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From *Res Ipsa Loquitur* to Diethylstilbestrol: The Unidentifiable Tortfeasor in California†

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Among the most troublesome cases for courts in California and elsewhere are those in which the plaintiff has suffered a major injury, wrongfully caused, but the plaintiff cannot identify the tortfeasor responsible. If the plaintiff can identify an injurer over the course of litigation all is well.[1] If the plaintiff cannot significantly narrow the list of potential wrongdoers the tort system is unable to provide a remedy.[2] Difficulty arises, however, when the plaintiff can identify a group of possible tortfeasors, but cannot identify any particular defendant as the one which actually caused his or her injury.

As a general principle of tort law, a plaintiff must establish a connection between his or her injury and an act or omission of the defendant.[3] Inherent in this requirement is an identification of the defendant as the tortfeasor.[4] The doctrine of *res ipsa loquitur,* in its ordinary sense,[5] relieves a plaintiff of the burden of proving the precise cause of injury but not of the necessity of identifying the responsible tortfeasor.[6] Thus, to permit recovery by plaintiffs victimized by unidentifiable tortfeasors, doctrinal expansion has been necessary. California courts have responded to the call.[7]

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1. In jurisdictions where fictitious name or "Doe" pleading is permitted, for example, a plaintiff may establish the identity of tortfeasors subsequent to the filing of his complaint.

2. *Cf.* Pierce, *Encouraging Safety: The Limits of Tort Law and Government Regulation,* 33 VAND. L. REV. 1281 (1980) (advocating administrative system of compensation).

3. W. KEETON, D. DOBBS, R. KEETON & D. OWENS, PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 263 (5th ed. 1984) [hereinafter PROSSER AND KEETON]. This connection is usually labelled "proximate cause" or "legal cause." *Id.*

4. In a products liability case, for example, an essential element has been, until recently at least, the identification of the named defendant as the manufacturer or supplier of the defective product. *See id.* § 103, at 713.

5. *See infra* text accompanying notes 8-45.

6. This results from the control requirement, or the requirement of bringing negligence home to the defendant. *See infra* text accompanying notes 29-37.

7. Although the importance of the issues discussed herein is not limited to any particular jurisdiction, I have confined the focus of this article to California cases. California courts have generally been on the leading edge of developments in the law in this area and, by focusing on a single jurisdiction, the progression of and interrelationships among the cases are more easily discernible.

In Part I of this article, I will discuss *res ipsa loquitur* as a rule of circumstantial evidence and will proceed to trace its doctrinal progression through a policy-driven version of the doctrine to the concerted action and alternative liability theories of liability. In Part II, I will focus on the setting in which the problem of unidentifiable tortfeasors has been most dramatically presented—women injured by the drug diethylstilbestrol (DES). Finally, in Part III, I will suggest considerations for courts fashioning new theories of liability for unidentifiable tortfeasor cases or applying existing tort theories to new factual situations.

I. THE DOCTRINAL PROGRESSION OF THE UNIDENTIFIABLE TORTFEASOR

A. Res Ipsa Loquitur *and Inferences from Circumstantial Evidence*

The doctrine of *res ipsa loquitur,* as it appears in its usual and most familiar form, is a rule of circumstantial evidence.[8] More precisely, it allows (or compels) an inference of negligence from circumstantial evidence where the defendant is unable to present sufficient contrary evidence. The doctrine applies "where the accident is of such a nature that it can be said . . . that it probably was the result of negligence by someone and that the defendant is probably the person who is responsible."[9] It is worth noting that the "inference of negligence" permitted by the doctrine is not an inference that a *particular* act of the defendant was negligent, but is an inference that the defendant did *some* negligent act which proximately caused the harm in question although the specific cause of the plaintiff's injury is unknown.[10]

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8. William Prosser was a strong proponent of this view. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 39, at 213 (4th ed. 1971) [hereinafter W. PROSSER, TORTS]; Prosser, *Res Ipsa Loquitur in California,* 37 CALIF. L. REV. 183, 191 (1949) [hereinafter Prosser, *Res Ipsa*]; *cf.* Clark v. Gibbons, 66 Cal. 2d 399, 409, 426 P.2d 525, 532, 58 Cal. Rptr. 125, 132 (1967) (doctrine of *res ipsa loquitur* "fundamentally predicated upon inferences deducible from circumstantial evidence and the weight to be given to them" (citing Quintal v. Laurel Grove Hosp., 62 Cal. 2d 154, 397 P.2d 161, 41 Cal. Rptr. 577 (1964))).

9. Zentz v. Coca Cola Bottling Co., 39 Cal. 2d 436, 446, 247 P.2d 344, 349 (1952); *see also Clark,* 66 Cal. 2d at 409, 426 P.2d at 532, 58 Cal. Rptr. at 132; Prosser, *Res Ipsa, supra* note 8, at 233. Under California Evidence Code § 646, enacted in 1970, *res ipsa loquitur* is a presumption affecting the burden of producing evidence. Once the defendant has introduced evidence that would support a finding that he was not negligent or that any negligence on his part was not a proximate cause of the occurrence, the presumption vanishes. However, the jury may still find the defendant negligent on the basis of the circumstantial evidence that gave rise to the doctrine. *See* Law Revision Commission Comment of 1970, CAL. EVID. CODE § 646 (West Supp. 1989).

10. *See* Fowler v. Seaton, 61 Cal. 2d 681, 687, 394 P.2d 697, 700, 39 Cal. Rptr. 881, 884 (1964) ("There is no absolute requirement that the plaintiff explain how the accident happened. Res ipsa loquitur may apply where the cause of the injury is a mystery, if there is a reasonable and logical inference that defendant was negligent, and that such negligence caused the injury.").

It may appear that the doctrine of *res ipsa loquitur,* as so stated, is no more than an embodiment of common sense. Surely judges and juries are capable of drawing conclusions from circumstantial evidence without the aid of a doctrine with a latin name.[11] However, the doctrine, by focusing on the likelihood of the essential components of the plaintiff's case, provides a logical framework for approaching circumstantial evidence. As such, it is a powerful antidote to an unfortunate judicial hesitancy to accept circumstantial evidence. This hesitancy, and the utility of *res ipsa loquitur* in combatting it, can be seen most clearly in a brief examination of the line of cases following *Sargent v. Massachusetts Accident Co.*[12] and the commentary those cases have inspired.

Upham Sargent was a young adventurer who disappeared kayaking down the Nottaway River in Quebec. The *Sargent* case involved the effort of Sargent's father (the beneficiary of Upham's accident insurance policy), to collect a claim requiring that he prove by a preponderance of the evidence that the insured died from an accidental injury.[13] Although the Massachusetts Supreme Court found this burden satisfied, it first made the following observations with respect to the preponderance of the evidence standard:

> It has been held not enough that mathematically the chances somewhat favor a proposition to be proved; for example, the fact that colored automobiles made in the current year outnumber black ones would not warrant a finding that an undescribed automobile of the current year is colored and not black, nor would the fact that only a minority of men die of cancer warrant a finding that a particular man did not die of cancer. . . . The weight or ponderance of evidence is its power to convince the tribunal which has the determination of the fact, of the actual truth of the proposition to be proved. After the evidence has been weighed, that proposition is proved by a ponderance of the evidence

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11. *See* Prosser, *Res Ipsa, supra* note 8, at 184-85; Seavey, *Res Ipsa Loquitur: Tabula in Naufragio,* 63 HARV. L. REV. 643, 645 (1950); *cf.* Jaffe, *Res Ipsa Loquitur Vindicated,* 1 BUFFALO L. REV. 1, 1 (1951) (characterizing Prosser's and Seavey's position as being that "the concept of *res ipsa loquitur* where it is correctly applied is redundant and where it is not redundant is wrong").

12. 307 Mass. 246, 29 N.E.2d 825 (1940). Praise of the doctrine because it helps plaintiffs win cases and because it is used to revise concepts of liability and proof, *see, e.g.,* Jaffe, *supra* note 11, at 15, is, to my mind, unconvincing. An argument that the plaintiff should prevail in a negligence action even though the evidence is not sufficient to show that the plaintiff's injury was more probably than not proximately caused by the defendant's negligence is really an argument that a different standard of care (*e.g.,* strict liability) should be applied to the defendant's conduct. Such a position is better established directly than by distortion of the negligence standard. *See* Gordon v. Aztec Brewing Co., 33 Cal. 2d 514, 530, 203 P.2d 522, 532 (1949) (Traynor, J., dissenting and concurring) (If strict liability is to be imposed "it should be imposed openly and not by spurious application of rules developed to determine the sufficiency of circumstantial evidence in negligence cases."). The use of the doctrine to pursue distinct policy goals is the subject of Part I, section B *infra.* Although the legal standards resulting from the policy-driven application of the doctrine may be justified, the use of the term "*res ipsa loquitur*" has created confusion and invited misapplication.

13. *Sargent,* 307 Mass. at 250, 29 N.E.2d at 827.

> if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there.[14]

This language was quoted approvingly in two subsequent Massachusetts Supreme Court decisions finding defendants not to have been sufficiently identified as the cause of the plaintiff's injury. In *Smith v. Rapid Transit, Inc.*,[15] the plaintiff was forced off the street by a bus, but she offered no evidence other than that the defendant had the sole franchise for operating a bus line on that street. In *Tartas' Case*,[16] the plaintiff sued the workmen's compensation insurer of one employer, but the court found that the plaintiff's decedent could have contracted his fatal illness while working for any of several employers.[17]

The meaning of the *Sargent* court's "actual belief" dictum has stirred considerable interest in academic circles. There are several possible explanations. A first possibility is that the "actual belief" required by *Sargent* exists only if the plaintiff shows that the likelihood of the proposition to be proved exceeds fifty percent by some significant margin. This would, of course, run counter to generally understood standards of proof in civil litigation. In addition, contrary to what the *Sargent* court may have thought,[18] such a rule would in individual cases increase the likelihood of an erroneous decision.[19] Moreover, none of the *Sargent* cases have discussed the proof requirement in numerical terms.

A more subtle interpretation is that *Sargent* requires a plaintiff to offer some individualized proof; general statistical evidence, except perhaps in

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14. *Id.*

15. 317 Mass. 469, 58 N.E.2d 754 (1945). The *Smith* case is the basis for the blue bus hypothetical. *See infra* text accompanying note 276.

16. 328 Mass. 585, 105 N.E.2d 380 (1952).

17. The Massachusetts Supreme Court has continued to cite *Sargent* with approval. *See, e.g.*, Stepakoff v. Kantar, 393 Mass. 836, 473 N.E.2d 1131 (1985); King's Case, 352 Mass. 488, 225 N.E.2d 900 (1967); Sullivan v. Hamacher, 339 Mass. 190, 158 N.E.2d 301 (1959); Sevigny's Case, 337 Mass. 747, 151 N.E.2d 258 (1958); Tucker v. Pearlstein, 334 Mass. 33, 133 N.E.2d 489 (1956); *see also* Lampe v. Franklin Am. Trust Co., 339 Mo. 361, 384, 96 S.W.2d 710, 723 (1936) (The jury "must not attempt to base a verdict upon what facts may be 'more probable,' if they cannot decide what facts are true.").

18. *See* Brook, *Inevitable Errors: The Preponderance of the Evidence Standard in Civil Litigation*, 18 TULSA L.J. 79, 94 (1982) [hereinafter Brook, *Inevitable Errors*] ("the early exponents of the actual-belief-in-truth concept regarded it as actually a way of increasing accuracy and limiting the number of errors").

19. *See* Ball, *The Moment of Truth: Probability Theory and Standards of Proof*, 14 VAND. L. REV. 807, 822-23 (1961); Brook, *Inevitable Errors*, *supra* note 18, at 86; Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1341 n.37 (1971); *cf.* Kaye, *Probability Theory Meets Res Ipsa Loquitur*, 77 MICH. L. REV. 1456, 1481 (1979) (arguing that plaintiffs who attempt to prove negligence indirectly should generally be required to show that the likelihood of negligence is substantially greater than not); Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 851, 875 n.101 (1984) (suggesting that, by reducing the number of cases, overdeterrence of tortious conduct may minimize errors).

rare instances, is not enough to satisfy the plaintiff's burden.[20] This position is defended either by asserting that particularistic evidence is necessary to provide a causal explanation,[21] or by arguing that in most cases, taking into account the probative value of the nonproduction of particularistic evidence, the likelihood of the required showing is less than 50% even though the statistical evidence taken alone may suggest that the likelihood is greater.[22] The counterargument is that, in terms of its value in deciding cases, particularistic evidence is not qualitatively different, much less better, than statistical evidence.[23] Moreover, even taking into account the lack of particularistic evidence, the plaintiff's statistical evidence may be strong enough to make the probability of the truth of his assertion greater than 50%.[24] Although it is certainly relevant if a party that should be able to produce evidence does not produce it,[25] the pursuit of certain kinds of evidence (i.e., nonstatistical evidence, or even noncircumstantial evidence) may interfere with proper factfinding.

A third explanation of the *Sargent* cases looks beyond the language of the courts to the factual records underlying the cases before them. Read narrowly, the *Sargent* cases stand for the simple proposition that a plaintiff may not recover if he or she offers no evidence on a crucial part of his or her case.[26] Although cases are best decided by examining the whole of the

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20. *See* Brook, *Inevitable Errors, supra* note 18, at 89; *see, e.g.,* Tribe, *supra* note 19, at 1341 n.37; Wright, *Causation in Tort Law,* 73 CALIF. L. REV. 1735, 1826 (1985); *see also* Jaffe, *supra* note 11, at 4 (characterizing traditional view as being that "[t]he conditions for a finding are not satisfied merely by showing a greater statistical probability. . . . There must be a *rational,* i.e., evidentiary, basis on which the jury can choose the competing probabilities.").

21. *See, e.g.,* Wright, *supra* note 20, at 1821-26 (causal explanation necessary to impose liability; naked statistical evidence provides only causal prediction).

22. *See* Tribe, *supra* note 19, at 1349; *see also* Kaye, *The Laws of Probability and the Law of the Land,* 47 U. CHI. L. REV. 34, 40 (1979) (following Tribe); Kaye, *The Paradox of the Gatecrasher and Other Stories,* 1979 ARIZ. ST. L.J. 101, 106 (also following Tribe). To use one of the *Sargent* examples, if the plaintiff had the burden of showing that his decedent did not die of cancer, the plaintiff's failure to offer evidence of a specific cause of death may lead the factfinder to conclude that plaintiff's decedent more likely than not did die of cancer, notwithstanding that a majority of men do not die of cancer.

For an explanation of courts' aversion to naked statistical evidence not based upon the utility (or lack of utility) of such evidence in obtaining correct decisions, see Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts,* 98 HARV. L. REV. 1357 (1985). Nesson argues that verdicts based solely on naked statistical evidence are unacceptable because the judicial system strives to project an acceptable account of what happened, and in such cases the public knows that the factfinder can do no more than make a bet on the evidence. *Id.* at 1379.

23. *See* Brook, *The Use of Statistical Evidence of Identification in Civil Litigation: Well-worn Hypotheticals, Real Cases, and Controversy,* 29 ST. LOUIS U.L.J. 293, 327-28 (1985) [hereinafter Brook, *Use*]; Rosenberg, *supra* note 19, at 870.

24. *See* Brook, *Use, supra* note 23, at 326.

25. See *infra* text accompanying notes 277-86 for a more detailed discussion.

26. *See* Brook, *Use, supra* note 23, at 303; *see also* Friese v. Boston Consol. Gas Co., 324 Mass. 623, 631, 88 N.E.2d 1, 5 (1949) (citing *Sargent* and *Smith* for the proposition that verdicts must rest on a solid foundation).

evidence presented (taking into account, where appropriate, the nonproduction of other evidence), reconsidering the *Sargent* and *Smith* facts and concluding that the decisions were supportable does not solve the *Sargent* problem. The *Sargent* language, with its ambiguous implications, still creates confusion.[27]

Res ipsa loquitur as a circumstantial evidence rule cuts through the uncertainties presented by the various analyses of *Sargent.* Application of the doctrine returns the factfinder's focus where it belongs: to what the facts of the accident say about the likelihood of negligence and the defendant's connection to it. If the facts of the accident are such that its cause was more likely than not the defendant's negligence, the burden of proof shifts to the defendant. The degree of conviction in the factfinder's mind and the type and quantity of evidence before the court are simply not in issue. Although this approach is proper for all negligence cases, it is most valuable where the complete story of the plaintiff's injury is unavailable and the factfinder may be tempted to throw up its hands in confusion and to not weigh the evidence before it.[28]

Notwithstanding the relatively simple concepts behind the *res ipsa loquitur* circumstantial evidence rule, California courts have experienced a great deal of difficulty in applying the rule. This difficulty has resulted from the problems inherent in reducing a rule to a formula and mechanically applying that formula without regard to its underlying purposes.[29] The starting point for the modern statement of the doctrine is the Wigmore formulation:

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27. In *Stepakoff,* for example, the Massachusetts Supreme Court approved a trial court's jury instruction it described as follows:

> The judge instructed the jury that the plaintiff had the burden of proving all the essential elements of her case by a fair preponderance of the evidence. Quoting from [*Sargent*], he told the jury that "[t]he weight or preponderance of evidence is its power to convince the tribunal which has the determination of the facts, of the actual truth of the proposition to be proved. After the evidence has been weighed, that proposition is proved by a preponderance of the evidence if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may linger there." The judge also stated: "Another description of the state of mind which is satisfied by a fair preponderance of the evidence is a firm and abiding conviction in the truth of the plaintiff's case. A third word picture of this burden of proof is a balance of probability in favor of the plaintiff." Later in his charge, the judge told the jury that the plaintiff had to prove "that her husband's death was more likely due to the negligence of the defendant than to some other cause for which he is not liable."

Stepakoff, 393 Mass. at 843, 473 N.E.2d at 1136.

28. One type of response has been to refer gratuitously to two possible causes of an accident as "equally great," which if meant as "neither of which can be supported by the evidence" may be acceptable, but if meant literally is almost certainly incorrect. *See* Jaffe, *supra* note 11, at 4 (criticizing Galbraith v. Busch, 267 N.Y. 230, 196 N.E. 36 (1935)).

29. Prosser, *Res Ipsa, supra* note 8, at 187-88.

> (1) [t]he apparatus must be such that in the ordinary instance no injurious operation is to be expected unless from a careless construction, inspection, or user; (2) both inspection and user must have been at the time of the injury in the control of the party charged; (3) the injurious occurrence or condition must have happened irrespective of any voluntary action at the time by the party injured. It may be added that the particular force and justice of the rule, regarded as a presumption throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person.[30]

The California Supreme Court quoted Prosser's restatement of Wigmore's formula[31] in *Ybarra v. Spangard*,[32] and this language has been cited frequently.[33]

In unidentifiable tortfeasor cases, the requirement of most concern is the second one—the requirement that the injury-causing instrument must have been under the "control" of the defendant. California courts have sometimes viewed this requirement as being simply a way of determining whether an injury was the result of the *defendant's* negligence.[34] More often, the control requirement has been treated as a special element to be shown. As a consequence, courts have in some cases applied *res ipsa loquitur* without sufficiently examining the possibility of negligence on the part of someone other than the defendant[35] and, in other cases, courts have had to stretch the control "rule" so as to enable the plaintiff to proceed.[36] Prosser's remark that:

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30. 9 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2509 (J. Chadbourn rev. ed. 1981).

31. (1) [T]he event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.

W. PROSSER, TORTS, *supra* note 8, § 39, at 214. Prosser goes on to state that "this traditional formula is neither complete nor accurate so far as it goes." *Id.*

32. 25 Cal. 2d 486, 489, 154 P.2d 687, 689 (1944). The court also quoted Wigmore's statement concerning the accessibility of evidence to the defendant. *Id.* at 490, 154 P.2d at 689.

33. *See, e.g.*, Newing v. Cheatham, 15 Cal. 3d 351, 359, 540 P.2d 33, 39, 124 Cal. Rptr. 193, 199 (1975); Raber v. Tumin, 36 Cal. 2d 654, 659, 226 P.2d 574, 577 (1951).

34. *See, e.g., Zentz*, 39 Cal. 2d at 443, 247 P.2d at 348.

35. *See, e.g., Newing*, 15 Cal. 3d at 362-63, 540 P.2d at 41, 124 Cal. Rptr. at 201 (defendant's decedent controlled crashed airplane, so evidence of mechanical failure would not have been relevant); Godfrey v. Brown, 220 Cal. 57, 29 P.2d 165 (1934) (two car collision and plaintiff a passenger in car controlled by the defendant); *cf.* Kilgore v. Shepard Co., 52 R.I. 151, 158 A. 720 (1932) (plaintiff in control of stool that broke while he sat on it).

36. In Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944) and *Gordon*, 33 Cal. 2d at 514, 203 P.2d at 522, involving suits against the manufacturers of bottles which exploded when picked up by the plaintiffs, the California Supreme Court held that the control requirement could be satisfied by a showing that the defendant had control at the time of the alleged negligent act and the condition of the instrumentality had not been changed after it

> [i]t would be far better, and much confusion would be avoided, if the idea of "control" were to be discarded altogether, and if we were to say merely that the apparent cause of the accident must be such that the defendant would be responsible for any negligence connected with it[37]

is still germane.

The problem presented by the unidentifiable tortfeasor cases, however, is fundamental and does not turn on whether the requirement is cast in terms of the defendant's "control" of the injury-causing instrument or its connection with the alleged negligence. Where the facts disclose multiple defendants acting independently, no one of which more likely than not controlled the instrumentality or was connected with the negligence, no case—circumstantial or otherwise—has been proved by a preponderance of the evidence against any one of them.[38] Courts sometimes fail to appreciate this issue,[39] and occasionally consciously impose liability under these circumstances to promote separate policy goals.[40] The latter cases, the subject of the next section of this Part, in fact take the doctrine of *res ipsa loquitur* well beyond the confines of a rule of circumstantial evidence. They also highlight the fact that *res ipsa loquitur,* as a rule of circumstantial evidence, simply does not work for the case of the unidentifiable tortfeasor.

In completing this discussion of the circumstantial evidence rule formulation of *res ipsa loquitur,* it is worth noting the treatment of Wigmore's statement concerning the rule's relationship to the defendant's accessibility to the chief evidence of the case.[41] Although some California cases have

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left the defendant's possession. In Rose v. Melody Lane of Wilshire, 39 Cal. 2d 481, 247 P.2d 335 (1952), the plaintiff was injured when a barstool broke while he was sitting on it and it was held sufficient that the defendant had exclusive control as to construction, inspection and maintenance of the stool.

37. Prosser, *Res Ipsa, supra* note 8, at 201.

38. *See Raber,* 36 Cal. 2d at 662-63, 226 P.2d at 579 (Traynor, J., dissenting and concurring); *Godfrey,* 220 Cal. at 69, 29 P.2d at 170 (Thompson, J., dissenting); Seavey, *supra* note 11, at 646.

39. In *Raber,* for example, the plaintiff was injured by a falling ladder while helping to remodel a store. The only others in the building, one of whom presumably negligently placed the ladder, were Tumin, the store owner, and Endriss, an employee of Tumin. Tumin should have been responsible for either his or his employee's negligence, but Endriss should have been responsible only for his own negligence. The court nonetheless held that the doctrine of *res ipsa loquitur* operated against each defendant, notwithstanding the lack of specific evidence implicating either Tumin or Endriss. The distinction between Tumin and Endriss did not escape the attention of Justice Traynor. *See Raber,* 36 Cal. 2d at 661-65, 226 P.2d at 578-81 (Traynor, J., dissenting and concurring).

40. It is difficult to classify automobile collision cases such as *Godfrey,* 220 Cal. at 57, 29 P.2d at 165 (applying *res ipsa loquitur* against the driver of the car in which the plaintiff was a passenger). Prosser's normally lucid discussion of the doctrine's history in California does not adequately account for the results of the collision cases. *See* Prosser, *Res Ipsa, supra* note 8, at 204-08.

41. *See supra* text accompanying note 30.

considered the "superior knowledge" of the defendant,[42] this superior knowledge has been held not to be a prerequisite for the doctrine's application.[43] Prosser, moreover, considered the superior knowledge argument a makeweight which accomplishes nothing but to make the basis for decisions less clear.[44] For *res ipsa loquitur* as a circumstantial evidence rule, this result is correct. Although nonproduction of important evidence which should have been available may affect the evaluation of the probabilities of the defendant's negligence,[45] this does not, for the simple purpose of deciding circumstantial evidence cases, require a formal burden-shifting doctrine. The defendant's presumably superior access to relevant information, however, serves as the foundation for the policy-driven version of *res ipsa loquitur.*

B. Enhanced Res Ipsa Loquitur

Courts have, in a group of cases, relied upon the defendant's presumably superior access to relevant information to shift the burden of producing evidence (if not the burden of proof) to the defendant.[46] Although decided in the name of *res ipsa loquitur,* such cases in reality evidence a departure from the use of the doctrine as a measure of the inferences permissible from the evidence presented in pursuit of policy goals.[47] I will refer to this policy-driven version of *res ipsa loquitur* as "enhanced *res ipsa loquitur*" to differentiate it from the circumstantial evidence rule.[48]

Enhanced *res ipsa loquitur* appears in two categories of cases. The first consists of cases in which a special relationship exists between the plaintiff and the defendant, and the courts have employed the doctrine to ensure that in the event of uncertainty the loss falls on the defendant. The second category consists of cases in which a special relationship may exist, but the doctrine is primarily used to sanction the defendant for the nonavailability of evidence.

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42. *See Zentz,* 39 Cal. 2d at 445, 247 P.2d at 348.

43. *See* Seffert v. Los Angeles Transit Lines, 56 Cal. 2d 498, 501, 364 P.2d 337, 339, 15 Cal. Rptr. 161, 163 (1961); *Zentz,* 39 Cal. 2d at 445, 247 P.2d at 349.

44. *See* W. PROSSER, TORTS, *supra* note 8, § 39, at 225; Prosser, *Res Ipsa, supra* note 8, at 204. *But see* Jaffe, *supra* note 11, at 6 ("[T]ypically . . . the defendant has greater access to the facts than the plaintiff . . . . *Res ipsa* rests on the notion that it is fair to treat the probability as the fact if the defendant has the power to rebut the inference.").

45. *See* Dierman v. Providence Hosp., 31 Cal. 2d 290, 295, 188 P.2d 12, 14 (1947); *see also infra* text accompanying note 79.

46. In *Ybarra,* (*see infra* text accompanying notes 91-102) Chief Justice Gibson, in resorting to the "basic underlying purpose" and "the reason and spirit" of the doctrine of *res ipsa loquitur,* quoted Wigmore's proviso on the accessibility to evidence set forth at *supra* text accompanying note 30. *Ybarra,* 25 Cal. 2d at 489-90, 154 P.2d at 689.

47. Prosser recognized this policy-driven use of the doctrine at an early stage. *See* W. PROSSER, TORTS, *supra* note 8, at 222-24.

48. It is unfortunate that the courts have not devised a new term for this new theory of liability. *Cf.* Jaffe, *supra* note 11, at 15 (approving the use of *res ipsa loquitur* to revise concepts of liability and proof).

Enhanced *res ipsa loquitur* first appeared in cases involving suits by passengers against common carriers.[49] *Housel v. Pacific Electric Railway Co.*,[50] involved a collision on the streets of Los Angeles between a hay wagon and a street car bearing the plaintiff as a passenger.[51] The California Supreme Court interpreted *res ipsa loquitur*, when applied to common carrier cases, as providing "that proof of the injury to the passenger while he was being carried as such creates a *prima facie* case or presumption of negligence on the part of the carrier, which the carrier is called upon to meet or rebut."[52] The court reasoned that in view of the high degree of care required of a carrier toward its passengers, "a collision would not happen in the ordinary course of events if the carrier exercised such care . . . ."[53] The court also noted that "the means of proving the specific facts as to the cause of the accident are peculiarly within the power of the carrier, and the explanation should come from it, rather than from the passenger, who very often is unable to ascertain and prove the real facts."[54] In *Bourguignon v. Peninsular Railway Co.*,[55] the "rule" was reduced to the following formula:

> [W]here the accident is of such a character that it speaks for itself . . . and raises a presumption of negligence, the defendant will not be held blameless except upon a showing either (1) of a satisfactory explanation of the accident, that is, an affirmative showing of a definite cause for the accident in which cause no element of negligence on the part of the defendant inheres, or (2) of such care in all possible respects as necessarily to lead to the conclusion that the accident could not have happened from want of care, but must have been due to some unpreventable cause, although the exact cause is unknown.[56]

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49. Prosser notes that it was perhaps inevitable that "Baron Pollock's Latin phrase should become involved in passenger cases, and that it should there cross-breed with the carrier's burden of proof and produce a monster child." Prosser, *Res Ipsa, supra* note 8, at 186. In Judson v. Giant Powder Co., 107 Cal. 549, 40 P. 1020 (1895), a case of similar vintage, *res ipsa loquitur* was applied against the owner of a nitroglycerin factory, the explosion of whose plant destroyed all evidence of its cause. The *Judson* facts, however, have fortunately proven to be rare.

50. 167 Cal. 245, 139 P. 73 (1914).

51. The precise facts of the *Housel* case seem unlikely to be repeated.

52. *Housel*, 167 Cal. at 247, 139 P. at 74.

53. *Id.* at 249, 139 P. at 75.

54. *Id.* at 249-50, 139 P. at 75; *see also Godfrey*, 220 Cal. at 69-71, 29 P.2d at 170-71 (Thompson, J., dissenting) (describing common carrier rule as based on high standard of care required of common carriers and common carriers' superior knowledge or means of information).

55. 40 Cal. App. 689, 181 P. 669 (1919).

56. *Id.* at 694-95, 181 P. at 671 (California Supreme Court, on motion for rehearing en banc). In *Seffert*, the California Supreme Court approved a trial court's *res ipsa loquitur* instruction in a passenger's suit against a carrier similar to the *Bourguignon* formula while also maintaining that "[s]uperior knowledge by the defendant is not a prerequisite for the application of the doctrine." *Seffert*, 56 Cal. 2d at 501, 364 P.2d at 339, 15 Cal. Rptr. at 163.

The effect is to shift the burden of proof, and the loss if proof is unavailable, to the carrier.

The California Supreme Court later employed enhanced *res ipsa loquitur* as a products liability precursor in cases involving broken or exploded beverage bottles.[57] In these pre-strict liability cases, to recover from bottlers plaintiffs were required to show either negligence in the bottling process or a defective bottle coupled with negligent inspection for defects by the bottler. The plaintiffs offered no specific evidence of either and the question presented was whether *res ipsa loquitur* could be used against the defendants. Much of the court's opinion in each case is spent resolving the question of whether the defendant had sufficient "control" over the bottle in question at the time of the accident for the application of the doctrine,[58] but more important for present purposes are the court's discussions of the permissibility of inferring the defendant's negligence from the fact that the bottles broke.

The issue was first debated in *Honea v. City Dairy,*[59] a case concerning a young girl injured by a milk bottle which "just broke" while she was carrying it. The majority concluded that the court could not take judicial notice "that defects [in glass bottles] will not ordinarily occur unless the bottler is negligent,"[60] and consequently disallowed application of the doctrine. The dissent argued:[61] (1) bottles do not ordinarily break unless they are defective; (2) the bottler had a duty to inspect the bottle and discover any defects; and (3) based upon evidence that "a defect would be discoverable by reasonable inspection,"[62] failure to inspect or negligent inspection may be inferred from the fact that the defect was not discovered. In *Escola v. Coca Cola Bottling Co.,*[63] a case involving a waitress injured by an exploding Coca Cola bottle, the court[64] noted testimony concerning bottle

57. These cases include *Escola,* 24 Cal. 2d at 453, 150 P.2d at 436, *Gordon,* 33 Cal. 2d at 514, 203 P.2d at 522 and *Zentz,* 39 Cal. 2d at 436, 247 P.2d at 344; *see also* Hoffing v. Coca-Cola Bottling Co., 87 Cal. App. 2d 371, 197 P.2d 56 (1948) (following *Escola*).

58. *See supra* text accompanying notes 34-37. The "control" issue serves in this instance as a surrogate for proximate causation analysis. *Cf. Rose,* 39 Cal. 2d at 486-87, 247 P.2d at 338 (sufficient that defendant had exclusive control of collapsed bar stool so far as construction, inspection or maintenance was concerned; no consequence that plaintiff was in control of the stool while he was sitting on it).

59. 22 Cal. 2d 614, 140 P.2d 369 (1943).

60. *Id.* at 620, 140 P.2d at 372.

61. *Id.* at 623-27, 140 P.2d at 374-76 (Carter, J., dissenting). The dissent also pointed to the bottler's superior position to explain what would have been required to discover the defect. *Id.* at 624-25, 140 P.2d at 374-75.

62. *Id.* at 623, 140 P.2d at 374.

63. 24 Cal. 2d at 453, 150 P.2d at 436.

64. It is interesting to note that the majority opinions in *Honea, Escola, Zentz* and *Ybarra* were all written by Chief Justice Phil Gibson.

testing practices and essentially followed the reasoning of the *Honea* dissent.[65]

The cases use the language of *res ipsa loquitur,*[66] but in fact much more is going on. A rule that, because practicable tests are available, any failure to detect a defect may be presumed negligent puts the bottler in a very disadvantageous position.[67] There is no cost-benefit analysis of available tests,[68] and even if a bottler performs complete testing, if in some instances the tests are not accurate the bottler would still be liable. As Justice Traynor noted in his *Escola* concurrence,[69] the result is close to a rule of strict liability. The court used *res ipsa loquitur* to promote a policy of shifting defective product losses from consumer to producer.

The most prominent cases in which enhanced *res ipsa loquitur* has been used to sanction the defendants for the nonavailability of evidence are *Dierman v. Providence Hospital*[70] and *Haft v. Lone Palm Hotel.*[71] Mabel Dierman was injured during surgery when the electric needle being used to remove a wart from her nose ignited the gas used as an anesthetic.[72] The

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65. The court reasoned that the explosion must have been caused by an overcharging of the bottle with gas or a defect in the bottle, the bottler being responsible for the former and for negligent inspection for the latter. The bottlemaker conducted extensive tests, so it was not likely that bottles were delivered to the bottler with defects which could not have been discovered by the bottler by visual inspection. The court further suggested that if latent defects could occur after manufacturing, bottles should not be reused unless subjected to the same sort of tests conducted by the manufacturer. *See Escola,* 24 Cal. 2d at 459-61, 150 P.2d at 439-40. *Escola* was followed in *Gordon,* 33 Cal. 2d at 517-18, 203 P.2d at 524 (exploding beer bottle) and *Zentz,* 39 Cal. 2d at 449, 247 P.2d at 351 (exploding Coca Cola bottle).

66. *Zentz,* for example, contains a thorough discussion of the rules of the doctrine. *Zentz,* 39 Cal. 2d at 440-47, 247 P.2d at 346-50.

67. *See* Jaffe, *supra* note 11, at 12 ("[*Escola*] talks the language of *res ipsa* and liability rather indiscriminately.").

68. *Cf.* United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947) (probability cost-benefit test).

69. *Escola,* 24 Cal. 2d at 463, 150 P.2d at 441 (Traynor, J., concurring). Traynor was critical and would have instead imposed liability without negligence. In *Gordon,* he expressed his disapproval of the use of *res ipsa loquitur* as follows:

> By approving the res ipsa loquitur instructions given in this case, the majority opinion leaves it to the jury to hold defendant strictly liable not only for defects in its bottles when they leave its control but also for defects that develop in the normal course of marketing procedures. If such liability is to be imposed it should be imposed openly and not by spurious application of rules developed to determine the sufficiency of circumstantial evidence in negligence cases.

Gordon, 33 Cal. 2d at 530, 203 P.2d at 532 (Traynor, J., concurring). That the application of *res ipsa loquitur* can effectively change the applicable standard of care was also recognized by other contemporary observers. *See, e.g.,* Hinds v. Wheadon, 67 Cal. App. 2d 456, 465, 154 P.2d 720, 724 (1945) (insisting that *res ipsa loquitur* "is a rule of evidence and not of liability and it does not impose upon one charged with negligence the duty of exercising a higher degree of care than would be required of him in a case where the doctrine was inapplicable").

70. 31 Cal. 2d at 290, 188 P.2d at 12.

71. 3 Cal. 3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970).

72. *Dierman,* 31 Cal. 2d at 291-92, 188 P.2d at 12-13.

explosion could have been caused by the use of an improper gas, gas contaminated by an unclean anesthetizing apparatus, gas contaminated by the hospital or gas contaminated when purchased by the hospital from the manufacturer.[73] The defendant doctor and nurse described the accident and procedures followed but did not offer proof either as to whether the gas was pure or whether they were responsible for its impurity.[74] The jury was instructed on *res ipsa loquitur* and returned a verdict for the defendants, but the California Supreme Court reversed.[75]

The *Dierman* case contains elements of a special relationship between defendant and plaintiff[76] and the majority quotes the *Bourguignon* formula,[77] but California courts in general have not imposed a duty upon physicians and hospitals above a simple negligence standard.[78] The most noteworthy element of the majority opinion, however, is an extended criticism of the defendants' failure to produce the tank of gas used, a chemical analysis of its contents, evidence of the condition of the tank or the circumstances under which it was stored. The court concluded:

> In a res ipsa loquitur case where, in addition to the prima facie showing of negligence, it is admitted or appears beyond dispute that the defendant has it in his power to produce substantial evidence material to the issue but fails to do so, *it must be presumed that such evidence, if produced, would have been adverse to defendant,* and under such circumstances the evidence is insufficient to support a verdict for the defendant and plaintiff is entitled to a directed verdict.[79]

Because, as Justice Traynor noted in dissent,[80] the relevant time for testing the content of the gas container was the time of the accident and not the time of the trial, the majority's approach attacks more than a failure to produce available evidence at trial; rather, the majority believed such evidence should have been available and sanctioned the defendants for its nonavailability.[81]

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73. *Id.* at 292-93, 188 P.2d at 13.

74. *Id.* at 293-94, 188 P.2d at 13-14.

75. *Id.* at 292, 188 P.2d at 13.

76. *See Raber,* 36 Cal. 2d. at 664, 226 P.2d at 580 (Traynor, J., dissenting and concurring) ("The relationship between an unconscious patient and those who have undertaken to treat him may also be [a situation] that justifies placing the burden of proof on the attendants . . . .").

77. *Dierman,* 31 Cal. 2d at 295, 188 P.2d at 15; *see supra* text accompanying note 56.

78. *Cf. Clark,* 66 Cal. 2d at 414-21, 426 P.2d at 535-40, 58 Cal. Rptr. at 135-40 (Tobriner, J., concurring) (advocating strict liability for rare operating room injuries).

79. *Dierman,* 31 Cal. 2d at 295, 188 P.2d at 14 (emphasis added).

80. *Id.* at 299, 188 P.2d at 17 (Traynor, J., dissenting).

81. *See id.* ("If liability of defendants followed as a matter of law from their failure to preserve such a container or to account for its absence, they would be penalized for failing to anticipate a lawsuit and to prepare their defense thereto.").

Haft involved the drowning of Morris Haft and his five-year-old son in a motel pool in Palm Springs. In contravention of a state statute, the motel had neither provided a lifeguard nor posted a warning sign at the pool.[82] The court resolved one issue in the case by concluding that the liability of a pool owner who has provided neither a lifeguard nor a warning sign should be measured with respect to the failure to provide a lifeguard.[83] A second issue concerned the burden of proof as to cause-in-fact (*i.e.*, whether the Hafts were responsible for their own drowning). This was also resolved in the plaintiff's favor. Although the court alluded to the special duty of an innkeeper to his guests,[84] its principal rationale was that the lack of proof as to causation was a direct and foreseeable result of the defendants' negligent failure to provide a lifeguard.[85] The court noted that although the main purpose of a lifeguard is to aid those in danger, "an attentive guard does serve the subsidiary function of witnessing those accidents that do occur."[86] Because the defendants were responsible for the nonavailability of evidence they were sanctioned with the imposition of the burden of proof. *Haft* has been followed in multiple collision cases to impose liability upon the defendant responsible for the later collision where that collision made unascertainable the extent of damage caused by the earlier collision.[87]

The enhanced *res ipsa loquitur* cases, whether special relationship cases or sanction for nonavailability of evidence cases, ignore whether the defendant actually had relevant information that could have been produced at trial. Thus, more is involved than a failure to produce evidence affecting the probability that the defendant was negligent,[88] and the relevance of these cases is not entirely eliminated by modern discovery rules.[89] Rather, enhanced *res ipsa loquitur,* under the name of *res ipsa loquitur* and upon a foundation

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82. *Haft,* 3 Cal. 3d at 762-63, 478 P.2d at 467-68, 91 Cal. Rptr. at 747-48.

83. *Id.* at 766-69, 478 P.2d at 470-72, 91 Cal. Rptr. at 750-52.

84. The opinion speaks of the pool owner's "paying patron" and notes that the pool owner "profits from the presence of the pool." *Id.* at 774-75, 478 P.2d at 477, 91 Cal. Rptr. at 757.

85. *Id.* at 773, 478 P.2d at 476, 91 Cal. Rptr. at 756.

86. *Id.* at 771, 478 P.2d at 474, 91 Cal. Rptr. at 754; *cf.* Smith v. Americania Motor Lodge, 39 Cal. App. 3d 1, 113 Cal. Rptr. 771 (1974) (absence of safety rope at pool did not adversely affect availability of evidence of causation).

87. *See, e.g.,* Vahey v. Sacia, 126 Cal. App. 3d 171, 178 Cal. Rptr. 559 (1981) (in multiple collision, driver of fifth car had burden of proof as to causation of fourth car driver's injuries where not clear whether injuries attributable to first or second collision); Lareau v. Southern Pac. Transp. Co., 44 Cal. App. 3d 783, 118 Cal. Rptr. 837 (1975) (railroad had burden of proof as to causation of death where decedent was first injured in car collision and then killed by train).

88. *See supra* note 22 and accompanying text.

89. The rule may have a bearing on incentives to create and maintain information that could become relevant at trial. *See* Robinson, *Multiple Causation in Tort Law: Reflections on the DES Cases,* 68 VA. L. REV. 713, 733-34 (1982).

of "superior access to information," represents a new rule of liability: If evidence is not available and either the defendant has a special relationship with the plaintiff or the defendant is responsible for the nonavailability of evidence, the defendant is liable.

Unlike *res ipsa loquitur* in the ordinary sense,[90] enhanced *res ipsa loquitur* may be employed with substantial impact in unidentifiable tortfeasor cases. The leading example of this is *Ybarra v. Spangard.*[91] The facts of *Ybarra* are sketchy but simple. Joseph Ybarra entered the hospital for surgery and subsequently developed paralysis and atrophy in his shoulder.[92] Evidence was introduced to the effect that Ybarra's condition resulted from pressure or strain applied between his shoulder and neck and could have occurred during surgery.[93] The defendants included most of the doctors and nurses who attended Ybarra during his hospital stay and were related (as employees or independent contractors) in a variety of ways which would not normally make any one of them responsible for the conduct of all of the others.[94]

The court's opinion, although brief, is wide-ranging and speaks to the issues at hand in a variety of voices. The *Ybarra* decision can be attributed to the defendants' superior access to relevant information[95] and categorized either as a special duty case[96] or as a sanction for nonavailability of evidence case.[97] There is also a strong element of common enterprise or joint

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90. *See supra* text accompanying notes 34-40.

91. 25 Cal. 2d at 486, 154 P.2d at 687.

92. *Id.* at 487-88, 154 P.2d at 688.

93. *Id.* at 488, 154 P.2d at 688.

94. *Id.* at 491-92, 154 P.2d at 690.

95. *See* Jaffe, *supra* note 11, at 8. The court said, for example, "Without the aid of the doctrine a patient . . . would be entirely unable to recover unless the doctors and nurses in attendance voluntarily chose to disclose the identity of the negligent person and the facts establishing liability" and quoted Wigmore's remarks with respect to access to information. *Ybarra,* 25 Cal. 2d at 490, 154 P.2d at 689.

96. *See supra* note 76 and accompanying text; W. PROSSER, TORTS, *supra* note 8, § 39, at 223. The court said, for example, "The passenger sitting awake in a railroad car at the time of a collision, the pedestrian walking along the street and struck by a falling object or the debris of an explosion, are surely not more entitled to an explanation than the unconscious patient on the operating table," *Ybarra,* 25 Cal. 2d at 490, 154 P.2d at 689, and "[e]very defendant in whose custody the plaintiff was placed for any period was bound to exercise ordinary care to see that no unnecessary harm came to him." *Id.* at 491, 154 P.2d at 690.

97. *See* W. PROSSER, TORTS, *supra* note 8, § 39, at 223 (suggesting the opinion was an attempt to break the conspiracy of silence in the medical profession). The court said, for example, "The control, at one time or another, of one or more of the various agencies or instrumentalities which might have harmed the plaintiff was in the hands of every defendant or of his employees or temporary servants. This, we think, places upon them the burden of initial explanation," *Ybarra,* 25 Cal. 2d at 492, 154 P.2d at 690, and "[i]f [the doctrine of *res ipsa loquitur* were not applicable] the courts, to avoid gross injustice, would be forced to invoke the principles of absolute liability, irrespective of negligence, in actions by persons suffering injuries during the course of treatment under anesthesia." *Id.* at 490-91, 154 P.2d at 689. On retrial, the doctors and nurses testified, but the trial court nevertheless found for the plaintiff and was upheld on appeal. *See* Ybarra v. Spangard, 93 Cal. App. 2d 43, 208 P.2d 445 (1949).

tortfeasor treatment.[98] Finally, the case can be seen as a unique, result-oriented decision.[99]

Ybarra is best viewed, however, as an early example of California courts' willingness to stretch existing theories and to devise new tort doctrines to aid worthy plaintiffs in unidentifiable tortfeasor cases. *Ybarra* broke new ground. None of the strands discussed was enough by itself to support a decision for the plaintiff, but taken together they provided a basis to grant relief. The *Ybarra* "holding" has been followed to varying extents in subsequent cases involving operating room mishaps,[100] but, of greater importance, the *Ybarra* result has been referred to approvingly in doctrine-expanding cases such as *Haft, Summers v. Tice*[101] and *Sindell v. Abbott Laboratories.*[102] Enhanced *res ipsa loquitur* as used in *Ybarra* is a forerunner of express theories of liability designed to address the unidentifiable tortfeasor problem.

C. *The Concerted Action and Alternative Liability Theories of Liability*

Enhanced *res ipsa loquitur* is a new theory of liability under the guise of allocating burdens of proof. The next stage in the doctrinal progression[103] was the development of two express theories of liability suitable for application in unidentifiable tortfeasor cases: the concerted action theory and the alternative liability theory. Concerted action and alternative liability are similar in that both involve defendants taking complementary actions and

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98. *See Clark,* 66 Cal. 2d at 411, 426 P.2d at 533, 58 Cal. Rptr. at 133. The court said, for example, "A hospital today conducts a highly integrated system of activities, with many persons contributing their efforts," *Ybarra,* 25 Cal. 2d at 493, 154 P.2d at 691, and "[t]he defendant employers would be liable for the neglect of their employees; and the doctor in charge of the operation would be liable for the negligence of those who became his temporary servants for the purpose of assisting in the operation." *Id.* at 492, 154 P.2d at 690.

99. *See* Seavey, *supra* note 11, at 646. The court said, for example, "The present case is of a type which comes within the reason and spirit of the doctrine [of *res ipsa loquitur*] more fully perhaps than any other," *Ybarra,* 25 Cal. 2d at 490, 154 P.2d at 689, and "[w]e do not at this time undertake to state the extent to which the reasoning of this case may be applied to other situations in which the doctrine of res ipsa loquitur is invoked." *Id.* at 494, 154 P.2d at 691.

100. *See, e.g., Clark,* 66 Cal. 2d at 399, 426 P.2d at 525, 58 Cal. Rptr. at 125; *Quintal,* 62 Cal. 2d at 154, 397 P.2d at 161, 41 Cal. Rptr. at 577; Leonard v. Watsonville Community Hosp., 47 Cal. 2d 509, 305 P.2d 36 (1956); Seneris v. Haas, 45 Cal. 2d 811, 291 P.2d 915 (1955); *Dierman,* 31 Cal. 2d at 290, 188 P.2d at 12; Oldis v. La Societe Francaise de Bienfaisance Mutuelle, 130 Cal. App. 2d 461, 279 P.2d 184 (1955).

101. 33 Cal. 2d 80, 199 P.2d 1 (1948).

102. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied,* 449 U.S. 912 (1980).

103. By "stage" I refer to doctrinal sophistication, as this development was only roughly chronological.

the doctrines are often called into play in comparable factual situations.[104] Their theoretical underpinnings, however, are quite different.

Concerted action is a joint tortfeasor doctrine. As described by Prosser and Keeton, the doctrine provides that joint liability is imposed upon "[a]ll those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt the wrongdoer's acts done for their benefit."[105] An express agreement among the defendants is not necessary and a tacit understanding will suffice,[106] but it is "essential that each particular defendant who is to be charged with responsibility shall be proceeding tortiously, which is to say with the intent requisite to committing a tort, or with negligence."[107] The classic example of the concerted action theory is the case of an unlawful car race between A and B which results in a collision between B's car and a car driven by C. Under the concerted action theory, A and B are engaged in a common tortious enterprise and C may maintain an action against A even though their cars did not touch.[108]

The leading California concerted action case dealing with the unidentifiable tortfeasor problem is *Orser v. George*.[109] *Orser* arose from an accidental shooting at a duck club outing. Vierra, Jacobson and James negligently fired a number of shots at a mudhen.[110] Orser, who was working in a field and in the line of fire, was killed by a pistol bullet.[111] Vierra (and possibly Jacobson) fired the fatal pistol and James fired a rifle.[112] The court found that James must nevertheless be held as a defendant because:

> the record [of James firing alternately with Vierra at the same mudhen and in the same line of fire] permits a possibility James knew Vierra's conduct constituted a breach of duty owed Orser and that James was giving Vierra substantial "assistance or encouragement"; also that this was substantial assistance to Vierra in a tortious result with James' own

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104. The doctrines are considered frequently, for example, in cases involving mishaps with firearms. *See, e.g.,* Burton v. Waller, 502 F.2d 1261 (5th Cir. 1974), *cert. denied,* 420 U.S. 964 (1975) (alternative liability); *Summers,* 33 Cal. 2d at 80, 199 P.2d at 1 (alternative liability); Orser v. George, 252 Cal. App. 2d 660, 60 Cal. Rptr. 708 (1967) (concerted action); Moore v. Foster, 182 Miss. 15, 180 So. 73 (1938) (concerted action); Oliver v. Miles, 144 Miss. 852, 110 So. 666 (1927) (concerted action).

105. PROSSER AND KEETON, *supra* note 3, § 46, at 323.

106. *Id.* at 323.

107. *Id.* at 324. The concerted action theory is somewhat akin to criminal conspiracy theory, although an agreement itself can be a crime but cannot amount to a tort without the infliction of some harm. *See id.*

108. *See* Agovino v. Kunze, 181 Cal. App. 2d 591, 5 Cal. Rptr. 534 (1960).

109. 252 Cal. App. 2d at 660, 60 Cal. Rptr. at 708.

110. *Id.* at 665-66, 60 Cal. Rptr. at 712.

111. *Id.* at 664, 60 Cal. Rptr. at 711.

112. *Id.* at 666, 60 Cal. Rptr. at 712-13.

conduct, "separately considered, constituting a breach of duty to" Orser.[113]

Once concerted action is shown, particular causation is irrelevant and the problem of identifying the particular agent of causation is solved: All defendants participating in the common enterprise are responsible for the plaintiff's harm. The challenge lies in determining whether the conduct by the defendants in a particular instance constitutes tortious "concerted action." Express agreements with respect to tortious enterprises are not common and are in any event difficult to prove. Determining whether the course of conduct undertaken by the defendants evidences an implied understanding, on the other hand, requires difficult line drawing.

These difficulties are illustrated by *Hall v. E.I. DuPont de Nemours & Co.*,[114] a federal district court case suggesting a variant on the concerted action theory sometimes referred to as "enterprise liability."[115] *Hall* involved a lawsuit against all six American manufacturers of dynamite blasting caps. The plaintiff children were injured while playing with blasting caps which contained no warning label and could be easily detonated; individual manufacturers of specific caps could not be identified.[116] The court found sufficient allegations of joint control of risk on the part of the defendants through common adherence to industry safety standards and delegation of functions of safety investigation and design to a jointly sponsored trade association.[117] The result may very well have differed, however, depending upon factors such as the structure of the industry, the product, the alleged defect and the use made of the trade association. In industrial unidentifiable tortfeasor cases, the application of concerted action theory principles is far from simple.

The case establishing the alternative liability theory is *Summers v. Tice*.[118] Summers, Tice and Simonson went quail hunting and, despite admonitions to "keep in line," the hunters ended up being positioned at the points of a triangle.[119] Tice and Simonson each shot at a quail and one shot, from either Tice's or Simonson's gun, hit Summers in the eye.[120] The trial court found that both Tice and Simonson were negligent in firing in Summers' direction and that Summers was not contributorily negligent.[121]

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113. *Id.* at 668, 60 Cal. Rptr. at 714.

114. 345 F. Supp. 353 (E.D.N.Y. 1972). The decision was rendered in the context of a motion by the defendants for dismissal or for severance and transfer of the case. Because of unresolved choice of law questions, the case was decided assuming "the existence of a national body of state tort law." *Id.* at 360.

115. *See Sindell*, 26 Cal. 3d at 607, 607 P.2d at 933-34, 163 Cal. Rptr. at 141-42.

116. *Hall*, 345 F. Supp. at 359.

117. *Id.* at 375-76.

118. 33 Cal. 2d at 80, 199 P.2d at 1.

119. *Id.* at 82, 199 P.2d at 2.

120. *Id.*

121. *Id.* at 82-83, 199 P.2d at 2.

In considering the case, the California Supreme Court had before it two Mississippi precedents in which two persons had fired shots simultaneously but only one, who could not be identified, had hit another person. *Oliver v. Miles,*[122] involving two hunters who negligently fired across a road and hit a passerby, and *Moore v. Foster,*[123] involving two policemen who wrongfully fired at a fleeing suspect, had each been resolved on the theory that the defendants' activity constituted concerted action. In *Summers,* however, the court did not rely on the concerted action theory, perhaps because the plaintiff had neglected to proceed on that theory at the trial court level.[124] Instead, the court reasoned that because the defendants were both wrongdoers and created the situation where the negligence of one of them injured the plaintiff, the burden should rest with each defendant to absolve himself or be jointly liable for the whole damages.[125] Like enhanced *res ipsa loquitur, Summers* has been applied in multiple collision cases.[126] In general, however, incidents of contemporaneous negligence by two or more defendants resulting in an untraceable injury have apparently been rare and the *Summers* rule has not often been found controlling.[127]

The concerted action theory, as a theoretical matter, fits neatly into the category of joint torts, the concerted action of the defendants constituting a central element of the tort. The alternative liability theory is quite different. Whether expressed in terms of a mere projection of proper behavioral norms[128] or unfair liability for at least one defendant for an injury he did not cause,[129] *Summers* represents the imposition of liability for negligent

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122. 144 Miss. at 852, 110 So. at 666.

123. 182 Miss. at 15, 180 So. at 73.

124. *Summers,* 33 Cal. 2d at 88, 199 P.2d at 5. This failure on the plaintiff's part is spelled out more clearly in the court of appeal opinion. *See* Summers v. Tice, 190 P.2d 963, 967 (Cal. Dist. Ct. App. 1948) (opinion vacated). It can also be maintained that negligently firing in Summers' direction was a "one shot deal" and that, unlike shooting across a pond (*Orser*) or deliberately trying to bring down a fleeing misdemeanant (*Moore*), Tice and Simonson were not engaged in wrongful conduct; their overall enterprise (quail hunting) was not only not inherently tortious but included Summers.

125. *Summers,* 33 Cal. 2d at 86, 199 P.2d at 4.

126. *See, e.g.,* Vasquez v. Alameda, 49 Cal. 2d 674, 681-83, 321 P.2d 1, 6-7 (1958) (Traynor, J., dissenting); *Vahey,* 126 Cal. App. 3d at 171, 178 Cal. Rptr. at 559.

127. *See, e.g.,* Vecchione v. Carlin, 111 Cal. App. 3d 351, 168 Cal. Rptr. 571 (1980) (One possible cause of infant's death was defendants' action; another possible cause was preexisting medical condition.); Garcia v. Joseph Vince Co., 84 Cal. App. 3d 868, 148 Cal. Rptr. 843 (1978) (suit against two manufacturers only one of which made defective product); Eley v. Curzon, 121 Cal. App. 2d 280, 263 P.2d 86 (1953) (pedestrian may not have been struck by any of the defendants); *see also Burton,* 502 F.2d at 1261 (seven officers fired at demonstrators without privilege, 31 fired with privilege). *Summers* was incorrectly applied in Litzmann v. Humboldt County, 273 P.2d 82 (Cal. Ct. App. 1954). In *Litzmann,* a child was injured by an aerial bomb negligently left at a fairgrounds by one of two defendants. The court found that both defendants could be held liable notwithstanding that one defendant had clearly not left the bomb or otherwise breached any duty toward the plaintiff.

128. *See* Nesson, *supra* note 22, at 1384.

129. *See* Wright, *supra* note 20, at 1817-18 (arguing that the *Summers* rationale is more a penal argument than a tort argument).

risk creation and represents a major departure from traditional principles of tort law.[130] In allocating the burden of loss between an innocent plaintiff and negligent defendants, *Summers* comes very close to endorsing the concept of "negligence in the air."[131]

Notwithstanding their differences, the concerted action and alternative liability theories have each provided an express doctrine for dealing with unidentifiable tortfeasor cases. By admitting the formulation of independent theories of liability, each moves beyond the groping of *Ybarra* to a rule-system by which liability may be determined. These theories of liability provide the principal backdrop for the most challenging unidentifiable tortfeasor cases presented to date—those involving lawsuits by women injured *in utero* by DES.

II. The Unidentifiable Tortfeasor and the DES Cases

A. *The Market Share Answer to the DES Causation Problem*

The unidentifiable tortfeasor issue has been brought to the fore in the last several years with the emergence of claims against the manufacturers of the drug diethylstilbestrol (DES) and the landmark California Supreme Court decision in *Sindell v. Abbott Laboratories.*[132] DES is a synthetic estrogenic hormone first synthesized by a group of British medical researchers in the late 1930s.[133] A number of drug companies thereafter filed New Drug Applications (NDAs) with the Federal Food and Drug Administration (FDA) requesting authorization to produce and market DES for several purposes, none related to problems in pregnancy. Following an FDA request for information pooling in late 1940, several drug companies formed a "small committee" to coordinate the joint submission of clinical data on DES in a "master file" to be used with respect to all DES NDAs. The FDA approved the marketing of DES for nonpregnancy uses in late 1941. Supplemental NDAs for the use of DES as a miscarriage preventative were filed in 1947. A few companies conducted experiments on the safety and efficacy of DES for this purpose, but most relied instead upon published studies done by independent researchers at several medical schools. The FDA approved the marketing of DES as a miscarriage preventative in July

130. *See* Rosenberg, *supra* note 19, at 882-83.

131. *See id.* at 883. *But cf.* Palsgraf v. Long Island Ry. Co., 248 N.Y. 339, 162 N.E. 99 (1928) (proof of "negligence in the air" not sufficient).

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

133. The DES fact discussion presented here is taken primarily from Martin v. Abbott Laboratories, 102 Wash. 2d 581, 587-90, 689 P.2d 368, 373-74 (1984), Collins v. Eli Lilly & Co., 116 Wis. 2d 166, 177-81, 342 N.W.2d 37, 43-44, *cert. denied,* 469 U.S. 826 (1984) and Schwartz & Mahshigian, *Failure to Identify the Defendant in Tort Law: Towards a Legislative Solution,* 73 Calif. L. Rev. 941, 943-45 (1985).

1947. Following a study linking a form of cancer in young women with the use of DES by their mothers during pregnancy, the FDA contraindicated DES for use for the prevention of miscarriages in November 1971.

Although there were apparently a few principal producers,[134] as many as 200 to 300 companies manufactured and marketed DES between 1947 and 1971. As described by one court:

> Some companies marketed the drug under a trade name; others marketed it generically. Several companies supplied DES to competitors. Because the DES compounds produced by the drug companies were chemically identical, pharmacists often filled prescriptions for DES with whatever company's drug was in stock, a practice that the firms were aware of. None of the companies warned physicians about the possibility of carcinogenic or other risks to the offspring of women who took DES.[135]

In fact, a number of the daughters of women who ingested DES during pregnancy have suffered clear cell adenocarcinoma, a fast-spreading vaginal and cervical cancer requiring radical surgery, and many more have suffered adenosis, a vaginal tract abnormality of uncertain import.[136] Clear cell adenocarcinoma is extremely rare outside of the DES context[137] and has a minimum latent period of ten to twelve years.[138] Plaintiffs allege that drug companies did inadequate testing, knew or should have known that DES was unsafe and failed to give adequate warnings of its potential danger.[139]

A significant difficulty facing DES plaintiffs has been an inability to identify any particular drug company as the producer of the DES ingested by their mothers. The DES problem is widespread with numerous actors (both drug companies and victims) and no unity of time or place, either with respect to the tortious[140] acts performed or the injuries incurred. The difficulty in identifying particular tortfeasors results from both the time past and the indistinct marketing of DES. Memories have faded and records

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134. The plaintiff in *Sindell* asserted that Eli Lilly and Company and five or six other companies produced 90% of the DES marketed for the prevention of miscarriages. *Sindell*, 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

135. *Martin*, 102 Wash. 2d at 589, 689 P.2d at 374.

136. *Compare* Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 965 & n.10 (1978) (adenosis may be precancerous) *with* Schwartz & Mahshigian, *supra* note 133, at 945 ("Adenosis has not been shown to be a precancerous condition and it seems to regress and disappear over time.").

137. *See* Comment, *supra* note 136, at 965 & n.8.

138. *Sindell*, 26 Cal. 3d at 594, 607 P.2d at 925, 163 Cal. Rptr. at 133.

139. *See, e.g., id.* at 594-95, 607 P.2d at 925-26, 163 Cal. Rptr. at 133-34.

140. For purposes of this discussion, I will assume that the DES plaintiffs will be able to prove wrongful conduct on the part of DES manufacturers. Jury verdicts have to date not been uniform. *Compare* Bichler v. Eli Lilly & Co., 55 N.Y.2d 571, 436 N.E.2d 182 (1982) (affirming $500,000 verdict for plaintiff) *and* Needham v. White Laboratories, No. 76-1101 (N.D. Ill. Aug. 27, 1979) ($800,000 verdict for plaintiff), *rev'd*, 1980-1981 Prod. Liab. Rep. (CCH) ¶ 8875 (7th Cir. 1981) *with* Keil v. Eli Lilly & Co., No. 75-70997 (E.D. Mich. Nov. 21, 1980) (verdict for defendant).

have been lost or destroyed[141] and there were many manufacturers of a relatively fungible product. Although plaintiffs have asserted that the drug companies should bear the responsibility for the generic use of the drug[142] and defendants have countered that the plaintiffs' mothers had better access to their particular prescription information,[143] plaintiffs' inability to identify particular tortfeasors cannot be squarely blamed on either party.[144] As one commentator has observed, the DES cases may be one of the rare instances "in which useful, nonquantitative evidence is all but impossible to obtain."[145]

The *Sindell* case was brought against eleven drug manufacturers by Judith Sindell, a DES daughter who suffered a malignant bladder tumor and adenosis.[146] The suit was brought as a class action requesting compensatory and punitive damages for Sindell and equitable relief for the class.[147] Sindell pleaded a number of theories of liability[148] and alleged concerted action and a joint enterprise on the part of the defendants in an effort to make them jointly liable.[149] Sindell acknowledged that she could not identify the manufacturer of the particular DES taken by her mother.[150] The trial court dismissed the action on the basis of Sindell's inability to identify a particular manufacturer,[151] but the court of appeal reversed, holding that the plaintiff could proceed on both the concerted action and alternative liability theories of liability.[152]

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141. In Michigan, for example, state law requires the preservation of the prescription records of pharmacies for only five years. *See* Abel v. Eli Lilly & Co., 418 Mich. 311, 321, 343 N.W.2d 164, 168, *cert. denied,* 469 U.S. 833 (1984).

142. *See Sindell,* 26 Cal. 3d at 595, 607 P.2d at 926, 163 Cal. Rptr. at 134.

143. *See, e.g.,* McCreery v. Eli Lilly & Co., 87 Cal. App. 3d 77, 84, 150 Cal. Rptr. 730, 734 (1978) (plaintiff's mother knew of and possessed prescription; plaintiff's mother selected the doctor and the pharmacy involved).

144. This is what the court concluded in *Sindell. Sindell,* 26 Cal. 3d at 600-01, 607 P.2d at 930, 163 Cal. Rptr. at 138.

145. Kaye, *The Limits of the Preponderance of the Evidence Standard: Justifiably Naked Statistical Evidence and Multiple Causation,* 1982 AM. BAR FOUND. RES. J. 487, 489 [hereinafter Kaye, *Limits*].

146. *Sindell,* 26 Cal. 3d at 594-95, 607 P.2d at 926, 163 Cal. Rptr. at 134.

147. *Id.* at 595, 607 P.2d at 926, 163 Cal. Rptr. at 134. Sindell asked that the defendants be ordered to warn of the danger of DES and the need for certain tests and to establish free clinics to perform such tests. *Id.* "The plaintiff class consist[ed] of 'girls and women who are residents of California and who have been exposed to DES before birth and who may or may not know that fact or the dangers' to which they were exposed." *Id.* at 593 n.1, 607 P.2d at 925 n.1, 163 Cal. Rptr. at 133 n.1.

148. *Id.* at 595, 607 P.2d at 926, 163 Cal. Rptr. at 134. These theories included negligence, strict products liability, lack of informed consent, breach of express warranties, breach of implied warranties, fraud and violations of the Federal Food, Drug and Cosmetic Act. *See* Sindell v. Abbott Laboratories, 149 Cal. Rptr. 138, 141 (Cal. Ct. App. 1978), *rev'd,* 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied,* 449 U.S. 912 (1980).

149. *Sindell,* 26 Cal. 3d at 595, 607 P.2d at 926, 163 Cal. Rptr. at 134.

150. *Id.* at 595-96, 607 P.2d at 926, 163 Cal. Rptr. at 134.

151. *Id.* at 596, 607 P.2d at 926, 163 Cal. Rptr. at 134.

152. *See Abbott,* 149 Cal. Rptr. at 143-50.

The California Supreme Court also reversed the trial court,[153] but not for the reasons articulated by the court of appeal. The California Supreme Court rejected concerted action, alternative liability and other unidentifiable tortfeasor theories of liability[154] but instead fashioned a new theory of liability known as "market share liability." The market share liability rule generally works as follows: If (1) the plaintiff is innocent, (2) the defendants are negligent (at least in general terms), (3) the plaintiff's injury was caused by a uniform product,[155] (4) the plaintiff, through no fault of her own, cannot identify the particular manufacturer responsible for her harm and (5) the plaintiff has joined as defendants the manufacturers of a substantial share of the product that caused her injury, then the burden shifts to each defendant to either demonstrate that it could not have made the particular product that caused the plaintiff's injury or assume liability for the plaintiff's loss in proportion to its market share.[156]

The court elected to devise a remedy because, as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury.[157] The court also reasoned that in "our contemporary complex industrialized society, advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer" and courts should fashion remedies to meet changing needs, just as courts created strict products liability to adapt to "an era of mass production and complex marketing methods."[158] In the DES context, the court found it reasonable to measure the likelihood that any of the defendants produced the actual injury-causing product "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."[159]

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153. Under California law, a grant of hearing by the supreme court vacates a court of appeal decision. The supreme court then considers the case as if it were on direct appeal from the trial court.

154. *Sindell,* 26 Cal. 3d at 598-610, 607 P.2d at 928-35, 163 Cal. Rptr. at 136-43. The court also rejected enhanced *res ipsa loquitur* as embodied in *Haft* and the enterprise liability advanced in *Hall. See supra* text accompanying notes 82-87, 114-17; *see infra* text accompanying notes 239-41, 255-58.

155. Product uniformity is not an entirely accurate description of the DES situation. *See infra* text accompanying notes 208-09.

156. *Sindell,* 26 Cal. 3d at 610-12, 607 P.2d at 936-37, 163 Cal. Rptr. at 144-45. There appears to be no requirement that defendants have better access to relevant information than do the plaintiffs.

157. *Id.* at 610-11, 607 P.2d at 936, 163 Cal. Rptr. at 144.

158. *Id.* at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144 (citing Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 467-68, 150 P.2d 436, 443-44 (1944) (Traynor, J., concurring)); *see also* Brown v. Superior Court, 44 Cal. 3d 1049, 1070, 751 P.2d 470, 483, 245 Cal. Rptr. 412, 424-25 (1988).

159. *Sindell,* 26 Cal. 3d at 611-12, 607 P.2d at 937, 163 Cal. Rptr. at 145.

B. Sindell's *Unanswered Questions*

In establishing market share liability in *Sindell,* the California Supreme Court left open a number of important questions relating to the doctrine's application, only some of which have been addressed in subsequent DES cases. The first of these questions concerns the standard of care required of DES manufacturers and the related issue of which specific causes of action can be pursued on a market share theory when a particular responsible defendant is unidentifiable. In *Sindell,* the plaintiff pleaded a number of causes of action and requested punitive damages.[160] Although the majority opinion in *Sindell* uses the language of negligence,[161] the court did not address specifically the standard of care to be applied.

Most of the cause of action/market share questions were addressed directly in the California Supreme Court's recent decision in *Brown v. Superior Court of San Francisco.*[162] *Brown* involved at least sixty-nine individual DES cases that were consolidated for the purpose of deciding common legal questions. On appeal from pretrial rulings adverse to the plaintiffs, the court decided that drug manufacturers could not be held strictly liable for a defect in the design of a prescription drug.[163] That determination was not based on the market share theory, but on "the public interest in the development, availability and reasonable price of drugs."[164]

The court also determined that neither a breach of express or implied warranty claim nor a fraud claim could be pursued on a market share theory, the former because recovery on a warranty theory would be inconsistent with the court's resolution of the strict liability question,[165] and the latter because an essential element of a fraud claim is the state of mind of a particular manufacturer, a showing too individualized to resolve on a market share basis.[166] Although the punitive damages issue was not addressed in *Brown,* the court's fraud analysis suggests that punitive damages cannot be recovered under a market share theory.[167]

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160. *See supra* text accompanying notes 147-48.

161. *See, e.g., 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" (emphasis added)).

162. 44 Cal. 3d 1049, 751 P.2d 470, 245 Cal. Rptr. 412 (1988).

163. *Id.* at 1057-69, 751 P.2d at 475-83, 245 Cal. Rptr. at 416-24.

164. *Id.* at 1061, 751 P.2d at 477, 245 Cal. Rptr. at 418. The court adopted comment k to § 402A of the *Restatement (Second) of Torts,* which the court viewed as imposing "liability on a drug manufacturer only if it failed to warn of a defect of which it either knew or should have known." *Id.* at 1059, 751 P.2d at 476, 245 Cal. Rptr. at 417. *See generally* Abraham, *Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform,* 73 VA. L. REV. 845, 854-59 (1987) (discussion of standard of care issues in the mass tort context).

165. *Brown,* 44 Cal. 3d at 1072, 751 P.2d at 484, 245 Cal. Rptr. at 426.

166. *Id.* at 1071, 751 P.2d at 484, 245 Cal. Rptr. at 425-26.

167. *See also* Magallanes v. Superior Court, 167 Cal. App. 3d 878, 213 Cal. Rptr. 547 (1985) (punitive damages not recoverable under market share theory).

It is also worth noting that arguments more relevant to the standard of care question can easily enter the debate on the merits of the market share theory.[168] This is the case in both the majority and dissenting opinions in *Sindell,* the majority characterizing the defendants as better cost spreaders[169] and the dissent charging that market share liability will inevitably inhibit the dissemination of new drugs.[170] The *Brown* decision will, one hopes, serve as a focal point for the standard of care debate and allow market share liability to be analyzed on its merits as an unidentifiable tortfeasor doctrine.

A second question left open by *Sindell* but resolved by *Brown* is whether, under a market share theory, the defendants before the court are jointly liable for all of the plaintiff's losses (with the defendants' market shares being used simply to apportion damages among the defendants) or whether the defendants are only severally liable for a percentage of the plaintiff's losses equal to each defendant's market share.[171] Viewed another way, do the defendants (through higher payments) or the plaintiff (through a less than full recovery) absorb a loss for the market share of manufacturers who are out of business, bankrupt, not amenable to service of process or otherwise not joined as defendants in the action?

The majority opinion in *Sindell* can be read either way. The opinion refers to apportioning damages among the defendants, states that the defendants may cross-complain against other DES manufacturers and confesses that "a defendant may be held liable for a somewhat different percentage of the damage than its share of the appropriate market would justify."[172] On the other hand, the opinion asserts that each defendant will only be liable for the proportion of the judgment represented by its share of the market, manufacturers will not be held responsible for the products of another and "each manufacturer's liability for an injury would be approximately equivalent to the damages caused by the DES it manufactured."[173] Most commentators have

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168. *Cf.* Note, *Market Share Liability: An Answer to the DES Causation Problem,* 94 HARV. L. REV. 668, 674-75 (1981) (advantage of *Sindell* is that it will result in greater emphasis placed on standard of care questions).

169. *Sindell,* 26 Cal. 3d at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144.

170. *Id.* at 619, 607 P.2d at 941-42, 163 Cal. Rptr. at 149-50 (Richardson, J., dissenting); *see also McCreery,* 87 Cal. App. 3d at 86-87, 150 Cal. Rptr. at 736.

171. Assume, for example, plaintiff's damages are $300, defendant A has a 50% market share, defendant B has a 25% market share and no other defendants are joined. If defendants are jointly liable, the plaintiff recovers $300, $200 of which (50/75 of the judgment) is paid by defendant A and $100 of which (25/75 of the judgment) is paid by defendant B. If defendants are only severally liable, the plaintiff recovers $225 (leaving $75 unrecovered), defendant A pays $150 (50/100 of plaintiff's damages) and defendant B pays $75 (25/100 of plaintiff's damages).

172. *Sindell,* 26 Cal. 3d at 612-13, 607 P.2d at 937, 163 Cal. Rptr. at 145.

173. *Id.* at 613, 607 P.2d at 938, 163 Cal. Rptr. at 146.

read *Sindell* as imposing only several liability,[174] but others, including the *Sindell* dissent,[175] have read *Sindell* to impose liability for 100% of the plaintiff's damages.[176] Of the three other state supreme courts adopting a market share type theory, one opted for a variant on joint liability,[177] one opted for several liability[178] and the third took an intermediate course.[179]

In *Brown,* the California Supreme Court rejected the joint liability interpretation and concluded that, under a market share theory, "each defendant should be liable only for the portion of a plaintiff's damages that corresponds to the percentage of its share of the relevant market for DES."[180] The court recognized that joint liability may subject a defendant to a portion of the judgment greatly in excess of its market share and that several liability would likely result in a less than full recovery for the plaintiff.[181] The court's choice of several liability was in large measure determined by "*Sindell*'s goal of achieving a balance between the interests of DES plaintiffs and manufacturers of the drug."[182]

A rule of several liability, however, has more to commend it than simply being a good compromise between leaving plaintiffs remediless and subjecting defendants to damages in excess of their share. Several liability is more consistent with *Sindell*'s stated goal of reproducing what would occur if identification were possible in all cases.[183] Also, if market share liability is to be championed as a doctrine imposing liability for risk creation, as

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174. *See, e.g.,* Murphy v. E.R. Squibb & Sons, 40 Cal. 3d 672, 701-02, 710 P.2d 247, 267-68, 221 Cal. Rptr. 447, 467-68 (1985) (Kaus, J., dissenting); Zafft v. Eli Lilly & Co., 676 S.W.2d 241, 248 (Mo. 1984) (Gunn, J., dissenting); Robinson, *supra* note 89, at 726; Schwartz & Mahshigian, *supra* note 133, at 657; Note, *Industry-wide Liability and Market Share Allocation of Damages,* 15 GA. L. REV. 423, 438-46 (1981); Note, *supra* note 168, at 673.

175. *Sindell,* 26 Cal. 3d at 617, 607 P.2d at 940, 163 Cal. Rptr. at 148 (Richardson, J., dissenting).

176. *See, e.g.,* Payton v. Abbott Labs, 386 Mass. 540, 572, 437 N.E.2d 171, 189 (1982); *Martin,* 102 Wash. 2d at 601-02, 689 P.2d at 380-81; Wright, *supra* note 20, at 1819.

177. *See Collins,* 116 Wis. 2d at 166, 342 N.W.2d at 37. Under *Collins,* the plaintiff may proceed against a single defendant and to recover must show that the plaintiff's mother took DES, that DES caused the plaintiff's subsequent injuries, that the defendant produced or marketed the type of DES taken by the plaintiff's mother and that the defendant's conduct in producing and marketing the DES constituted a breach of a legally recognized duty to the plaintiff. The plaintiff and the defendant may bring in other defendants. Liability among defendants is apportioned based upon a number of factors, including market share and degree of fault. *Id.* at 194-200, 342 N.W.2d at 50-53.

178. *See* Hymowitz v. Eli Lilly & Co., 73 N.Y.2d 487, 541 N.Y.S.2d 941 (1989) (following *Brown*).

179. *See Martin,* 102 Wash. 2d at 581, 689 P.2d at 368. Under *Martin,* defendants who can establish their market share are only liable for that percentage of the plaintiff's losses. Any defendants who cannot establish their market share are liable in equal shares for the balance of the plaintiff's losses. *Id.* at 602-03, 689 P.2d at 382-83.

180. *Brown,* 44 Cal. 3d at 1072, 751 P.2d at 485, 245 Cal. Rptr. at 426.

181. *Id.* at 1072-73, 751 P.2d at 485, 245 Cal. Rptr. at 426.

182. *Id.* at 1075, 751 P.2d at 487, 245 Cal. Rptr. at 428.

183. *See* Note, Sindell v. Abbott Laboratories: *A Market Share Approach to DES Causation,* 69 CALIF. L. REV. 1179, 1196 (1981).

opposed to merely dividing a loss between plaintiffs and defendants,[184] the risk created by a particular drug company is not higher because not all manufacturers can be joined in an action. Also, economic efficiency considerations suggest that to force defendants to internalize losses properly attributable to the production (market share) of other drug manufacturers may result in overdeterrence of drug production. Finally, in breaking new legal ground to devise a remedy benefiting plaintiffs it is important institutionally for a court to at least appear to be treating defendants fairly.[185]

Another limitation on plaintiffs' ability to recover under a market share theory not fully articulated in *Sindell* is the requirement that the plaintiff join as defendants drug manufacturers whose market shares represent a "substantial share" of the DES market. The court noted that a law review note advocating a theory akin to market share liability suggested that 75-80% of the DES market should be required but the court declined to establish a specific percentage as a threshold.[186]

An opportunity to articulate the substantial share requirement more specifically was presented in *Murphy v. E.R. Squibb & Sons.*[187] *Murphy* was brought by Christine Murphy, an individual DES daughter, against a single drug manufacturer, E.R. Squibb & Sons, Inc., on the theory that Squibb produced the particular DES taken by her mother.[188] After the *Sindell* decision was announced, Murphy attempted to broaden her action against Squibb to include a market share theory and offered to prove that Squibb had a ten percent share of the national market for DES.[189] The trial court only allowed Murphy to proceed on her original theory and the jury returned a special verdict finding that the DES purchased by Murphy's mother was *not* manufactured by Squibb.[190] The court of appeal affirmed on the theory that the special verdict established a market share theory defense by satisfying Squibb's burden of proving that it did not manufacture the injury-causing DES.[191] The California Supreme Court also affirmed the

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184. *See, e.g.,* Robinson, *supra* note 89, at 739-40 (*Sindell* court allocated loss in proportion to the degree of risk created).

185. *See infra* text accompanying notes 306-09.

186. *Sindell,* 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. The law review note cited was Comment, *supra* note 136.

187. 40 Cal. 3d 672, 710 P.2d 247, 221 Cal. Rptr. 447 (1985). The majority opinions in *Sindell, Murphy* and *Brown* were all written by Justice Stanley Mosk.

188. *Id.* at 675, 710 P.2d at 249, 221 Cal. Rptr. at 449. Murphy was able to identify the pharmacist from which her injury-causing DES was purchased and also named the pharmacy as a defendant. The most controversial part of the *Murphy* decision was the majority's conclusion that a pharmacy could not be held strictly liable for defective prescription drugs sold by it.

189. *Id.* at 675, 710 P.2d at 249, 221 Cal. Rptr. at 449.

190. *Id.* at 675-76, 710 P.2d at 249, 221 Cal. Rptr. at 449.

191. *See* Murphy v. E.R. Squibb & Sons, 202 Cal. Rptr. 802, 811-12 (Cal. Ct. App. 1984) (opinion vacated). This reasoning is not sound. If the only evidence presented to the jury was

trial court,[192] but on a different ground, holding that ten percent of the DES market did not constitute a "substantial share."[193] The court again left open, however, the percentage of the market it would consider a "substantial share."[194]

Of more fundamental concern is whether the "substantial share" requirement is valuable at all. The California Supreme Court's stated reason for the substantial share requirement was "to diminish the injustice of shifting the burden of proof to defendants to demonstrate that they could not have made the drug which caused the plaintiff's injuries."[195] The court also appears to have been trying to minimize the extent to which market share liability departed from the alternative liability theory of *Summers,* which the court interpreted as requiring all possible tortfeasors to be before the court.[196] If defendants were jointly liable under a market share theory for all of the plaintiff's damages, a substantial share requirement would serve to reduce defendants' exposure to overpayment.[197] With several liability, however, defendants are not exposed to overpayment. Moreover, the likelihood of any individual drug manufacturer being held liable for a portion of a judgment when it in fact did not cause the plaintiff's injury is not affected by the presence of other defendants. This has led some to argue that the substantial share requirement is unnecessary.[198]

The substantial share requirement is helpful, however, insofar as it serves as a forced joinder rule and an election of legal theory rule. Forcing a plaintiff to join a number of drug manufacturers in her market share suit can promote fairness in several ways. With more manufacturers participating

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Squibb's 10% market share the special verdict would be appropriate, but this should not exonerate Squibb from paying 10% of a market share judgment, at least if manufacturers representing a "substantial share" of the market are defendants. The court of appeal's rationale would exonerate from a market share judgment all defendants with a market share determined to be less than 50%.

192. *See supra* note 153.

193. *Murphy,* 40 Cal. 3d at 684, 710 P.2d at 255, 221 Cal. Rptr. at 455.

194. *See* Note, *Dealing Defective Drugs—Limiting Pharmacist and Manufacturer Liability:* Murphy v. E.R. Squibb & Sons, Inc., 21 U.S.F. L. REV. 173, 190-93 (1986). The author concludes that "substantial share" requires joinder of defendants comprising over 50% of the market. The author's reading of the language in *Sindell* and *Murphy,* however, is probably too fine.

195. *See Brown,* 44 Cal. 3d at 1073, 751 P.2d at 485, 245 Cal. Rptr. at 427 (citing *Sindell,* 26 Cal. 3d at 612, 607 P.2d at 924, 163 Cal. Rptr. at 132).

196. *See Sindell,* 26 Cal. 3d at 602, 607 P.2d at 930-31, 163 Cal. Rptr. at 138-39.

197. If, for example, the plaintiff can proceed with defendants representing only 25% of the market present, those defendants may face liability for four times their share of the DES market. If the plaintiff can only proceed with defendants representing 80% of the market present, those defendants will only face liability for 1.25 times their share of the DES market.

198. *See, e.g., Murphy,* 40 Cal. 3d at 701-02, 710 P.2d at 267-68, 221 Cal. Rptr. at 467-68 (Kaus, J., dissenting) ("any particular defendant bears the same liability no matter how many or how few other manufacturers are joined"); Robinson, *supra* note 89, at 725-26 (substantial share requirement pointless).

in the action, better data on market shares is likely to be available.[199] In addition, multiple defendants can spread legal costs, at least as to common issues.[200] Plaintiffs also will not be able to force settlements on individual defendants with a small market share who face slight liability but for whom the cost of defending a suit would be burdensome,[201] which also may decrease the number of suits filed.[202]

The way the substantial share requirement acts as an election of legal theory rule is illustrated by the facts of *Murphy*.[203] For Murphy to have proceeded on her traditional action against Squibb while at the same time joining a number of manufacturers and proceeding on a market share theory would have been awkward at best. By essentially forcing the plaintiff to choose between a traditional action against a single drug company and a market share suit, the substantial share requirement protects courts from having to handle two trials at once, and to the extent plaintiffs choose to proceed against a single manufacturer, the number of market share suits would decrease. Although the substantial share requirement denies plaintiffs like Murphy who try and fail to identify a particular manufacturer even a partial recovery, this disadvantage is outweighed by administrative advantages for the court.[204]

An even more important issue with market share liability is the relevant definition of the market. The definition may (or may not) take into account a variety of factors, including time periods, geographic areas, product identifiability and marketing approaches. Manufacturers entered and left the DES market throughout the twenty-four year period during which DES was marketed as a miscarriage preventative,[205] so DES market shares differed at different times. Also, national market shares differed from local market shares and information on both is sketchy.[206] Neither national nor local market shares necessarily correspond to the amount of DES sold by a

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199. *See* Note, *supra* note 183, at 1197-98.

200. Given the nature of plaintiffs' allegations, standard of care and breach of duty questions are likely to be common. Defendants' interests with respect to determining market shares are adverse.

201. *See* Note, *supra* note 183, at 1198.

202. Plaintiffs would normally have an incentive to reduce their own legal costs by proceeding against several manufacturers in a single action. If the strategy of forcing settlements from individual defendants is pursued, however, plaintiffs may need to resort to actions against individual manufacturers.

203. *See supra* text accompanying notes 187-94.

204. Administrative considerations are an important factor in the ability of courts to devise new unidentifiable tortfeasor doctrines. *See infra* text accompanying notes 310-13.

205. *See Collins*, 116 Wis. 2d at 180, 342 N.W.2d at 44.

206. *See Sindell*, 26 Cal. 3d at 613, 607 P.2d at 937-38, 163 Cal. Rptr. at 145-46 (acknowledging practical problems in determining market share); *Hymowitz*, 73 N.Y.2d at 511, 541 N.Y.S.2d at 949 ("[T]he reliable determination of any market smaller than the national one likely is not practicable."); *Collins*, 116 Wis. 2d at 189, 342 N.W.2d at 48 (determining not to follow *Sindell* because of "practical difficulty of defining and proving market share").

particular pharmacy.[207] Although DES was manufactured using a standard scientific formula,[208] pills differed, at least to some extent, in dosage, size, shape and color.[209] Also, the marketing schemes employed by manufacturers differed, some using brand names, others selling generically,[210] and with variations in price[211] and perhaps record keeping and distribution schemes.[212]

One approach is to define market share narrowly, focusing on the particular facts of the individual case at hand. Even if unable to identify a manufacturer, plaintiffs should at least be able to identify the time and place of pregnancy and may be able to provide some description of the injury-causing product. Market share could be determined with respect to the DES sold during a particular time period, in a particular pharmacy or city and/or with particular physical characteristics.[213] The principal advantage of this approach is that if market share is sensitive to the facts before the court, it will most nearly approximate the probability that the defendant's product caused the plaintiff's injury. In addition, a tightly focused market share approach ties market share liability more closely to normal tort rules in the event the plaintiff has some information identifying the manufacturer.

An alternate approach is to define the market broadly without regard to the details of a given plaintiff's situation. Defendants' "market shares" would be constant from case to case notwithstanding the availability of particularized information affecting the probabilities of causation in a given instance.[214] Even

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207. *See, e.g.,* Mertan v. E.R. Squibb & Sons, 190 Cal. Rptr. 349, 354 (Cal. Ct. App. 1983) (opinion ordered not published) (evidence indicated pharmacies carried DES manufactured by some drug companies but not others).

208. *See Sindell,* 26 Cal. 3d at 605, 607 P.2d at 932-33, 163 Cal. Rptr. at 140-41.

209. *See Martin,* 102 Wash. 2d at 605, 689 P.2d at 382 (requiring that plaintiff prove that "defendant produced or marketed the *type* (*e.g.,* dosage, color, shape, markings, size, or other identifiable characteristics) of DES taken by plaintiff's mother"); *Murphy,* 202 Cal. Rptr. at 810 (opinion vacated) (noting dispute in trial court over physical characteristics of DES pills taken); Note, *supra* note 183, at 1192.

210. *See McCreery,* 87 Cal. App. 3d at 84, 150 Cal. Rptr. at 734 (Lilly and Rexall marketed DES under nonproprietary name).

211. *See Martin,* 102 Wash. 2d at 608, 689 P.2d at 384 (Squibb dismissed as defendant because wholesale price of Squibb's trademark DES higher than retail price paid by plaintiff's mother).

212. *See* Note, *supra* note 183, at 1192. Some DES was not marketed as a miscarriage preventative but could have been used that way with a drug company's knowledge. *See* Miles Laboratories v. Superior Court, 133 Cal. App. 3d 587, 184 Cal. Rptr. 98 (1982) (drug manufacturer not dismissed as defendant in market share suit).

213. *See, e.g.,* George v. Parke-Davis, 107 Wash. 2d 584, 591-92, 733 P.2d 507, 511-12 (1987) (market shares should be determined based upon sales in local market (pharmacy, pharmacies or city where DES purchased) but national market share data admissible if local figures unavailable); *Zafft,* 676 S.W.2d at 248 (Gunn, J., dissenting) (relevant market was area of plaintiff's mother's residence, drugstore and pharmacist).

214. In *Hymowitz,* the New York Court of Appeals adopted the market share rule using a national market. The court wished to avoid burdening parties with separate determinations in each case and even refused to allow defendant drug companies an opportunity to escape liability by showing that they did not cause a particular plaintiff's injury. 73 N.Y.2d at 511-12, 541 N.Y.S.2d at 949-50.

if DES suits are not pursued as class actions,[215] mass-litigation techniques such as those employed in *Brown*[216] allow parties and courts to benefit from economies of scale in fact-finding through the use of a single set of market share determinations in a number of cases. Over a large run of cases defendants' liability in the aggregate should work out properly. Also, market share cases should have consistent outcomes.[217]

With either approach "market share" can be refined to reflect not simply gross product sold, but the likelihood of the defendant having manufactured the injury-causing product in an *unidentifiable* tortfeaser case.[218] Such refinement would attempt to account for variations in the identifiability or harmfulness of defendants' products.[219] Without such refinement, manufacturers with relatively identifiable products would face greater overall liability in that they would be solely responsible for damages in conventional suits in which they were identified without any reduction of their proportion of market share judgments.[220] Making such adjustments to "market shares," however, would likely present significant proof problems and would risk adding another level of complication and arbitrariness to already difficult adjudications.

In *Sindell,* the court defined the market broadly as the "entire production of the drug sold by all [manufacturers] for [the] purpose [of preventing miscarriage],"[221] but carved out an exclusion from liability for any defendant which can prove that it did not manufacture the injury-causing pills in a particular case.[222] The wisdom of the *Sindell* approach depends upon the

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215. Although class actions may be a desirable way to handle DES cases, noncommon issues of fact have made class certification difficult to obtain. *Compare* Note, *supra* note 168, at 675 (advantages) *with Payton,* 83 F.R.D. at 382 (granting class certification for certain purposes). Following remand, the trial court in *Sindell* denied certification of the plaintiff class, citing "the lack of commonality among class members on issues of proximate cause, extent of injury, and appropriate medical examination or treatment." *See* Jolly v. Eli Lilly & Co., 44 Cal. 3d 1103, 1120, 751 P.2d 923, 934, 245 Cal. Rptr. 658, 668-69 (1988).

216. *See supra* text accompanying notes 162-63.

217. *See generally* Abraham, *supra* note 164, at 870-71 (mass tort cases more equitable if similar cases treated alike).

218. *See* Rosenberg, *supra* note 19, at 867 ("when market share and risk contribution diverge . . . apportionment should accord with a firm's contribution to risk").

219. *See, e.g.,* Case Comment, *Refining Market Share Liability:* Sindell v. Abbott Laboratories, 33 STAN. L. REV. 937, 944-46 (1981) (defining and advocating the use of "causation shares"). Identifiability can vary among DES manufacturers in that a particular company may have made physically distinct pills, marketed more heavily with a trade name orientation or kept more thorough distribution records.

220. *See* Case Comment, *supra* note 219, at 946; Note, *supra* note 183, at 1192-93. Failure to account for variations in identifiability and harmfulness provides an incentive for manufacturers to produce generic, untraceable products and to invest less in making products safer. *See* Note, *Market Share Liability for Defective Products: An Ill-Advised Remedy for the Problem of Identification,* 76 NW. U.L. REV. 300, 316-21 (1981).

221. *Sindell,* 26 Cal. 3d at 611-12, 607 P.2d at 937, 163 Cal. Rptr. at 145.

222. *Id.* at 602, 607 P.2d at 930, 163 Cal. Rptr. at 138; *cf. Hymowitz,* 73 N.Y.2d at 512, 541 N.Y.S.2d at 950 (defendant excused if did not participate in marketing of DES for pregnancy use; if defendant did so participate, however, defendant not excused even if defendant could not have caused particular plaintiff's injury).

availability and quality of focused or direct evidence. The choice of market share definition inevitably involves a trade off of administrability and consistency versus precision in particular cases. If evidence to refine "market shares" is difficult to obtain or of questionable accuracy, the pursuit of precision may be little more than a costly exercise in arbitrariness. As a first venture into a new area with no way for the court to grasp the full evidentiary picture,[223] *Sindell*'s broad approach is reasonable. The exclusion for defendants who could not have been responsible, although of little use to most manufacturers,[224] at least minimizes the appearance of gross unfairness in particular cases.

A final issue presented by market share liability involves the cases in which the plaintiff has some information pointing to a particular manufacturer. In *Rogers v. Rexall Drug Co.*, decided with *Sindell*, the plaintiff amended her complaint to allege that a particular defendant manufactured the DES which injured her. The court suggested that, should she fail to establish that fact, she could rely on a market share theory.[225]

Alternatives are available. For example, suits in which plaintiffs pursue recovery against a particular manufacturer could be disallowed altogether. This would eliminate the costly pursuit of particular evidence and would avoid excess liability for defendants with identifiable products.[226] On the other hand, this approach would deny plaintiffs a remedy under traditional tort theories and might force courts to unnecessarily incur the burdens of handling market share liability cases.

A less drastic alternative would be to deny plaintiffs the opportunity to pursue a market share recovery in cases where it does not seem necessary or appropriate.[227] This would avoid the assertion that market share is a reasonable approximation of the likelihood that a particular manufacturer caused the plaintiff's injury in the face of a significant amount of specific evidence,[228] but might place plaintiffs with no specific evidence in a relatively better position,[229] perhaps discouraging the production of evidence.[230] As is

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223. *Sindell* was decided on appeal from a demurrer.

224. *See, e.g., Miles Laboratories,* 133 Cal. App. 3d at 587, 184 Cal. Rptr. at 98 (drug manufacturer did not manufacture DES as a miscarriage preventative but not dismissed as a defendant because DES made by manufacturer could have been so used with manufacturer's knowledge).

225. *See Sindell,* 26 Cal. 3d at 597, 607 P.2d at 927, 163 Cal. Rptr. at 135.

226. *See supra* text accompanying note 220.

227. In Celotex Corp. v. Copeland, 471 So. 2d 533 (Fla. 1985), the Florida Supreme Court declined to adopt market share liability in an asbestos context, pointing out that the plaintiff was able specifically to identify at least eleven manufacturers supplying asbestos products to which he was exposed and had a proper cause of action against such identified manufacturers. *Id.* at 535-36.

228. *See, e.g., Mertan,* 190 Cal. Rptr. at 349 (opinion ordered not published) (plaintiff allowed to pursue market share theory despite presence of substantial specific evidence).

229. *See, e.g., Sindell,* 26 Cal. 3d at 618, 607 P.2d at 941, 163 Cal. Rptr. at 149 (Richardson, J., dissenting).

230. *See infra* text accompanying notes 277-86.

the case in defining the relevant market, the best approach to these cases may only be determinable as courts gain experience.

The particulars of market share liability remaining unsettled after *Brown* are noteworthy but are perhaps inevitable with a new theory of liability. Their resolution is not necessary to evaluate the position of market share liability in the panoply of unidentifiable tortfeaser doctrines.

C. *Market Share Liability in Perspective*

An important aspect of market share liability which has received little attention from commentators is what the *Sindell* court could have done but did not do. Faced with the *Sindell* appeal and the set of facts pleaded, the California Supreme Court could have chosen any of three different courses of action: (1) affirm the trial court and deny recovery to the plaintiff, (2) conclude that the facts pleaded by the plaintiff stated a cause of action under recognized theories of liability for unidentifiable tortfeasor cases, or (3) devise a new theory of liability (or make explicit modifications to an existing theory) to provide the plaintiff a remedy.

In addition to the general factors counseling restraint in the creation of new theories of liability,[231] in the DES context legislative or administrative solutions have considerable appeal.[232] Yet administrative compensation systems are not without problems.[233] Moreover, the legislative process to establish a compensatory scheme would by its nature be political, involving the political power of manufacturers as well as the sympathetic or moral appeal of victims. A premature closing of the courthouse doors would likely disadvantage the DES plaintiffs in that manufacturers would have little incentive to participate in a legislative solution if they no longer feared judicial liability. The DES unidentifiable tortfeasor problem is a tort law problem. Whether they endorse or deny a remedy, courts have an obligation to address the issue.

Unlike other courts,[234] the *Sindell* court held that the facts alleged by the plaintiff stated a cause of action. Before articulating its market share theory, however, the court rejected the application of enhanced *res ipsa loquitur* as

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231. *See infra* text accompanying notes 275-317.

232. *See, e.g., Sindell,* 26 Cal. 3d at 621-22, 607 P.2d at 943, 163 Cal. Rptr. at 151 (Richardson, J., dissenting) (policy decision to introduce and define market share liability should rest with the legislature); Mulcahy v. Eli Lilly & Co., 386 N.W.2d 67, 76 (Iowa 1986) (solution in legislative domain); Schwartz & Mahshigian, *supra* note 133, at 964-75 (proposing legislative solution).

233. *See* Abraham, *supra* note 164, at 885-98; Rosenberg, *supra* note 19, at 926-28.

234. *See, e.g., McCreery,* 87 Cal. App. 3d at 77, 150 Cal. Rptr. at 730; *Mulcahy,* 386 N.W.2d at 67; *Zafft,* 676 S.W.2d at 241.

embodied in *Haft*,[235] the concerted action theory of liability[236] and the enterprise liability variation thereof in *Hall*;[237] and the alternative liability theory.[238] The rejection of these unidentifiable tortfeasor doctrines on the pleaded facts was more than mere table-setting for market share liability. The endorsement of any one of these theories in the DES context would have expanded greatly its scope with significant consequence for future application in other situations.

Sindell argued that *Haft* was analogous because the "defendants' failure to discover or warn of the dangers of DES and to label the drug as experimental caused her mother to fail to keep records or remember the brand name of the drug prescribed to her."[239] The court concluded, however, that the absence of evidence resulted "primarily from the passage of time rather than from [the defendants'] acts of failing to provide adequate warnings" and was not "due to the fault of defendants."[240] The court also noted the "superior access to information" language in *Ybarra* and *Summers* but commented that in *Sindell* neither the plaintiff nor the defendants were in a better position to identify the manufacturer of DES ingested by the plaintiff's mother.[241]

Following the *Haft* reasoning to find DES manufacturers liable would have imposed significant record-keeping duties on drug manufacturers,[242] especially given the time element and indirect relationship between manufacturer and user.[243] To hold manufacturers liable for failing to provide labels that would have led to the availability of evidence is to overrun the unidentifiable tortfeasor issue. The failure to label is at the heart of the negligence issue, but does not provide a link between a particular manufacturer and a given plaintiff unless, under enhanced *res ipsa loquitur* notions, one makes a defendant's negligence a sufficient reason to decide the identification issue against it as well. To hold negligent defendants automatically liable in an unidentifiable tortfeasor case without regard to their degree of cooperation, their relationship to the plaintiff or their present ability to

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235. *See supra* text accompanying notes 70-87. Enhanced *res ipsa loquitur* on the basis of a special relationship between drug manufacturer and user is not apposite. Indeed, *Brown* suggests that a drug manufacturer's standard of care toward the user of its products may be *less* than usual. *See supra* text accompanying notes 163-64.

236. *See supra* text accompanying notes 105-13.

237. *See supra* text accompanying notes 115-17.

238. *See supra* text accompanying notes 118-27.

239. *Sindell*, 26 Cal. 3d at 601 n.14, 607 P.2d at 930 n.14, 163 Cal. Rptr. at 138 n.14.

240. *Id.* at 601, 607 P.2d at 930, 163 Cal. Rptr. at 138. Later in the opinion, however, the court stated that the defendants' "conduct in marketing a drug the effects of which are delayed for many years played a significant role in creating the unavailability of proof." *Id.* at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144.

241. *See id.* at 599-600, 607 P.2d at 928-29, 163 Cal. Rptr. at 136-37.

242. *See* Robinson, *supra* note 89, at 734-35; *see also infra* text accompanying notes 277-86 (discussion of liability theories and incentives to preserve evidence).

243. *See Sindell*, 26 Cal. 3d at 601, 607 P.2d at 930, 163 Cal. Rptr. at 138.

produce evidence would isolate a single aspect of *Ybarra* as sufficient to impose liability.[244] This would significantly expand enhanced *res ipsa loquitur* in the unidentifiable tortfeasor context.

Sindell's concert of action claim was based upon allegations of

> "planned and concerted action, express and implied agreements, collaboration in, reliance upon, acquiescence in and ratification, exploitation and adoption of each other's testing, marketing methods, lack of warnings . . . and other acts or omissions . . ." and that "acting individually and in concert, [defendants] promoted, approved, authorized, acquiesced in, and reaped profits from sales" of DES.[245]

These allegations, Sindell claimed, "state a 'tacit understanding' among defendants to commit a tortious act against her."[246] The court of appeal concluded that Sindell's allegations suggested that each defendant "gave substantial 'assistance or encouragement' to the tortious conduct of the others" and that a concert of action cause of action could be maintained.[247]

The California Supreme Court, however, looked more deeply into the complaint and determined that "[t]he gravamen of the charge of concert [was] that defendants failed to adequately test the drug or to give sufficient warnings of its dangers and that they relied upon the tests performed by one another and took advantage of each others' promotional and marketing techniques . . . ,"[248] which the court viewed as common parallel or imitative conduct.[249] The court reviewed *Orser v. George*[250] and other cases and characterized concert of action cases as involving a small number of defendants, a single plaintiff, actions occurring over a short span of time and direct participation by the defendant in the injury-causing act or encouragement or assistance of the person who directly caused the injury.[251] The court also concluded that the genericness of the DES manufactured was understandable in the prescription drug context.[252] Finally the court thought

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244. *See supra* text accompanying notes 95-99. The particular aspect would be that of "sanction for nonavailability of evidence."

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

246. *Id.* at 605, 607 P.2d at 932, 163 Cal. Rptr. at 140.

247. *See* Sindell v. Abbott Laboratories, 149 Cal. Rptr. 138, 145 (Cal. Ct. App. 1978), *rev'd,* 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied,* 449 U.S. 912 (1980). The Michigan Supreme Court, without significant elaboration, found the concert of action theory applicable in the DES context in Abel v. Eli Lilly & Co., 418 Mich. 311, 343 N.W.2d 164, *cert. denied,* 469 U.S. 833 (1984). The New York Court of Appeals allowed a DES daughter to recover on a concert of action theory in Bichler v. Eli Lilly & Co., 55 N.Y.2d 571, 436 N.E.2d 182 (1982), because the defendant had failed to preserve the issue on appeal.

248. *Sindell,* 26 Cal. 3d at 605, 607 P.2d at 932, 163 Cal. Rptr. at 140.

249. *See id.*, 607 P.2d at 933, 163 Cal. Rptr. at 141.

250. 252 Cal. App. 2d 660, 60 Cal. Rptr. 708 (1967); *see supra* text accompanying notes 105-13.

251. *Sindell,* 26 Cal. 3d at 605-06, 607 P.2d at 933, 163 Cal. Rptr. at 141.

252. *Id.* at 605, 607 P.2d at 932-33, 163 Cal. Rptr. at 140-41. It has also been noted that the concerted activities of the DES manufacturers—the pooling of information for the FDA application—was not tortious. *See* Schwartz & Mahshigian, *supra* note 133, at 942 (citing Morton v. Abbott Laboratories, 538 F. Supp. 593 (M.D. Fla. 1982)).

it "dubious whether liability on the concert of action theory can be predicated upon substantial assistance and encouragement given . . . pursuant to a tacit understanding to fail to perform an act."[253]

The *Sindell* court correctly perceived that the application of the concert of action theory to allow liability in that case would greatly extend the reach of that doctrine. By limiting the concert of action theory, the court prevented parallel conduct on the part of manufacturers from resulting in joint and several liability for each without regard to whether it produced, or demonstrably did not produce, the injury-causing product.[254]

The *Sindell* court also rejected the "enterprise liability" variant on the concerted action theory of *Hall v. E.I. DuPont de Nemours & Co.*[255] Sindell argued that DES manufacturers followed an industry-wide safety standard and pointed to a law review comment detailing an "enterprise liability" approach to the DES causation problem.[256] The court, however, distinguished *Hall* because, unlike the blasting cap industry, there were a large number of DES manufacturers and no trade association had been delegated functions related to product safety.[257] Also, FDA regulation resulted in product standards influenced to a considerable degree by the federal government.[258] The court, in essence, took a narrow view of joint control of risk. Although following industry standards should not establish due care *per se,*[259] neither should it establish liability without evidence of causation.

The most attractive of the existing unidentifiable tortfeasor doctrines before the *Sindell* court was the alternative liability theory of *Summers v. Tice.*[260] Like *Summers, Sindell* can be characterized as a case involving an innocent plaintiff and negligent defendants in which evidence identifying the injury-causing defendant is unavailable through no fault of the plaintiff's. The court of appeal, drawing on *Ybarra* and *Haft,* had found the alternative liability theory applicable.[261]

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253. *Sindell,* 26 Cal. 3d at 606, 607 P.2d at 933, 163 Cal. Rptr. at 141. Distinctions between acting and failing to act are, however, subtle. The DES manufacturers' alleged concert of action can be recharacterized as an agreement to take the act of marketing DES without adequate testing. The shooters' concert of action in *Orser* can be recharacterized as an agreement to fail to perform the act of ascertaining whether anyone was in the line of fire.

254. *See id.* at 605, 607 P.2d at 933, 163 Cal. Rptr. at 141; *see also* Henderson, *DES Litigation: The Tidal Wave Approaches Shore,* 3 CORP. L. REV. 143, 146 (1979).

255. 345 F. Supp. 353 (E.D.N.Y. 1972); *see supra* text accompanying notes 114-17.

256. *Sindell,* 26 Cal. 3d at 608-09, 607 P.2d at 934-35, 163 Cal. Rptr. at 142-43. The *Fordham Law Review* comment combines elements of *Hall* and *Summers* in formulating its "enterprise liability" theory. *See* Comment, *supra* note 136, at 995-1006. The rule proposed is not dissimilar to the market share theory (*e.g.,* the comment advocates the use of market shares to apportion liability). What the comment advances, however, is not adoption of *Hall* as much as a new theory of liability.

257. *Sindell,* 26 Cal. 3d at 609, 607 P.2d at 935, 163 Cal. Rptr. at 143.

258. *Id.*

259. *See* The T.J. Hooper, 60 F.2d 737 (2d Cir.), *cert. denied,* 287 U.S. 662 (1932).

260. 33 Cal. 2d 80, 199 P.2d 1 (1948); *see supra* text accompanying notes 118-25.

261. *See Sindell,* 149 Cal. Rptr. at 147-50. The Michigan Supreme Court found the alternative

The California Supreme Court, however, rejected alternative liability. In so doing, the court focused on the fact that, of as many as 200 DES manufacturers, only six were before the court. The court expressed concern that there was therefore a "substantial likelihood" that none of the defendants before the court had manufactured the DES which caused the plaintiff's injuries.[262] This, however, did not prevent the court from creating market share liability, although the "substantial share" requirement may be seen as an attempt to address the concern. The court's concern with alternative liability, therefore, appears to have been primarily with imposing joint and several liability on all defendants without regard to the likelihood that a particular defendant produced the injury-causing product. *Summers* involved two defendants, both before the court, with each equally likely to have caused the plaintiff's injury, so joint and several liability worked well.[263] The absence of some manufacturers and the varying market shares of those present, however, would make dividing liability equally among those defendants before the court neither efficient nor fair.[264]

In addition, *Summers'* transfer of the burden of proof to the defendants to absolve themselves is most reasonable when all who may have caused the injury are before the court.[265] Consider, for example, the facts of *Eley v. Curzon.*[266] In *Eley,* a pedestrian on a highway in low visibility conditions was hit by a car or truck. Three drivers who may have hit the plaintiff were named as defendants. However, the plaintiff could have been struck by yet a fourth driver, and without the presence of a party to speak to this possible cause the defendants present would be left to absolve themselves through speculation.[267] By declining in *Sindell* to apply unmodified the alternative liability theory, the court contained the theory and prevented its expansion to cases far afield of the *Summers* scenario.

Market share liability is in some respects a radical theory. Like alternative liability, market share liability imposes liability for risk creation.[268] Market

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liability theory, modified to include a requirement of an effort on the part of the plaintiff to identify a particular defendant, applicable in *Abel,* 418 Mich. at 311, 343 N.W.2d at 164. In *Abel,* all DES manufacturers who sold product in the relevant jurisdiction were believed to be before the court.

262. *Sindell,* 26 Cal. 3d at 603, 607 P.2d at 931, 163 Cal. Rptr. at 139.

263. *See* Kaye, *Limits, supra* note 145, at 510-11.

264. *See* Henderson, *supra* note 254, at 147.

265. The presumed liability of the defendants collectively to produce an explanation of the plaintiff's injury was a significant factor in *Ybarra. See supra* text accompanying notes 95-99.

266. 121 Cal. App. 2d 280, 263 P.2d 86 (1953). The *Eley* court rejected the applicability of *Summers* to the situation presented.

267. The nonpresence of defendants because of bankruptcy or settlement presents a difficult case. *See, e.g.,* Gard v. Raymark Indus., 185 Cal. App. 3d 583, 229 Cal. Rptr. 861 (Cal. Ct. App. 1986) (ordered not published) (approving application of alternative liability theory against remaining manufacturers). Joint and several liability remains a problem, but defendants who have settled or are bankrupt are still identified and presumably available to testify.

268. *See* Robinson, *supra* note 89, at 749; Rosenberg, *supra* note 19, at 882-83; Wright, *supra* note 20, at 1819; *supra* text accompanying note 140.

share liability goes further, however, in at least one respect. In *Summers* the defendants each breached a duty toward a particular plaintiff before the court, but in *Sindell* defendants breached duties to indeterminate DES daughters whose mothers used their products. Market share liability deals with the identifiable tortfeasor issue in the aggregate,[269] replacing individual responsibility with collective responsibility.[270]

Viewed in perspective, however, market share liability is a narrow unidentifiable tortfeasor doctrine tailored to a particular set of circumstances.[271] As presently articulated, the doctrine does not reach unidentifiable tortfeasor cases involving nonfungible products, cases in which the plaintiff's injury may not have been wrongfully caused or cases in which not all defendants have acted tortiously. The nonfungibility problem has restricted the use of market share liability in the asbestos context.[272] The non-wrongful cause limitation appears to limit the doctrine's applicability in cases such as suits against polluters who increase risks of disease.[273] Finally, the non-tortiously-acting defendants limitation effectively precludes the use of market share liability in manufacturing defect (as opposed to design defect) product liability cases.[274]

Perhaps *Sindell*'s most significant breakthrough is its demonstration of a court's willingness to devise new tort doctrines to deal with specific unidentifiable tortfeasor situations. In the next Part of this Article I will suggest certain factors courts should take into account in devising new unidentifiable tortfeasor remedies. Measured by these criteria, market share liability appears to be a well-crafted approach to the DES causation problem.

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269. *See* Wright, *supra* note 20, at 1819.

270. *See* Abraham, *supra* note 164, at 862; Bush, *Between Two Worlds: The Shift from Individual to Group Responsibility in the Law of Causation of Injury,* 33 UCLA L. REV. 1473, 1484-85 (1986).

271. *Cf.* Delgado, *Beyond* Sindell*: Relation of Cause-In-Fact Rules for Indeterminate Plaintiffs,* 70 CALIF. L. REV. 881 (1982) (advocating expansion of market share liability to apply to cases where victims are not identifiable).

272. *See, e.g., In re* Related Asbestos Cases, 543 F. Supp. 1152, 1158 (N.D. Cal. 1982) ("asbestos fibers are of several varieties, each used in varying quantities by the defendants in their products, and each differing in harmful effects"); Mullen v. Armstrong Worldwide Indus., 200 Cal. App. 3d 250, 246 Cal. Rptr. 32 (1988); *Gard,* 185 Cal. App. 3d at 583, 229 Cal. Rptr. at 861; *Celotex,* 471 So. 2d at 538.

273. *See* Note, *supra* note 168, at 678-79; *cf.* Delgado, *supra* note 271, at 899-902 (advocating expansion of market share liability to cover cases involving defendant's conduct increasing incident of injury beyond level attributable to natural causes).

274. *See* Note, *supra* note 168, at 678. Market share liability was rejected in Sheffield v. Eli Lilly & Co., 144 Cal. App. 3d 583, 192 Cal. Rptr. 870 (1983), where the plaintiff had been injured by an improperly prepared polio vaccine and could not identify the particular manufacturer. *See also* Cummins v. Firestone Tire & Rubber Co., 495 A.2d 963, 972 (Pa. Super. Ct. 1985) (rejecting market share liability where plaintiff "failed to allege that all of the manufacturers [of multi-piece tire rim assemblies] have placed on the market fungible products which share identical defective qualities").

III. UNIDENTIFIABLE TORTFEASOR DOCTRINAL CONSIDERATIONS

In Part I of this Article I examined the development of unidentifiable tortfeasor doctrines in a variety of contexts. In Part II, I examined the market share theory of liability and noted that, although market share liability marked a major breakthrough in the DES context, the theory was carefully crafted for the particular unidentifiable tortfeasor problem presented and is more limited than would have been the endorsement of the application of existing unidentifiable tortfeasor doctrines.

In this Part, I will discuss several interrelated categories of issues courts should consider in devising new unidentifiable tortfeasor doctrines or expanding existing doctrines. These categories can be loosely labeled evidence production considerations, effectiveness considerations, the moral imperative and institutional considerations. These will be considered in the light of two unidentifiable tortfeasor settings: the DES situation and the situation presented by the well-known "blue bus" hypothetical. The DES situation has been described earlier.[275] The "blue bus" hypothetical can be stated as follows:

> Mrs. Smith was driving on a public street and was forced off the road by a negligently driven bus. She is able to testify that the bus was blue, but is unable to describe the bus to any greater extent. Blue Bus Co. owns and operates 80% of the blue buses operating in the town. Mrs. Smith files a negligence action against Blue Bus Co. alleging the foregoing. Does she recover?[276]

A. Evidence Production Considerations

The benefits for dispute resolution of having relatively full evidence before the court are plain.[277] Fact-finding will be more accurate and judgments perceived to be based upon complete information will likely be accorded greater public acceptance.[278] The evidence production question, therefore, is not whether additional evidence is beneficial but instead how far to pursue its production.

The question has two separate aspects. The first concerns incentives to produce available evidence in a given case. Evidence production can be

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275. *See supra* text accompanying notes 132-45.

276. This simple version of the hypothetical follows Tribe, *supra* note 19, at 1340-41. Alternate versions are detailed in Brook, *Use, supra* note 23, at 298-99 and Nesson, *supra* note 22, at 1378-79. The hypothetical is based upon Smith v. Rapid Transit, Inc., 317 Mass. 469, 58 N.E.2d 754 (1945), one of the *Sargent* cases. *See supra* text accompanying notes 12-27.

277. The value of different types of evidence (*e.g.*, direct, circumstantial, statistical) is a separate issue. *See supra* text accompanying notes 20-25.

278. *See* Nesson, *supra* note 22, at 1379; Wright, *supra* note 20, at 1826.

encouraged by placing the burden on the party expected to be able to produce evidence to produce it or lose, even though evidence before the court suggests that that party should win.[279] *Ybarra* reflects this concern in part.[280]

The other aspect concerns incentives to obtain or preserve evidence in a particular category of cases. Assuming important evidence is not presently available, the responsible party can be held accountable, thereby providing incentives for labelling, record keeping and witnessing.[281] This was the main thrust of the version of enhanced *res ipsa loquitur* propounded in *Dierman* and *Haft*.[282]

In *Sindell* neither party could be expected to produce evidence as to specific causation and the lack of evidence could not fairly be attributed to the conduct of either the plaintiff or the defendants.[283] In the blue bus case, however, evidence suppression is an important issue. Under most circumstances a driver run off the road by a bus would be able to make a more complete identification than simply that the bus was blue. Before providing Mrs. Smith a remedy, the court must be comfortable with her explanation of her inability to provide a better description. To award Mrs. Smith a recovery would otherwise create a disincentive for her to provide evidence. Evidence obtainment and preservation concerns are less salient but could be relevant if Mrs. Smith did not keep her spectacles prescription current or if Blue Bus Co.'s practices made its buses difficult to identify.[284]

The pursuit of evidence can, of course, be taken too far[285] and courts must be careful to avoid making, to quote Prosser, "sheer ignorance . . . the most powerful weapon in law."[286] Nevertheless, before fashioning or extending unidentifiable tortfeasor doctrines courts must be sensitive to the effects of such doctrines on incentives to produce, obtain and preserve relevant evidence.

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279. *See* Tribe, *supra* note 19, at 1361. Incentives to produce evidence may be directed at defendants as well as plaintiffs. *See* Brook, *Inevitable Errors, supra* note 18, at 101.

280. *See supra* text accompanying note 95.

281. *See* Robinson, *supra* note 89, at 733-34.

282. *See supra* text accompanying notes 70-89.

283. *See supra* text accompanying note 144.

284. In Kaminsky v. Hertz, 94 Mich. App. 356, 288 N.W.2d 426 (1979), a defendant's course of conduct made the operators of vehicles with its logo difficult to determine. The plaintiff was injured by ice which fell from a truck identified only as having Hertz colors and logo. Hertz owned 90% but not all of such vehicles. In ruling that the plaintiff presented sufficient evidence to go to the jury on the ownership question, the court relied in part upon a belief that "any business organization which permits a commercial conveyance to operate on the public highways prominently proclaiming its name owes a duty to the public to stand by that voluntary, self-advertising proclamation." *Id.* at 359, 288 N.W.2d at 427.

285. *Dierman* and, perhaps, *Ybarra* are examples of this. *See supra* text accompanying notes 76-81 and notes 95-99.

286. Prosser, *Res Ipsa, supra* note 8, at 222.

B. *Effectiveness Considerations*

Effectiveness considerations involve the effectiveness of an unidentifiable tortfeasor doctrine in achieving the optimum distribution of loss between plaintiffs and defendants and among defendants. An effective remedy avoids overdeterrence and underdeterrence and leaves each party in a fair position.[287] Effectiveness concerns are most significant with unidentifiable tortfeasor doctrines employing probabilistic or statistical evidence. One aspect of the problem concerns the efficiency of a remedy in a particular case or category of cases and another concerns the flexibility of the jurisdiction's tort system.

Before devising or employing an unidentifiable tortfeasor doctrine based upon probabilistic or statistical evidence, courts must first consider the probative value of such evidence. If much specific evidence relating to the factual determinations to be made is before the court, probabilistic or statistical evidence may be of very little help.[288] If specific evidence is not available, courts must, before employing probabilistic or statistical evidence, ascertain the closeness of the relationship between the measure employed and the determination sought. The value of background statistics can vary significantly.[289]

In the DES context, although market shares are difficult to determine and the market share theory does not account for possible differences in the harmfulness of DES produced,[290] the amount of DES produced by each drug manufacturer is a reasonable approximation of the amount of harm caused.

A close relationship between market shares and harm caused often does not exist, however, in many other cases which appear similar. Some products, like asbestos,[291] appear in a variety of forms with varying toxicities. Some products, like cigarettes,[292] increase the risk of certain types of diseases

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287. One element of fairness is imposing liability on defendants commensurate with the harm they caused. Another element is imposing liability only on defendants who have demonstrably breached the applicable standard of care. *See infra* text accompanying notes 297-304.

288. *See* Brook, *Use, supra* note 23, at 305; *see also* Guenther v. Armstrong Rubber Co., 406 F.2d 1315 (3d Cir. 1969) (significant specific evidence; probability-based remedy rejected); Mertan v. E.R. Squibb & Sons, 141 Cal. App. 3d 511, 190 Cal. Rptr. 349 (Cal. Ct. App. 1983) (opinion ordered not published) (significant specific evidence; plaintiff nevertheless permitted to pursue market share theory).

289. *See* Brook, *Use, supra* note 23, at 343.

290. *See supra* text accompanying notes 205-12.

291. *See supra* note 272 and accompanying text.

292. *See* Abraham, *supra* note 164, at 865 ("nothing even remotely as precise a proxy for the probability of responsibility as market share is available in most nonsignature disease cases"); Note, *supra* note 168, at 678 n.54 ("Cigarette smoking increases the incidence of heart disease and lung cancer, but cannot be isolated from other factors and established as the but-for cause of a particular individual's disease.").

without being the sole cause. Also, differences in marketing methods and the presence or absence of warnings and safety instructions may make equally dangerous products differ in their likelihood of causing injury.[293] In such cases "market shares" alone are not sufficient, and reasonable causation probabilities can only be determined with difficulty and a fair degree of speculation.

In the blue bus case, it does not necessarily follow from the fact that Blue Bus Co. owns and operates 80% of the blue buses operating in the town that there is an 80% likelihood that Blue Bus Co. caused Mrs. Smith's accident. Probabilities would differ if Blue Bus Co.'s drivers drove negligently more (or less) often than drivers of other companies[294] and could change dramatically if the accident occurred on a regular route of Blue Bus Co. (or another bus company) or if the accident occurred near (or away from) Blue Bus Co.'s yard.

A more general consideration in devising probability-based unidentifiable tortfeasor doctrines is whether the jurisdiction's tort rules are sufficiently flexible to apportion liability fairly. With market share liability, as amplified by *Brown,* DES manufacturers are liable only severally and in a proportion not in excess of their market shares.[295] If the plaintiff cannot be limited to less than a full recovery or if the defendants' liability must be joint and several, however, solvent defendants before the court may be subject to greater than "efficient" liability. In the blue bus case, for example, Blue Bus Co. may face liability for all accidents involving unidentified blue buses.[296]

C. *The Moral Imperative*

The moral imperative supports applying an unidentifiable tortfeasor doctrine when it can be shown independently of the specific causation issue that the defendants each breached a duty of care owed to the plaintiff or similarly situated persons. In the DES situation presented in *Sindell,* all defendants were assumed to have been negligent and a cornerstone of the court's decision was the rationale of *Summers v. Tice* that "as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury."[297] Even if, as the *Sindell* dissent pointed out,[298] it is more

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293. *See* Note, *supra* note 168, at 679 n.58.

294. *See* Brook, *Use, supra* note 23, at 346-47 (percentage of buses not same as percentage of negligently driven buses).

295. *See supra* text accompanying notes 171-82.

296. *See* Tribe, *supra* note 19, at 1349-50. This is not to say, however, that it is necessarily more "efficient" or fair in such a situation to leave a plaintiff remediless. *See* Brook, *Inevitable Errors, supra* note 18, at 101-02.

297. Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 610-11, 607 P.2d 924, 936, 163 Cal. Rptr. 132, 144, *cert. denied,* 449 U.S. 912 (1980); *see supra* text accompanying notes 154-59.

298. *Sindell,* 26 Cal. 3d at 616, 607 P.2d at 939, 163 Cal. Rptr. at 147 (Richardson, J., dissenting).

likely than not that a given defendant did not cause the injury of the particular plaintiff, each DES manufacturer did increase the risk of injury to the plaintiff and other DES daughters collectively and it is likely that each defendant's wrongful conduct was responsible for harm to someone.[299]

When, in an unidentifiable tortfeasor situation, causation and negligence are linked, however, uncertainty about identity is also uncertainty about negligence. In the blue bus case, for example, if Blue Bus Co. did not force Mrs. Smith's car off the road, Blue Bus Co. did not act negligently toward anyone. If we believe there is an 80% chance Blue Bus Co. caused Mrs. Smith's accident and Mrs. Smith is allowed to prevail, there is an 80% chance of having correctly held liable a tortfeasor. If, however, ten separate bus companies each operate 10% of the blue buses operating in the town, to award a remedy would impose liability on ten defendants each of which was substantially less likely than not negligent and nine of which were in fact innocent. The moral imperative for providing a remedy in such a case is at best weak and the message delivered by the court is more "don't operate buses" than "don't act wrongfully."[300]

Unidentifiable tortfeasor cases involving manufacturing defects are similar.[301] In *Sheffield v. Eli Lilly & Co.*,[302] for example, the plaintiff had been permanently disabled by an injection of defective Salk polio vaccine, the manufacturer of which could no longer be identified. A critical difference from *Sindell* was that all defendants in *Sindell* manufactured a defective generic product, while in *Sheffield,* although all defendants manufactured a generic product, only one manufactured a defective one and market share liability was rejected.[303] Courts must be wary, therefore, of employing unidentifiable tortfeasor doctrines in cases involving isolated injuries or other situations in which an independent showing cannot be made on the standard of care issue.[304]

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299. *Sindell* is in this sense more compelling than *Summers. Sindell* can be viewed as a decision to deal with the DES problem in the aggregate without concern over matching individual DES daughters with particular manufacturers. *But cf.* Schwartz & Mahshigian, *supra* note 133, at 948 (essential to show defendant breached duty to individual plaintiff).

300. *See* Nesson, *supra* note 22, at 1383.

301. Professor Rosenberg argues that proportionality rules like market share liability should be applicable to intermittent torts, taking into account long-run accident or defect rates. *See* Rosenberg, *supra* note 19, at 868. If a given industry produces a large number of similar defective products of untraceable source, the DES scenario may invite comparison. Even in such event, however, evidentiary problems in determining defective product track-records would likely be insurmountable.

302. 144 Cal. App. 3d 583, 192 Cal. Rptr. 870 (1983).

303. *Id.* at 592-99, 192 Cal. Rptr. at 875-80; *see also* Garcia v. Joseph Vince Co., 84 Cal. App. 3d 868, 148 Cal. Rptr. 843 (1978) (plaintiff injured by defective fencing blade made by one of two manufacturers).

304. In special situations the moral imperative may suggest protecting to a greater extent a particular party from the risk of error. Protection of defendants in criminal prosecutions is one example. *See* Ball, *supra* note 19, at 816; Brook, *Use, supra* note 23, at 309; *cf. supra* text accompanying notes 49-69 (enhanced *res ipsa loquitur* applied when special relationship exists between the plaintiff and the defendant).

D. *Institutional Considerations*

Before devising new unidentifiable tortfeasor doctrines or employing existing doctrines in new situations, courts must consider issues relating to the role and operations of the judicial system. A readily apparent issue concerns the role of the courts in addressing the existing harm. Legislative solutions are not always feasible and the denial or grant of a tort remedy may affect the legislative process.[305] Nevertheless, many situations are better left in the legislative domain and/or are best addressed by providing administrative remedies.

A more subtle factor involves the public acceptance of judgments. A goal of the judicial process is to articulate statements about past events that can be accepted as true for purposes of entering a judgment and spelling out the rights of the parties thereafter.[306] A problem for the acceptability of unidentifiable tortfeasor doctrines based primarily on statistical evidence is that uncertainty is acknowledged and the public is aware that the trier of fact cannot do better than make a probabilistic statement, a "bet."[307] Against this, of course, must be balanced public acceptance difficulties in withholding a remedy from deserving plaintiffs[308] and the value to the judicial system of being seen as attempting to reach probable results, thereby reducing the number of "errors."[309] There are a large number of DES cases and liability may be viewed as working out in the aggregate. Acceptability is a significant concern, however, in isolated incident cases.

A third institutional consideration is the wise allocation of judicial resources. Ideally, no proper remedy should be denied because of inadequate resources. Realistically, courts have limited resources which they should allocate in a manner maximizing the judicial system's productivity.[310] Even assuming accurate results are obtainable,[311] overcoming formidable proof problems may be difficult and resource consuming. The DES situation involves a large number of cases and a great deal of harm.[312] Providing a remedy for isolated incidents like the blue bus case, however, may not be worthwhile. To ensure that limited judicial resources are well spent, before devising or employing new unidentifiable tortfeasor doctrines courts must balance the magnitude of the problem presented, in terms of the number of like cases and the severity of harm caused, against administrative burdens and proof problems.

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305. *See supra* notes 231-34 and accompanying text.
306. *See* Ball, *supra* note 19, at 808; Nesson, *supra* note 22, at 1358-59.
307. *See* Nesson, *supra* note 22, at 1378-79.
308. *See* Brook, *Use, supra* note 23, at 335-36.
309. *See* Brook, *Inevitable Errors, supra* note 18, at 105.
310. *See* Rosenberg, *supra* note 19, at 888.
311. *Cf. supra* text accompanying notes 287-96 (effectiveness of remedies varies).
312. *See supra* text accompanying note 136.

The practical realities of litigation also burden the parties so courts should evaluate the magnitude of the harm and the problem of proof from the litigants' perspective. Granting a remedy while placing a virtually insurmountable burden of proof upon the plaintiff does not accomplish much. Conversely, placing heavy or impossible proof burdens on defendants may make suits difficult to defend from a practical standpoint and amount to an imposition of liability. A situation of particular concern would be one in which a plaintiff could maintain an action against a number of defendants with bare allegations or only a minimal factual showing. In such a case it may be cost-effective for a plaintiff to bring suit but not cost-effective to present even a meritorious defense, especially if a defendant's share of the total liability is minor. Thus, the plaintiff may be able to readily obtain settlements without the need to have, or to establish, a case.[313]

Finally, courts must consider the possibility that a new unidentifiable tortfeasor doctrine will be misapplied in subsequent cases. Unidentifiable tortfeasor doctrines are fact specific and the danger of error is great. Courts can misapprehend key factual elements of a case,[314] apply liability theories without recognizing the absence of essential elements[315] and misunderstand the purpose of doctrinal components.[316] Also, with respect to unidentifiable tortfeasor remedies relying on probability determinations, courts must remember that mathematical "proofs" are often replete with inadequacies, both in terms of mathematical error and nonsubstantiation of data.[317]

CONCLUSION

Unidentifiable tortfeasor cases present difficult problems of uncertainty. Courts must deal not only with uncertainty about the commission of a tort

313. *See* Note, *supra* note 220, at 324 (viewing the market share theory as an example of such a case). This is not to say that cases should not settle nor to deny that nearly every case, no matter how frail, has some "nuisance value" in settlement. The difference is that the sum of the "nuisance values" to a large number of defendants may be considerable in relation to the intrinsic value of the plaintiff's claim.

314. *See, e.g.*, Raber v. Tumin, 36 Cal. 2d 654, 226 P.2d 574 (1951) (discussed *supra* note 38); Dierman v. Providence Hosp., 31 Cal. 2d 290, 188 P.2d 12 (1947) (discussed *supra* text accompanying notes 72-81).

315. *See, e.g.*, Litzmann v. Humboldt County, 273 P.2d 82 (Cal. Dist. Ct. App. 1954) (discussed *supra* note 127).

316. *See, e.g.*, Murphy v. E.R. Squibb & Sons, 202 Cal. Rptr. 802 (Cal. Ct. App. 1984) (opinion vacated) (discussed *supra* note 191 and accompanying text); Kilgore v. Shepard Co., 52 R.I. 151, 158 A. 720 (1932) (discussed *supra* note 35).

317. *See, e.g.*, United States v. Massey, 594 F.2d 676 (8th Cir. 1974) (prosecutor confused the probability of matching hair samples with the probability of mistaken identity); Miller v. State, 240 Ark. 340, 399 S.W.2d 268 (1966) (no foundation on which to base probabilities); People v. Collins, 68 Cal. 2d 319, 438 P.2d 33, 66 Cal. Rptr. 497 (1968) (no substantiation of probabilities, misapplication of product rule, confusion of probability of occurrence with probability of mistaken identity); State v. Sneed, 76 N.M. 349, 414 P.2d 858 (1966) (probability estimates mere speculation). *See generally* Tribe, *supra* note 19 (critique of use of mathematics in fact finding).

but uncertainty concerning the identity of the tortfeasor. While the doctrine of *res ipsa loquitur* provides a means to deal with uncertainty, overcoming the tendencies exhibited in the *Sargent* line of cases, it does not, as a circumstantial evidence rule, address the unidentifiable tortfeasor situation.

From *res ipsa loquitur* and the separate notion of certain defendants having "superior access to information," California courts developed the doctrine I have referred to as enhanced *res ipsa loquitur.* Enhanced *res ipsa loquitur* deals with uncertainty by shifting the burden of proof (and loss, if proof is not available) to defendants standing in a special relationship to plaintiffs or who can be characterized as responsible for the uncertainty. As evidenced by *Ybarra,* when these factors are present, enhanced *res ipsa loquitur* can be used with major impact in unidentifiable tortfeasor cases.

The concert of action theory and alternative liability theory are express unidentifiable tortfeasor doctrines. Although these doctrines appear in similar factual situations involving complementary action by two or more defendants, their theoretical underpinnings are quite different. Both are limited, however, in that the concert of action theory requires an agreement and the alternative liability theory requires a limited number of potential tortfeasors, all of whom are before the court.

The DES situation presents the unindentifiable tortfeasor problem dramatically. The California Supreme Court responded in *Sindell* by fashioning a new unindentifiable tortfeasor doctrine—market share liability. Although properly hailed as a breakthrough, market share liability was actually less of a departure from current norms than would have been stretching existing unidentifiable tortfeasor doctrines to apply to the DES situation.

Although important aspects of the doctrine are still unsettled, market share liability appears to be generally well-suited to the DES situation: A large amount of harm needs to be redressed, there is, at least at the pleading stage, the moral imperative presented by innocent plaintiffs and negligent defendants, the use of market shares and several liability makes for an effective remedy and evidence production worries are relatively mild. With the hypothetical blue bus case the reasons for providing a remedy are less compelling. There are significant concerns about evidence suppression, effectiveness and the magnitude of institutional burdens relative to the amount of harm to be redressed.

Although courts have erred and misapplied doctrines, California courts have generally done a good job handling unidentifiable tortfeasor situations. Their and other courts' ability to continue to do so in the future will hinge upon their sensitivity to issues presented by unidentifiable tortfeasor situations and their creativity and flexibility in formulating well-tailored responses.

COMMENTARY

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