due diligence requirement is not sufficient to resolve many of the moral and economic dilemmas presented under the market share theory. For a further discussion of these problems, see *infra* notes 70-185 and accompanying text.

[65] For examples of commentators who support the market share theory of liability, see Miller & Hancock, *Perspectives on Market Share Liability: Time for a Reassessment?*, 88 W

It is helpful to take note of the debate surrounding this unique theory. As other commentators have shown, market share liability initially seems an equitable and efficient resolution of the competing interests between innocent plaintiffs and defendants. A closer look shows that this theory does great violence to the traditional concepts that form the basis of liability in tort.

II. THE RESPONSE TO MARKET SHARE LIABILITY

"[T]he central policy issue in tort law is whether the principal criterion of liability is to be based on individual fault or on a wide distribution of risk and loss."[66] Twentieth century scholars regularly debate this tort law dialectic. In its most rudimentary terms, the conflict is one between "moralists" and "economists."[67] Moralists emphasize principles of equity and justice as the bases of fault and liability in tort.[68] Economists promote economic efficiency as the proper basis for tort liability [69] Without discussing the relative merits

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VA. L. REV. 81 (1985); Robinson, *Multiple Causation in Tort Law: Reflections on the DES Cases*, 68 VA. L. REV. 713 (1982); Spitz, *From Res Ipsa Loquiter to Diethylstilbestrol: The Unidentifiable Tortfeasor in California*, 65 IND. L.J. 591 (1990); Twerski, *supra* note 63; Comment, *Recovery for D.E.S. Litigants*, *supra* note 20; Comment, *Enterprise Liability*, *supra* note 20; Comment, *Overcoming the Identification Burden*, *supra* note 20; Comment, *The DES Causation Conundrum: A Functional Analysis*, 32 N.Y.L. SCH. L. REV. 939 (1987) [hereinafter Comment, *Causation Conundrum*]; Comment, *The DES Manufacturer Identification Problem: A Florida Public Policy Approach*, 40 U. MIAMI L. REV. 857 (1986). *But see* Cochran, *Plaintiff's Creative Approaches to Prove Who or What Caused Injury*, 57 DEF. COUNS. J. 452 (1990); Fischer, *supra* note 27; Wilner & Gayer, *supra* note 63; Comment, *Market Share Liability for Defective Products: An Ill-Advised Remedy for the Problem of Identification*, 76 NW. U.L. REV. 300 (1981) [hereinafter Comment, *An Ill-Advised Remedy*]; Comment, *Market Share Liability: A Plea for Legislative Alternatives*, 1982 U. ILL. L. REV. 1003 [hereinafter Comment, *Legislative Alternatives*]; Comment, *The Application of a Due Diligence Requirement to Market Share Theory in DES Litigation*, 19 U. MICH. J.L. REF. 771 (1986) [hereinafter Comment, *Due Diligence Requirement*].

[66] Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 499 (1961) (citing C. GREGORY & H. KALVERN, CASES ON TORTS 689 (1959)).

[67] S. Herwin, *Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions*, 136 U. PA. L. REV. 729, 743-44 (1988); Comment, *An Ill-Advised Remedy*, *supra* note 65, at 314.

[68] Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 151 (1973). For purposes of this article the authors will utilize the theories of Cicero, Immanuel Kant, John Locke, Dean Roscoe Pound, H.L.A. Hart, and Tony Honoré to develop the traditional moralist view of tort law.

[69] R. POSNER, ECONOMIC ANALYSIS OF LAW 6 (1972). Along with Judge Posner, the major proponents of the economic and law movement are Dean Guido Calabresi and R.H. Coase. *See* G. CALABRESI, THE COSTS OF ACCIDENTS (1970); Calabresi, *supra* note 66; Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). To the extent this Article discusses the economic theory of tort law, the authors focus primarily on the theories of Guido Calabresi.

of either position, this Article argues that under either approach, market share liability fails to satisfy the underlying policy goals.

A. The Moralist Position

Moralists contend that law should reflect society's notions of equity and justice. Accordingly, liability in tort presupposes the concept of moral blame.[70] Simply stated, for a jury to find a defendant liable, justice and equity require a showing that the defendant's actions violated accepted societal standards of conduct.[71]

At first glance, market share liability seems to satisfy moral objectives. In fact, and as some courts and commentators have noted, as between an innocent plaintiff and a potentially culpable defendant, a moralist position requires courts to impose liability on the defendant.[72] Justice requires that when balancing the interest of an innocent plaintiff against the interest of a blameworthy defendant, tort law serves moral objectives by finding the defendant liable. While there is a certain appeal to this argument, it is fatally flawed because the analysis fails to take note of one of the fundamental policy goals of the moralist theory

Market share liability abrogates the requirement that liability attach only when the defendant's actions are the cause-in-fact of the plaintiff's injury Causation in tort law is bifurcated into two distinct

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[70] H. HART & T. HONORÉ, CAUSATION IN THE LAW 63 (2d ed. 1985). As Dean Pound also noted, "[l]iability could flow only from culpable conduct or from assumed duties" and, "'[e]very act of man which causes damage to another obliges him through whose fault it happened to make reparation.' In other words, liability is to be based on an act, and it must be a culpable act." R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 79, 81 (rev. ed. 1954) (citing the French Civil Code's theory of delictal liability). *See* Zwier, *"Cause in Fact" in Tort Law—A Philosophical and Historical Examination*, 31 DE PAUL L. REV 769, 773 (1982) (analysis of fault focuses on blameworthiness, while analysis of causation focuses on identification of responsible party).

[71] Fischer, *supra* note 27, at 1629-30.

[72] *See, e.g.*, Sindell v. Abbott Laboratories, 607 P.2d 924, 936, 163 Cal. Rptr. 132, 144 (1980) ("[A]s between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury."), *cert. denied*, 449 U.S. 912 (1980); Comment, *Enterprise Liability*, *supra* note 20, at 995-96 (same). *But see* Robinson, *supra* note 65, at 735 ("Even if, as some torts scholars have supposed, the law favors compensation of accident victims, it does not follow that it also favors liability. Absent some reason to believe that a particular defendant caused the plaintiff's injury, or that because of his relationship to the plaintiff, he should bear the plaintiff's loss, it would be a strange legal rule that as *a matter of policy* favored holding a defendant liable and so presumed him responsible.") (emphasis in original). It is precisely a policy reason, however, that has led courts to adopt market share liability.

concepts. Causation-in-fact is a question for the trier of fact.[73] Proximate causation, on the other hand, traditionally is a policy question that limits liability to those circumstances where the defendant's conduct has a sufficient nexus to the plaintiff's injury.[74] Market share liability removes the cause-in-fact element and replaces it with a concept this Article shall describe as "probable causation." The authors utilize the term to describe the purely statistical probability that a particular defendant did in fact cause the plaintiff's injury. The reader should not understand the term to mean that a defendant more probably than not caused the plaintiff's injury, or that it was foreseeable that the defendant's actions would cause the plaintiff's injury.

Market share theory no longer requires the plaintiff to prove an essential question of fact—whether the defendant did in fact cause the plaintiff's injury. Instead, courts applying market share liability have held that if a defendant markets a fungible product that causes injury, the court will find that the product is a probable cause of that injury[75] in proportion to the defendant's market share. Courts have taken this approach in an attempt to allow plaintiffs to recover when they cannot factually identify the injury causing party.

The criticism of probable causation as a replacement to causation-in-fact lies at the very essence of the moralist approach to tort law. Under this theory, principles of "corrective justice"[76] seek to

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[73] Firak, *The Developing Policy Characteristics of Cause-in-Fact: Alternative Forms of Liability, Epidemiological Proof and Trans-Scientific Issues*, 63 TEMP. L. REV. 311, 312 (1990) (citing Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60, 60 (1956)). *But see* Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1737, 1823 (1985) (arguing that policy also influences determinations regarding cause-in-fact).

[74] *See* Firak, *supra* note 73, at 311.

[75] *See, e.g.*, Martin v. Abbott Laboratories, 689 P.2d 368, 383 (Wash. 1984) (where defendant can establish actual market share, market share theory holds the defendant severally liable in proportion to the defendant's market share).

[76] Richard Wright provides a concise definition of corrective justice. As Professor Wright notes, the theory is premised on the right of individuals to freely pursue life plans or goals. Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. DAVIS L. REV. 1141, 1180 (1988). The traditional corrective justice theory assumes compensation for only those plaintiffs who establish that they were injured by the tortious conduct of another. Compensation is rendered to discourage individuals from exposing others to an unreasonable and foreseeable risk of injury. *Id.* at 1179.

Some scholars suggest that this premise is derived from the works of Immanuel Kant. *See* Weinrib, *Causation and Wrongdoing*, 63 CHI. [-] KENT L. REV. 407, 449 (1987) [hereinafter Weinrib I]. Societal order should not be maintained absent a respect for individual rights and freedoms, measured against the rights and freedoms of others. I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 34 (1965). As Professor Weinrib notes, "Kant's legal philosophy was

compensate only those plaintiffs who can show that a particular tortfeasor caused their injury.[77] An example illustrates this point.

While on her way home from work Penny is injured in an automobile accident when another driver fails to stop at a red light, enters the intersection, and hits Penny's car. Penny is, by no fault

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thus an exploration of the intelligibility of doing and suffering as between free and equal moral persons." Weinrib I, *supra*, at 449. It is the concept of conduct and harm, or doing and suffering, that balances the interests of all individuals' rights to both personal autonomy and freedom from harm. *Cf.* Weinrib, *Law as a Kantian Idea of Reason*, 87 COLUM. L. REV. 472, 479-80 (1987). For traditional corrective justice theorists, causation-in-fact is the scale on which individual rights are balanced, and a necessary part of any liability equation.

In Professor Schroeder's recent articles, he presents a public law view of corrective justice that draws many of the same conclusions previously outlined by Jules Coleman in his numerous writings on the subject of retributive justice. *See* Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439 (1990) [hereinafter Schroeder I]; Schroeder, *Corrective Justice, Liability for Risks, and Tort Law*, 38 UCLA L. REV. 143 (1990) [hereinafter Schroeder II]. For a discussion of Coleman's views on corrective justice, see J. MURPHY & J. COLEMAN, THE PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 167-89 (1984); Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421 (1982). In short, Professor Schroeder contends that liability for risk-creation is compatible with the underlying premise of corrective justice. Schroeder II, *supra*, at 143. He explains that a Kantian framework compels an *ex ante* or "before the fact" view of tort liability. Schroeder I, *supra*, at 452-53. Responsibility for an actor's wrongful conduct is measured at the time of action, rather than *ex post* or "after the fact," the time at which the conduct causes injury. *Id.* at 451-60. Schroeder postulates a world view in which one bears responsibility and, therefore, pays compensation to a fund akin to private insurance, based solely upon the decision to engage in risk-increasing behavior. *See id.* at 468 ("A system that imposes liability for choices can be a system to provide compensation for the consequences of actions. The difference is that it requires compensation from all participants in a class of actions, rather than only those whose actions fortuitously cause ultimate harm."). Such a system, the author notes, maximizes the role of predictability in matters of individual accountability for tortious actions. *Id.* at 459, 464-66. One might question, however, how the removal of causation makes predicting liability more *certain*, unless one is to say that liability for creating risks is more predictable because *liability* is more certain. *Cf.* Simons, *Corrective Justice and Liability for Risk-Creation: A Comment*, 38 UCLA L. REV. 113, 118 (1990).

Schroeder defends his *ex ante* view of corrective justice in tort law by suggesting that the bipolar relationship in litigation must be rejected. Schroeder I, *supra*, at 470-71. A public law theory provides an acceptable vehicle for *ex ante* corrective justice because collective responsibility replaces the emphasis tort law places on individual accountability. *Id.* at 472. Hence, there exists no need to protect individual autonomy. *Id.*

Schroeder's view has lead at least one scholar to question whether his *ex ante* approach is in fact a theory of corrective justice. Simons, *supra*, at 121. Simons notes that an *ex ante* view imposes a tort fine on an individual that does not represent the defendant's culpability for actual harm. Instead, "[t]he fine simply reflects the [future] harm expected to result from the defendant's conduct." *Id.* The dispute regarding whether liability for risk-creation is consistent with corrective justice principles is not one that is resolved, as Simon freely notes. *Id.* at 125-29. What one must admit, however, is that in the present context, litigation is bipolar and an *ex ante* theory that imposes liability for risk-creation, without an internal financing system as Schroeder postulates, does so without regard to personal culpability and an individual's right of autonomy.

[77] *See supra* note 76.

of her own, unable to identify the driver of the car, who caused her injuries. Nevertheless, Penny brings an action against Delta Motors seeking to impose liability on Delta because it carelessly manufactures cars prone to steering mechanism failures. In this scenario, Penny stands innocent while Delta is culpable of at least some "blameworthy" conduct—manufacturing defective cars. Yet it is obviously apparent that our system of tort law does not permit Penny to recover from Delta unless Penny can prove that Delta's blameworthy conduct was in some manner causally related to Penny's injury In short, and as one commentator has explained, corrective justice presupposes "our asking not only 'Why can this plaintiff recover from *this* defendant?' but also 'Why can *this* plaintiff recover from this defendant?'"[78]

Most courts discussing causation-in-fact in the market share liability context view causation as serving only to answer why the law should find a particular defendant liable for the injury of a plaintiff. Essentially, these courts view cause-in-fact as the basis for identifying the proper and responsible defendant.[79] As these courts reason, equity dictates that the defendant's conduct should not prevent the plaintiff from recovery[80] because the plaintiff's inability to identify the injury causing party is likely attributable to the defendant's conduct.[81] Consequently, courts have determined that justice requires a relaxation of the plaintiff's burden of identifying a particular defendant as the cause-in-fact of the plaintiff's injury [82]

The counterpart of the causation analysis, however, should also serve to answer the question of why a particular plaintiff may invoke the principles of equity and justice as grounds for imposing liability As the illustration above shows, equity and justice also require that the plaintiff stand in some unique and identifiable position to the defendant's conduct that permits her, as opposed to the rest of the

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[78] Weinrib I, *supra* note 76, at 414.

[79] *See, e.g., Sindell*, 607 P.2d at 928, 163 Cal. Rptr. at 136 (beginning with the proposition that the plaintiff bears the burden of defendant identification).

[80] *See Martin*, 689 P.2d at 381 (noting that plaintiff's inability to identify defendant was due to the generic nature of product, the large number of drug manufacturers, the failure of manufacturers to keep records, and the passage of time between production of the drug and the plaintiff's injury).

[81] *Id., see* Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1075, 541 N.Y.S.2d 941, 947 (N.Y. 1989) ("[T]he ever-evolving dictates of justice and fairness, which are the heart of our common-law system, require formation of a remedy for injuries caused by DES. "), *cert. denied*, ____ U.S. ____ , 110 S. Ct. 350 (1989).

[82] *Sindell*, 607 P.2d at 937, 163 Cal. Rptr. at 145.

world, to shift the cost of her injury onto the defendant.[83] In essence, causation-in-fact also serves to identify the proper plaintiff to be compensated for a defendant's blameworthy conduct.[84] Simply because a party has acted carelessly does not mean that any individual with an injury—not causally related to the negligent conduct—may seek redress against the careless party. Stated another way, blameworthy conduct alone does not subject a party to liability, for "[s]ome boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy."[85] The obvious boundary, and most fundamental policy ideal in the moralist theory, is that individuals should not have to bear the costs of injuries they did not in fact cause.

Historically, the moralist position has as one of its primary objectives the protection of each individual's autonomy or "freedom of action."[86] To protect this interest, tort law imposes liability upon an actor only when his conduct unjustifiably infringes upon the interests of another.[87] Liability in tort should not arise absent proof that one person's conduct has caused harm to the interests of another. To allow liability without a showing of causation is to permit tort law to unduly restrict every individual's liberty.[88] Two primary views, Puritanism and the school of natural law, have shaped the moralist goal that tort law protect individual autonomy by restricting liability for one's actions to those circumstances where the conduct causes an unjustifiable infringement of another's right to be free from harm.

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[83] Weinrib I, *supra* note 76, at 412. Professor Weinrib focuses on the relationship between causation and wrongdoing and places particular emphasis on the use of causation to identify the plaintiff properly compensable for a defendant's wrongful conduct. *Id.* at 414.

[84] *Id.*

[85] PROSSER AND KEETON, *supra* note 4, at 264.

[86] Roscoe Pound defines "freedom of action" as the right to be free from liability for one's actions unless those actions infringe upon the rights of another. R. POUND, THE SPIRIT OF THE COMMON LAW 143 (1921).

[87] Prosser and Keeton likewise view freedom of action in terms of individual autonomy balanced against an individual's right to be free from harm. PROSSER AND KEETON, *supra* note 4, at 6.

[88] *See* R. POUND, *supra* note 86, at 143. Pound characterizes liberty as dictating that persons shall be free to act in the manner they choose, unless their conduct violates accepted societal standards of conduct and infringes upon and in fact causes harm to the interest of another person. *Id.* He emphasizes that personal freedom is at the foundation of all law including modern property and contract laws that secure the right to freely acquire property interests and permit persons to enter into voluntary agreements to exact performance from one another in exchange for mutual promises. *Id.* at 143-45.

1. *Puritanism and the Moralist Policy*

In Anglo-American history, the Puritans have assumed an important role in shaping the law Due in part to persecution by the English authorities, the Puritans' theological and philosophical views held that the protection of individual freedoms was the primary purpose of the law [89] Rebuffing the majority's efforts to conform the Puritans to traditional English societal beliefs, the Puritans developed a view of the law that sought to protect the individual's freedom.[90] This view encompassed a person's right to speak, think and act unrestricted by totalitarian influences. Government should not impose social order by subjecting the actions of unwilling men to restrictive rules of law, but by encouraging men to freely consent to live according to accepted standards governed by a societal contract.[91] As several commentators have noted, the Puritans' strong spirit of individualism dictated that all persons closely monitor the effect of laws addressing individual freedom.[92] Essential to the goal of limiting the law's potential for oppressive restriction on individual liberty was the requirement that government utilize the force of law to restrict an individual's conduct only when the conduct infringed

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[89] Zwier, *supra* note 70, at 785.

[90] *Id.* At the heart of Puritanism was the attempt to create a "new order" that was premised upon the belief that each person knew and carried the laws of God in his mind and heart. *Id.* at 785 n.93. Accordingly, individuals collectively covenant with one another to live out their lives in accordance with the law of God. *Id.* at n.92. Law, therefore, was the voluntary undertaking of each person to conform to God's principles for correct behavior. *Id.* at 785. It was based on consent and not the power of several authorities to require individuals to conform to certain rules. The supremacy of each individual's will and freedom of action was the basis for the Puritans' philosophy of law. *Id.* As Pound notes, "[a] fundamental proposition from which the Puritan proceeded was the doctrine of a 'willing covenant of conscious faith, made by the individual.'" R. POUND, *supra* note 86, at 42. The resulting theories created an order that sought to secure and protect individual autonomy. *Id.*, *see* Zwier, *supra* note 70, at 785-86.

[91] Dean Pound analogizes the Puritan's view of law to that of contract theory. Because each individual is free to act in accordance with her conscience and to covenant with others to accept and abide by a social standard for behavior, all law must also find its legitimacy in the social contract of those persons who agree to be bound by the law. R. POUND, *supra* note 86, at 43. The Puritan view is similar to the view expressed by John Locke in his treatise on government. At the center of Locke's theory was the premise that government exists, continues, and is legitimate because each individual willingly submits his autonomy to the will of the majority in the form of a social contract. J. LOCKE, THE SECOND TREATISE OF GOVERNMENT 54-55 (1952). Locke noted that the only way persons may properly divest themselves of their natural liberty is "to agree to join or unite into a community for their comfortable, safe, and peaceable living one amoungst another. " *Id.* at 55; *see also* J. ROUSSEAU, ON THE SOCIAL CONTRACT 23-26 (1983) (Rousseau also notes that government and its laws find their basis in individuals that willingly consent to contract with one another to forgo individual freedom and accept a social standard that governs and restricts each person's actions.).

[92] *See* Zwier, *supra* note 70, at 785-88.

upon the rights of another person.[93] In effect, this view provided a system of checks and balances to guard against antisocial behavior while maintaining respect for personal autonomy Absent such balancing established by requiring a causal connection, any restriction on an individual's freedom is unwarranted and inconsistent with the Puritans' philosophy of law

2. *Natural Law and the Moralist Policy*

Closely related to the Puritan theory of legal philosophy was the school of natural law. At the core of the natural law theorist's perspective was the belief that reason was superior to any other virtue because it instructed men in morality and led to the knowledge of God.[94] Reason also dictated that all persons possess "natural rights" to be free from the arbitrary and inflexible exercise of power.[95] Historically, scholars have discussed the natural rights of liberty and freedom in terms of "individualism."

The concept of individualism or "personal security" is bifurcated. First, natural law philosophers posit that the law must secure and protect individual rights from intrusion by others.[96] The coun-

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[93] *See* 4 R. POUND, JURISPRUDENCE 508-15 (1959) (arguing that the purpose of causation is to create satisfactory balance between the social interest in general security and the individual interest in freedom of action).

[94] *See* O. GIERKE, NATURAL LAW AND THE THEORY OF SOCIETY 1500 TO 1800, at 36 (1958) (citing F SUAREZ, TRACTATUS DE LEGIBUS AC DEO LEGISLATORE (1611)); H. CAIRNS, LEGAL PHILOSOPHY FROM PLATO TO HEGEL 175-84 (1949) (discussing the scholastic St. Thomas Aquinas and his theory of natural law). Secular moral philosophers also developed theories of natural law, premised on reason, which expressed principles of natural rights similar to those articulated by Christian theologians. According to Hugo Grotius, a natural right is that moral quality which bestows upon a person freedom and liberty to act unrestricted by another individual or government. 4 R. POUND, *supra* note 93, at 63 (citing GROTIS, DE IURE BELLI AC PACIS (1625)). In either case, both groups accepted that reason leads to the belief that all persons have certain fundamental and natural rights that protect individual liberty.

An example of such a theory is observed in the writings of Cicero. Cicero conceptualized law in three distinct classifications. First and foremost was the heavenly law, or *lex caelestis*, which is not a product of human reason, but an external force that governs the whole universe. H. CAIRNS, *supra*, at 135. Cicero defined natural law, or *lex naturae*, as the perfect reason of wise men and the resulting rules that reason discovers that permit nations to govern their citizens and allow persons to achieve the highest good, the enjoyment of life. *Id.* at 140-41. Finally, Cicero viewed positive law, or *lex vulgas*, as rules the State creates that bond civil society and either command or prohibit action. *Id.* at 141-42.

[95] *See* R. POUND, *supra* note 86, at 150 ("[I]ndividual rights and justice as the realization of individual rights were put above state and society as permanent absolute realities which state and society existed only to protect.").

[96] "In consequence, its [natural law] idea of security includes two elements: everyone is to be secured in his interests against aggression by others and others are to be permitted to acquire from him or to exact from him only through his will that they do so or through his

terpart holds that the law should restrict individual freedom only when one's conduct unjustifiably violates the personal security of others.[97] As the law attempts to balance a plaintiff's and defendant's rights to security, the cause-in-fact element becomes an indispensable factor in the equation. Consequently, for the plaintiff to recover for a violation of her right to be free from harm, she must identify the defendant as the person who caused her injury.[98] Absent such identification, the balancing of interests requires that courts protect the integrity of the defendant's security by refusing to shift the cost of a plaintiff's injury to a defendant who was not causally responsible.[99]

3. *Moralism and Market Share Liability*

The judicial system, in its acceptance of market share liability, overemphasizes the goal of protecting the plaintiff's security against infringement. The plaintiff's interest is only one of the rights that equity and justice must protect.[100] In the market share liability context, courts have permitted the plaintiff to recover for injuries without identifying the party who caused the harm. The plaintiff's right to compensation is thus elevated above several defendants' rights to freedom of action. Moreover, the plaintiff's right is protected without a showing that any defendant's conduct infringed upon the plaintiff's interest to be free from harm. The resulting effect violates the underlying goal of the moralist position—to uphold all individuals' rights to be free from unwarranted restrictions on their freedom.[101]

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breach of rules devised to secure others in like interest." R. POUND, *supra* note 86, at 143. The theory of natural law led Herbert Spencer, a Kantian philosopher, to remark, "[e]very man is free to do that which he wills provided he infringes not the equal liberty of any other man." H. CAIRNS, *supra* note 94, at 401-02 (citing H. SPENCER, JUSTICE § 27 (1891)).

[97] R. POUND, *supra* note 86, at 143.

[98] *See* Zwier, *supra* note 70, at 795 (arguing that cause-in-fact is implicit in notion of responsibility and without proof of causation, liability would violate individual freedom and social contract).

[99] *Cf.* 5 R. POUND, JURISPRUDENCE 319-24 (1959) (positing that the doctrine of contributory negligence was premised on the theory that he who caused his own injury had no standing to shift loss to another who was also at fault); Epstein, *Two Fallacies in the Law of Joint Torts*, 73 GEO. L.J. 1377, 1378-82 (1985) (criticizing the theory that removes the cause-in-fact element because such a theory often results in a wholly innocent party bearing liability for harm it did not cause).

[100] *See, e.g.*, R. POUND, *supra* note 86, at 143 (asserting that tort law must also secure individuals' rights to freedom of action).

[101] *See* England, *The System Builders: A Critical Appraisal of Modern American Tort Theory*, 9 J. LEGAL STUD. 27, 27 (1980); Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 851, 859-60 (1984).

Probable causation as the basis for liability in the market share context also violates the very policy goals of equity and justice that courts have invoked to justify the theory's existence. Courts utilize probable causation to elevate one individual's rights to compensation over several individuals' rights to freedom of action. The law should not premise the burden of liability, and infringement upon individual autonomy, on the mere possibility that a defendant caused injury in proportion to that defendant's share of a product market. Without requiring a factual showing that a defendant caused the plaintiff's injury, courts frustrate moral objectives when they impose liability on several individuals who bear no responsibility for the harm.[102]

Probable causation creates additional problems because it removes the plaintiff's incentive to attempt diligently to identify the culpable defendant.[103] For example, one plaintiff may try to identify the injury causing party, and discover that the responsible defendant is either a very small business or insolvent. This plaintiff is eventually left without any compensation for her injuries. Another plaintiff, who relies on the market share theory, and does nothing to establish who caused her injury, will recover because at least some of the named defendants will be able to satisfy a judgment. In this scenario, probable causation brings about the inequitable result of rewarding the ignorant plaintiff while denying the diligent plaintiff recovery [104]

The Washington Supreme Court, in *Martin v Abbott Laboratories*, asserted that its decision to adopt probable causation served to balance the interests of both plaintiffs and defendants by eliminating the plaintiff's burden of establishing causation-in-fact, while reducing the defendants' liability to only their calculated market shares.[105] The court based its holding on a desire to shift the costs of injury to those parties who were in a better position than the plaintiff to absorb the loss.[106] This position is contrary to precedent because the law has never recognized the defendant's wealth as a legitimate factor in determining whether a party should bear the

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[102] *See* Comment, *An Ill-Advised Remedy*, *supra* note 65, at 327 (submitting that to hold the defendant liable for accidents he did not cause and is not responsible for offends the just and equitable requirement that liability bear some connection to responsibility.).

[103] *Id.* at 328; *see* Comment, *Due Diligence Requirement*, *supra* note 65, at 783 (noting that a plaintiff has no incentive to identify the tortfeasor under market share theory and, therefore, urging that courts adopt a due diligence element).

[104] Comment, *An Ill-Advised Remedy*, *supra* note 65, at 329.

[105] *Martin*, 689 P.2d at 383.

[106] *Id.* at 382.

responsibility for a plaintiff's injury [107] Courts should consider a defendant's ability to pay only after the plaintiff has shown that the defendant's conduct was blameworthy, and that the defendant's conduct did in fact cause the plaintiff's injury [108] Probable causation produces inequitable results because it uses the defendant's ability to pay as a basis for liability, regardless of whether the defendant was causally responsible for the plaintiff's harm.[109] Not only does the theory of market share liability fail to satisfy the moralist policy of protecting individual autonomy, but as we shall see, it also fails to meet the economists' objectives of promoting efficiency

B. The Economist Position

The "law and economics" movement of the twentieth century[110] seeks to blend principles of economics[111] with legal analysis to produce certain social or policy goals. The primary goal of this legal philosophy is to promote efficient allocation of individual and social resources.[112] Scholars discussing tort law have devised several analyses to achieve this goal, such as "risk-distribution,"[113] "cost-benefit,"[114] and "risk-utility "[115] Whatever the mechanics of the analyses

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[107] *See Sindell*, 607 P.2d at 941, 163 Cal. Rptr. at 149 (Richardson, J., dissenting) ("A system priding itself on '*equal* justice under law' does not flower when the liability as well as the *damage* aspect of a tort action is determined by a defendant's wealth." (emphasis in original)).

[108] *Id.*

[109] Comment, *An Ill-Advised Remedy*, *supra* note 65, at 328.

[110] While by no means an exhaustive list, the prominent architects of the "law and economics" movement are Guido Calabresi, R.H. Coase, and Richard Posner. See *supra* note 69 for a selection of these authors' works.

[111] Richard Posner defines economics as "the science of human choice in a world in which resources are limited in relation to human wants. It explores and tests the implications of the assumption that man is a rational maximizer of his ends in life, his satisfactions—what we shall call his 'self-interest.'" R. POSNER, *supra* note 69, at 1.

[112] Posner discusses efficiency in terms of exploiting economic resources so that a consumer's willingness to purchase goods and services is a direct indicator of human satisfaction. *Id.* at 4.

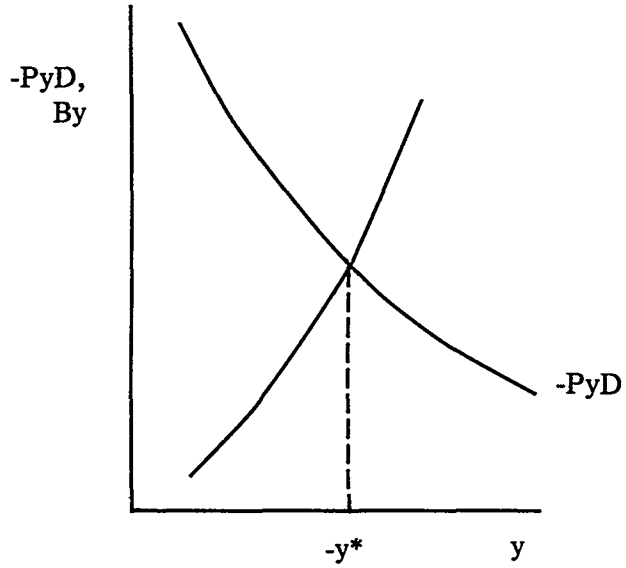
[113] Dean Calabresi provides an illustration of risk-distribution. As part of his analysis of secondary accident cost avoidance, he poses two correlatives concerning the cost of accidents. First, "taking a large sum of money from one person is more likely to result in economic dislocation than taking a series of small sums from many people." G. CALABRESI, *supra* note 69, at 39 (citing Feezer, *Capacity to Bear Loss as a Factor in the Decision of Certain Types of Tort Cases*, 78 U. PA. L. REV. 805, 809-10 (1930)). Second, even if the total economic effect of the loss were the same, "many small losses would be preferable to one large one simply because people feel less pain if 10,000 of them lose one dollar apiece than if one person loses $10,000." G. CALABRESI, *supra* note 69, at 39. In essence then, risk-distribution is a concept that seeks to minimize the social costs accidents cause by broadly spreading those costs among the general society. *Id.*, *see generally* Calabresi, *supra* note 66.

[114] Cost-benefit analysis has its roots in a formula articulated by Judge Learned Hand in

are, however, the economic legal theorist seeks to benefit societal

United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947). In *Carroll*, a tugboat lost control of a barge that struck a tanker, sinking the barge and its cargo of flour. *Id.* at 170-71. The barge had no bargee or other attendant on board when the vessel broke its moorings. *Id.* The court considered the issue of whether the absence of an attendant should reduce the plaintiff's recovery for injury to his own vessel. *Id.* at 173. The *Carroll* court set forth the following formula to determine liability: The probability that an accident shall occur is equal to P The gravity of resulting injury is equal to L. Finally, the burden of taking precautions to avoid the accident is equal to B. If the burden of avoidance is less than the product of the probability of an accident multiplied by the severity of injury, then the court will impose liability on the responsible party. In arithmetical terms, liability is expressed in the equation B < PL. *Id.*

Richard Posner has seized upon the "Learned Hand" formula of cost-benefit analysis, utilizing a similar formula in his decisions. *See, e.g.*, United States Fidelity & Guar. Co. v. Jadranska Slobodna Plovidba, 683 F.2d 1022, 1026 (7th Cir. 1982). Posner's variation on the formula is called the economic model of due care. *See* W LANDES & R. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 58-62 (1987). In order to quantify the probability of loss versus the burden of avoidance, Posner removes B (the burden of cost prevention) and replaces it with By (the marginal cost of care). *Id.* at 87. He also replaces PL (the probability of and resulting damage from an accident) with -PyD (the marginal reduction in accident damage), rewriting the Hand Equation as By < -Py D. *Id.* He summarizes his theory noting that accident causing conduct is negligent (y*) if the "marginal cost of accident avoidance is less than the marginal benefit from avoidance." *Id.* In graphic form the equation is represented as follows:



Id. at 60 (figure 3.3). For a more detailed discussion of the cost-benefit theory, see White, *Risk-Utility Analysis and the Learned Hand Formula: A Hand that Helps or a Hand that Hides?*, 32 ARIZ. L. REV. 77, 102-06 (1990).

[115] Risk-utility analysis is an extension of the Learned Hand formula. In short, the formula imposes liability if the risk of a product outweighs its social usefulness. Note, *Strict Product Liability and the Risk-Utility Test for Design Defect: An Economic Analysis*, 84

goals by deterring inefficient or socially undesirable conduct,[116] reducing societal secondary costs for accidents and injuries,[117] and limiting governmental or administrative costs that result from a defendant's tortious conduct.[118]

Courts adopting market share liability have also premised their decisions on the contention that it is economically efficient.[119] Stated simply, these courts have found that the theory serves economic interests because it reduces societal costs by distributing the risk of a plaintiff's loss among several potentially responsible defendants, rather than placing the burden solely on the injured party [120] What courts have failed to evaluate, however, is the degree to which market share liability deters undesirable conduct, spreads secondary costs, or reduces administrative costs resulting from tortious conduct.[121] This Article concludes that although market share liability promotes some economic goals, the costs of the theory outweigh its benefits.

COLUM. L. REV. 2045, 2050 (1984) [hereinafter Note, *Risk-Utility Test*]. Dean Wade also has a theory of risk-utility. His test imposes liability for a product's design defect if "the magnitude of the risk created by the dangerous condition of the product [is not] outweighed by the social utility attained by putting it out in this fashion." Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 835 (1973) (citing Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 37 (1973)). The courts utilize various factors in making this determination: (1) the usefulness of the product, (2) the availability of a feasible alternative design, (3) the availability of substitutes, and (4) the consumers' ability to guard against a product's danger. Note, *Risk-Utility Test*, *supra*, at 2050-51. The law of supply and demand, or a consumer's willingness to purchase a product, determines the product's economic utility. *Id.* at 2052. Risk is the number of accidents a product will likely cause multiplied by the costs for those accidents. *Id.* at 2053. For a graphic depiction of the risk-utility theory, see *id.* at 2053, 2056-58, 2062-66. There the author graphs the variables in an elementary risk-utility analysis, and proceeds to consider the costs for alternative designs, the effect of risk not known to the consumer, and finally the cost effect of imposing liability for a product where no feasible alternative design exists. *Id.*

[116] G. CALABRESI, *supra* note 69, at 266.

[117] *Id.* at 27-28.

[118] *Id.* at 28.

[119] The *Martin* court articulated this theory:

> Moreover, as between the injured plaintiff and the possibly responsible drug company, the drug company is in a better position to absorb the cost of the injury. The drug company can either insure itself against liability, absorb the damage award, or pass the cost along to the consuming public as a cost of doing business. We conclude that it is better to have drug companies or consumers share the cost of the injury than to place the burden solely on the innocent plaintiff.

Martin, 689 P.2d at 382.

[120] *Id.*

[121] For a discussion of these issues, see *infra* notes 122-88 and accompanying text.

1. *The Goal of Deterrence*

As Professor Calabresi explained in his seminal treatise *The Costs of Accidents*, one of the primary subgoals of an economic analysis of the law is the deterrence of inefficient conduct.[122] Courts may achieve this result by either rewarding safer practices to encourage those who would engage in such conduct,[123] or penalizing dangerous practices to discourage those who would engage in such conduct.[124] Market share liability does not, however, achieve the deterrent goals of the economic theory.

First and foremost, market share liability does not create incentives to promote safer conduct. In fact, pharmaceutical market share liability may actually discourage manufacturers from creating safer products and developing new socially beneficial products.[125]

Market share liability spreads the cost of a plaintiff's injury onto the manufacturers of an injury causing product, regardless of whether a specific manufacturer's product caused the plaintiff's injury.[126] In the context of inherently fungible products such as DES, a manufacturer that attempts to create a safer product will not fully benefit from its efforts because the market share theory does not consider, for purposes of liability, the safety efforts of an individual defendant.[127] Moreover, if a drug manufacturer is successful in producing a safer product, which by its inherent nature remains fungible and otherwise indistinguishable from other manufacturers' products, market share liability still does not permit the safe manufacturer to exculpate itself.[128] Although the efforts of the safety minded pro-

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[122] *See* G. CALABRESI, *supra* note 69, at 26.

[123] *Id.* at 73. Calabresi notes that individuals engaged in unsafe practices will alter their conduct and shift to safer practices if accident costs are reflected in the practices' price. He goes on to explain that the degree of change depends upon the difference in costs between the two practices and whether the safe alternative is a good substitute. *Id.*

[124] *Id.* at 73-74.

[125] *See, e.g.*, Payton v. Abbott Laboratories, 437 N.E.2d 171, 189-91 (Mass. 1982) (arguing that market share liability discourages pharmaceutical manufacturers from developing socially beneficial drugs); *see also* Note, *A Question of Competence: The Judicial Role in the Regulation of Pharmaceuticals*, 103 HARV. L. REV. 773, 784-85 (1990) (contending that increased liability leads to increased cost for beneficial medications, thereby harming the general public); Comment, *Overcoming the Identification Burden*, *supra* note 20, at 634 (positing that extending liability through market share theory produces "chilling" effect on research and development of new drugs).

[126] *See supra* notes 16-29 and accompanying text.

[127] *Cf.* Spitz, *supra* note 65, at 632 (pointing out that market share liability does not consider differences in individual manufacturers' warnings and safety instructions).

[128] *Cf. Martin*, 689 P.2d at 383 (noting that safety efforts or efforts to improve drugs are not considered exculpatory).

ducer may lessen the total number of injuries resulting from the product, the cost for all injuries is still spread among the product market.[129] Irresponsible manufacturers may receive a "free ride" on the efforts of safer manufacturers.[130] As one commentator has noted, "[r]elatively safe producers end up subsidizing relatively unsafe producers."[131] There exist insufficient incentives under the market share theory to encourage drug manufacturers to develop safer products because a manufacturer does not fully benefit from its safety efforts, and may in fact subsidize and share equally in judgments with producers of the same product who do not spend the same resources to improve the safety of their products.[132] Indeed, there arguably exist economic incentives to ride free on the efforts of manufacturers who choose to improve the safety of their products.[133]

Second, market share liability reduces manufacturer incentives to spend the time and resources necessary to develop socially beneficial products because of the fear of long term and almost limitless liability.[134] In *Payton v Abbott Laboratories*,[135] several thousand women who were exposed *in utero* to DES brought a class action suit. The plaintiffs asked the Massachusetts Supreme Court to adopt market share liability and remove the identification requirement from a plaintiff's negligence action.[136] The court initially noted that tort law historically requires the plaintiff to identify the injury causing party in a law suit for negligence.[137] It went on to state that removing the cause-in-fact requirement would discourage pharma-

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[129] Miller & Hancock, *supra* note 65, at 104.

[130] *Id.* Professors Miller and Hancock note that an individual's attempts to improve safety produce social gains that are externalized, resulting in "free/riding." When one particular manufacturer expends time and resources to enhance product safety, it does not receive the full benefit of its efforts because the benefit is spread among other manufacturers and the general society. *Id.* (citing Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960)).

[131] Comment, *An Ill-Advised Remedy*, *supra* note 65, at 317.

[132] Miller & Hancock, *supra* note 65, at 104.

[133] *See* Comment, *An Ill-Advised Remedy*, *supra* note 65, at 320 (noting that free riders have incentives to make cheap products that are difficult to distinguish from those of safe manufacturers).

[134] *See, e.g.*, Enright v. Eli Lilly & Co., 553 N.Y.S.2d 494 (N.Y. Sup. Ct. 1990) (extending market share liability to pre-conception injuries in DES granddaughters), *rev'd*, 1991 WL 18192 (Feb. 19, 1991) (Westlaw). Estimates of settlement costs for DES cases currently pending are as high as $240 million. Freudenheim, *Precedent is Seen in DES Decision*, N.Y. Times, Apr. 6, 1989, at 19, col. 2.

[135] 437 N.E.2d 171 (Mass. 1982).

[136] *Id.* at 188.

[137] *See id.* (positing that identification serves two purposes: it separates wrongdoers from innocent actors, and it ensures that wrongdoers are held liable for only the harm they cause).

ceutical manufacturers from developing new and socially beneficial drugs.[138] According to the *Payton* court, "[p]ublic policy favors the development and marketing of new and more efficacious drugs."[139] The court reasoned that to hold each drug manufacturer liable not only for its product, but also for the products of other manufacturers, imposes such broad liability as to discourage the development and marketing of new drugs.[140] Particularizing its analysis to the DES problem, the court noted that the very cure to the plaintiff's cancerous disease may lie in the development and manufacturing of new drugs.[141]

Expansive liability under the market share theory, although admittedly penalizing dangerous activities and producing some desirable deterrent effects, fails to meet the economic goal of creating incentives for safer conduct. Market share liability reduces manufacturer incentives to produce safer drugs and to meet society's tremendous demand for new drugs to prevent and cure illness.[142] Consequently, the market share theory may work to create an atmosphere where individuals are exposed to greater risks of harm and only limited resources are made available to meet society's health care needs.

2. *The Goal of Spreading Societal Secondary Costs*

Market share liability is premised on the desire to spread the costs of an accident from an injured party to several parties engaged in the enterprise that caused the loss.[143] In theory, it is argued that to expose one person to a large loss is more likely to result in economic dislocation and increased secondary losses,[144] than to have several people bear relatively small parts of the same loss.[145] In

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[138] *Id.* at 189-90.

[139] *Id.*

[140] *Id.* at 189-90 n.17.

[141] *Id.* at 190 n.18.

[142] *See* Comment, *Federal Preemption of Prescription Drug Labeling: Antidote for Pharmaceutical Industry Overdosing on State Court Jury Decisions in Products Liability Cases*, 22 J. MARSHALL L. REV. 629, 648 nn.130-31 (1989) (notes statistical data regarding number of prescriptions written yearly, and the life saving use of the drugs insulin, cholestyramine, and nicotine polacrilex).

[143] *See, e.g.*, *Martin*, 689 P.2d at 382 (stating that defendants can insure against liability, absorb the costs as part of doing business, or pass the costs along to consumers); Calabresi, *supra* note 113, at 505 (same).

[144] Risk-distribution theory is premised on this argument. As Calabresi notes, the crushing burden of accident costs placed on one individual may lead to greater and more drastic social costs. *See* G. CALABRESI, *supra* note 69, at 39; *see also supra* note 113.

[145] G. CALABRESI, *supra* note 69, at 39.

practice, this concept may mean requiring 1,000 people to pay $1 each instead of requiring one person to pay $1,000 individually [146] Thus, no one person is financially devastated and society is able to absorb the loss without it seriously affecting the economic climate because the loss is spread among a greater number of individuals.[147]

These authors do not dispute that market share liability succeeds in spreading the costs of an injury from one individual to several defendants. In this limited aspect, market share liability meets the economic goal of spreading societal costs. Even in its success, however, market share liability creates problems of application since the theory will most likely cause manufacturers to increase the price of products unrelated to the accident.[148]

As manufacturers discover that their products create dangerous conditions, they will remove the products from the stream of commerce to avoid further liability [149] Consequently, manufacturers will not be unable to pass on to consumers the costs of those accidents the old product caused. The manufacturer will be left with two choices. The manufacturer may totally absorb the loss and not spread the costs to the consuming public in the form of higher prices for the product.[150] This result is in direct conflict with the economic goal of spreading costs broadly among numerous parties so that no one individual is left to bear a severe financial burden.[151] The other alternative is to increase the cost for those safe and nondefective products that the manufacturer currently markets.[152] Although this choice effectively spreads the costs for accidents, it does so in a manner unrelated to the actual risk of injury caused by the unsafe products.[153] In essence, safe products will cost more. Consequently, although market share liability promotes the spreading of secondary

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[146] *Id.*

[147] *Id.*

[148] Comment, *An Ill-Advised Remedy*, *supra* note 65, at 322.

[149] The *Restatement (Second) of Torts* states that before a court may find a manufacturer strictly liable, the product upon which liability is premised must enter the stream of commerce through sale. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[150] See *supra* note 143.

[151] G. CALABRESI, *supra* note 69, at 39.

[152] While this is an alternative, one might ask how, in practical terms, a manufacturer may raise the price of its products and remain competitive with other manufacturers who do not face the same burdens of absorbing the costs of liability for an older defective product? Either manufacturers will increase the price for a product that is patented and therefore unique, or manufacturers will be forced to absorb the loss from the defective product in an effort to have their current products competitively priced.

[153] Comment, *An Ill-Advised Remedy*, *supra* note 65, at 322.

losses, the theory does so without a nexus to the actual market of an injury causing product.[154]

Market share liability also fails to spread the loss effectively among numerous defendants. Under the *Martin* court's decision, a plaintiff need join only one manufacturer of the injury causing product.[155] Under *Sindell*, a plaintiff need join only a substantial share of the product market.[156] In most cases then, a plaintiff will join only a small percentage of the product manufacturers.[157] Additionally, various plaintiffs most likely will join the same small group of defendants that are currently large and solvent companies.[158] Plaintiffs will not join the smaller or nonexistent businesses that manufactured the product.[159] Consequently, the market share theory spreads the loss to only a small group of the entire product market, which is asked to absorb a disproportionate share of the losses caused by the entire industry.[160] This result does not effectively promote the economic goal of broadly spreading the secondary costs of accidents to several individuals.[161]

In conclusion, market share theory does promote a limited spreading of secondary costs. The theory does not, however, fully succeed in achieving the economic goal of a broad distribution of loss. The benefits gained from market share liability are limited and are outweighed by the theory's inefficiency in deterring undesirable conduct. Further, as this Article discusses immediately below, the theory fails to reduce the administrative costs of accidents.

3. *The Goal of Reducing Administrative Costs*

Market share liability increases administrative costs in two general areas. First, the removal of the cause-in-fact element from a plaintiff's claim encourages a greater number of lawsuits and in-

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[154] *Id.*

[155] *See Martin*, 689 P.2d at 382.

[156] *See Sindell*, 607 P.2d at 937, 163 Cal. Rptr. at 145.

[157] For example, while over 300 companies manufacture DES, in the *Smith* case, the trial and appellate courts chose to adopt market share liability although only eight defendants remained in the case. Smith v. Eli Lilly & Co., 560 N.E.2d 324, 326-27 (1990).

[158] In *Sindell*, *Martin*, *Hymowitz*, and *Collins*, Eli Lilly, Abbott Laboratories, E.R. Squib & Sons, Upjohn and Rexall Drug Company were all named as defendants. *Sindell*, 607 P.2d at 927, 163 Cal. Rptr. at 135; *Martin*, 689 P.2d at 372; *Hymowitz*, 539 N.E.2d at 1070-71, 73 N.Y.2d at 494-501; *Collins*, 342 N.W.2d at 41.

[159] In *Smith*, the plaintiff joined only 138 of the possible 300 DES manufacturers as defendants. *Smith*, 560 N.E.2d at 326.

[160] Comment, *An Ill-Advised Remedy*, *supra* note 65, at 322 n.124.

[161] *See* G. CALABRESI, *supra* note 20, at 40.

creases the burden on the courts' already crowded dockets.[162] Hence, market share liability runs afoul of principles of judicial economy Second, market share liability creates new and unique evidentiary problems that waste time and energy [163] These new evidentiary problems will not only further burden the courts, but also will cause the litigants possibly to spend a considerable and often disproportionate amount of time and money in relation to the plaintiff's damages.[164]

a. Market Share Liability and Judicial Costs

Market share theory increases the already crowded court dockets. This result is attributable to two factors. First, market share liability increases the number of lawsuits filed. Traditionally, an injured party that could not identify the cause of her injury would not bring suit because a court would dismiss her claim at the pleading stage.[165] Under market share theory, a plaintiff need join only one manufacturer of the injury causing product, and need not establish which, if any, of the defendants caused the plaintiff's injury [166] Thus, a greater number of plaintiffs may bring suit. The result most likely will lead to an explosion of lawsuits involving the injury causing product. For an example of this problem one need only look to New York State where close to 600 DES cases are currently pending.[167]

The second reason market share liability increases the court's burden is that the theory encourages plaintiffs to join a greater number of defendants. Traditionally, plaintiffs join only the defendant or defendants that the plaintiff identifies as the injury causing party or parties.[168] Under *Sindell*, however, a plaintiff must join a substantial share of the product market.[169] Consequently, a plaintiff may initially join several hundred defendants to ensure that she has

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[162] *See* Freudenhiem, *supra* note 134, at 19 col. 2 (citing over 1,200 DES cases nationwide, and 600 in New York alone, with plaintiffs seeking $3 billion in damages).

[163] See *infra* notes 174-88 and accompanying text.

[164] *Cf.* Gilgoff, *The DES Daughters Get Day in Court*, Newsday, May 1, 1989, § G 4 (Business), at 1 (noting industry costs for DES litigation are $67 million, while in the case of individual attorney interviewed, only four out of the 105 DES cases he handles involve cancer).

[165] Gray v. United States, 445 F Supp. 337 (S.D. Tex. 1978).

[166] *See, e.g.*, *Martin*, 689 P.2d at 382.

[167] Freudenhiem, *supra* note 134, at 19, col. 2.

[168] *See, e.g.*, Payton v. Abbott Laboratories, 437 N.E.2d 171, 188 (Mass. 1982) (noting that identification of responsible defendant is long standing prerequisite to liability for negligence).

[169] *Sindell*, 607 P.2d at 937, 163 Cal. Rptr. at 145.

named a sufficient percentage of the product market.[170] As a result, market share liability induces larger, more complex litigation potentially involving hundreds of defendants,[171] over several states, who may no longer do business in the product industry, and who may no longer even exist in the same corporate form.[172] All of these factors serve to make market share liability a cumbersome and awkward theory for courts to apply [173]

b. Market Share Liability and Litigation Costs

Not only will market share liability increase judicial costs, but it also will increase litigation costs. Evidentiary problems under the market share theory account for most of the new costs. Three principal reasons exist for the increase in evidentiary problems with attendant higher costs.

First, market share liability shifts the burden of defendant identification from the plaintiff to the defendant.[174] The theory makes this shift without any inquiry into whether the plaintiff or defendant, in an individual case, is in a better position to present evidence linking a specific manufacturer with the injury causing product.[175] In some cases, a plaintiff exercising due diligence[176] actually may be in the better position, and may incur a lesser cost of identifying the injury causing defendant.[177] Even in those cases where no party stands in a position to identify the correct defendant easily, the problems and costs of locating documentary evidence[178] that would link a specific manufacturer to the plaintiff's injury are multiplied because numerous manufacturers may duplicate discovery efforts.

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[170] *See Smith*, 560 N.E.2d at 326 (here, plaintiff named 138 companies as defendants instead of naming the one company that caused her injury).

[171] *Id.*

[172] Of the 138 companies Sandra Smith named as defendants, only 20 remained after the trial court granted motions to dismiss on grounds of change in corporate ownership and jurisdiction. *Id.* at 326.

[173] *See* Fischer, *supra* note 27, at 1642 (concluding that market share liability is ineffective because of practical and procedural difficulties).

[174] *See, e.g., Sindell*, 607 P.2d at 937, 163 Cal. Rptr. at 145 (premising liability on market share and not on plaintiff's showing that defendant caused injury).

[175] Fischer, *supra* note 27, at 1649-50.

[176] *Id.* at 1650. For a more complete discussion of a suggested due diligence standard and its application to market share liability, see Comment, *Due Diligence Requirement*, *supra* note 65.

[177] Fischer, *supra* note 27, at 1650.

[178] For example, manufacturers will have to attempt to locate the records of pharmaceutical wholesalers, retailers, physicians, and pharmacies to track the sale of its product to the plaintiff. *Id.*

Second, the litigants' costs will increase because the market share theory imposes upon both the plaintiff and defendant the duplicative burden of establishing the relevant product market. The plaintiff must show that she has joined a substantial share of either the national, regional or local product market,[179] depending on the applicable version of market share liability Hence, the plaintiff bears the evidentiary burden of uncovering facts that establish the relevant market and proving that the named defendants represent a substantial share of that market.[180]

To exculpate themselves under the market share theory, defendants must present evidence tending to establish that they did not market or sell the product in the plaintiff's applicable geographic region.[181] Consequently, both the plaintiff and defendant bear the burden of presenting evidence that establishes a relevant geographic market.[182] The costs incurred under this duplicative evidentiary burden are compounded by the long time gap between the sale of the product and the plaintiff's injury [183] Records concerning the relevant sales and distribution of the product in a particular market are usually unavailable, leaving the parties to piece the product market together through the burdensome process of combining witness testimony[184] and the business records of intermediary companies.[185]

A final, similar problem presents itself as defendants seek to establish their actual market share. Market share liability requires the defendant to establish its actual market share, in a particular geographic market, to avoid an assumed and potentially larger percentage of the product market.[186] Many laws, however, require drug manufacturers to maintain sales records for only five years.[187] The problem of insufficient or nonexistent records also inhibits proof of market percentage because it takes so long for the plaintiff's injury to manifest itself. Consequently, market share theory increases liti-

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[179] *See, e.g., Sindell*, 607 P.2d at 937, 163 Cal. Rptr. at 145 (holding that plaintiff must name a substantial share of undetermined geographic market).

[180] *See* George v. Parke-Davis, 733 P.2d 507 (Wash. 1987) (holding that plaintiff must allege that the manufacturer does business in the relevant local market).

[181] *Id.*

[182] *Id.*

[183] Comment, *Enterprise Liability*, *supra* note 20, at 972.

[184] For example, the defendant might utilize the testimony of sales persons, doctors, nurses, or pharmacists.

[185] *See supra* note 178 for an example of available documentary evidence.

[186] *Martin*, 689 P.2d at 382-83.

[187] *See Smith*, 560 N.E.2d at 329; *see also* MICH. COMP. LAW § 333.17752 (1980) (requiring that prescription records be maintained for only five years).

gation costs as it embroils the parties in duplicative and costly discovery efforts in order to answer the evidentiary issues presented.[188]

4. *Economics and Market Share Liability*

Market share liability fails to meet the economic goal of efficiency The theory does not promote safer conduct. In fact, market share liability offers incentive for manufacturers not to improve product safety, and not to develop new products that would benefit the health and safety of the general public.[189] Further, the theory reduces secondary costs in a distorted manner by causing manufacturers to spread the costs for liability of a defective product onto consumers of nondefective and safe products.[190] Consequently, the market share theory spreads secondary costs in a fashion unrelated to the actual market influences of a dangerous product.[191] Finally, market share liability dramatically increases the administrative costs to both courts and litigants.[192] The increase in administrative costs is particularly unjustifiable in cases where a defective product causes only minor, short term illnesses.[193] To summarize, the economic costs of market share liability outweigh the theory's benefits.

Part II of this Article has shown that market share liability fails to meet the underlying policy rationale of either a moral or economic analysis of tort law The theory does not promote principles of equity and justice.[194] Additionally, the theory does not promote the economic goal of efficiency.[195] The next section of this Article applies the same policy analysis to the *Smith v. Eli Lilly & Co.* decision, and concludes that the Illinois Supreme Court correctly rejected market share liability for reasons of moral and economic policy

III. A POLICY ANALYSIS OF *SMITH V ELI LILLY & CO.*

In *Smith*, Sandra Smith brought a products liability action seeking recovery for injuries received from her *in utero* exposure to

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[188] Fischer, *supra* note 27, at 1648-50.

[189] *See supra* notes 125-42 and accompanying text.

[190] *See supra* notes 155-61 and accompanying text.

[191] *See supra* notes 152-54 and accompanying text.

[192] *See supra* notes 162-88 and accompanying text.

[193] *See supra* note 164 and accompanying text.

[194] For a moral analysis of market share liability, see *supra* notes 100-09 and accompanying text.

[195] For an economic analysis of market share liability, see *supra* notes 119-88 and accompanying text.

DES.[196] The plaintiff originally named 138 drug companies as defendants.[197] The trial court dismissed 118 of those defendants on jurisdictional, change of corporate ownership, or misidentification grounds.[198] Twelve of the remaining defendants were able to exculpate themselves by proving that they did not manufacture the injury causing product in the dosage, color, or type the plaintiff's mother ingested.[199] Eight defendants[200] remained in the case when the trial court decided to sustain a count of the plaintiff's complaint based upon a *Sindell* version of market share liability.[201] The Illinois Appellate Court affirmed the trial court's decision,[202] although it adopted a theory similar to that articulated by the Washington Supreme Court in *Martin v Abbott Laboratories*.[203] The decision set the stage for the Illinois Supreme Court to determine whether to adopt market share liability, and if so, in what form.

As this Article shows, market share liability is essentially a policy-based decision to ease the plaintiff's burden of establishing the cause-in-fact element of her claim.[204] The Illinois Supreme Court also viewed market share liability as a policy-based rule.[205] The *Smith* court's analysis explores the policy justifications for market share liability and concludes that the theory fails to advance its alleged goals.[206] The court's opinion is not divided into separate and distinct discussions of the moral and economic approaches to tort law The following discussion shows, however, that the *Smith* court was not only cognizant of moral and economic policies, but specifically appealed to each of these policies in its decision to reject market share liability [207]

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[196] Smith v. Eli Lilly & Co., 560 N.E.2d 324, 326 (Ill. 1990).

[197] *Id.*

[198] *Id.*

[199] Fourteen defendants filed summary judgment motions, of which the court granted twelve. *Id.*

[200] The remaining defendants included Abbott Laboratories, Eli Lilly & Company, Premo Pharmaceutical Laboratories, Inc., Carroll Dunham Smith Pharmacal Company, William H. Rorer, Inc., S.E. Massengill Company, Harvey Laboratories, Inc., and Boyle & Company. *Id.* at 326-27.

[201] *Id.* at 327.

[202] Smith v. Eli Lilly & Co., 527 N.E.2d 333, 339 (Ill. App. Ct. 1988), *rev'd*, 560 N.E.2d 324 (Ill. 1990).

[203] *Id.*

[204] *See, e.g.*, Sindell v. Abbott Laboratories, 607 P.2d 924, 936, 163 Cal. Rptr. 132, 144 (1980) ("[A]s between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury."), *cert. denied*, 449 U.S. 912 (1980).

[205] *Smith*, 560 N.E.2d at 329.

[206] *See infra* notes 208-59 and accompanying text.

[207] For a discussion of the *Smith* court's moralist analysis, see *infra* notes 215-27 and

The Illinois Supreme Court began its analysis by examining the fundamental substantive principles of tort law [208] The court explained that in negligence cases, as well as in strict products liability actions, tort law requires a factual causal connection between the defendant's conduct and the plaintiff's damage.[209] The court also noted that the plaintiff traditionally has the burden of proving that the defendant caused her injury [210] The *Smith* court reasoned that causation-in-fact serves two important functions in tort law [211] Causation-in-fact identifies the blameworthy party, who must bear the costs of the plaintiff's injury.[212] Further, causation-in-fact limits potential liability, thereby avoiding over deterrence that would impede socially beneficial conduct.[213] The *Smith* court viewed the traditional tort element of cause-in-fact as promoting both moral and economic policy goals.[214] A closer examination of the court's decision reveals the *Smith* court's reliance on a policy analysis to reject market share liability

A. The Moralist Policy

Having already outlined the necessity for a plaintiff to prove the element of cause-in-fact, the *Smith* decision concluded that market share liability contravenes fundamental tort principles by imposing liability on the mere possibility of causation.[215] The court explained that public policy does not favor a plaintiff's recovery over a defen-

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accompanying text. For a discussion of the *Smith* court's economic analysis, see *infra* notes 228-59 and accompanying text.

[208] *See Smith*, 560 N.E.2d at 328.

[209] *See id.* ("[The] [c]ausation-in-fact requirement entails a reasonable connection between the act or omission of the defendant and the damages which the plaintiff has suffered.").

[210] *See id.*

[211] *See id.* at 329.

[212] *Id.*

[213] *Id.* In so holding, the court stated as follows:

> The identification element of causation in fact serves an important function in tort law. Besides assigning blame-worthiness to culpable parties, it also limits the scope of potential liability and thereby encourages useful activity that would otherwise be deterred if there were excessive exposure to liability.

Id.

[214] The court recognized that moral goals are served by causation identifying moral blame, a fundamental prerequisite to liability under the moralist position. R. POUND, *supra* note 70, at 79-81. The court also recognized that the causation-in-fact element serves the economic interests of avoiding over-deterrence, or deterrence of socially beneficial conduct. *See supra* notes 122-42 and accompanying text.

[215] *See Smith*, 560 N.E.2d at 333 ("[I]t has been said that this theory contravenes the fundamental tort principle that a mere possibility is insufficient to satisfy causation.").

dant's right to require the plaintiff to prove a causal link between the defendant's conduct and the plaintiff's injury.[216] The court's decision reflects the moralist goal of protecting individual freedom.[217] Consistent with the moralist perspective, the Illinois Supreme Court recognized that causation provides a system of checks and balances to restrict antisocial behavior while protecting personal autonomy.[218] The decision found the mere possibility of causation, which this Article discusses in terms of probable causation,[219] provides an unsupportable basis for imposing liability on a defendant.[220] A chief component in the court's analysis of this point was its recognition that probable causation leads to an inevitable and unjustifiable result: "[S]ome defendants wholly innocent of wrongdoing towards the particular plaintiff will shoulder part or all of the responsibility for the injury caused."[221]

In its second appeal to principles of equity and justice, the Illinois Supreme Court noted that market share liability rewards those plaintiffs that do not attempt to establish the cause-in-fact element of their injury, while it punishes plaintiffs that through due diligence establish a causally responsible but insolvent party.[222] Under the market share liability theory, a plaintiff avoids the risk that the culpable party may be judgment proof. The court concluded that the market share theory produces an incentive not to identify, or even attempt to identify, the defendant that caused the plaintiff's injury.[223] Consequently, market share liability produces the inequitable result of removing the plaintiff's burden of establishing the cause-in-fact element of her claim and subjects potentially innocent defendants to liability, without any showing that the plaintiff is unable to identify the culpable party.[224]

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[216] On this point, the court cited the Oklahoma Supreme Court, which explained, "the public policy favoring recovery on the part of an innocent plaintiff does not justify the abrogation of the rights of a potential defendant to have a causative link proven between the defendant's specific tortious acts and the plaintiff's injuries." *Smith*, 560 N.E.2d at 336 (citing Case v. Fibreboard Corp., 743 P.2d 1062, 1067 (Okla. 1987)).

[217] *Cf.* R. POUND, *supra* note 86, at 143.

[218] *See Smith*, 560 N.E.2d at 339-340 (presenting several rationales why removal of the causation element in market share liability is not warranted).

[219] *See supra* notes 74-75 and 102-09 and accompanying text.

[220] *See Smith*, 560 N.E.2d at 333, 344-45.

[221] *Id.* at 340.

[222] *Id.* at 338-39.

[223] *Id.* at 339.

[224] The court articulated this point:

> Market share liability also has the potential to treat plaintiffs who cannot identify

Finally, the *Smith* court resisted the temptation to impose liability on a potentially responsible defendant solely because that defendant has large financial resources.[225] The court noted that a defendant's wealth is not a suitable basis for determining liability [226] The decision comports with principles of equity and justice that predicate liability on injury causing blameworthy conduct and not on an individual's ability to pay for an injured party's damage.[227] By choosing the course it did, the court protected individual rights to personal autonomy and freedom from unfettered judicial retrictions on conduct.

B. The Economist Policy

Although the *Smith* court did not expressly state that it was undertaking an economic analysis of market share liability, the court premised its decision in part on a finding that market share liability produces inefficient results. In this regard, the court focused on three economic problems created by the theory First, market share liability ineffectively deters inefficient conduct and, in fact, may deter socially beneficial conduct.[228] Next, market share liability spreads secondary costs in only a limited and ineffective manner.[229] Finally, the theory produces increased administrative costs, both from the standpoint of the judiciary and of the litigants.[230]

As already discussed, one of the primary subgoals of an economic analysis of the law is to devise a legal system that encourages socially beneficial conduct, while effectively discouraging inefficient conduct.[231] The *Smith* court found that market share liability fails to meet this subgoal.

> the specific manufacturer responsible for the DES maternally ingested more favorably than one who can. In a typical tort case the plaintiff takes the risk that the defendant will be able to assume financial responsibility for injuries caused. However, with the market share theory, liability is spread throughout members of the industry, reducing the risk that plaintiff will be without a solvent defendant. The theory thus punishes plaintiffs who can satisfy the identification element, while creating an incentive not to locate the particular manufacturer.

Id. at 338-39.

[225] *Id.* at 342.

[226] *See id.* (noting that it is unfair to impose liability solely due to defendant's perceived wealth or ability to obtain insurance).

[227] *See supra* notes 106-09 and accompanying text.

[228] *See infra* notes 232-44 and accompanying text.

[229] *See infra* notes 246-50 and accompanying text.

[230] *See infra* notes 251-59 and accompanying text.

[231] G. CALABRESI, *supra* note 69, at 28, 73-74.

The court noted that market share liability, which removes the defendant identification element from a plaintiff's cause of action, results in the overdeterrence of manufacturer production.[232] Similar to the *Payton* court,[233] the *Smith* court predicted that the market share theory's expansive liability will eventually cripple the entire pharmaceutical industry's research and development efforts.[234] Consequently, the court found that market share liability actually discourages socially beneficial conduct.

On a related point, the *Smith* court noted that market share liability fails to discourage inefficient or unsafe conduct effectively. Initially, the court raised the interesting point that no evidence in the case established the need for further incentive to produce safer products in the pharmaceutical industry [235] In short, the court challenged the necessity for the additional deterrence that market share liability provides, in light of the existing deterrence that negligence and strict product liability laws provide.[236]

Even if more deterrence is necessary, the Illinois Supreme Court noted that the theory's deterrence is ineffective for two reasons. Because of the nature of DES injuries, the harm will manifest itself only a generation after the product is ingested.[237] Thus, market share liability does not discourage manufacturers from producing a product at the time the product may cause injury [238] The theory seeks to discourage past conduct retroactively In DES cases, such retroactive deterrence is unnecessary and has no effect on the present sale or marketing of DES, since manufacturers have long since stopped recommending the drug for use during pregnancy.[239]

One might argue that market share liability is economically justifiable because it encourages manufacturers to improve the safety of their products presently on the market.[240] Market share liability, however, imposes a broad form of liability on the entire product

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[232] *Smith*, 560 N.E.2d at 341.

[233] *See supra* notes 135-42 and accompanying text.

[234] *Smith*, 560 N.E.2d at 342.

[235] *Id.*

[236] *Id.*

[237] *Id.*

[238] *Id.*

[239] For example, the court noted that in 1971, almost twenty years before the *Smith* case was decided, manufacturers stopped selling DES for use during pregnancy. *Id.* at 328.

[240] *See, e.g.*, Collins v. Eli Lilly Co., 342 N.W.2d 37, 49 (Wis. 1984) (arguing that the cost of damages will act as an incentive for drug companies to test their products adequately for safety).

industry [241] The *Smith* court recognized that market share liability provides no incentive for each manufacturer to improve its particular product's safety [242] The basis for this opinion was that all manufacturers are, in effect, insurers of other manufacturers' products under the theory [243] Market share liability does not distinguish between manufacturers, regardless of whether one manufacturer attempts to improve the safety of its product, while another manufacturer takes no additional safety measures.[244] Instead, the goal of market share liability is to require the entire industry, rather than a particular plaintiff, to absorb the cost for an injury [245] Therefore, manufacturers are left with little or no incentive to improve product safety.

The *Smith* decision soundly rejects the argument that market share liability effectively deters inefficient conduct while promoting socially beneficial conduct. The opinion finds that market share liability does not support that primary subgoal of the economic position. The court's economic critique of market share liability, however, did not stop with a discussion of deterrence.

A second subgoal of the economic position is the effective spreading of secondary costs.[246] The *Smith* court found that the market share theory does not effectively and broadly spread secondary costs. The court noted that a majority of the product manufacturers were not before the court.[247] As a result, the plaintiff's damage was spread among a limited group of companies.[248] The market share theory holds the named defendants liable for the plaintiff's damage that could be attributed to the dozens of manufacturers the plaintiff has not joined, or for various reasons the court has dismissed from the action.[249] Thus, the *Smith* court was troubled by the fact that although market share liability produces some secondary cost spreading, it does so in a very limited and ineffective manner.[250]

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[241] *See Sindell*, 607 P.2d at 937, 163 Cal. Rptr. at 145 (noting that since the plaintiff need join only a substantial share of product market, any manufacturer may be subject to liability).

[242] *Smith*, 560 N.E.2d at 342-43.

[243] *See id.*

[244] *Cf.* Spitz, *supra* note 65, at 632 (pointing out that market share liability does not consider differences in individual manufacturers' warnings and safety instructions).

[245] See *supra* notes 126-33 and accompanying text.

[246] G. CALABRESI, *supra* note 69, at 27-28.

[247] *Smith*, 560 N.E.2d at 344.

[248] *Id.*

[249] *Id.*

[250] *Id.*

The final subgoal of the economic theory is the reduction of administrative costs.[251] The *Smith* decision establishes that market share liability actually increases judicial and litigant costs. The Illinois Supreme Court noted that market share liability will produce new and unique evidentiary problems, increasing both the monetary and practical burdens traditional tort litigation already imposes upon courts and litigants.[252] The court found the theory's requirements that a plaintiff establish a substantial market share, and that a defendant prove its actual market percentage, impose an unattainable evidentiary burden upon the parties in light of the unreliable and insufficient data available to resolve these issues.[253]

Additionally, and as the *Smith* case's own procedural history establishes, market share liability increases the number of defendants and dispositive motions based on jurisdictional, evidentiary, or change in corporate ownership grounds.[254] In *Smith*, the plaintiff initially named 138 defendants, seventy of which filed appearances.[255] The case generated costly motions on several issues filed by both the plaintiff and defendants.[256] The trial court devoted its time and energy to hearing and resolving many of these motions, even before the litigants had reached the substantive issues in the case.[257] If the case were to proceed to trial, the *Smith* court cautioned that the evidentiary problems under market share liability would risk overwhelming jurors, transforming each trial "into a maxi-trial on a plethora of issues."[258] The court concluded that the increased administrative costs alone may far exceed a defendant's proportionate share of an eventual judgment.[259] Consequently, the Illinois Supreme Court maintains that, far from meeting the economic subgoal of reducing administrative costs, market share liability actually increases such costs.[260]

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[251] G. CALABRESI, *supra* note 69, at 28.

[252] *Smith*, 560 N.E.2d at 337.

[253] The *Smith* court took particular note of the difficulties experienced by California trial courts in determining definitions of a geographic market and identifying a substantial share or a particular defendant's share of the product market. *Id.* at 337-38.

[254] *Id.* at 326.

[255] *Id.*

[256] At least fifty companies filed motions to dismiss and fourteen companies filed summary judgment motions. *Id.*

[257] For example, the motions to dismiss involved such nonsubstantive questions as jurisdiction, successor liability, and error in identification. *Id.*

[258] *Id.* at 334.

[259] *Id.* at 338.

[260] *Id.*

The *Smith* court found that market share liability is a policy based rule designed to ease a plaintiff's burden of establishing causation-in-fact.[261] Although the court did not expressly articulate its analysis of this theory in terms of a moral or economic approach to tort law, the *Smith* decision appealed to and relied heavily upon the policy goals inherent in each of those legal theories. Under either a moral or economic analysis, the Illinois Supreme Court correctly found that market share liability does not satisfy the fundamental policy goals of tort law.

Analyzed on an individual level, the decision is lamentable because some injured victims inevitably will go uncompensated. Analyzed on a social level, however, the decision benefits the interests of all persons. It protects individual autonomy, and it encourages manufacturers to continue to research, develop, market, and sell drugs that save lives and reduce pain and suffering for millions. To summarize, the *Smith* decision produces a result both equitable and economically efficient. The question remains, however, whether the Illinois Supreme Court, for similar reasons, will reject the long standing doctrine of alternative liability when suggested for application in pharmaceutical products liability cases.

IV THE NEXT STEP: ALTERNATIVE LIABILITY IN THE "CLASSIC" SENSE

Prosser and Keeton describe alternative liability as "clearly established double fault."[262] Alternative liability, like market share liability, relieves the plaintiff of identifying an actual tortfeasor.[263] The classic example of this theory of liability is *Summers v Tice*.[264] In *Summers*, the plaintiff and two defendants went hunting.[265] The defendants, apparently armed with identical shotguns, missed their target, a quail, and struck the plaintiff in his right eye and face.[266] Several issues were clear beyond doubt: birdshot caused the plaintiff's injury, both defendants fired birdshot, the plaintiff was struck by birdshot fired by one or both of the defendants, and the plaintiff could not prove which defendant fired the shots that struck the plaintiff.[267]

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[261] *See id.* at 330 (citing policy rationale articulated by *Sindell* decision).

[262] PROSSER AND KEETON, *supra* note 4, at 271.

[263] *Id.* at 270-71.

[264] 199 P.2d 1 (Cal. 1948).

[265] Summers v. Tice, 199 P.2d 1, 2 (Cal. 1948).

[266] *Id.*

[267] *Id.* at 2.

The court affirmed a negligence judgment against both defendants.[268] In its analysis, the court considered the relative position of the parties and the burden of requiring the plaintiff to establish the identity of the injury causing defendant. In shifting the plaintiff's burden, the court relied on the fact that both defendants were careless toward the plaintiff, and that they collectively brought about a situation where the negligence of one of them injured the plaintiff.[269] When faced with an evidentiary burden that the plaintiff could not overcome, the court reacted with a policy analysis. The decision forced the defendants to attempt to exculpate themselves, rather than permitting the plaintiff to remain uncompensated.

Although *Summers* stretched, and perhaps snapped, the traditional causation-in-fact element of a cause of action in tort, the opinion leaves behind certain important principles that one cannot abandon when determining whether alternative liability should apply to pharmaceutical products litigation. First, *Summers* was a negligence case and, therefore, the court focused on the defendants' conduct toward the plaintiff.[270] The conduct of each defendant was virtually identical. Second, the type of injury—shotgun wounds—was undisputed.[271] Third, it was clear that the birdshot that struck the plaintiff was fired from either or both of defendants' shotguns. In short, the only unknown was which of the two defendants in fact caused the plaintiff's injuries.[272] Under this narrow, special fact pattern, the court did not require the plaintiff to identify who caused the harm.

Pharmaceutical products litigation, unlike traditional negligence actions, does not typically focus on the conduct of a manufacturer toward a consumer. Liability is strictly applied and not conditioned on the plaintiff's showing that the defendant violated a standard of care.[273] Instead, product liability cases typically concern the condition of a product.[274] Even "failure to warn" pharmaceutical cases generally do not focus on a manufacturer's duty to warn the consumer, since the duty to warn runs only to the prescribing physician under the "learned intermediary rule."[275]

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[268] *Id.*

[269] *Id.* at 4-5.

[270] *Id.* at 2.

[271] *Id.*

[272] *Id.*

[273] M. POLELLE & B. OTTLEY, ILLINOIS TORT LAW 555 (1985).

[274] *Id.*

[275] *See, e.g.*, Kirk v. Michael Reese Hosp., 513 N.E.2d 387, 394 (Ill. 1987) (duty to warn extends only to prescribing physician).

In *Senn v. Merrell-Dow Pharmaceuticals, Inc.*,[276] the Supreme Court of Oregon decried the violence that alternative liability visits upon the burden of proving factual causation in tort. In *Senn*, the plaintiff sued the only two defendants that might have manufactured the injury causing diphtheria pertussis tetanus vaccine.[277] Nevertheless, the court held that the plaintiff could not invoke the *Restatement (Second) of Torts* § 433B version of alternative liability.[278]

The court focused on the burden of proof issue and explained that the application of alternative liability

> to a case [in] which neither defendant is able to produce exculpatory evidence is to impose liability where the probability of causation is 50 percent or less ("as probable as not" or "less than probable") as opposed to the traditional 50 + percent ("more probable than not") preponderance of evidence standard and to impose liability on all defendants when in fact only one of them could have caused plaintiff's harm.[279]

The same analysis applies to Illinois law, which requires that a plaintiff prove each element of a cause of action as "more probably true than not."[280]

The *Senn* court's commentary illustrates the basic unfairness of efforts to impose joint liability without a preponderance of proof of causation. Not only does alternative liability raise a presumption of liability with a 50 percent or lower proof of causation,[281] as the *Senn* court observed, the theory also fails to explain or justify the requirement that the defendant prove it has not caused the plaintiff's harm.[282] The court questioned what lesser degree of likelihood other courts will permit in order for a plaintiff to establish causation, or a defendant to establish a lack of causation.[283] Should that degree of causation continue to shift with the number of defendants?[284] For

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[276] 751 P.2d 215 (Or. 1988).

[277] Senn v. Merrell-Dow Pharmaceuticals, Inc., 751 P.2d 215, 216 (Or. 1988).

[278] *Id.* at 222-23.

[279] *Id.* at 222.

[280] Reivitz v. Chicago Rapid Transit Co., 158 N.E. 380, 381-82 (Ill. 1927) (holding that the plaintiff must prove each element of a cause of action by greater weight or preponderance of evidence); *see also* Sutton v. Washington Ruther Parts & Supply Co., 530 N.E.2d 1055, 1058-59 (Ill. App. Ct. 1988) (holding that plaintiff must present evidence beyond mere possibility that defendant manufactured injury causing product).

[281] *Senn*, 751 P.2d at 222.

[282] *Id.* at 223.

[283] *Id.*

[284] *Id.*

example, in a case where ten defendants are before the court, should the court impose liability on the defendants when the plaintiff is unable to prove greater than a ten percent likelihood that each of the defendants individually caused the injury? Under alternative liability, as the number of defendants increases the likelihood that a particular defendant caused the plaintiff's injury decreases. The theory not only relieves the plaintiff of proving causation in fact but also finds defendants liable for damages without a showing that any particular defendant more likely than not caused the plaintiff's injury.

Similar to the market share theory, questions of moral and economic policy would suggest that alternative liability is an unjustifiable and inefficient theory. Alternative liability unduly restricts an individual's freedom of action without a showing that the defendant's conduct infringed on the rights of another person.[285] The theory, like market share liability, creates many over deterring effects[286] and increased administrative costs[287] because alternative liability imposes liability without proof of causation and creates new evidentiary causation problems that will lead to an increased spending of judicial and litigant time and resources.

CONCLUSION

This Article explores the variations of market share liability, the moral and economic theories of tort law, and the application of these theories to the *Smith v Eli Lilly & Co.* opinion and alternative liability At each juncture, the authors conclude that non-identification of tortfeasors does not promote the purpose of tort law. Furthermore, both market share liability and alternative liability are inconsistent with Illinois products liability law. That certain injured persons will remain uncompensated is a result that must be tolerated, for the alternative is the imposition of liability on those that are truly not culpable.

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[285] *See supra* notes 76-88 and accompanying text.

[286] *See supra* notes 122-42 and accompanying text.

[287] *See supra* notes 162-88 and accompanying text.