St. John's Law Review

Volume 64, Winter 1990, Number 2 Article 7

Market Share Liability--Did New York Go Too Far?: Hymowitz v. Eli Lilly & Co.

William D. Wilson

MARKET SHARE LIABILITY—DID NEW YORK GO TOO FAR?: *HYMOWITZ v. ELI LILLY & CO.*

From 1947 to 1971, physicians widely prescribed diethylstilbestrol ("DES"), a synthetic estrogen,[1] to pregnant women in order to prevent miscarriages.[2] In 1971, the Food and Drug Administra-

---

[1] *See* Downey & Gulley, *Theories of Recovery for DES Damage: Is Tort Liability the Answer?*, 4 J. LEGAL MED. 167, 168-72 (1983). A group of British scientists who were searching for a substitute for natural estrogens discovered DES in the late 1930's. *Id.* Natural estrogens had been used to treat menopausal symptoms prior to the discovery of DES. *See* Ferrigno v. Eli Lilly & Co., 175 N.J. Super. 551, 562, 420 A.2d 1305, 1310 (1980). Natural estrogens, which had been available since the late 1920's, had several drawbacks. *Id.* They were very expensive and could only be administered through injections into the buttocks which often resulted in painful abscesses. *Id.* DES was a major scientific advance, since it could be administered orally and was approximately 300 times less expensive than natural estrogens. *See* Note, *Risk Contribution: An Undesirable New Method for Apportioning Damages in the DES Cases*, 10 J. CORP. L. 743, 745 (1985). The drug, however, was never patented, and as a result, anyone was allowed to market it. *See* Martin v. Abbott Laboratories, 102 Wash. 2d 581, 587, 689 P.2d 368, 373 (1984).

Before the manufacturers were permitted to market DES in the United States, they were required to seek approval from the Food and Drug Administration. *See* Roberts & Royster, *DES and the Identification Problem*, 16 AKRON L. REV. 447, 451 (1983). The approval process required each manufacturer to submit a New Drug Application ("NDA") pursuant to the Federal Food, Drug, and Cosmetic Act, ch. 675, § 502, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C.A. § 355 (West Supp. 1990)), detailing the proposed uses of the drug, the chemical composition of the drug, clinical data verifying the drug's safety, the methods of manufacturing it, and the proposed labeling. *Id.* The first applicants sought approval to market DES for several purposes, including "the treatment of post-menopausal symptoms, senile vaginitis, gonorrheal vaginitis, and suppression of lactation." *See* Payton v. Abbott Laboratories, 512 F. Supp. 1031, 1033 (D. Mass. 1981).

In order to facilitate the granting of approval to market DES, the FDA made four requests of the drug companies which filed applications. *See id.* They were asked to: (1) submit their test data jointly in a master file to accelerate the evaluation process; (2) use the same United States Pharmacopeia standard to "establish the chemical identity of the drug"; (3) grant permission to the FDA to use the information gathered by the manufacturers to evaluate new applications; and (4) develop uniform labeling requirements with respect to use of the drug and recommended dosages. *Id.* The FDA granted permission to market DES for non-pregnancy uses in 1941. *See* Biebel, *DES Litigation and the Problem of Causation*, 51 INS. COUNS. J. 223, 224 (1984).

[2] *See* Note, *Market Share Liability and DES*—Sindell v. Abbott Laboratories: *Square Pegs in Round Holes*, 13 CONN. L. REV. 777, 781 (1981). It was not until 1947 that the FDA approved of DES as a miscarriage preventative. *See* Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 593, 607 P.2d 924, 925, 163 Cal. Rptr. 132, 133, *cert. denied*, 449 U.S. 912 (1980). By 1952, the FDA no longer considered DES a new drug. *See Ferrigno*, 175 N.J. Super. at 565, 420 A.2d at 1312. This meant that any company desiring to market DES could do so with-

tion ("FDA") withdrew its approval of DES as a miscarriage preventive[3] after tests linked DES to a high occurrence of vaginal and cervical cancer in women who were exposed to it *in utero*.[4] Numerous lawsuits followed.[5] Due to the generic nature of DES and the extended latency period prior to discovery of any injury, plaintiffs typically have been unable to identify the culpable defendant.[6] As a result, most courts have denied recovery to victims of DES.[7]

---

out filing an NDA. *Id.* An estimated 200 to 300 companies marketed DES between 1947 and 1971. *See Martin*, 102 Wash. 2d at 589, 689 P.2d at 374. Due to the generic nature of DES, pharmacists commonly filled prescriptions with whatever brand of DES that was in stock. *Payton*, 512 F. Supp at 1034. It is estimated that one-half million to three million women used DES during pregnancy from 1947 to 1971. *See* Fischer, *Products Liability--An Analysis of Market Share Liability*, 34 VAND. L. REV. 1623, 1623-24 (1981); Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 965 & n.6 (1978) (characterizing low-end of range as conservative).

[3] *See* Roberts & Royster, *supra* note 1, at 455. DES is still approved for uses other than the prevention of miscarriages, such as the treatment of menopausal symptoms, senile vaginitis, and prostate cancer. *See* Schwartz & Mahshigian, *Failure to Identify the Defendant in Tort Law: Towards a Legislative Solution*, 73 CALIF. L. REV. 941, 945 (1985).

[4] *See Ferrigno*, 175 N.J. Super. at 565, 420 A.2d at 1312. In 1971, Dr. Arthur Herbst and two colleagues published an article which concluded that there existed a statistical link between vaginal and cervical clear cell adenocarcinoma, a rare form of cancer, and the use of DES during pregnancy. *Id.* A far more common abnormality linked to DES is vaginal adenosis which is an abnormal presence of glandular tissue in the vagina. *See* Fischer, *supra* note 2, at 1624; *see also* Note, *supra* note 2, at 782 (estimating that 30-90% of daughters of mothers who ingested DES during pregnancy will experience adenosis). Adenosis, which is not considered pre-cancerous, tends to disappear over time. *See* Roberts & Royster, *supra* note 1, at 454. Research has also indicated a possible link between DES and infertility in men born of mothers who used DES. *See* Biebel, *supra* note 1, at 226. It is estimated, however, that 29% of the reported adenocarcinoma cases have no connection to DES. *See* Fischer, *supra* note 2, at 1661. Therefore, it is possible that a plaintiff's injuries were not caused by DES even though the drug was taken by the plaintiff's mother. *Id.*

[5] *See* Smith v. Eli Lilly & Co., 173 Ill. App. 3d 1, 10 n.7, 527 N.E.2d 333, 339 n.7 (1988) ("an estimated 1,000 suits [have been filed] against DES pharmaceutical manufacturers, most of which are still pending in the courts"), *rev'd*, 59 U.S.L.W. 2051 (Ill. 1990).

[6] *See Martin*, 102 Wash. 2d at 590, 689 P.2d at 375; Roberts & Royster, *supra* note 1, at 455-56; *see, e.g.*, Morton v. Abbott Laboratories, 538 F. Supp. 593, 599-600 (M.D. Fla. 1982) (plaintiff's suit against eight manufacturers dismissed for failure to prove that particular defendant produced DES which caused injury); Ryan v. Eli Lilly & Co., 514 F. Supp. 1004, 1006-07 (D.S.C. 1981) (manufacturer must be linked to specific instrumentality that caused injury); Gray v. United States, 445 F. Supp. 337, 338 (S.D. Tex. 1978) (essential element of products liability case is that plaintiff must identify specific manufacturer). Under traditional tort principles a plaintiff is required to show a causal relationship between the defendant's actions and the injuries sustained. *See* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS § 41, at 263 (5th ed. 1984) [hereinafter PROSSER & KEETON]. "It is quite clear that an essential element of the plaintiff's case has been the identification of the named defendant as the manufacturer or supplier of the defective product." *Id.* § 103, at 713.

[7] *See* Note, *supra* note 2, at 783-84. DES is a fungible drug produced from an identical chemical formula and commonly sold in a generic form. *See* Payton v. Abbott Laboratories,

Some courts, however, have permitted recovery by either modifying existing tort theories or fashioning new ones.[8] The theory of market share liability is one of several relatively recent tort doctrines which provide for the imposition of liability without a traditional showing of causation.[9] Recently, in *Hymowitz v. Eli Lilly &*

---

512 F. Supp. 1031, 1034 (D. Mass. 1981); *see also* Note, *supra* note 1, at 746-47 (discussing DES identification problem). Several manufacturers of DES sold portions of their stock to other manufacturers. *See Payton*, 512 F. Supp. at 1034. The minimum latency period of DES is ten to twelve years, *see* Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 594, 607 P.2d 924, 925, 163 Cal. Rptr. 132, 133, *cert. denied*, 449 U.S. 912 (1980), and in some instances it may take as long as thirty years before symptoms begin to develop. *See* Downey & Gulley, *supra* note 1, at 172. Consequently, many records detailing the sale of DES have been either lost or destroyed. Biebel, *supra* note 1, at 227. Additionally, the memories of those who participated in DES transactions have faded over time. *See* Bichler v. Eli Lilly & Co., 55 N.Y.2d 571, 579, 436 N.E.2d 182, 185, 450 N.Y.S.2d 776, 779 (1982).

[8] *See* Biebel, *supra* note 1, at 227-31. The major premise underlying these theories is that an innocent plaintiff should be favored over a culpable defendant. *See Martin*, 102 Wash. 2d at 604, 689 P.2d at 382; *see also Sindell*, 26 Cal. 3d at 610-11, 607 P.2d at 936, 163 Cal. Rptr. at 144 ("as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury").

[9] *See* Fischer, *supra* note 2, at 1627 n.32. Under a market share liability theory, a plaintiff can recover without identifying the particular manufacturer of the DES that the plaintiff's mother ingested. *Id.* at 1626. The burden of proof shifts to the defendants to show that they did not produce the suspect DES. *Id.* at 1635. The manufacturers who are unable to prove that they were not responsible for the plaintiff's injuries are held liable for the portion of the plaintiff's judgment that represents their share of the DES market. *Id.* at 1635-36. Application of this rule approximates the damages of each manufacturer's liability for the DES it marketed. *See Sindell*, 26 Cal. 3d at 613, 607 P.2d at 938, 163 Cal. Rptr. at 146. Under the market share theory, a manufacturer's liability is several only. *See* Brown v. Superior Court, 44 Cal. 3d 1049, 1075, 751 P.2d 470, 486-87, 245 Cal. Rptr. 412, 428 (1988). Thus, a plaintiff would recover less than the full amount of the judgment since some of the manufacturers are no longer in business and others may not be amenable to suit in a particular jurisdiction. *Id.* at 1072-73, 751 P.2d at 485, 245 Cal. Rptr. at 426.

Another nontraditional theory of liability which has been advanced to justify recovery is alternative liability. *See* Schwartz & Mahshigian, *supra* note 3, at 946-49. At least one court has shown support for its use in DES cases. *See* Abel v. Eli Lilly & Co., 418 Mich. 311, 334, 343 N.W.2d 164, 174, *cert. denied*, 469 U.S. 833 (1984). Alternative liability applies when "the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it." RESTATEMENT (SECOND) OF TORTS § 433(b) (1965). Under this theory, all tortfeasors must appear before the court to facilitate the identification of the wrongdoer. *See* Schwartz & Mahshigian, *supra* note 3, at 946. The alternative liability theory, however, does not work well in DES cases due to the large number of manufacturers and the inability of the plaintiff to prove that the defendant which caused the harm is before the court. *See* Fischer, *supra* note 2, at 1634-35.

A third nontraditional theory of liability, concert of action, places liability for the plaintiff's injuries on all the defendants even though only one was the direct cause. *See* Downey & Gulley, *supra* note 1, at 173-78. Under the concert of action theory, all those who take part in "a common plan or design to commit a tortious act" are equally liable to the plaintiff. PROSSER & KEETON, *supra* note 6, § 46, at 323. Consequently, in DES litigation, a de-

Co.,[10] the New York Court of Appeals adopted a market share liability theory which imposes liability on manufacturers of DES, based on their proportionate share of the national market at the time of a plaintiff's exposure to DES.[11] The *Hymowitz* court further held that liability would be several, and that defendants would be precluded from exculpating themselves.[12]

In *Hymowitz*, the plaintiffs sought relief against several manufacturers of DES,[13] alleging that they had sustained injury from DES while *in utero*. As in most DES litigation, the plaintiffs were

---

fendant would be held liable even if it could prove that it was not responsible for the plaintiff's injuries. *See* Miller & Hancock, *Perspectives on Market Share Liability: Time for a Reassessment?*, 88 W. VA. L. REV. 81, 97 (1985). Two courts have, at least at one time, supported this theory. *See Abel*, 418 Mich. at 337, 343 N.W.2d at 175-76; *Bichler*, 55 N.Y.2d at 584-85, 436 N.E.2d at 188-89, 450 N.Y.S.2d at 782-83. In *Bichler*, the court employed the concert of action theory because of the defendant's failure to, *inter alia*, move for a limitation on the judgment to the defendant's market share, or join the other DES companies to the action. *See id.* at 581, 436 N.E.2d at 186, 450 N.Y.S.2d at 780. The court in *Bichler* stated that it would "leave for another day consideration of whether other theories of liability" may establish a cause of action. *Id.* at 580, 436 N.E.2d at 186, 450 N.Y.S.2d at 780.

Finally, a fourth theory of liability, known as enterprise liability, provides that if a plaintiff is injured by a defect in a product which is common to all products of that type, each manufacturer of that product must be held liable. *See* Downey & Gulley, *supra* note 1, at 179. However, unlike the concert of action theory, defendants can exculpate themselves by showing that their product did not cause the plaintiff's injuries. *See id.* The remaining defendants are then held jointly and severally liable for the plaintiff's injuries. *Id.*; *see, e.g.*, Hall v. E.I. Dupont DeNemours, 345 F. Supp. 353, 378 (E.D.N.Y. 1972) (liability imposed on six manufacturers representing entire industry). Enterprise liability is usually applied only where the manufacturers of the product "jointly controlled the risk either by an express agreement or by parallel behavior in delegating safety functions and adhering to insufficient safety standards." Schwartz & Mahshigian, *supra* note 3, at 953 (footnote omitted). However, enterprise liability has been rejected in DES litigation. *See* Burnside v. Abbott Laboratories, 351 Pa. Super. 264, 285-87, 505 A.2d 973, 984-85 (1985); *see also Morton*, 538 F. Supp. at 598 (enterprise liability does not support liability in DES cases); *Ryan*, 514 F. Supp. at 1017 (enterprise concept is repugnant to most basic tenets of tort law).

[10] 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941, *cert. denied*, 110 S. Ct. 350 (1989).

[11] *Id.* at 502, 539 N.E.2d at 1072, 541 N.Y.S.2d at 944. The court in *Hymowitz* stated that the circumstances of the case "call for recognition of a realistic avenue of relief for plaintiffs injured by DES." *Id.* at 507, 539 N.E.2d at 1075, 541 N.Y.S.2d at 947. After consideration of the various theories of liability adopted by other states, the *Hymowitz* court concluded that market share liability, based on a national market, provided "the best solution." *Id.* at 511, 539 N.E.2d at 1077, 541 N.Y.S.2d at 949.

[12] *Id.* at 512-13, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950. Although the court conceded that imposition of several liability would diminish a plaintiff's recovery if some of the original participants in the market were not before the court, it felt it had equitably balanced the situation by precluding exculpation even where DES manufacturers could prove their particular product never injured the plaintiff. *See id.*; *see also infra* notes 27-30 and accompanying text.

[13] *Id.* at 502, 539 N.E.2d at 1071, 541 N.Y.S.2d at 943.

unable to specifically identify the manufacturer of the drug that caused their particular injury.[14] In addition, several plaintiffs whose actions were previously time barred[15] were permitted to bring their actions under the New York Revival Statute,[16] which revived the claims of victims of DES and certain other toxic substance injuries, for one year from the date of its enactment.[17]

In *Hymowitz*, the defendant manufacturers moved for summary judgment on the ground that the plaintiffs were unable to identify which manufacturers of the drug allegedly caused their individual injuries.[18] Several of the defendants, contending that the revival of the actions was violative of both the Federal and State Constitutions,[19] sought dismissal on statute of limitations grounds as well.[20] The trial court denied the defendants' motion for summary judgment and, on cross motion by the plaintiffs, rejected the defendants' affirmative defense of the statute of limitations.[21] The Appellate Division affirmed, but certified a question to the Court of Appeals as to whether the orders of the trial court were proper.[22] The Court of Appeals answered the certified question in the affirmative and affirmed the order of the Appellate Division.[23]

---

[14] *Id.* at 503, 539 N.E.2d at 1072, 541 N.Y.S.2d at 944; *see also* Bichler v. Eli Lilly & Co., 55 N.Y.2d 571, 579, 436 N.E.2d 182, 185, 450 N.Y.S.2d 776, 779 (1982) (due to generic nature of DES and long time lapse before appearance of injuries it is practically impossible to later pinpoint particular manufacturers responsible for plaintiff's injuries).

[15] *See Hymowitz*, 73 N.Y.2d at 504, 539 N.E.2d at 1073, 541 N.Y.S.2d at 945. Prior to 1986, the relevant New York statute of limitations period accrued upon exposure to the drug causing the injury, thus, leaving many DES actions time barred due to the long latency period of the drug's harmful effects. *See id.* at 503-04, 539 N.E.2d at 1073, 541 N.Y.S.2d at 945. This was modified by the Legislature, Ch. 682, § 2, [1986] N.Y. LAWS 1565 (McKinney), when a discovery rule for "the latent effects of exposure to any substance" was instituted. *See* N.Y. CIV. PRAC. L. & R. § 214-c(2) (McKinney 1990); *see also* Siegel, *New York Adopts a "Discovery" Rule For Exposure Cases—And Even Offers a Short Time for Which To Revive Expired Claims*, 321 N.Y. ST. L. DIG. 1, 1 (1986).

[16] *See* Ch. 682, § 4, [1986] N.Y. LAWS 1567 (McKinney).

[17] *See Hymowitz*, 73 N.Y.2d at 513, 539 N.E.2d at 1079, 541 N.Y.S.2d at 951. This statute revived, for a period of one year expiring on July 30, 1987, time-barred claims which involved exposure to any of five designated substances. *See* N.Y. CIV. PRAC. L. & R. § 214-c, commentary at 637 (McKinney 1990). These substances included DES, tungsten-carbide, asbestos, chlordane, and polyvinylchloride. *Id.* Under the statute, a plaintiff could bring an action even if it had been brought previously as long as its dismissal was based solely on statute of limitation grounds. *Id.*

[18] *Hymowitz*, 73 N.Y.2d at 504, 539 N.E.2d at 1073, 541 N.Y.S.2d at 945.

[19] *Id.* at 513, 539 N.E.2d at 1079, 541 N.Y.S.2d at 951.

[20] *Id.* at 504, 539 N.E.2d at 1073, 541 N.Y.S.2d at 945.

[21] *Id.*

[22] *Id.*

[23] *Id.* at 516, 539 N.E.2d at 1080, 541 N.Y.S.2d at 952.

Writing for the court, Chief Judge Wachtler upheld the adoption of the market share theory of liability based on a national market[24] for determining liability and apportioning damages in DES cases.[25] The court further held that the revival statute as it applies to DES was constitutional.[26] The market share theory of liability apportions each defendant's liability according to the amount of risk of injury it created in marketing DES for use during pregnancy.[27] The court concluded that each defendant would be liable to the plaintiff for the proportion of the total damages that represented the defendant's share in the national DES mar-

---

[24] *Id.* at 511-12, 539 N.E.2d at 1073, 541 N.Y.S.2d at 950. Although the court conceded the lack of a "reasonable link between liability and the risk created by a defendant to a particular plaintiff," it decided to utilize a national market for "practical reasons." *Id.* Determining market shares can be difficult and time-consuming since many of the records detailing the production and sale of DES have been lost or destroyed and several manufacturers have since gone out of business. *See* Fischer, *supra* note 2, at 1648. Also, because DES was manufactured for a number of purposes, production figures, if available, might not accurately reflect the amount of DES which was produced for preventing miscarriages. *Id.* With these considerations in mind, the court in *Hymowitz* decided to use a national market based on information which had already been compiled after many years of litigation by the California courts. *See Hymowitz*, 73 N.Y.2d at 509, 539 N.E.2d at 1076, 541 N.Y.S.2d at 948.

[25] *Hymowitz*, 73 N.Y.2d at 511-12, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950. The court in *Hymowitz* limited its adoption of the theory of market share liability to DES litigation only. *Id.* at 508, 539 N.E.2d at 1075, 541 N.Y.S.2d at 947.

[26] *Id.* at 513-14, 539 N.E.2d at 1079, 541 N.Y.S.2d at 951. The *Hymowitz* court noted that the United States Supreme Court has held that statutes of limitations "represent a public policy about the privilege to litigate" and are "subject to a relatively large degree of legislative control." Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945). Therefore, the court in *Hymowitz* held that the federal due process clause was not violated by the Legislature's revival of time-barred actions. *Hymowitz*, 73 N.Y.2d at 513-14, 539 N.E.2d at 1079, 541 N.Y.S.2d at 951. New York State law requires application of an even stricter standard of review. *See id.* at 574, 539 N.E.2d at 1079, 541 N.Y.S.2d at 951. Under state law the "Legislature may constitutionally revive a personal cause of action where the circumstances are exceptional and are such as to satisfy the court that serious injustice would result to plaintiffs not guilty of any fault if the intention of the Legislature were not effectuated." *Id.* (quoting Gallewski v. Hentz & Co., 301 N.Y. 164, 174, 93 N.E.2d 620, 624 (1950)). The court held that the revival of the DES claims clearly met this standard since the circumstances presented were "exceptional" and that "an injustice has been rectified." *Id.*

The defendants argued that the statute violated equal protection since it only revived actions involving exposure to five toxic substances. *Id.* at 515, 539 N.E.2d at 1080, 541 N.Y.S.2d at 952. Under New York law, however, the Legislature has broad discretion in enacting laws, and a statute is presumed to be constitutional unless it can be shown that a distinction has no rational basis. *See* Trump v. Chu, 65 N.Y.2d 20, 25, 478 N.E.2d 971, 974-75, 489 N.Y.S.2d 455, 458-59 (1985); Montgomery v. Daniels, 38 N.Y.2d 41, 59-60, 340 N.E.2d 444, 455, 378 N.Y.S.2d 1, 16 (1975). Accordingly, the court held that the statute did not violate equal protection since it had a "rational basis" and the Legislature "acted within its broad range of discretion in enacting the law." *Hymowitz*, 73 N.Y.2d at 515, 539 N.E.2d at 1080, 541 N.Y.S.2d at 952.

[27] *Hymowitz*, 73 N.Y.2d at 512, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950.

ket.[28] The court further added that a defendant who sold DES for pregnancy use could not excuse itself from liability, even if it was able to prove that it was not the particular seller or manufacturer of the drug that injured the plaintiff.[29] To balance the court's hard-line disallowance of exculpatory attempts by defendants, it also determined that a defendant's liability would be several, not joint.[30]

Although concurring in the majority's decision to uphold the constitutionality of the revival statute and the adoption of the market share liability theory, Judge Mollen rejected the court's conclusion that a defendant who sold DES for pregnancy purposes could not exculpate itself.[31] Judge Mollen contended that a defendant should not be held liable if it could prove, by a preponderance of the evidence, that it was in no way responsible for the production or distribution of the particular drug which injured the plaintiff.[32] Moreover, to ensure full recovery by the plaintiffs, he proposed that liability be joint *and* several.[33]

It is submitted that while the court acted properly in adopting a market share liability theory in DES cases and in upholding the constitutionality of the revival statute, it acted improperly in de-

---

[28] *Id.*

[29] *Id.* The court reasoned that since liability was based on the overall risk to the public created by a particular defendant, and not on the issue of causation in a particular case, the defendants would be provided with a "windfall" if they were able to escape liability. *Id.* The court further stated that any defendant's ability to exculpate itself would be based on mere "fortuities" which do not in any way reduce the defendant's actual culpability since it is the creation of the risk which matters and not causation in a single case. *Id.* The court did, however, conclude that it would be unfair and unjust to disallow exculpation for those defendants who could prove that they did not market DES for pregnancy purposes since they in no way contributed to the over-all risk of injury. *Id.* It should be noted, though, that the court did not find a sufficient factual basis for this defense to liability in the record below. *Id.* at 512 n.2, 539 N.E.2d at 1078 n.2, 541 N.Y.S.2d at 950 n.2.

[30] *See id.* at 512-13, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950; *see also* note 12 and accompanying text.

[31] *Id.* at 516, 539 N.E.2d at 1081, 541 N.Y.S.2d at 953 (Mollen, J., concurring in part, dissenting in part).

[32] *Id.* (Mollen, J., concurring in part, dissenting in part). Judge Mollen urged that "to preclude exculpation would directly and unnecessarily contravene the established common-law tort principles of causation," and that the majority's decision "represented a radical departure from fundamental tenets of tort law and is unnecessarily unfair and inequitable to the defendants who have proven, or can prove, that they did not produce the pill which caused the injury." *Id.* at 519-20, 539 N.E.2d at 1082-83, 541 N.Y.S.2d at 954-55 (Mollen, J., concurring in part, dissenting in part).

[33] *Id.* at 521, 539 N.E.2d at 1084, 541 N.Y.S.2d at 956 (Mollen, J., concurring in part, dissenting in part).

nying those defendants who are not responsible for the plaintiff's injuries the opportunity to exculpate themselves. This Comment will examine market share liability as adopted by the court in *Hymowitz*. In addition, this Comment will suggest that defendants who can prove that they are not responsible for the plaintiff's injuries should be excused from liability. Finally, this Comment will propose that in determining a defendant's share of the national market, the sales of a defendant who properly has exculpated itself should be subtracted from the total national DES sales, and the market shares of the remaining defendants should be adjusted to reflect this new market.

I. MARKET SHARE LIABILITY

In order to recover under a traditional products liability theory, the plaintiff must prove that the product was defective, that the defect caused the injuries, and that the defendant was in some way responsible for the defective product.[34] The theory of market share liability was created in order to help ease a plaintiff's burden in proving that a particular defendant was directly responsible for manufacturing the product that caused the injuries.[35] Since its inception in *Sindell v. Abbott Laboratories*,[36] several courts, through various versions of market share liability,[37] have attempted "to

---

[34] *See, e.g.*, Biebel, *supra* note 1, at 226 (plaintiff must prove defective product, causation of injury, and that defect is attributable to defendant); LaMarca, *Market Share Liability, Industry-Wide Liability, Alternative Liability and Concert of Action: Modern Legal Concepts Preserving Liability for Defective But Unidentifiable Products*, 31 DRAKE L. REV. 61, 62 (1982) (same); Roberts & Royster, *supra* note 1, at 450 (same).

[35] *See* Martin v. Abbott Laboratories, 102 Wash. 2d 581, 602-03, 689 P.2d 368, 381 (1984). In adopting a market share liability theory, the court in *Martin* stated that "the crux of the problem facing [a] DES plaintiff is that she cannot identify the drug company that she alleges caused her injury." *Id.* at 602, 689 P.2d at 381; *see also* Biebel, *supra* note 1, at 231 (market share liability theory created to solve problem of defendant identification in DES cases); Note, *Market Share Liability: An Answer to the DES Causation Problem*, 94 HARV. L. REV. 668, 679 (1981) (same).

[36] 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980). The *Sindell* court believed that "some adaptation of the rules of causation and liability" was appropriate since in today's society "advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer." *Id.* at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144.

[37] *See* McCormack v. Abbott Laboratories, 617 F. Supp. 1521, 1525-26 (D. Mass. 1985); *Martin*, 102 Wash. 2d at 581, 689 P.2d at 368. The *Martin* court rejected the market share theory adopted in *Sindell*. *See id.* at 602, 689 P.2d at 381. The theory adopted in *Martin* requires that the plaintiff bring an action against only one defendant as opposed to the *Sindell* requirement that a substantial share of the market be joined in the action. *Id.* at 604, 689 P.2d at 382. Under *Martin*, to bring an action the plaintiff must allege the

achieve as close an approximation as possible between a DES manufacturer's liability for damages and its individual responsibility for the injuries caused by the products it manufactured."[38] The market share theory abolishes the plaintiff's burden of proving the traditional tort requirement of a causal relationship between the injury and the defendant's actions.[39] Thus, a plaintiff may bring an action where the specific manufacturer of the drug causing the injury is indeterminable.[40] In turn, a particular defendant's liability is apportioned according to its share of the market,[41] thereby mak-

---

following:

> [1] that the plaintiff's mother took DES; [2] that DES caused the plaintiff's subsequent injuries; [3] that the defendant produced or marketed the type of DES taken by the plaintiff's mother; and [4] that the defendant's conduct in producing or marketing the DES constituted a breach of a legally recognized duty to the plaintiff.

Id.

Similar to the approach in *Sindell*, the defendants are able to escape liability by establishing that they did not produce or market the specific drug which caused the plaintiff's injuries. *See id.* at 605, 689 P.2d at 382. However, unlike *Sindell*, the defendants that are unable to exculpate themselves are presumed to have an equal share of the DES market. *Id.* at 605, 689 P.2d at 383. A defendant can rebut this presumption by proving its actual share. *Id.* Once a defendant establishes its market share, the presumed market share of the remaining defendants will be increased in order to account for one-hundred percent of the market. *Id.* at 606, 689 P.2d at 383. If all the defendants are able to prove their respective market shares, those shares will not be inflated, and the plaintiff will recover less than one-hundred percent of the judgment. *Id.* The defendants may also implead third-party defendants in order to reduce their presumed share of the market. *Id.* This version of market share liability was subsequently adopted in another state. *See McCormack*, 617 F. Supp. at 1521. *See generally* Note, McCormack v. Abbott Laboratories: *Application of Market Share Liability to Resolve the DES Dilemma*, 29 ARIZ. L. REV. 155, 158-64 (1987) (analyzing impact of *Martin* and *McCormack* on DES litigation).

[38] *See* Brown v. Superior Court, 44 Cal. 3d 1049, 1074-75, 751 P.2d 470, 486-87, 245 Cal. Rptr. 412, 427-28 (1988). In *Hymowitz*, the court tried "to apportion liability so as to correspond to the over-all culpability of each defendant, measured by the amount of risk of injury each defendant created to the public-at-large." *Hymowitz*, 73 N.Y.2d at 512, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950; *see also Martin*, 102 Wash. 2d at 601, 689 P.2d at 380 (*Sindell* market share theory rejected "due to its inherent distortion of liability," choosing another theory which it found more accurately represented defendant's liability).

[39] *See Martin*, 102 Wash. 2d at 607, 689 P.2d at 383 ("the dilution of causal blame that is attributable to a given defendant may be counterbalanced by the corresponding dilution of liability"); Fischer, *supra* note 2, at 1628 (market share liability relaxes "the traditional principle in tort law which imposes upon the plaintiff the burden of proving that the defendant's action was at least a cause in fact of the injury that the plaintiff sustained"); Note, *Products Liability:* Sindell v. Abbott Laboratories: *Proportional Unidentifiable Fairness and the Oklahoma Perspective*, 34 OKLA. L. REV. 843, 844 (1981) (market share theory "represents an unprecedented step in a steady progression of relaxed standards" in conventional causation theory).

[40] *See Sindell*, 26 Cal. 3d at 611, 607 P.2d at 936-37, 163 Cal. Rptr. at 144-45.

[41] *See id.* at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. The court held that it was

ing causal blame proportionate to the degree of certainty that the defendant caused the harm.[42]

While market share liability relieves the plaintiff's burden of proving causation with respect to a particular defendant, the plaintiff still must prove that the defendant acted tortiously in producing or marketing DES, and that DES was the cause of the injury.[43] Thus, liability will not be imposed on a particular defendant if it can prove that it properly tested the product, and produced or marketed a reasonably safe product.[44] Therefore, although a de-

---

reasonable in DES litigation "to measure the likelihood that any of the defendants supplied the product which allegedly injured plaintiff by the percentage which the DES sold by each of them for the purpose of preventing miscarriage bears to the entire production of the drug sold by all for that purpose." *Id.*; *see also* Note, Sindell v. Abbott Laboratories: *A Market Share Approach to DES Causation*, 69 CALIF. L. REV. 1179, 1187 (1981) (analysis of the theory of market share liability).

A defendant's market share is computed by dividing the total amount of DES sold by that manufacturer in the relevant market by the total amount of DES sold by all the manufacturers in that market. *See* Fischer, *supra* note 2, at 1648. Therefore, under the market share liability theory, the choice of a particular market can have a profound effect on a defendant's potential liability. *Id.* at 1642. For example, assume that a plaintiff's mother purchased DES from a particular pharmacy but was unable to remember the particular brand. *Id.* at 1642-43. Assume further that the pharmacist filled prescriptions using DES produced by five manufacturers and was also unable to identify which brand was used to fill any particular customer's prescription. *Id.* at 1643. Additionally, assume that one of those manufacturers supplied thirty percent of the DES sold in that state, but was only responsible for ten percent of the DES sold nationally. *Id.* Depending upon the market which is selected, that manufacturer could be liable for either ten percent (national market), twenty percent (local market), or thirty percent (statewide basis) of the plaintiff's judgment. *Id.*

[42] *See Sindell*, 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. Since there is no causal link to any one manufacturer, market share liability reduces causation to the probability that any manufacturer caused the harm. *See* Note, *supra* note 39, at 844. In DES cases, causal blame becomes diluted due to the large number of manufacturers who could have produced the drug which caused the plaintiff's injuries. *See* Fischer, *supra* note 2, at 1640. Therefore, the causal blame attributable to any particular defendant is very low. *See id.* at 1641. It has been argued that this dilution of causal blame is justified by the corresponding dilution of liability under the market share theory. *See Martin*, 102 Wash. 2d at 606-07, 689 P.2d at 383. Ultimately, each defendant will be held liable only for the amount of harm that it statistically is likely to have caused. *Id.*

[43] *See* McCormack v. Abbott Laboratories, 617 F. Supp. 1521, 1527 (D. Mass. 1985); *see also* Miller & Hancock, *supra* note 9, at 111 (market share theory requires that plaintiff prove "wrongful conduct" by defendant); Robinson, *Multiple Causation in Tort Law: Reflections on the DES Cases*, 68 VA. L. REV. 713, 727 (1982) (same). If a defendant can show that it exercised "optimal care" it will not be held liable. *See* Rosenberg, *The Causal Connection in Mass Exposure Cases: A 'Public Law' Vision of the Tort System*, 97 HARV. L. REV. 849, 868 (1984).

[44] *See* Collins v. Eli Lilly & Co., 116 Wis. 2d 166, 192 n.11, 342 N.W.2d 37, 49 n.11, *cert. denied*, 469 U.S. 826 (1984). As the court in *Collins* noted, "it is not solely the generic status of the drug but the safety or efficacy of the drug, generic or otherwise, which may give rise to liability." *Id.*

fendant did not cause a particular plaintiff's injuries, that defendant is not considered "wholly innocent."[45]

II. EXCULPATION OF DEFENDANTS

Unlike other courts which have adopted the market share liability theory, the *Hymowitz* version holds a manufacturer liable notwithstanding proof that it did not manufacture the DES which injured the plaintiff.[46] This approach greatly increases the possibility that a defendant will be held liable for injuries that it in fact did not contribute to, which, in effect, turns each manufacturer into an insurer[47] of a product which conformed to all government regulations and controls.[48] Under *Hymowitz*, a manufacturer is

---

[45] *See McCormack*, 617 F. Supp. at 1527 (participation in distribution of drug without having injured particular plaintiff enough to hold defendant culpable).

[46] *Hymowitz*, 73 N.Y.2d at 512, 539 N.E.2d at 1077, 541 N.Y.S.2d at 950. All other courts adopting a market share liability theory have allowed the exculpation of those defendants who could prove that they did not produce or market the particular drug which injured the plaintiff. *Id.* at 519, 539 N.E.2d at 1082, 541 N.Y.S.2d at 954 (Mollen, J., concurring in part, dissenting in part); *see also McCormack*, 617 F. Supp. at 1531 (exculpation of defendant permitted); *Sindell*, 26 Cal. 3d at 612, 607 P.2d at 924, 163 Cal. Rptr. at 145 (same); *Martin*, 102 Wash. 2d at 605, 689 P.2d at 382 (same). *But see Collins*, 116 Wis. 2d at 186, 342 N.W.2d at 47 (court allowed exculpation of only those defendants who could prove that they did not market or produce DES either during time plaintiff was exposed to it or in "relevant geographical market" in which plaintiff's mother purchased it).

[47] *See Hymowitz*, 73 N.Y.2d at 520, 539 N.E.2d at 1083, 541 N.Y.S.2d at 955 (Mollen, J., concurring in part, dissenting in part). Judge Mollen maintained that the majority created "an unprecedented strict liability cause of action" by not allowing exculpation of defendants who could prove that they did not produce the DES which injured the plaintiff. *Id.* (Mollen, J., concurring in part, dissenting in part). Although the court was incorrect in not allowing exculpation, it is submitted that the court's decision does not go so far as to violate the defendants' due process rights. The standard for determining whether or not due process has been violated is one of fundamental fairness in light of the total circumstances. *See, e.g.*, Long v. Thornton Township High School Dist. 205, 82 F.R.D. 186, 191 (N.D. Ill. 1979) ("[d]ue process must be determined by what is fair and reasonable in light of the totality of the circumstances" (quoting Hillman v. Elliot, 436 F. Supp. 812, 816 (W.D. Va. 1977))); Whitfield v. Simpson, 312 F. Supp. 889, 894 (E.D. Ill. 1970) (same); *see also* Bell v. Burson, 402 U.S. 535, 541 (1971) (in reviewing state action court must "look to substance, not to bare form, to determine whether constitutional minimums have been honored" (quoting Willner v. Comm'n on Character, 373 U.S. 96, 106-07 (1963) (Goldberg, J., concurring))). In a civil action, fairness requires that liability imposed on a defendant should be "roughly proportional" to the severity of the risk he created. *See* Robinson, *supra* note 43, at 739. Therefore, in determining whether it is fair to hold a defendant liable, the critical point seems to be "the creation of a risk that society deems to be unreasonable, not whether anyone was injured by it." *Id.* at 739-40 (nature of defendant's general conduct not changed by fact that it is not responsible for specific harm done).

[48] *See Sindell*, 26 Cal. 3d at 609, 607 P.2d at 935, 163 Cal. Rptr. at 143. In *Sindell*, the court stated that adherence to government standards in no way would relieve a defendant of liability for the harm which it caused. *See id.* However, the court also noted that "since the

subject to liability where there was a chance that someone could have been injured by its product, whether or not anyone, in actuality, was injured by its product.[49]

By denying defendants the right to exculpate themselves, the *Hymowitz* court has "unnecessarily contravene[d] the established common-law tort principles of causation."[50] Although public policy favors imposing liability on the manufacturers who created the risk and benefited from the sale of the product,[51] liability should not be imposed unless it can be shown "that the defendant drug company reasonably could have contributed in some way to the actual injury."[52] This is consistent with the basic principle of tort law that the one who causes the harm should be liable for the resulting injuries.[53] The mere creation of a risk which does not result in injury is not a tort.[54] Further, it has been held that the ultimate goal of market share liability is "the imposition of liability only on those companies who could have manufactured the DES which caused the plaintiff's injuries."[55]

Moreover, the *Hymowitz* court stated that if a plaintiff is able to identify the particular manufacturer of the product which caused her injuries, the plaintiff's action must be brought under "established principles of products liability" since there is no need

---

government plays such a pervasive role in formulating the criteria for the testing and marketing of drugs, it would be unfair to impose upon a manufacturer liability for injuries resulting from the use of a drug which it did not supply simply because it followed the standards of the industry." *Id.* at 610, 607 P.2d at 935, 163 Cal. Rptr. at 143.

[49] *Hymowitz*, 73 N.Y.2d at 520, 539 N.E.2d at 1083, 541 N.Y.S.2d at 955 (Mollen, J., concurring in part, dissenting in part). The theory of liability adopted by the court in *Hymowitz* closely parallels that of concerted action. *Id.* (Mollen, J., concurring in part, dissenting in part). Under the concerted action theory, defendants are held liable because of their participation in a tortious act even if they were not the direct cause of the plaintiff's injuries. *See* Schwartz & Mahshigian, *supra* note 3, at 950. The only difference between the concerted action theory and the one adopted by the court in *Hymowitz* is that a defendant is held jointly and severally liable under the concerted action theory, whereas under the theory adopted by *Hymowitz*, defendants are held severally liable only. *See Hymowitz*, 73 N.Y.2d at 513, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950.

[50] *See Hymowitz*, 73 N.Y.2d at 519, 539 N.E.2d at 1082, 541 N.Y.S.2d at 949 (Mollen, J., concurring in part, dissenting in part) (citations omitted).

[51] *See* Smith v. Eli Lilly & Co., 173 Ill. App. 3d 1, 15-16, 527 N.E.2d 333, 342 (1988).

[52] *See* Collins v. Eli Lilly & Co., 116 Wis. 2d 166, 191 n.10, 342 N.W.2d 37, 49 n.10., *cert. denied*, 469 U.S. 826 (1984).

[53] *See* Schwartz & Mahshigian, *supra* note 3, at 942, 963.

[54] *See* PROSSER & KEETON, *supra* note 6, § 41, at 263-68; Schwartz & Mahshigian, *supra* note 3, at 963.

[55] *Smith*, 173 Ill. App. 3d at 21, 527 N.E.2d at 346.

to utilize market share liability in those cases.[56] This will expose manufacturers of an easily identifiable product to "double" liability;[57] they will not only be liable for one hundred percent of the judgment when identification is possible, but will also be liable for the proportion of a judgment representing their market share in cases where identification is not possible.[58]

Furthermore, if exculpation is not allowed, a manufacturer of a fungible product, such as DES, has no incentive to maintain accurate records or implement additional safety measures since it will be held liable even when it could prove that it was not responsible for the product which caused the plaintiff's injuries.[59] By not permitting exculpation, the *Hymowitz* decision will inhibit manufacturing of new and innovative drugs[60] since "as each new product faces huge and seemingly unlimited liability, the incentive to continue research is reduced."[61]

III. Liability of Individual Defendants

Under the system of market share liability adopted by the court in *Hymowitz*, the individual defendants are only subject to several liability.[62] Put into effect, the plaintiff will recover less than one hundred percent of the full judgment.[63] Judge Mollen, in a separate opinion, suggested, alternatively, that manufacturers who were unable to exculpate themselves should be held jointly and severally liable for the plaintiff's damages.[64] It is submitted, however, that the court was correct in its adoption of several liability

---

[56] *Hymowitz*, 73 N.Y.2d at 504-05, 539 N.E.2d at 1073, 541 N.Y.S.2d at 945 (citing Bichler v. Eli Lilly & Co., 55 N.Y.2d 571, 579, 436 N.E.2d 182, 185, 450 N.Y.S.2d 776, 779 (1982)).

[57] *See* Note, *supra* note 35, at 676.

[58] *See id.*; *see also* LaMarca, *supra* note 34, at 78 (discussing problem of "double liability" and ways in which it can be avoided).

[59] *See Smith*, 173 Ill. App. 3d at 24-25, 527 N.E.2d at 348; Delgado, *Beyond* Sindell: *Relaxation of Cause-In-Fact Rules for Indeterminate Plaintiffs*, 70 Calif. L. Rev. 881, 894 (1982); Schwartz & Mahshigian, *supra* note 3, at 960.

[60] *See* Fischer, *supra* note 2, at 1629. "To the extent that the doctrine allows a defendant to be held liable for more harm than it in fact caused, the theory potentially has an unduly inhibiting effect." *Id.*; *see also* Miller & Hancock, *supra* note 9, at 91 (not allowing exculpation goes against public policy which supports discovery of new drugs).

[61] Roberts & Royster, *supra* note 1, at 467-68.

[62] *Hymowitz*, 73 N.Y.2d at 512-13, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950.

[63] *Id.*

[64] *Id.* at 516, 539 N.E.2d at 1078, 541 N.Y.S.2d at 953 (Mollen, J., concurring in part, dissenting in part).

only. Several liability based on a defendant's market share is "an equitable way to provide the plaintiffs with the relief they deserve, while also rationally distributing the responsibility for plaintiffs' injuries among defendants."[65] If liability were joint and several, defendants with the deepest pockets who were amenable to suit would end up paying an amount far greater than their market share.[66] Further, the imposition of joint and several liability would frustrate the effect that market share liability has in balancing the interests of the DES manufacturers and the injured plaintiffs,[67] and would therefore have a "chilling" effect on the manufacturers of pharmaceuticals.[68]

IV. A Proposed Method for Determining Market Shares

Defendants who can prove that they did not market or produce the DES that injured a plaintiff should be permitted to exculpate themselves. Moreover, it is proposed that in computing the relevant market shares of the defendants for the purpose of apportioning damages, the relevant market should be reevaluated without including the sales of the exculpated defendants. This adjustment of the market shares would result in a more accurate representation of the probability that each remaining defendant caused the plaintiff's injury.[69] Since information about national

---

[65] *See id.* at 512, 539 N.E.2d at 1080-81, 541 N.Y.S.2d at 952-53.

[66] *See* Brown v. Superior Court, 44 Cal. 3d 1049, 1075, 751 P.2d 470, 487, 245 Cal. Rptr. 412, 428 (1988).

[67] *See id.*

[68] *See supra* note 60 and accompanying text.

[69] Assume, *arguendo*, that the plaintiff brought an action against six manufacturers who were responsible for 90% of the DES produced. Also assume that each of those manufacturers had an equal share of the market. There would then be a 15% probability that any one of those manufacturers was responsible for the plaintiff's injuries, and a 90% probability that the responsible defendant was before the court. Therefore, the plaintiff would be entitled to collect 90% of the total judgment. Assume further that one defendant was allowed to exculpate itself by proving that it was not responsible for the plaintiff's injuries. Under market share liability as adopted by the *Sindell* court, the plaintiff would then be able to collect only 75% of the total judgment, with the five remaining defendants being liable for 15% each. Under the approach adopted by the court in *Hymowitz*, the plaintiff would still be able to collect 90% of the total judgement since exculpation would not be allowed.

It is submitted that the problem with the *Sindell* approach is that the market share of the exculpated defendant is still taken into account in the calculation even though it was determined that it in no way contributed to the plaintiff's injuries. Instead of using a market which represents 100% of the DES sold, it is suggested that the exculpated defendant's share (15%) be subtracted from the total market (100%) and the remaining defendants' shares be recalculated using this new market (85% of the total DES produced). It is as-

market shares has already been compiled,[70] the above method of reevaluating market shares could easily be performed.

CONCLUSION

Denying recovery to innocent victims of prenatal injuries because of their inability to pinpoint the particular manufacturer of the drug which injured them is a great injustice. The theory of market share liability provides a just and equitable solution to this problem. However, while the interests of justice and fundamental fairness favor providing an innocent plaintiff a remedy, the courts must also balance the interests of both the plaintiffs and the defendants when fashioning a solution. In *Hymowitz*, the New York Court of Appeals has unnecessarily departed from fundamental principles of causation by preventing innocent defendants from exculpating themselves.

William D. Wilson

---

serted that this is a more precise calculation of the possibility that the plaintiff's injury was caused by the remaining defendants, since as the number of wrongdoers is decreased, the culpability of each of the remaining ones increases.

[70] *See Hymowitz*, 73 N.Y.2d at 509, 539 N.E.2d at 1076, 541 N.Y.S.2d at 948.