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Negligence in the Paint: The Case for Applying the Risk Contribution Doctrine to Lead Litigation – A Response to Gray & Faulk

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INTRODUCTION

The civil justice system in the United States has long embraced two separate, distinct concepts in its evolution. First, the common law has historically been regarded as flexible and adaptable, conforming itself equally well to both its rich traditions and the evolving realities of our modern times. Second, tort law specifically is rooted in the principle that individuals have a duty to refrain from engaging in conduct that may result in foreseeable harm. These concepts have intersected at significant times throughout our jurisprudence when courts adopted legal theories that compensate a victim for injuries despite his or her inability to satisfy the requirements of particularized causation: *res ipsa loquitor*,¹ alternative liability, market share liability, and risk contribution liability. Courts fashioned these theories in rare instances to address the anomalous cases in which the plaintiff, through no fault of his or her own, could not readily identify which tortfeasor, among multiple tortious actors, actually caused his or her harm.

Once such modification was the Wisconsin Supreme Court's adoption of the risk-contribution theory of liability in *Collins v. Ely Lilly & Co.*² In that case, the court noted that "[i]nherent in

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1. The burden was not always shifted with *res ipsa*. See, e.g., WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 302-05 (Hornbook Series, West Publishing Co. 1941). See *infra* Part I.

2. 342 N.W.2d 37 (Wis. 1984).

the common law is a dynamic principle which allows it to grow and to tailor itself to meet changing needs within the doctrine of *stare decisis*, which, if correctly understood, was not static and did not forever prevent the courts from reversing themselves or from applying principles of common law to new situations as the need arose.”³

For twenty-one years after it was issued, *Collins* stood alone in Wisconsin as the only risk contribution case. Then, in 2005, the court revisited the risk contribution doctrine in *Thomas ex rel. Gramling v. Mallett*,⁴ a case in which a young child had been poisoned by white lead carbonate pigments manufactured long ago.⁵ Like the *Collins* case, the *Thomas* case posed questions of foreseeability and causation; while Steven Thomas had evidence that white lead carbonate pigments had poisoned him, he could not identify the precise manufacturer of those specific white lead carbonate pigments. The *Thomas* court determined that when the pigment manufacturers designed, manufactured, and promoted white lead carbonate for use as a pigment in residential paint, they engaged in conduct that would result in foreseeable harm, thus exposing themselves to tort liability.⁶

In making the threshold judgment to subject the former manufacturers of white lead carbonate to the risk contribution doctrine, the Wisconsin Supreme Court considered several key public policies. Specifically, the *Thomas* court considered the contribution of the manufacturers to (1) the creation of the risk of harm to the children who were completely innocent victims;⁷ (2) the comparatively better position of the pigment manufacturers to absorb the cost of the injury;⁸ and (3) the need to deter knowingly wrongful conduct that causes harm by manufacturers of widely distributed products.⁹

Despite those clearly articulated policy rationales, as well as the other grounds relied upon by the *Thomas* court, the decision

3. *Id.* at 45.

4. 701 N.W.2d 523 (Wis. 2005).

5. Thus far, the Wisconsin Supreme Court has limited the application of the risk contribution doctrine only to manufacturers of diethylstilbesterol (DES) and manufacturers of white lead carbonate. *Collins v. Eli Lilly Co.*, 342 N.W.2d 37 (Wis. 1984); *Thomas ex rel. Gramling v. Mallett*, 701 N.W.2d 523 (Wis. 2005).

6. *See infra* Part I.

7. *Thomas*, 701 N.W.2d at 557-58.

8. *Id.* at 558.

9. *Id.* at n.44.

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was criticized by John S. Gray and Richard O. Faulk.¹⁰ However, the criticisms are unfounded because they overlook the natural and well-recognized evolution of the common law in modern society; fail to address the very real issues of foreseeability encompassed in both the *Thomas* and *Collins* decisions; and do not adequately and accurately recognize the compelling facts unique to the lead poisoning crisis created by the lead pigment manufacturing defendants.

Contrary to the view of Gray and Faulk,¹¹ the courts' formulations of market share and risk contribution liability do not represent radical departures from the core principles of early tort law. The evolution of risk contribution and other theories of burden-shifting liability not only compensates for instances in which the injury-causing tortfeasor is not readily identifiable, but also accounts for technological advancements that have given birth to mass tort.¹² Specifically, without judicial modification of the common law, the law would implicitly grant tort immunity to the

10. John S. Gray & Richard O. Faulk, "Negligence in the Air?" Should "Alternative Liability" Theories Apply in Lead Paint Litigation, 25 PACE ENVTL. L. REV. 147 (2008).

11. *Id.*

12. It is indisputable that a court's receptivity to modifying the common law to provide for remedies for industrial (and even perhaps post-industrial) torts carries profound ramifications. The breadth of harm caused by DES and by lead has been astounding. Numerous sources estimate that the cost of injuries caused by DES is billions of dollars. *See, e.g.*, Mike D. Murphy, Note, *Market Share Liability New York Style: Negligence in the Air? Hymowitz v. Eli Lilly and Co.*, 55 MO. L. REV. 1047, 1048-49 (1990); David A. Fischer, *Products Liability: An Analysis of Market Share Liability*, 34 VAND. L. REV. 1623 (1981); Nlaraine R. Allen, Note, *A Remedy for the "DES Daughters": Products Liability Without the Identification Requirement*, 42 U. PITT. L. REV. 669, 691 (1981); James A. Henderson Jr., *Products Liability, DES Litigation: The Tidal Wave Approaches the Shore*, 3 CORP. L. REV. 143, 144 (1980); Naomi Sheiner, Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 968 n.21 (1978). The costs associated with lead exposure are even more stark. One group of researchers has estimated the lifetime costs ascribed to the number of children lead poisoned each year to be \$43 billion per annum. P.J. Landigran et al., *Environmental Pollutants and Disease in American Children: Estimates of Morbidity, Mortality, and Costs for Lead Poisoning, Asthma, Cancer, and Developmental Disabilities*, 110 ENVTL. HEALTH PERPSP. 721 (2002). Had courts adhered rigidly to outmoded tenets of tort law, the cost of the harm would have been borne exclusively by those other than the makers of the harm-producing product. Moreover, to ensure the immunization of tortious actors through strict adherence to the original conception of cause-in-fact would thwart the fundamental aims of tort law. Inevitably, some future product will cause mass latent injuries, perhaps on a scale wider than those caused by DES and lead, even to the extent that the product poses a threat to our medical and educational infrastructure. The civil law system should not remain so provincial as to render torts of such magnitude outside the bounds of a legal remedy. Accordingly, it is imperative that courts continue to thoughtfully and judiciously provide for civil resolution.

manufacturers of untraceable, fungible goods that cause widespread harm, despite the indisputable fact that all manufacturers behaved tortiously in the course of manufacturing and marketing the goods.

This Article will argue that it is logical, appropriate, and fair for courts to apply market share and risk contribution liability to litigation in which lead poisoned children seek redress for their injuries from the manufacturers of the product that injured them. Part I of this Article briefly follows the evolution of burden-shifting theories in tort law from *res ipsa loquitor*, to alternative liability, to market share liability to risk contribution liability. Part II examines the *Thomas* decision and seeks to illuminate its soundness. Part III rebuts arguments advanced by proponents of lead pigment manufacturers that contend that so-called “alternative liability theories” should not be applied to lead paint litigation. Part IV argues that it would behoove society for courts to remain open to extending market share and risk contribution liability to other contexts that, like DES and lead, reap pervasive and devastating injury. Just as the common law in the pre-industrial era could not account for unforeseen torts that would occur as a result of industrialization, it is likely that the present state of tort law insufficiently accounts for tort injuries that will occur in our future.

I. BURDEN-SHIFTING THEORIES OF TORT LAW: *RES IPSA LOQUITUR* TO RISK CONTRIBUTION

From time to time courts have encountered factual scenarios for which the existing common law was ill-suited. The paradigmatic scenario is one in which a person incurs an injury, the nature of the injury at minimum suggests that it occurred as a result of tortious conduct, but the nature of the injury is also such that the plaintiff is rendered unable to pinpoint the responsible party. Indeed, such a scenario broadly describes the fact patterns to which *res ipsa loquitor*, alternative liability, market share liability, and risk contribution liability have been applied. This Article briefly examines each doctrine in turn.

A. *Res Ipsa Loquitor*

The doctrine of *res ipsa loquitor* originated in English courts in the nineteenth century to allow plaintiffs, without having to

prove causation directly, to present a case to a jury based on circumstantial evidence that suggests negligent conduct has occurred.¹³ For instance, in the now infamous case of *Byrne v. Boadle*, a barrel of flour fell from a window of the defendant's warehouse onto the head of the plaintiff.¹⁴ The blow caused the plaintiff to lose all recollection of the event. At trial, the issue was whether the plaintiff was required to prove that the defendant was in fact negligent. The court observed that it was impossible for the plaintiff to ascertain how the barrel fell out of the window and that, given that a barrel in the defendant's custody could not fall from a warehouse window in the absence of negligence, it would be "preposterous" to require the plaintiff to call witnesses from the warehouse to prove negligence. Because the barrel's falling constituted prima facie evidence of negligence, the court absolved the plaintiff from proving that negligence occurred, and instead placed the burden on the defendant to marshal any facts to show that it was not negligent.

Since *Byrne, res ipsa* has been honed to reflect a common sense understanding that an inference of negligence may be raised without direct evidence of a negligent act so long as three conditions exist: (1) the injury is a type not ordinarily occurring absent negligence; (2) the defendant retains some control of the instrumentality causing injury, or the plaintiff uses an appliance the defendant has manufactured or maintained; and, (3) the plaintiff is not contributorily negligent.¹⁵ Accordingly, *res ipsa* relaxes the elements of tort by allowing the plaintiff to provide evidence of facts and circumstances surrounding his injury that lead to a reasonable inference that the defendant acted negligently, rather than requiring the plaintiff to directly prove each element of negligence.

13. See, e.g., WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 39, at 243 n.76 (4th ed. 1971) (citing *Scott v. London & St. Katherine Docks Co.*, 1865, 3H. & C. 596, 159 Eng. Rep. 665). Authorities agree that one of the earliest expressions of *res ipsa loquitur* is found in *Christi v. Griggs*, 1809, 2 Camp. 79, 170 Eng. Rep. 1088 (See PROSSER, HANDBOOK OF THE LAW OF TORTS § 39, at 243 n.70), in which the plaintiff, who was riding in a coach, was injured when an axle broke. The court observed that in the context of carrier and passenger, the coach has contracted to ensure a safe passage; and therefore, the court declared that on the question of negligence, the burden should be on the defendant to show "that the stagecoach was as good as could be made, and that the driver was as skillful a driver as could anywhere be found." 170 Eng. Rep. 1088 (quoted in William L. Prosser, *Res Ipsa Loquitur in California*, 37 CAL. L. REV. 183, 185 (1949)).

14. See PROSSER, HANDBOOK OF THE LAW OF TORTS § 39, at 243 (4th ed. 1971) (citing *Byrne v. Boadle*, 1863, 2 H. & C. 722, 159 Eng. Rep. 299).

15. See, e.g., *Giles v. City of New Haven*, 636 A.2d 1335 (Conn. 1994); *Smith v. Eli Lilly & Co.*, 560 N.E.2d 324 (Ill. 1990).

By allowing plaintiffs to prove negligence circumstantially rather than directly, *res ipsa* is predicated on the notion that lay juries are infused with sufficient common knowledge to draw reasonable inferences.¹⁶

Res ipsa loquitor is a widely-adopted rule of law. With only three exceptions, every state jurisdiction in the United States has adopted and applies *res ipsa*.¹⁷ And in the case of two of those exceptions, Michigan and South Carolina, it is agreed those jurisdictions indeed do apply *res ipsa*, but under a different name.¹⁸

Somewhat surprisingly, the formulation of *res ipsa* and its rapid acceptance by courts were met with little resistance; by and large commentators and judges viewed *res ipsa*'s relaxation of the plaintiff's burden in select cases as a welcome development in the law.¹⁹ An investigation of the early scholarship on the subject reveals that critics did not so much debate the substantive merit of *res ipsa*, but instead locked horns primarily over its procedural

16. See, e.g., WILLIAM L. PROSSER & W. PAGE KEETON, *THE LAW OF TORTS* § 39, at 243 (5th ed. 1995) ("The gist of *res ipsa loquitor* . . . is the inference, or process of reasoning by which the conclusion is reached. This must be based upon evidence given, together with sufficient background of human experience to justify the conclusion. It is not enough that plaintiff's counsel can suggest a possibility of negligence.").

17. STUART M. SPEISER, *THE NEGLIGENCE CASE: Res Ipsa Loquitor* § 1.1, at 4 (1972).

18. *Id.* at §§ 6:38, at 306, 6:71, at 361. See also John H. Crabb & Kenneth F. Johnson, *Res Ipsa Loquitor De Novo*, 15 *Maine L. Rev.* 56 (1963) ("[M]ichigan and South Carolina state they have formally rejected the concept [of *res ipsa loquitor*] altogether, but they in effect apply it under other guises."). Michigan applies *res ipsa* under the alternative name "circumstantial evidence of negligence," which Speiser refers to as the "Michigan equivalent of the *res ipsa loquitor* doctrine." SPEISER, *supra* note 17, at § 6:38, at 306 (citing *Mitcham v. Detroit*, 94 N.W.2d 388 (Mich. 1959)). Similarly, South Carolina does not apply *res ipsa* per se, but courts in that state do hold, a la *res ipsa*, that negligence may be proved by circumstantial evidence. SPEISER, *supra* note 17, at § 6:69, at 358 (citing *Chaney v. Burgess*, 143 S.E.2d 521 (S.C. 1965); *Orr v. Saylor*, 169 S.E.2d 396 (S.C. 1969) (Weatherford, J., dissenting)).

Pennsylvania is the other jurisdiction that is not counted as adopting *res ipsa*. However, the Commonwealth has adopted *res ipsa*, but only in certain circumstances: (1) when there is contractual privity between the plaintiff and the defendant, and (2) when the case involves a particularly dangerous commodity. SPEISER, *supra* note 17, at § 6:69, at 357.

19. See, e.g., Warren A. Seavey, *Res Ipsa Loquitor: Tabula In Naufragio*, 63 *HARV. L. REV.* 643 (1950). Seavey was an early critic of *res ipsa*, but not with respect to the substantive policy underlying the rule. His criticism was lodged with respect to its application in cases involving defendants about whom no inference of negligence can be drawn. *Id.* at 651-52. Despite his criticism that courts had applied *res ipsa* in ill-advised cases, Seavey stated: "By and large the rule [of *res ipsa loquitor*] has been innocuous . . ." *Id.* at 645-46. Moreover, he in fact praised the aim of the doctrine itself: "It would seem to be just that where plaintiff has submitted himself or his property to another, the other should be under a duty to explain any resulting harm which would not normally occur without negligence on the defendant's part." *Id.*

effect.²⁰ Numerous commentators supported the doctrine as embodying a public policy favoring plaintiffs who experience “hardship” in proving a negligence case,” especially in circumstances in which “increased usage of mechanization” placed the defendant at “a great, if not total, advantage over the plaintiff in the extent of opportunity to know or understand how the event came about.”²¹ In fact, even an early critic of *res ipsa* praised the aim of the doctrine despite the contention that there existed no evidence from which to infer negligence: “It would seem to be just that where the plaintiff has submitted himself or his property to another, the other should be under a duty to explain any resulting harm which would not normally occur without negligence on the defendant’s part.”²²

20. See, e.g., Louis L. Jaffe, *Res Ipsa Loquitor Vindicated*, 1 BUFF. L. REV. 1 (1951); Seavey, *supra* note 19; Crabb & Johnson, *supra* note 18; John W. Broadfoot, Comment, *Res Ipsa Loquitor and its Application in Georgia*, 14 MERCER L. REV. 427 (1963); William L. Prosser, *The Procedural Effect of Res Ipsa Loquitor*, 20 MINN. L. REV. 241 (1936); Charles E. Carpenter, *Res Ipsa Loquitor: A Rejoinder to Professor Prosser*, 10 SO. CAL. L. REV. 467 (1937); William L. Prosser, *Res Ipsa Loquitor: A Reply to Professor Carpenter*, 10 SO. CAL. L. REV. 459 (1937); William L. Prosser, *Res Ipsa Loquitor in California*, 37 CAL. L. REV. 183 (1949).

Primarily, the commentators wrestled over whether *res ipsa loquitor* created a presumption or an inference. See, e.g., Crabb & Johnson, *supra* note 18, at 59-61 (“When *res ipsa* became the subject of discussion by scholars, the focus of their attention was the problem of procedural effect which the courts had found to be so difficult. Like the courts, they disagreed about whether *res ipsa loquitor* operated to create a presumption or an inference. The attention of the more recent writers is similarly directed at the procedural consequences, to the detriment of more fundamental problems which the historical development of the doctrine has caused them to neglect.”). The detractors of *res ipsa* argued that not only did the confusion over the procedural effect of *res ipsa* muddy the doctrine, but also its application—whether it operated to create an inference or a presumption—was unnecessary because it created redundancy. The contours of *res ipsa*, they argued, were not appreciably different from those situations in which a jury is permitted to make a finding based on circumstantial evidence. Consequently, the detractors argued that *res ipsa* is fairly indistinguishable from the rules governing the admission of circumstantial evidence and therefore *res ipsa* should be subsumed into those rules. See, e.g., Prosser, *Res Ipsa Loquitor in California*, 37 CAL. L. REV. 183 (1949); Warren A. Seavey, *Res Ipsa Loquitor: Tabula In Naufragio*, 63 HARV. L. REV. 649 (1950); Crabb & Johnson, *supra* note 18, at 60-61.

A secondary criticism related to *res ipsa* stemmed from courts’ deployment of the doctrine in what commentators deemed to be inappropriate cases. See, e.g., Seavey, *supra* note 19; Prosser, 37 CAL. L. REV. 183. Commentators expressed concern that courts were applying *res ipsa* in cases in which there was no evidence from which negligence could be inferred. See Seavey, *supra* note 19 (citing *Ybarra v. Spangard*, 154 P.2d 687 (Cal. 1944)).

21. Crabb & Johnson, *supra* note 18, at 58-59.

22. Seavey, *supra* note 19, at 646.

Courts in virtually every jurisdiction agreed. The courts recognized both that industrial progress created new circumstances of injury that an outmoded common law could not redress and that they had the inherent authority to modify the law to provide redress under new circumstances.²³ For instance, in clarifying the elements of *res ipsa loquitor*, the Colorado Supreme Court stated the following in 1958:

It seems a proper sequitor to say that the more we are removed from "horse and buggy days," the more intensified and diversified our industrialism, mechanics and science become, the more technology and automation advance, the more the doctrine of *res ipsa loquitor* should take a stellar role in the law of negligence The law should march abreast of a highly mechanized and science-developed economy²⁴

In a dissenting opinion in a 1969 case, a justice of the South Carolina Supreme Court echoed the Colorado Supreme Court in voicing his dismay that his state had not adopted *res ipsa loquitor* in name (though, he contended that the court had in fact adopted the rule of *res ipsa* in substance):

The rule of *res ipsa loquitor* is a salutary rule of evidence utilized in some form in most jurisdictions in this country. With the inexorable advance toward a life wholly dependent upon complex technology the trend is even to give the rule a more liberal application. My concern is that South Carolina presently is following an inconsistent double standard. Human rights are involved as well as property rights. . . . The law cannot remain immutable any more than life and its service to society depends on its ability to meet the challenges of change. . . . I believe the time has come for South Carolina to permit its trial courts to make use of a salutary rule of evidence in the law of negligence. I would . . . adjudge that the trial courts of South Carolina have the inherent power to utilize the rule of evidence called *res ipsa loquitor*.²⁵

More recently, *res ipsa* has been lauded as a "logical framework for approaching circumstantial evidence" because it confines itself to "focusing on the likelihood of essential components of a

23. See, e.g., *Weiss v. Axler*, 328 P.2d 88 (Colo. 1958).

24. 328 P.2d at 91.

25. *Orr v. Saylor*, 169 S.E.2d 396, 402 (S.C. 1969) (Weatherford, J., dissenting).

plaintiff's case."²⁶ These observations of the merits of *res ipsa* apply with equal facility to market share and risk contribution liability. Hence, the roots of risk contribution were planted in the common law long ago; in this respect, risk contribution is neither the novel theory nor the radical departure that its detractors claim it is.

B. Alternative Liability

The California Supreme Court established alternative liability in *Summers v. Tice*, holding that two hunters who fired guns toward a plaintiff acted negligently, and that the burden should be shifted to each of them to extricate himself from liability.²⁷ It reasoned that it would be unfair to leave the innocent plaintiff remediless because he could not pinpoint which tortious defendant caused his injuries.²⁸

In *Summers*, the plaintiff led two other men on a hunt. He advised his cohorts to be careful and to "stay in line" with one another. However, after the plaintiff proceeded ahead, one of the defendants flushed a quail, which flew in the line where the plaintiff stood. Both hunters shot at the quail in the direction of the visible plaintiff. The plaintiff incurred shots to his eye and to his lip.²⁹

It was undisputed that one of the hunters was responsible for causing injury to the plaintiff's eye, but the plaintiff could not prove which.³⁰ Under traditional strictures of causation, the plaintiff's failure to show which hunter caused his injuries would have defeated his claim. However, the court recognized the injustice of such a result, and, consistent with the prevailing view in legal scholarship, subjected the defendants to joint and several liability, unless one could exonerate himself from fault.³¹

Citing case precedent, the *Restatement of Torts*, and Dean Wigmore, the court concluded that it would produce an untenable result to exonerate "both wrongdoers" and leave the plaintiff remediless because the plaintiff found himself "in the unfair position of pointing to which defendant caused the harm."³² "Ordinary de-

26. Stephen A. Spitz, *From Res Ipsa Loquitur to Diethylstilbestrol: The Unidentifiable Tortfeasor*, 65 IND. L. J. 591, 593 (1990).

27. *Summers v. Tice*, 199 P.2d 1 (Cal. 1948).

28. *Id.* at 4.

29. *Id.* at 2.

30. *Id.* at 3.

31. *Id.* at 3-5.

32. *Summers*, 199 P.2d at 4. For case precedent supporting its conclusion, the *Summers* court relied on *Oliver v. Miles*, 110 So. 666 (Miss. 1926), which, in reviewing

fendants,” the court observed, “are in a far better position to offer evidence to determine which one caused the injury.”³³

Significantly, as a final note, the court indicated that the result it announced would apply even if the defendants had not acted jointly, but rather had acted as *independent* tortfeasors: “If defendants are independent tortfeasors and thus each liable for the damage caused by him alone, and, at least, where the matter of apportionment is incapable of proof, the innocent wronged party should not be deprived of his right to redress.”³⁴ Thus, precedent dates back to 1948 for the specific proposition that, when a plaintiff is injured by more than one independently acting tortfeasor, but the plaintiff cannot identify which party caused his injury, the burden of causation should be shifted to the wrongdoing defendants so that “the innocent wronged party [is] not . . . deprived of his right to redress.”³⁵

The alternative liability theory enunciated by the *Summers* court is deeply rooted in the doctrine of *res ipsa loquitor*. Indeed, the court, in reaching its decision, relied on and analogized its holding to certain *res ipsa* cases. Specifically, the court relied on the case of *Ybarra v. Spangard*, a traditional *res ipsa loquitor* case issued by the California Supreme Court.³⁶ The *Summers* court, in discussing the *Ybarra* case, observed that in some circumstances it is just to shift the burden to the defendants to explain the cause of injury:

a case involving a simultaneous shooting by joint tortfeasors, stated: “We think that . . . each is liable for the resulting injury to the boy, although no one can say definitely who actually shot him. To hold otherwise would be to exonerate both from liability, although each was negligent, and the injury resulted from such negligence.” *Oliver*, 110 So. 666 (quoted in *Summers*, 199 P.2d at 3 (emphasis in original)).

The court also found Dean Wigmore’s treatise on torts persuasive. It quoted the treatise in relevant part as follows:

When two or more persons by their acts are possibly the sole cause of harm . . . and the plaintiff has introduced evidence that the one of the two persons . . . is culpable, then the defendant has the burden of proving that the other person . . . was the sole cause of harm The real reason for the rule that each joint tortfeasor is responsible for the whole damage is the practical unfairness of denying the injured person redress simply because he cannot prove how much damage each did, when it is certain that between them they did all

Summers, 199 P.2d at 3-4 (quoting WIGMORE, SELECT CASES ON THE LAW OF TORTS § 153 (1912)).

33. 199 P.2d at 4.

34. *Id.* at 5.

35. *Id.*

36. *Ybarra v. Spangard*, 154 P.2d 687 (Cal. 1944).

There the Court was considering whether the patient could avail himself of *res ipsa loquitur*, rather than where the burden of proof lay, yet the effect of the decision is that plaintiff has made out a case when he has produced evidence which gives rise to an inference of negligence which was the proximate cause of the injury. It is up to defendants to explain the cause of the injury. It was there said: "If the doctrine is to continue to serve a useful purpose, we should not forget 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.'"³⁷

Thus, alternative liability is actually a logical development of the legal jurisprudence concerning *res ipsa loquitur*. As with *res ipsa*, alternative liability is a long-standing, universally favored doctrine of law. It is now embodied in the *Restatement (Second) of Torts*:³⁸

Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm.³⁹

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

38. RESTATEMENT (SECOND) OF TORTS § 433B(3) cmt. h (1965). Interestingly, the Restatement, in its comments, notes the possibility that this rule of law may require modification to address factual scenarios heretofore not addressed by courts across the country. Specifically, the Restatement notes that:

The cases thus far decided in which the rule stated in Subsection (3) has been applied all have been cases in which all of the actors involved have been joined as defendants. All of these cases have involved conduct simultaneous in time, or substantially so, and all of them have involved conduct of substantially the same character, creating substantially the same risk of harm, on the part of each actor. It is possible that cases may arise in which some modification of the rule stated may be necessary because of complications arising from the fact that one of the actors involved is not or cannot be joined as a defendant, or because of the effect of lapse of time, or because of substantial differences in the character of the conduct of the actors or the risks which they have created. Since such cases have not arisen, and the situations which might arise are difficult to forecast, no attempt is made to deal with such problems in this Section. The rule stated in Subsection (3) is not intended to preclude possible modification if such situations call for it.

Id.

39. RESTATEMENT (SECOND) OF TORTS § 433B(3).

C. Market Share Liability

Market share liability represents the next step in the progression of burden-shifting doctrines of liability. Market share liability is invoked in circumstances in which a plaintiff is injured by a fungible product tortiously produced or marketed by multiple manufacturers, but the circumstances of injury render it impossible for the plaintiff to identify the manufacturer of the product which actually injured him.⁴⁰ Courts applying it apportion liability to defendant manufacturers according to their respective market share of the product responsible for injuring the plaintiff.⁴¹ In such circumstances, market share liability requires the defendant-manufacturers to prove that they did not produce the injuring product to exculpate themselves from liability.⁴² As with alternative liability, market share liability advances the policy that multiple tortfeasors should not be insulated from liability because the nature of their conduct renders it impossible for an innocent injured plaintiff to identify which caused the harm suffered.

The California Supreme Court, in *Sindell v. Abbott Laboratories*, was the first court to apply market share liability to provide redress to plaintiffs injured by in utero exposure to the cancer-causing drug DES. The plaintiffs filed a class action suit against eleven alleged manufacturers of DES, seeking redress for the particularly pernicious form of cancer (adenocarcinoma) that was caused by DES.⁴³

At the outset, the court catalogued the conduct of the defendants that created foreseeable harm:

During the period defendants marketed DES, they knew or should have known that it was a carcinogenic substance, that there was a grave danger after varying periods of latency it would cause cancerous and precancerous growths in the daughters of the mothers who took it, and that it was ineffective to prevent miscarriage. Nevertheless, defendants continued to advertise and market the drug as a miscarriage preventative. They failed to test DES for efficacy and safety; the tests performed by others, upon which they relied, indicated that it was not safe or effective. In violation of the authorization of the Food and Drug Administration, defendants marketed DES on

40. *See id.*

41. *See, e.g., Sindell v. Abbot Labs.*, 607 P.2d 924 (Cal. 1980).

42. *See id.*

43. *Id.* at 925.

an unlimited basis rather than as an experimental drug, and they failed to warn of its potential danger.⁴⁴

The court iterated that, generally, subjecting a defendant to liability is predicated on the plaintiff's showing that her injuries were caused by that defendant; however, the court explained that there are notable exceptions to this rule, including the *Summers v. Tice* alternative liability.⁴⁵ The court declined to apply any of the exceptions. It concluded that alternative liability was inapplicable under the circumstances because that doctrine requires that all potential tortious actors be joined in the suit.⁴⁶ The inapplicability of the existing burden-shifting doctrines of tort law would have left the innocent plaintiff remediless against irrefutably culpable defendants.⁴⁷

Under the circumstances, the court referenced "forceful arguments in favor of holding that the plaintiff has a cause of action".⁴⁸

In our contemporary complex industrialized society, advances in science and technology create fungible goods which may harm

44. *Id.* at 925-26.

45. *Id.* The other exceptions that the court noted are concerted action and "enterprise liability." *Id.* at 927-28. Under concerted action, a defendant is subject to liability based on his actions in connection with another (or multiple others), often in the form of a "common scheme or plan." PROSSER, HANDBOOK OF THE LAW OF TORTS § 46, at 291 (4th ed. 1971). The *Restatement (Second) of Torts* describes three scenarios by which a defendant may be liable for concerted action. A defendant is subject to concerted action liability if he or she, "(a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person." RESTATEMENT (SECOND) OF TORTS § 876 (1979).

Under "enterprise liability," defendant-manufacturers in a particular case are subject to liability by their adherence to an industry-wide standard that perpetuates the industry's engaging in conduct that could cause foreseeable harm. *See, e.g.,* Hall v. E.I. Du Pont de Nemours & Co., Inc., 345 F.Supp. 353 (E.D.N.Y. 1972); *Sindell*, 607 P.2d at 933-35. The result is that "the industrywide [*sic*] standard becomes itself the cause of plaintiff's injury, just as defendants' joint plan is the cause of injury in the traditional concert of action plea. Each defendant's adherence perpetuates this standard, which results in the manufacture of the particular, unidentifiable injury-producing product. Therefore, each industry member has contributed to plaintiff's injury." *Sindell*, 607 P.2d at 935 (quoting Naomi Sheiner, Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 997 (1978)). As such, each defendant could be liable for all injuries caused by adherence to the offending industry standard. *Sindell*, 607 P.2d at 934-935.

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

47. *Id.* at 925, 936.

48. *Id.* at 936.

consumers and which cannot be traced to any specific producer. The response of the courts can be either to adhere rigidly to prior doctrine, denying recovery to those injured by such products, or to fashion remedies to meet these changing needs. Just as Justice Traynor in his landmark concurring opinion in *Escola v. Coca Cola Bottling Co.*, recognized that in an era of mass production and complex marketing methods the traditional standard of negligence was insufficient to govern the obligations of manufacturer to consumer, so should we acknowledge that some adaptation of the rules of causation and liability may be appropriate in these recurring circumstances.⁴⁹

The court highlighted two additional arguments for subjecting the DES manufacturers to liability. First, the court echoed *Summers* in stating that “as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury.”⁵⁰ The court observed that it was not the plaintiffs’ fault that they could not admit any evidence of causation. While the defendants were not at fault for the absence of evidence either, “their conduct in marketing a drug the effects of which are delayed for many years played a significant role in creating the unavailability of proof.”⁵¹

Second, the court noted that the defendants were in the better position than the plaintiffs to absorb the cost of injury resulting from their manufacture of a defective product.⁵² “The manufacturer is in the best position to discover and guard against defects in its products and to warn of harmful effects; thus, holding it liable for defects and failure to warn of harmful effects will provide an incentive to product safety.”⁵³

Accordingly, the court subjected the DES manufacturers to liability and in doing so, obligated each manufacturer to cover damages approximately commensurate with its market share for the offending product.⁵⁴

In sum, the market share liability adopted by *Sindell* holds as follows: If (1) the plaintiff is innocent, (2) the defendants are negligent, (3) the plaintiff was injured by a fungible product, (4) the plaintiff, through no fault on her part, cannot identify the particu-

49. 607 P.2d at 936.

50. *Id.* at 936.

51. *Id.* at 936.

52. *Id.*

53. *Id.*

54. 607 P.2d at 936-37.

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lar manufacturer responsible for producing the DES pill that injured her, and (5) the plaintiff has joined a sufficient number of defendants who comprise a substantial share of the DES market, then (6) the burden shifts to each defendant-manufacturer to either (a) show that it could not have made the particular DES pill that caused the plaintiff's injury, or (b) assume liability for the plaintiff's damages in proportion to its market share.⁵⁵

Market share liability has not enjoyed the same widespread acceptance as the alternative liability theory or the doctrine of *res ipsa loquitor*.⁵⁶ Indeed, there is a significant split in courts, with some accepting the theory⁵⁷ and others rejecting it in similar factual circumstances.⁵⁸

55. *Id.* at 935-37.

56. The doctrine has not been adopted in lead poisoning cases. *See, e.g.*, *Santiago v. Sherwin Williams Co.*, 3 F.3d 546, 550-51 (1st Cir. 1993); *Brenner v. American Cyanamid Co.*, 263 A.D.2d 165, (N.Y. App. Div. 1999); *Skipworth v. Lead Industries Ass'n, Inc.*, 690 A.2d 169 (Pa. 1997); *Jefferson v. Lead Industries Ass'n, Inc.*, 106 F.3d 1245 (5th Cir. 1997).

57. *See, e.g.*, *In re Methyl Tertiary Butyl Ether ("MTBE") Prod. Liab. Litig.*, 209 F.R.D. 323 (S.D.N.Y. 2002); *Ferris v. Gatke Corp.*, 132 Cal. Rptr. 2d 819 (1st Dist. 2003); *George v. Hous. Auth. of New Orleans*, 906 So. 2d 1282 (4th Cir. 2005), *rehearing denied*, (July 22, 2005); *Gassmann v. Eli Lilly and Co.*, 407 F. Supp. 2d 203 (D.C. Cir. 2005); *In re MTBE Prod. Liab. Litig.*, 517 F. Supp. 2d 662 (S.D.N.Y. 2007); *In re MTBE Prod. Liab. Litig.*, 447 F. Supp. 2d 289 (S.D.N.Y. 2006); *Ray v. Cutter Lab. Div. of Miles, Inc.*, 754 F. Supp. 193 (D. Fla. 1991); *Conley v. Boyle Drug Co.*, 570 So.2d 275 (Fla. 1990); *Smith v. Cutter Biological, Inc., a Div. of Miles Inc.*, 823 P.2d 717 (Haw. 1991); *McCormack v. Abbott Labs.*, 617 F. Supp. 1521 (D. Mass. 1985); *Hymowitz v. Eli Lilly and Co.*, 539 N.E.2d 1069 (N.Y. 1989); *McElhaney v. Eli Lilly & Co.*, 564 F. Supp. 265 (D. S.D. 1983); *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353 (E.D. Tex. 1981); *Martin v. Abbott Labs.*, 689 P.2d 368 (Wash. 1984); *George v. Parke-Davis*, 733 P.2d 507 (Wash. 1987); *PAYTON v. ABBOTT LABS.*, 437 N.E.2d 171 (Mass. 1982) (dicta indicating "the view that [Massachusetts courts] might permit recovery from those defendants shown to be negligent to the extent of their participation in the DES market, even though the plaintiffs cannot identify the particular source of DES which their mothers ingested"). *See also McCormack*, 617 F. Supp. at 1525 (federal court citing *Payton* and predicting Massachusetts would adopt market share: "The emergence of a market-share theory of liability in American jurisprudence stems from the recognition by several courts that the field of products liability has been changed drastically with the advent of mass production of fungible goods and complex marketing methods.") *but cf.* *Santiago v. Sherwin-Williams Co.*, 782 F.Supp. 186, 191 (D. Mass. 1992) (recognizing *Payton* and *McCormack*, but declining to extend market share to lead pigment) *aff'd*, 3 F.3d 546 (1st Cir. 1993).

58. *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241 (Mo. 1984); *George v. Housing Authority*, 906 So.2d 1282, 1287 (La. App. 2005); *Smith v. Eli Lilly & Co.* 560 N.E.2d 324 (Ill. 1990); *Shackil v. Lederle Labs.*, 561 A.2d 511 (N.J. 1989); *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67, 76 (Iowa 1986); *Tidler v. Eli Lilly & Co.*, 851 F.2d 418 (D.C. Cir. 1988) (applying Maryland and D.C. law); *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 380 (3d Cir. 1990) (applying Pennsylvania law); *White v. Celotex Corp.*, 907 F.2d 104, 106 (9th Cir. 1990) (applying Arizona law); *Blackston v. Shook & Fletcher Insulation Co.*, 764 F.2d 1480, 1483 (11th Cir. 1985) (applying Georgia law); *Goldman v. Johns-*

D. Risk Contribution Liability

In 1984, four years after the California Supreme Court decided *Sindell*, the Wisconsin Supreme Court reviewed a similar personal injury case brought by a plaintiff who had suffered injuries stemming from her mother's ingestion of DES while she was pregnant with the plaintiff.⁵⁹ The plaintiff urged the court to adopt market share liability, among other doctrines of law, such as alternative liability, to account for her inability to pinpoint which DES manufacturer's pill caused her injuries.⁶⁰ In *Collins v. Ely Lilly & Co.*, the court eschewed the adoption of all theories of liability advanced by the plaintiff in favor of its own theory, risk contribution liability.⁶¹ Risk contribution holds that a plaintiff may maintain a cause of action for products liability if he or she can show that the defendant produced or marketed the type of product that caused injury to the plaintiff. Although the court declined to adopt market share liability for Wisconsin, the court left intact the premise upon which market share liability is based: as between the faultless plaintiff and the culpable defendants, the latter should bear the cost of injury. In essence, like market share liability, risk contribution relaxes traditional notions of product identification in limited circumstances.

Theresa Collins filed suit against seventeen companies that historically produced DES, alleging, among other claims, that they were negligent in producing and marketing DES for use by pregnant women, and that they misrepresented that DES was safe for such use.⁶² The trial court dismissed Collins' claim because she was unable to "identify the precise producer or marketer of the DES taken by her mother due to the generic status of some

Manville Sales Corp., 514 N.E.2d 691, 700-01 (Ohio 1987); Case v. Fibreboard Corp., 743 P.2d 1062, 1064-67 (Okla. 1987); Gaulding v. Celotex Corp., 772 S.W.2d 66, 70-71 (Tex. 1989).

59. *Collins*, 342 N.W.2d at 42.

60. *Id.* at 44-49 (indicating that the plaintiff proposed the adoption of alternative liability, concerted action liability, enterprise liability, civil conspiracy, and market share liability).

61. *Collins*, 342 N.W.2d at 48-49. The *Collins* court declined to adopt market share liability because that doctrine is "limited in practical applicability." *Id.* at 48. The court thought it was too burdensome to define and prove market share, especially given that the DES manufacturers lacked the data indicating how much each produced and marketed in a particular geographic region during a particular time. *Id.* at 48-49. In addition, the court concluded that the 'mini-trial' necessarily devoted to determining the defendant-manufacturers' market share would consume an intolerable amount of judicial resources. *Id.* at 49.

62. *Id.* at 42.

DES, the number of producers or marketers, the lack of pertinent records, and the passage of time.”⁶³

Collins could not satisfy the strictures of traditional legal causation so the court was faced with a difficult choice: it could either allow the innocent plaintiff to “bear the cost of injury” because she could not identify the manufacturer of the DES that injured her, or it could require the defendants to be subject to liability “for DES which they may not have produced or marketed.”⁶⁴ In “the interests of justice and fundamental fairness,”⁶⁵ as well as in direct response to the mandate of the Wisconsin Constitution,⁶⁶ the court chose the latter, fashioning the risk contribution doctrine as a method for recovery for DES and DES-like⁶⁷ products liability cases: “[A]s between the plaintiff, who probably is not at fault, and the defendants, who may have provided the product which caused the injury, the interests of justice and fundamental fairness demand that the latter should bear the cost of injury.”⁶⁸

In the course of its opinion, the court set forth the factual predicates a plaintiff must establish to invoke the risk contribution doctrine. A plaintiff must show: (1) the existence of many potential innocent plaintiffs;⁶⁹ (2) the shared culpability in producing or marketing what was later shown to be a harmful product;⁷⁰ (3) the inability of the innocent plaintiff to identify the precise manufacturer of the product that caused the injury because of the generic or fungible nature of the product, the large number of manufacturers, the passage of time, and the loss of records;⁷¹ and, (4) due to the traditional strictures of legal causation, the inability of the innocent plaintiff to recover from potentially negligent manufactures.⁷²

63. *Id.* at 43.

64. *Id.* at 49.

65. *Id.*

66. *Collins*, 342 N.W.2d at 45. The court cited Article I, section 9 of the Wisconsin Constitution as a basis for establishing the risk contribution doctrine. That section provides in relevant part: “Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character . . .” Wis. Const., art. I, § 9.

67. *Collins*, 342 N.W.2d at 49. The court stated that the risk contribution doctrine “could apply in situations which are factually similar to the DES cases.” *Id.*

68. *Collins*, 342 N.W.2d at 49.

69. *Id.* at 44.

70. *Id.* at 49.

71. *Id.* at 44.

72. *Id.* at 43, 44.

The court supported its decision to adopt risk contribution liability on a range of grounds. First, each defendant either sought government approval of DES or participated in the manufacturing or marketing of the drug.⁷³ Accordingly, the court reasoned, each defendant tortiously contributed to the risk of harm to the public, generally, and Collins, specifically, and therefore shared some measure of culpability.⁷⁴ Second, the court observed that, as between the injured plaintiff and a culpable drug company defendant, the defendant is “in a better position to absorb the cost of the injury.”⁷⁵ Consequently, the court concluded that it is better for drug companies and consumers to share the cost of injury than place that cost solely on the shoulders of an innocent plaintiff.⁷⁶ Finally, the court determined that subjecting drug companies to liability in this context would provide incentive for them to “test adequately the drugs they place on the market for general medical use.”⁷⁷

After setting forth its rationale for establishing the risk contribution doctrine, the *Collins* court proceeded to identify the elements the plaintiff must prove to establish liability under that doctrine: (1) Collins’ mother took DES; (2) DES caused Collin’s injuries; (3) the defendant produced or marketed the type of DES taken by Collins’ mother;⁷⁸ (4) the defendant’s conduct “in produc-

73. *Collins*, 342 N.W.2d at 49.

74. *Id.*

75. *Id.* at 49.

76. *Id.*

77. *Id.*

78. *Collins*, 342 N.W.2d at 50. The *Collins* court stated that a plaintiff need commence suit against only one defendant, rather than against all potentially liable defendants:

Practical considerations favor permitting the plaintiff to proceed, at least initially, against one defendant. One alternative would be to require the plaintiff to join as defendants “a substantial share” of the producers and marketers of DES. We conclude that this is unworkable because of the problems we noted earlier inherent in trying to establish the relevant market and each defendant’s share of the market. Another alternative would be to require the defendant to join a “reasonable number” of possibly liable defendants. We cannot, however, define what that “reasonable number” would be because there are so many potentially liable drug companies. Moreover, either alternative would waste judicial resources by requiring an initial determination of whether the plaintiff has joined a sufficient number of defendants. We also conclude that the defendant is [in] a better position than the plaintiff to determine which other drug companies may share liability. We recognize that many drug companies do not have relevant records, but they, as participants in the DES market, presumably have more information or potential access to relevant information than does the plaintiff.

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ing or marketing the DES constituted a breach of a legally recognized duty to [Collins].”⁷⁹ The court quickly emphasized that Collins was not obligated to prove that a “defendant produced or marketed the precise DES” taken by her mother.⁸⁰ Instead, she was required to establish only that “a defendant produced or marketed the *type* (e.g., color, shape, markings, size, or other identifiable characteristics) of DES” taken by her mother.⁸¹

Res ipsa, alternative liability, market share liability, and risk contribution liability are all welcome evolutions in the common law. They embody the widely-accepted and long-standing notion that the law should not leave an innocent plaintiff remediless against an indisputably tortious defendant.

II. *THOMAS V. MALLETT*: NEGLIGENCE IN THE PAINT – THE FIRST EXTENSION OF RISK CONTRIBUTION LIABILITY BEYOND DES

In 2005, the Wisconsin Supreme Court issued the groundbreaking decision of *Thomas v. Mallett*, declaring that the former manufacturers of lead pigment are not immune from personal injury lawsuits brought by lead-poisoned children, and that they are subject to liability under the risk contribution doctrine.⁸² The court emphasized three primary justifications for applying risk contribution to lead pigment cases: (1) the egregiously culpable conduct of the lead pigment industry in creating the risk of harm that led to the ensuing childhood lead poisoning crisis in Wisconsin;⁸³ (2) the fundamental state constitutional guarantee that “[e]very person is entitled to a certain remedy in the law for all injuries or wrongs which he may receive in his person”;⁸⁴ as well as, (3) the applicability of the “main policy reasons” identified in *Collins* that warranted the creation of the risk-contribution doctrine in the first place.⁸⁵ We examine each of these justifications more closely.

Id.

79. *Collins*, 342 N.W.2d at 50.

80. *Id.*

81. *Id.* (emphasis added).

82. *Thomas ex rel. Gramling v. Mallett*, 701 N.W.2d 523 (Wis. 2005).

83. *Id.* at 557.

84. *Id.* at 551 (citing Wis. Const., art. I, § 9).

85. *Id.*

A. The Lead Pigment Industry: A Century of Culpable Conduct

The summary judgment record before the *Thomas* court implicated such an egregious degree of tortious conduct on the part of the manufacturers of white lead carbonate that the Wisconsin Supreme Court, in part, justified the extension of the risk contribution on the basis of the public policy in favor of deterring knowingly wrongful conduct.⁸⁶ The *Thomas* court specifically noted that Sherwin Williams appreciated the dangers of residential lead paint even before it started manufacturing white lead carbonate as a pigment for residential use.⁸⁷

In July 1904, in its monthly publication *The S.W.P.*, Sherwin-Williams publicized the hazards of white lead paint. Under the bold headline, "DANGERS OF WHITE LEAD," Sherwin-Williams reported that a committee in France had been appointed to investigate the use of white lead and other lead mixtures for painting houses. Sherwin-Williams noted that one of the committee's experts indicated that lead paints were "poisonous in a large degree, both for the workmen and for the inhabitants of a house painted with lead colors." Sherwin-Williams also noted that the expert was of the opinion "that the absolute disuse of white lead has become an imperative necessity." Nevertheless, six years later, in 1910, Sherwin-Williams began manufacturing white lead carbonate after it acquired a white lead processing plant. Moreover, in 1917, during the First World War, Sherwin-Williams advised the War Department that government specifications for 50 percent white lead carbonate paint for war helmets should be replaced with its lead-free lithopone pigment.

86. *Id.* at 558 n.44. Indeed, the *Thomas* court noted that the public policy in *Collins* in favor of providing an incentive to drug companies to test adequately a product before placing it on the market was not implicated in the context of white lead carbonate because leaded pigments in residential paints had been banned over twenty-five years earlier. *Id.* The *Thomas* court further noted that it presented a detailed review of the historical conduct of the pigment manufacturers to illuminate the magnitude of the risk of injury created by the pigment manufacturers. *Id.* at 533 n.11.

87. The *Thomas* court exhaustively reviewed the culpable historical conduct of other white lead carbonate manufacturers as well as their trade associations, including Anaconda Lead Products Company and International Smelting (Atlantic Richfield Co. sued as successor in interest), Glidden (SCM and Millennium Holdings LLC sued as successor), W.P. Fuller (ConAgra sued as successor), National Lead Company (currently known as NL Industries), E.I. DuPont de Nemours, and American Cyanamid. However, for purposes of illustrating the egregious nature of the culpable conduct involved in the process of creating the risk of harm resulting in the public health catastrophe of widespread childhood lead poisoning, this Article will focus on the conduct of the Sherwin Williams Company as described by the *Thomas* court.

Sherwin-Williams stated that the advantage of switching to its lithopone pigment was that the danger from lead poisoning was entirely eliminated.⁸⁸

In contrast, the *Thomas* court observed that in 1909 France and Austria had banned or severely limited the use of white lead carbonate as a pigment in residential paints.⁸⁹ The League of Nations held a conference in Geneva in 1921, attended by 400 delegates from 40 nations, after which many nations acted to limit the residential use of white lead carbonate, including Belgium, Tunisia, Greece, Czechoslovakia, Great Britain, Hungary, Sweden, Poland, Spain, Yugoslavia, and Cuba.⁹⁰ The lead pigment manufacturers perceived the conference and the recommended limitations on using white lead carbonate for residential paints as a sinister plot by organized labor.⁹¹

Physicians employed by Sherwin Williams and other pigment manufacturers attended a confidential conference in Chicago in 1937 which was sponsored by their trade association, the Lead Industries Association (LIA). The particular vulnerability of children to lead poisoning was discussed at the conference.⁹² Wisconsin's highest court took particular umbrage at the culpable mindset exhibited by the pigment industry, noting that:

At this confidential conference, there was discussion on how to defeat workers' compensation claims by clearing the blood of lead poisoning evidence. Some suggestions included injecting the worker with liver in order to "bring him up" even though "it doesn't do him any good."⁹³

In 1939, the National Paint Varnish and Lacquer Association (NPVLA) confidentially warned its members, including Sherwin Williams, that it was vital to safe-guard the public with adequate warnings concerning toxic pigments such as white lead carbonate:

1. A manufacturer who puts out a dangerous article or substance without accompanying it with a warning as to its dangerous properties is ordinarily liable for any damage which results from such failure to warn.

88. 701 N.W.2d at 537.

89. *Id.* at 537 n.19.

90. *Id.* at 537 n.21.

91. *Id.*

92. *Id.* at 542.

93. *Id.* at 542 n.25.

....

9. The manufacturer . . . must know the qualities of his product and cannot escape liability on the ground that he did not know it to be dangerous.

10. The general rule that a manufacturer is not liable to those not in privity of contract with him does not apply when his product is imminently or inherently dangerous.⁹⁴

At the same time that Sherwin Williams manufactured and promoted white lead carbonate pigments for residential use, it also manufactured safer and more cheaply produced alternatives including zinc based paints and lithopone.⁹⁵ By 1942, the National Safety Council came to the conclusion that “the most obvious method of preventing lead poisoning is to substitute for lead and its compounds other materials that are non-toxic.”⁹⁶ As of December of 1945, despite advisories from the U.S. Children’s Bureau, the LIA and its members continued to promote lead paint for interior residential use, and Sherwin Williams as of that point in time went so far as to actually promote lead paint for use on toys.⁹⁷ Sherwin Williams ceased manufacturing white lead carbonate in 1947, but continued to sell interior residential paints with white lead carbonate manufactured by the National Lead Company as late as the 1950’s.⁹⁸

No reasonable person could deny that hundreds of thousands of children were poisoned by white lead carbonate produced by each of the leaded pigment manufacturers, including Sherwin Williams. The massive scale of each manufacturer’s contribution to the public health catastrophe of childhood lead poisoning, is evidenced by the fact that as of 1995, it was estimated that 675,000 children suffered from the devastating consequences of lead poisoning.⁹⁹ Given the latent nature of those injuries, the passage of time, and the generic/fungible nature of the pigment, few, if any, of those children are able to prove that Sherwin Williams was the manufacturer of the pigment they actually ingested. Nevertheless, many of those children have suffered life crippling inju-

94. *Id.* at 538. Other members of the NPVLA included the National Lead Company (currently known as NL Industries), Glidden, (named in *Thomas* as SCM Chemicals), and W.P. Fuller (named in *Thomas* as Con Agra).

95. *Id.* at 538 n.22.

96. *Id.*

97. *Id.* at 543, 546.

98. *Id.* at 546.

99. *Peace ex rel. Lerner v. Nw. Nat’l Ins. Co.*, 596 N.W.2d 429, 446-47 (Wis. 1999).

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ries. Many more children will be poisoned in the future as a direct result of Sherwin Williams' substantial contribution to the creation of the risk of lead poisoning. Unfortunately, absent widespread modification of the common law, this is a legacy that is poised to continue unabated everywhere except in Wisconsin.

B. Childhood Lead Poisoning: The Resultant Public Health Catastrophe

Six years before *Thomas*, in *Peace v. Northwestern National Insurance Co.*, the Wisconsin Supreme Court noted that lead from residential paint is an extreme neurotoxin and that "even a single atom of lead, once in the human body, binds to a protein and induces some damage; the greater the exposure, the more serious the effects."¹⁰⁰ The *Peace* court emphasized that the consequences of exposure can be disastrous for children:

At high blood levels . . . lead may cause encephalopathy and death. Survivors of encephalopathy may have lifelong severe disabilities, such as seizures and mental retardation. Lead toxicity affects almost every organ system, most importantly, the central and peripheral nervous systems, kidneys, and blood. . . . Lead interferes with enzymes that catalyze the formation of heme. It also inhibits both prenatal and postnatal growth. Lead impairs hearing acuity. Lead is a carcinogen in laboratory animals, and there is some evidence for carcinogenicity in workers exposed to lead but not in children.

Although the impairment of cognition in young children . . . has been reported, no threshold has been identified. . . . The relationship between lead levels and IQ deficits was found to be remarkably consistent. A number of studies have found that for every 10 ug/dL increase in blood lead levels, there was a lowering of mean IQ in children by four to seven points.¹⁰¹

The *Peace* court expressed an urgent concern that the devastating scope of the problem had reached epidemic proportions:

Six hundred seventy-five thousand American children are estimated to have blood lead levels indicating lead toxicity. Four to five million more have blood lead levels associated with im-

100. *Id.* at 438 n.14 (citing Sergio Piomelli, *Childhood Lead Poisoning in the '90's*, 93 PEDIATRICS 508 (Mar. 1994); Michael W. Sannon & John W. Graef, *Lead Intoxication in Infancy*, 89 PEDIATRICS 87 (Jan. 1992)).

101. *Id.* at 437 (quoting George A. Gellert et al., *Lead Poisoning: From Screening to Primary Prevention*, 92 PEDIATRICS 176, 177 (July 1993)).

paired neurological and intellectual functions. The two most important sources of exposure among children are lead-based paint and household dust.¹⁰²

Citing the most authoritative medical authority on the subject, the *Thomas* court elaborated on the tender vulnerability of children to lead poisoning:

According to the Center for Disease Control's ("CDC's") *Preventing Lead Poisoning in Young Children*, it is well-recognized that given children's rapidly developing nervous systems, "[c]hildren are particularly susceptible to lead's toxic effects." Because the human body cannot differentiate between lead and calcium, after lead has remained in the bloodstream for a few weeks, it is then absorbed into bones, where it can collect for a lifetime. Once lead enters the child's system, more lead is absorbed than would be in adults.

Children "are more exposed to lead than older groups because their normal hand-to-mouth activities may introduce many non-food items into their gastrointestinal tract." The CDC noted that "[p]lca, the repeated ingestion of nonfood substances, has been implicated in cases of lead poisoning; however, a child does not have to eat paint chips to become poisoned." It is more common for children to ingest dust and soil contaminated with lead from paint that either has flaked or chalked as it aged or has been otherwise disturbed during home maintenance or renovation. "This lead-contaminated house dust, ingested via normal repetitive hand-to-mouth activity, is now recognized as a major contributor to the total body burden of lead in children." Thus, "[b]ecause of the critical role of dust as an exposure pathway, children living in sub-standard housing and in homes undergoing renovation are at particular risk for lead poisoning."¹⁰³

The emerging scientific literature provides further cause for alarm. For example, as reported in the current policy statement of the American Academy of Pediatrics, recent studies confirm a link between early childhood lead exposure and delinquent behavior during adolescence and new data demonstrates inverse as-

102. *Id.* at 446-447 (citing Martha R. Mahoney, *Four Million Children at Risk: Lead Paint Poisoning Victims and the Law*, 9 STAN. ENVTL. L.J. 46-47 (1990)). The *Peace* court also indicated that the scope and gravity of lead poisoning prompted the United States Department of Health and Human Services to say in 1991 that childhood lead poisoning was "the most important environmental health problem for young children." *Id.* (citing 92 PEDIATRICS 176 (1993)).

103. *Thomas*, 701 N.W.2d at 533 (internal citations omitted).

sociations between blood lead concentrations below 10 µg/dL and IQ.¹⁰⁴

Medical authorities agree that the single most significant cause of childhood lead poisoning is lead from residential paint.¹⁰⁵ In Wisconsin, state authorities report that as of 2005 there were 765,978 homes with lead-based hazards.¹⁰⁶ It is estimated that one in six, or 120,000 of these toxic homes, were occupied by children under six years of age.¹⁰⁷ Given the levels of publicly funded programs available in Wisconsin, about 1,500 of these homes may be rendered lead safe for children per year.¹⁰⁸ Accordingly, Wisconsin public health authorities estimate that it will take many decades to eliminate significant existing lead hazards from homes currently occupied by vulnerable potential victims.¹⁰⁹

The *Thomas* court noted that approximately 3 million tons of lead remain in an estimated 57 million homes nationwide and 3.8 million of those homes contain both lead hazards *and* vulnerable children.¹¹⁰ Researchers estimate that American housing contains 7.5 billion square feet of interior surfaces covered with lead paint and 29.2 billion square feet of exterior surfaces covered with lead paint.¹¹¹ The average home with lead paint contains 259 square feet of interior lead paint and 996 square feet of exterior lead paint.¹¹² In fully one-third of all homes containing lead paint

104. American Academy of Pediatrics, *Lead Exposure in Children: Prevention, Detection, and Management*, 116 PEDIATRICS 2 (2005) (citing David E. Jacobs et al., *The Prevalence of Lead-Based Paint Hazards in U.S. Housing*, 110 ENVTL. HEALTH PERSP. A599-A606 (2002); Kim N. Dietrich et al., *Early Exposure to Lead and Juvenile Delinquency*, 23 NEUROTOXICOLOGY AND JUVENILE DELINQUENCY 511-18 (2001); Herbert L. Needleman et al., *Bone lead levels in Adjudicated Delinquents, A Case Control Study*, 24 NEUROTOXICOL TERATOL 711-17 (2002); Richard L. Canfield et al., *Intellectual Impairment In Children With Blood Lead Concentrations Below 10 µG Per Deciliter*, 348 NEW ENG. J. MED. 1517-26 (2003); Letter to the Editor, David C. Bellinger & Herbert L. Needleman, *Intellectual Impairment and Blood Lead Levels*, 349 NEW ENG. J. MED. 500 (2003)).

105. American Academy of Pediatrics, *supra* note 104. See also *Thomas*, 701 N.W.2d at 534.

106. Dep't of Health & Family Services, Division of Public Health, Report to the Governor and the Legislature, STATE EFFORTS TO END CHILDHOOD LEAD POISONING: EVALUATION OF ACT 113, p.3 (Apr. 13, 2005).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Thomas*, 701 N.W.2d at 534.

111. David E. Jacobs et al., *The Prevalence of Lead-Based Paint Hazards in U.S. Housing*, 110 ENVTL. HEALTH PERSP. 599, 603 (2002). Calculated in terms of square miles, this data indicates that there are a total of 1316.4 square miles of lead painted surfaces covering homes nationwide.

112. *Id.*

that is *not* deteriorated, impact and friction surfaces nevertheless produce hazardous levels of lead contaminated dust.¹¹³ The *Thomas* court echoed this concern noting that lead painted windows generate lead dust through normal open and closing even if the paint is otherwise intact.¹¹⁴ Thus, the dangers of lead poisoning from lead paint exist even when the paint is not deteriorated or otherwise might be considered to be in a “lead-safe status.”¹¹⁵

The culpable conduct of the white lead carbonate manufacturers created a truly monstrous risk of severe and devastating harm for children. Against this backdrop, the *Thomas* court tersely responded to the arguments that since any given child could have been poisoned at any time between 1900 and 1978, risk contribution should not be extended to white lead carbonate:

[T]he Pigment Manufacturers’ argument must be put into perspective: they are essentially arguing that their negligent conduct should be excused because they got away with it for too long. As *Thomas* says, the Pigment Manufacturers “are arguing that they should not be held liable under the risk contribution doctrine because of the magnitude of their wrongful conduct.”¹¹⁶

C. The Wisconsin State Constitutional Guarantee to a Remedy for Every Injury or Wrong

In opposing the extension of the risk contribution doctrine, the pigment manufacturers argued that white lead carbonate was not factually similar to DES because lead poisoning victims had available remedies against the landlords of the premises at which they were poisoned.¹¹⁷ The pigment manufacturers reasoned that in *Collins*, the common law was modified in order to provide a remedy to an otherwise remediless victim.¹¹⁸ Therefore, since Steven Thomas had a remedy against his landlords for his lead poisoning, the Wisconsin constitutional guarantee of a remedy was not implicated.¹¹⁹

Citing Article I, section 9 of the Wisconsin Constitution, the *Thomas* court disagreed. That provision in the constitution states:

113. *Id.*

114. 701 N.W.2d at 534.

115. *Id.* at 552.

116. *Id.* at 562.

117. *Id.* at 551-552.

118. *Id.*

119. 701 N.W.2d at 551.

Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws.

The *Thomas* court held that Article I, section 9, is not “so frail” as the pigment manufacturers characterized it. In doing so, the court clarified that the *Collins* court was “concerned with more than just ensuring that a plaintiff had a remedy against someone for something”; rather it was concerned with “fashioning an *adequate remedy* when one did not exist.”¹²⁰ The court expressed “serious concerns” over the attempt of the pigment manufacturers to “displace all of the blame for lead poisoning from its white lead carbonate pigment on landlords and the effect that will have on the adequacy of a plaintiff’s remedy.”¹²¹ Even though the individual plaintiff in *Thomas* had recovered from his landlords, future plaintiffs might not be so lucky because of the scant availability of premises insurance for lead poisoning injuries.¹²²

The *Thomas* court embraced the concurrence below:

The plain meaning of this section is that every person is entitled to a certain remedy for “all injuries *or* wrongs which he may receive in his person.” Notice that the wording is in the disjunctive. The way I read this clause, it means that even assuming only one injury, if that injury was brought about by separate wrongs against the person, that person is entitled to a remedy for each wrong.

I have never seen a case that insulates a wrongdoer from being exposed to a lawsuit just because there exists a remedy against another wrongdoer.¹²³

Furthermore, the *Thomas* court injected new vitality into Article I, section 9, noting that the right to a remedy is a “substantive right” entitling a litigant to a remedy as it exists in the common law and while the legislature may change the common law, such changes must be reasonable:

120. *Id.* at 552 (emphasis in original).

121. *Id.*

122. *Id.* at 552-53; *See also Peace*, 596 N.W.2d at 439, 449.

123. 701 N.W.2d at 554 (quoting *Thomas ex rel. Gramling v. Mallett*, 685 N.W.2d 791 (Wis. Ct. App. 2004), *rev’d in part, aff’d in part*, 701 N.W.2d 523 (Wis. 2005)).

If the legislature can take away the remedy to [an] unjustifiable and alarming extent, [the legislature] can destroy it entirely, and thus this solemn constitutional declaration of the people becomes a dead letter, a mere 'glittering generality' without substance or effect.¹²⁴

Thus, the *Thomas* court rejected the notion that the availability of remedies against other independent tortfeasors somehow satisfies the constitutional promise of an adequate and certain remedy for *all* injuries or wrongs.

D. White Lead Carbonate is Factually Similar to DES in All the Ways Relevant to the Public Policies That Justify the Risk Contribution Doctrine

The *Collins* court held that the risk contribution doctrine could be extended to other situations which are factually similar to the DES cases.¹²⁵ The *Thomas* court recognized that Steven Thomas, like the plaintiff in *Collins*, could not identify a precise manufacturer of the white lead carbonate he ingested because of the number of potential manufacturers, the passage of time, and the loss of records.¹²⁶ Thus, the key factual criteria upon which the *Collins* court relied to create the risk contribution doctrine were also the criteria that the *Thomas* court relied upon to determine that white lead carbonate cases are sufficiently similar to warrant extension of the doctrine.

Nevertheless, the pigment manufacturers argued that there existed a number of other significant factual differences between DES and white lead carbonate that should have precluded extension of the risk contribution doctrine. The *Thomas* court appropriately rejected these alleged differences as immaterial.

First, the pigment manufacturers argued that white lead carbonate was not fungible in that it was not manufactured from a chemically identical formula.¹²⁷ In *Collins*, all DES was chemically identical, whereas in *Thomas*, the offending white lead carbonate could have been made according to one of three slightly different chemical formulas.¹²⁸ However, fungibility is material to the risk contribution analysis only in so far as it relates to the

124. *Id.* at 555, n.37 (quoting *Phelps v. Rooney*, 9 Wis. 55, 82 (1859) (Dixon, C.J., dissenting)).

125. *Collins*, 342 N.W.2d at 50.

126. *Thomas*, 701 N.W.2d at 559.

127. *Id.*

128. *Id.*

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question of product interchangeability due to its generic status.¹²⁹ The degree of the product's fungibility relates directly to the plaintiff's ability to identify with precision the manufacturer of the product that actually injured him or her. Accordingly, the *Thomas* court focused on three dimensions of fungibility: whether it is functionally interchangeable, whether it is physically indistinguishable, and whether it presents some degree of uniform risk.¹³⁰

The *Thomas* court determined that it was undisputed that white lead carbonate pigments were in fact functionally interchangeable and physically indistinguishable as it pertained to the key issue of product identifiability. With regard to uniformity of risk, the *Thomas* court found that all "white lead carbonates were produced utilizing 'virtually identical chemical formulas' such that all white lead carbonates were identically defective."¹³¹ What emerged from the *Thomas* decision is a practical definition of fungibility that functionally and realistically takes into account the product identification criteria that justified the creation of risk contribution in the first place. To have required identical chemical formulas would have constituted the triumph of form over substance.

Second, the pigment manufacturers argued that DES cases presented a nine-month window of opportunity for exculpation under the risk contribution doctrine, while white lead carbonate cases involved exculpation periods of up to 78 years.¹³² However, depending on the date of construction, in lead pigment cases, the relevant exculpation period will not always be as long.¹³³ For example, if the home containing white lead carbonate was con-

129. *Id.*

130. *Id.* at 560-61.

131. *Thomas*, 701 N.W.2d at 561.

132. *Id.* at 562.

The Pigment Manufacturers note that the paint *Thomas* allegedly ingested could have been applied at any time between construction of the two houses in 1900 and 1905 and the ban on lead paint in 1978. This significant time span greatly exceeds the nine-month window during which a plaintiff's mother would have taken DES, the Pigment Manufacturers note. Given that *Collins* attempted to strike a balance between assuring a DES plaintiff had a remedy and providing a realistic opportunity to each DES pill manufacturer to prove that it could not have caused the plaintiff's harm (by establishing its DES could not have reached the mother during her pregnancy), the Pigment Manufacturers contend that *Collins* should not be extended given that they have no reasonable ability to exculpate themselves. *Id.*

133. *Id.* at 562-63.

structed in 1950, those manufacturers which ceased production prior to that date would presumably be able to exculpate themselves. The fact that in some cases the white lead carbonate could have been produced at anytime between 1900 and 1978, is simply reflective of the duration of the pigment manufacturers' wrongful conduct, and is not a reason to excuse it.¹³⁴

Third, the pigment manufacturers argued that white lead carbonate was factually different than DES because a child's lead poisoning could have been caused by many different sources of lead while adenocarcinoma of the vagina can be caused only by pharmaceutical use of DES by a pregnant mother. The pigment manufacturers also argued that lead poisoning causes many different injuries and therefore does not cause a "signature injury," in contrast to DES.¹³⁵ The *Thomas* court dismissed these differences as irrelevant to the criteria justifying the application of the risk contribution doctrine because "harm is harm, whether it be 'signature' or otherwise."¹³⁶ The logic is compelling. The risk contribution doctrine does not serve any public policy underlying its creation by courts' limiting its application to only those cases in which the injury is unique to the offending product. Furthermore, the risk contribution doctrine relaxes causation only with regard to product identification. The lead poisoning plaintiff retains the burden of proving that white lead carbonate caused his or her injuries.¹³⁷ Thus, under the risk contribution doctrine, the burden of proof for the lead poisoning plaintiff is more difficult than it is for the DES plaintiff.

In addition, the pigment manufacturers overstate the argument that DES-induced injuries could come only from the pharmaceutical use of the product by pregnant mothers. Just as there are some minor environmental sources of lead other than lead paint, such as water, so too there were alternative sources of DES. In 1979, five years *before Collins* was decided, the Food and Drug Administration banned DES as a growth promotant for livestock after determining that substantial scientific evidence established that its widespread use left potentially carcinogenic residues in edible portions of meat consumed by humans.¹³⁸ The practice of

134. *Id.*

135. *Thomas*, 701 N.W.2d at 563.

136. *Id.*

137. *Id.*

138. *United States v. 2,116 Boxes of Boned Beef*, 726 F.2d 1481, 1484 (10th Cir. 1984). *See also* Diethylstilbestrol; Withdrawal of Approval of New Animal Drug Applications; Commissioner's Decision, 44 Fed. Reg. 54852 (Sept. 21, 1979).

using DES for livestock feed had been widespread since the 1954 and the FDA first attempted unsuccessfully to ban the practice in 1973.¹³⁹ At the time that *Collins* was decided, it was well known that various consumer meats had presented an alternative source of DES ingestion for almost thirty years, as evidenced by the FDA's public record and numerous published decisions. The final order of the FDA banning DES from livestock feed was specifically concerned with human ingestion and, in particular, cited concerns about the development of adenocarcinoma in the daughters of DES treated mothers.¹⁴⁰

Finally, the pigment manufacturers argued that white lead carbonate was factually different than DES because, as pigment manufacturers, they were not in exclusive control of the risk of injury that their product created. The *Thomas* court pointedly disagreed for two reasons:

First, as doctors were the ones who prescribed the dosage of DES, so too were the paint manufacturers that mixed the amount of white lead carbonate in the paint. However, the paint did not alter the toxicity of the white lead carbonate anymore than the pharmacist did by filling a prescription. To the contrary, at best, the paint manufacturers actually diluted the white lead carbonate's toxicity. *In other words, the inherent dangerousness of the white lead carbonate pigment existed the moment the Pigment Manufacturers created it.*

Second, the record is replete with evidence that shows *the Pigment Manufacturers actually magnified the risk through their aggressive promotion of white lead carbonate, even despite the awareness of the toxicity of lead.* In either case, whoever had "exclusive" control over the white lead carbonate is immaterial.¹⁴¹

The salient facts in *Collins* that justified the creation of the risk contribution doctrine were (1) culpable manufacturer conduct in creating the widespread risk of harm to innocent victims, (2) the inability of the innocent victims to identify the precise manufacturer because of the generic/fungible nature of the product, (3) the number of potential manufacturers, (4) the passage of time,

139. *Hess & Clark v. FDA*, 495 F.2d 975, 978-79 (D.C. Cir. 1974); *Chemetron v. US Dep't of Health, Education & Welfare*, 495 F.2d 995 (D.C. Cir. 1974). It should be noted that the plaintiff in *Collins* was exposed to DES in utero in 1957, well after DES was in widespread use as feed supplement for livestock. *Collins*, 116 Wis. 2d at 174.

140. See Diethylstilbestrol; Withdrawal of New Animal Drug Applications; Commissioner's Decision, 44 Fed. Reg. 54879 (Sept. 21, 1979).

141. *Thomas*, 701 N.W.2d at 562-64 (emphasis added).

and (5) the loss of records. Each of those salient facts is present in the context of childhood lead poisoning caused by white lead carbonate, except that the degree of culpability of the pigment manufacturers was far more egregious than that of the DES manufacturers.

III. THE COUNTERARGUMENTS AGAINST THOSE CRITICAL OF EXTENDING RISK CONTRIBUTION TO LEAD LITIGATION: A REBUTTAL TO GRAY & FAULK, AND TO THE *THOMAS* DISSENTERS

John Gray and Richard Faulk, our fellow contributors to this journal on the topic of extending market share, risk contribution, and similar theories of liability to lead paint litigation, summon numerous arguments against applying those theories to lead litigation. We respectfully submit, however, that their arguments are specious. This section is devoted to exposing the weaknesses in their premises, arguments, and conclusions.

In the decades following the *Collins* decision, numerous commentators have opined on the wisdom and practicality of using alternative theories of liability to hold an industry responsible for the harms it caused. As critics of the application of risk contribution to lead pigment cases have pointed out, there exist notable distinctions between, on the one hand, *res ipsa*, alternative liability, and market share liability, and, on the other hand, risk contribution liability.¹⁴² Perhaps most significantly are the distinctions arising from (1) the “instrumentality” causing the injury, and (2) the source of that “instrumentality.”¹⁴³ A close inspection of these

142. See, e.g., Gray & Faulk, *supra* note 10, at 169-88.

143. Risk contribution may be distinguished from the other doctrines on two primary grounds. The doctrines of *res ipsa*, alternative liability, and market share liability as applied in DES cases lend themselves to quick identification of both the injury-causing “instrumentality” and its source. For instance, *res ipsa* requires either that the defendant retain some control of the instrumentality causing injury, or that the plaintiff use an instrumentality the defendant has manufactured or maintained. See, e.g., *Giles*, 636 A.2d 1335 (Conn. 1994); *Smith*, 560 N.E.2d 324, 339 (Ill. 1990). This element of *res ipsa* necessarily requires identification of the injury-producing instrumentality (e.g., a falling barrel), and the negligent defendant. Next, because alternative liability is invoked when multiple actors simultaneously engage in the similar conduct that creates the same risk of harm, and when each of them is joined in the suit, a plaintiff seeking application of that doctrine must identify what injured him (e.g., buck shot) and who breached the duty of care toward him that resulted in his injury (e.g., two hunting partners). Finally, when applied in the DES context, market share and risk contribution liability aide plaintiffs in tracing their injuries to a particular instrumentality, and thereby to its source, because DES is a fungible product

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distinctions, however, reveals that they prove to be nullities. As we discuss more specifically in subpart A below, contrary to Gray and Faulk's protestations, those distinctions do not militate against the application of risk contribution in lead pigment cases.

We rebut Gray and Faulk's criticisms on four grounds. First, any applicability of the distinctions in lead pigment cases actually *favors* a defendant pigment manufacturer in a case brought under the risk contribution doctrine.

Second, despite their alternate legal requirements, *res ipsa*, alternative liability, and market share liability all share the same aim: each derives from the long-standing, widely-accepted policy that holds that, as between an innocent plaintiff who cannot identify the injury-causing tortfeasor from among multiple tortfeasors, it is better to require the tortfeasors to extricate themselves from liability than to insulate all of them from liability.¹⁴⁴

Third, their criticism overlooks the legal tenet that the common law is flexible and changeable. Courts have long recognized that the common law must remain flexible to address the natural evolutions society undergoes.

Finally, the factual arguments Gray and Faulk present are rebuttable.

A. Distinctions Inherent in the Risk Contribution Doctrine Benefit Defendants in Lead-Poisoning Lawsuits

In lead pigment cases, neither the instrumentality nor the source of the instrumentality is readily apparent. With respect to the instrumentality, it is not assured that the injures alleged result from exposure to lead pigment. The injury alleged is often cognitive impairment, but, as Gray and Faulk point out, cognitive impairment may stem from myriad sources other than lead. In addition, with respect to the source of the instrumentality (if the

that produces a singular, or "signature," injury – adenocarcinoma. Thus, the pool of potential injury-causing instrumentalities is necessarily reduced to DES, and the pool of potential tortfeasors is necessarily reduced to DES manufacturers.

144. Richard M. Russell, Note, *The Causation Requirement: Guardian of Fairness or Obstacle to Justice? – Making Sense of a Decade of DES Litigation*, 25 SUFFOLK L. REV. 1071, 1102 (1991); Nancy Lee Firak, *The Developing Policy Characteristics of Cause-In-Fact: Alternative Forms of Liability, Epidemiological Proof and Trans-Scientific Issues*, 63 TEMPLE L. REV. 311 (1990); Nancy Lee Firak, *Alternative Forms of Liability: Developing Policy Aspects of the Cause-In-Fact Requirements of Tort Law*, 20 AZ. ST. L. J. 1041 (1988); Stephen A. Spitz, *From Res Ipsa Loquitur to Diethylstilbestrol: the Unidentifiable Tortfeasor in California*, 65 IND. L. J. 591 (1990).

instrumentality is determined to be lead), it is not assured that the lead exposure came from exposure to lead pigment; exposure to lead can occur through, food, water, or costume jewelry, for example, although the possibility of a child's contracting lead poisoning through these other sources, as opposed to lead pigment, is remote.

To the extent that the instrumentality (whether it be lead, as plaintiffs contend, or "confounders," as defendants contend), and its source (whether it be lead pigment, or other sources) are contested in lead litigation, those disputes *benefit* the defendants. When the injury-causing instrument, as well as the source of the instrument, may be one of numerous possibilities, the plaintiff bears a much greater burden of persuasion than he or she would otherwise bear if the instrument and the source were readily apparent. For instance, in *Sindell*, it was undisputed that the cause of the plaintiffs' injuries was DES. Consequently, the plaintiffs were absolved of admitting proof on that question. In contrast, in lead litigation, it is invariably disputed whether lead caused the plaintiff's injuries. Accordingly, a plaintiff must admit proof on that question. Furthermore, in lead litigation it is also invariably disputed whether the plaintiff was lead poisoned from exposure to lead paint or from exposure to some other source of lead. As a result, the plaintiff must admit proof on that question as well. The two questions of proof present in risk contribution lead litigation, but not present in DES litigation, benefits the defendants; it raises the likelihood that they will prevail. Given, the relative difficulty of proof that lead plaintiffs face, in comparison to DES plaintiffs, the shrill cries opposing the application of the risk contribution doctrine to lead cases rings rather hollow.

B. The Common Aim of *Res Ipsa*, Alternative Liability, Market Share Liability, and Risk Contribution Liability

All of the differences that distinguish lead cases reviewed under the risk contribution doctrine from cases reviewed under *res ipsa*, alternative liability, and market share liability in the DES context inure to the defendants' relative benefit. Nevertheless, it is the similarities among the four doctrines that further underscore the viability of applying risk contribution in lead cases.

Our examination of the theories reveals that they have sprung from each other in succession. Their interrelationship in

this manner shows that each is the logical extension of the one before, developed to address advancing technology and circumstances unforeseen by the early English common law. All attempt to give a plaintiff redress against culpable defendants when the plaintiff is injured under circumstances which the plaintiff previously would have been without remedy. As we have explained, the policy underlying this dates back to the early part of the last century. The common aim of the theories to effectuate the policy of extending redress to an innocent plaintiff against a culpable defendant underscores the wisdom of the theories in general, and the application of risk contribution to the lead poisoning cases specifically.

One of the central similarities between the theories is that, properly applied, each is triggered only when all defendants breached their duty of care.¹⁴⁵ As such, each is tied to the traditional tort concept of cause-in-fact; if a defendant can prove that it could not have been the cause-in-fact of the plaintiff's injury, it can avoid liability.¹⁴⁶ This requirement is particularly notable in lead poisoning cases. In a lead case, a defendant has the ability to obtain dismissal by showing that it did not produce white lead carbonate pigment. If it was not a manufacturer of the pigment, then, by definition, it can not possibly be a cause-in-fact of the plaintiff's injuries.

What is more, alternative liability, market share liability, and risk contribution liability are all undergirded by the same policy consideration of subjecting to liability those who create a risk of harm. What underlies the formulation of alternative liability, for example, is judicial recognition not only that the defendants were negligent toward the plaintiff, but also that the defendants' negligence created a certain risk that the particular harm suffered would result.¹⁴⁷ One lesson from *Summers*, therefore, is that "in some circumstances at least, a defendant who is not the cause-in-fact of plaintiff's injury may be held liable for it if he helps to create the risk that the kind of injury the plaintiff actually suffered"

145. Some courts unfortunately have applied *res ipsa loquitur* in cases in which there exists no evidence to indicate certain defendants, among multiple defendants, breached a duty of care. See, e.g., *Ybarra v. Spangard*, 154 P.2d 687 (Cal. 1944). We submit that in such circumstance, courts should refrain from applying *res ipsa loquitur*. Accord Seavey, *supra* note 19.

146. Firak, *The Developing Policy Characteristics of Cause-In-Fact*, *supra* note 144, at 324.

147. Firak, *Alternative Forms of Liability*, *supra* note 144, at 1055.

would result.¹⁴⁸ Market share and risk contribution liability hold similarly: a defendant's breach of duty towards a plaintiff, resulting in the creation of the kind of risk that produces the plaintiff's injury, is sufficient to expose the defendant to liability.¹⁴⁹ "[A]doption [of risk contribution] rests squarely on the court's policy decision to recognize participation in risk-creating activity as generating potential liability in order to compensate plaintiffs who have suffered real injuries but who are unable to meet traditional cause-in-fact requirements."¹⁵⁰ This expression common to alternative liability, market share liability, and risk contribution liability serves the policy of according fairness to an injured plaintiff and holding responsible risk creators.

Contrary to the assertions of Gray and Faulk, the embodiment of this policy in the common law is neither new nor radical. In fact, cases holding "that if the defendant's conduct increased the risk of harm to the plaintiff, the fact that the plaintiff cannot prove definitely that the harm resulted from the defendant's negligence does not necessarily prevent the plaintiff from recovering" date back to at least 1885!¹⁵¹

C. It is Intended that the Common Law Be Flexible and Changeable

It is widely recognized that courts are charged with developing the common law in response to fact patterns. They are free to engage in such development without deference to the other branches of government. Indeed, "in developing the common law, courts look at the other branches only to ensure that the legislature has not already spoken on an issue; they then seek to create workable public policy."¹⁵²

The development of each of these theories at various times over the last century is a direct result of the inherent flexibility and ability of the courts to fashion appropriate remedies to modern day dilemmas. In the words of the *Collins* court:

We have recognized that: "[i]nherent in the common law is a dynamic principle which allows it to grow and to tailor itself to

148. *Id.* at 1056.

149. *Id.* at 1062.

150. *Id.* at 1065.

151. Seavey, *supra* note 19, at 648 (citing *Reynolds v. Texas & Pac. R.R.*, 37 La. 694 (1885)).

152. Lynn Adelman & Shelley Fite, *Exercising Judicial Power: A Response to The Wisconsin Supreme Courts Critics*, 91 MARQ. L. REV. 425, 440 (2007).

meet changing needs within the doctrine of *stare decisis*, which, if correctly understood, was not static and did not forever prevent the courts from reversing themselves or from applying principles of common law to new situations as the need arose.”¹⁵³

Similarly, as at least one commentator has noted:

The developments of *res ipsa loquitor*, alternative liability, concert of action, contributory negligence, and products liability all evidence judicial acknowledgement of the need for change in the common law when *stare decisis* inhibits rather than promotes justice.¹⁵⁴

D. Gray & Faulk’s Factual Arguments are Rebuttable

Gray and Faulk attempt to undercut the Wisconsin Supreme Court’s decision in the *Thomas* case by engaging in a series of factual arguments. Each of these factual arguments is unavailing.

Gray and Faulk begin by attempting to undercut the long-accepted tort policy that, when an innocent plaintiff is unable to pinpoint the injuring party among a cadre of culpable actors, the cadre is in the best position to incur the cost of injury. They do so by attempting to displace blame for lead poisoning from the manufacturers of the toxic product to those who own properties whose surfaces are covered by the toxic product, stating that “the manufacturers did nothing to permit or promote the decades of neglect and inadequate maintenance by landowners that ultimately produced the alleged exposures [to leaded pigments]”¹⁵⁵

The premise of Gray and Faulk’s argument may be undercut both factually and legally. Legally, the issue that Gray and Faulk allude to is actually one of superseding, intervening cause. However, Wisconsin follows the minority rationale espoused in *Pal-*

153. *Collins*, 342 N.W.2d at 45 (citing *Bielski v. Schulze*, 114 N.W.2d 105 (Wis. 1962)). See also *Gauer v. Harrant*, 557 A.2d 210, 216 (Md. 1989) (“[A]s we have often noted, the common law of this State is ‘subject to judicial modification in the light of modern circumstances or increased knowledge.’ Indeed, we have not hesitated to change the common law by adopting a new cause of action where such a course was compelled by changing circumstances. Even the doctrine of *stare decisis* does not prevent us from ‘changing or modifying a common law rule by judicial decision where we find, in light of changed conditions or increased knowledge, that the rule has become unsound in the circumstances of modern life, a vestige of the past, no longer suitable to our people.’”).

154. Russell, *supra* note 144, at 1102. See also Robert E. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463 (1962).

155. Gray & Faulk, *supra* note 10, at 152.

sgraf v. Long Island Railroad Co.,¹⁵⁶ establishing that everyone owes a duty of care to the entire world.¹⁵⁷ Further, Wisconsin follows an equally broad cause-in-fact rule, thus eliminating the doctrines of superseding and intervening cause.¹⁵⁸ In *Fandrey v. American Family Mutual Insurance Company*,¹⁵⁹ the Wisconsin Supreme Court noted that these doctrines are subsumed by a post-trial analysis of whether liability in fact ought to be limited by public policy considerations.¹⁶⁰

Furthermore, Gray and Faulk's argument is flawed because it does not accurately reflect mainstream medical and scientific knowledge about lead poisoning. The most common method of exposure is not, as Gray and Faulk suggest, through exposure to inadequately maintained surfaces that may be peeling, chipping, or flaking, but rather through ingestion of paint dust caused by friction and impact surfaces covered with intact lead paint – such as friction resulting from the opening and closing of a window.¹⁶¹ To the extent that children are exposed to lead through chipping, peeling paint, this development is one that the manufacturers actually *foresaw*.¹⁶² As noted by the *Thomas* court, many of the pigment manufacturers “did more than simply contribute to a risk; they knew of the harm that white lead carbonate pigments caused and continued production and promotion of the pigment notwithstanding that knowledge.”¹⁶³ The pigment manufacturers, acting through their trade association, chose to respond to increasing public reports of lead poisoning by blaming the victims and their parents.¹⁶⁴ In 1957 the LIA's leadership stated that “the major source of trouble is the flaking of lead paint in the ancient slum dwelling of our older cities,” and adding that “the problem of lead poisoning will be with us for as long as there are slums.”¹⁶⁵ The conclusion of the LIA's leadership was “until we can find a means

156. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

157. *Fandrey ex rel. Connell v. Am. Family Mut. Ins. Co.*, 680 N.W.2d 345 n.8 (Wis. 2004) (citing *A.E. Inv. Corp. v. Link Builders, Inc.*, 214 N.W.2d 764 (Wis. 1974)).

158. *Ryan v. Cameron*, 71 N.W.2d 408, 411 (Wis. 1955).

159. *Fandrey*, 680 N.W.2d at 351 n.8.

160. *Id.*; *See also Alvarado v. Sersch*, 662 N.W.2d 350 (Wis. 2003).

161. *Thomas*, 701 N.W.2d at 553.

162. *Thomas*, 701 N.W.2d at 536-37, n.19.

163. *Id.* at 558.

164. G. MARKOWITZ ET AL., *DECEIT AND DENIAL, THE DEADLY POLITICS OF INDUSTRIAL POLLUTION* 103 (University of California Press 2002).

165. *Id.*

to (a) get rid of our slums, and (b) educate the relatively ineducable parent, the problem will continue to plague us.”¹⁶⁶

Gray and Faulk are mistaken when they assert that “owners and landlords of residences had control of a substantial portion of the risks posed by lead-based paints – simply *because lead-based paint is not hazardous until it is neglected to the point where it peels and flakes* and is then ingested or the dust is inhaled.”¹⁶⁷ In truth, lead-based paint is hazardous regardless of whether it peels or flakes.

In sum, we highlight four primary weaknesses in Gray and Faulk’s arguments. First, plaintiffs in lead litigation face daunting burdens of proof that plaintiffs in the DES cases did not face. Accordingly, defendants enjoy certain relative advantages under the risk contribution doctrine. Second, risk contribution is not the drastic change in the law its critics claim that it is. Risk contribution is the logical offspring of *res ipsa*, alternative liability, and market share liability, because all of those doctrines share the common aim of providing redress for an innocent plaintiff against a culpable defendant. Third, the risk contribution theory is not only a logical evolution in the common law, it is also a *natural* evolution in the common law. It was intended that the common law would evolve, and it is incumbent upon courts to modify the common law “when *stare decisis* inhibits rather than promotes justice.”¹⁶⁸ Finally, Gray and Faulk’s Article contains rebuttable factual and legal premises.

IV. THE PRUDENCE OF PRESERVING MARKET SHARE AND RISK CONTRIBUTION LIABILITY FOR THE FUTURE: THE EQUITY OF FORECLOSING IMMUNITY TO SELECT TORTIOUS ACTORS, AND THE ENORMOUS PUBLIC HEALTH CONSEQUENCES OF UNFORESEEN INDUSTRIAL TORTS

The vehemence with which the advocates of the lead pigment industry, commentators, and jurists have resisted market share and risk contribution liability, as well as the doomsday rhetoric they have employed to disparage those doctrines, would suggest that courts have applied these doctrines recklessly and indiscrimi-

166. *Id.*

167. Gray & Faulk, *supra* note 10, at 189 (emphasis added).

168. Russell, *supra* note 144, at 1102.

nately.¹⁶⁹ Extension of those doctrines, however, could be safely characterized as thoughtful and measured. Since market share liability was first adopted by the California Supreme Court in 1980,¹⁷⁰ five other states have followed suit, applying either market share or risk contribution liability.¹⁷¹ Wisconsin first adopted risk contribution in 1984; the Wisconsin Supreme Court applied that doctrine to a DES case.¹⁷² It took twenty-one years for the court to apply risk contribution to another context, lead paint.¹⁷³ Thus, the evolution of market share and risk contribution liability

169. See, e.g., Gray & Faulk, *supra* note 10, at 153 (“[P]laintiffs [advocating the extension of market share or risk contribution theories] are not asking courts merely to take a *small* step further along an already ‘slippery slope.’ Instead, they are asking the court to leap into an unknown abyss where *all* defendants are assumed guilty – even if the presence of their product cannot be shown to have any connection with the injury. In this ‘ends justify the means’ argument, the . . . plaintiffs seek to force an entire industry into the role of unfunded underwriters of judicially-created insurance.”); RICK ESENBERG, A COURT UNBOUND? THE RECENT JURISPRUDENCE OF THE WISCONSIN SUPREME COURT 2 (2007) (Federalist Society White Paper), available at http://www.fedsoc.org/doclib/20070329_WisconsinWhitePaper.pdf. (“A national advocacy group led by Dick Armey, former majority leader of the House of Representatives, called Wisconsin a ‘Tort Hell Tundra.’”); Diane Sykes, *Reflections on the Wisconsin Supreme Court*, 89 MARQ. L. REV. 723, 730 (2006) (“Apportioning risk contribution liability among manufacturers of lead pigment based on market share and relative culpability over an almost eight-decade period of time is nearly impossible as a factual matter.”); *Thomas*, 701 N.W.2d at 590-91 (Prosser, J., dissenting) (“Wisconsin will be the mecca of lead paint suits. There is no statute of repose on products liability here, and this court has now created a remedy for lead poisoning so sweeping and draconian that it will be nearly impossible for paint companies to defend themselves or, frankly, for plaintiffs to lose.”).

170. *Sindell*, 607 P.2d 924.

171. *Thomas*, 701 N.W.2d 523 (extending Wisconsin’s risk contribution doctrine, a variant of market share liability, to lead pigment); *Smith v. Cutter Biological, Inc.*, 823 P.2d 717 (Haw. 1991) (adopting market share liability in the context of hemophiliacs contracting AIDS after being injected with a blood product that facilitates coagulation); *Conley v. Boyle Drug Co.*, 570 So.2d 275 (Fla. 1990) (applying market share liability to DES case); *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069 (N.Y. 1989), *cert. denied*, 493 U.S. 944 (1989) (adopting market share liability in a DES case); *Collins*, 342 N.W.2d 37 (1984) (adopting risk contribution liability in the DES context); *Martin v. Abbott Labs.*, 689 P.2d 368 (Wash. 1984) (applying a modified version of market share liability to a DES case).

Some states, however, have rejected plaintiffs’ invitations to adopt market share liability. See, e.g., *Sutowski v. Ely Lilly & Co.*, 696 N.E.2d 187 (Ohio 1998) (holding that market share liability is not available as a remedy under Ohio products liability law); *Smith v. Eli Lilly & Co.*, 560 N.E.2d 324 (1990) (holding that market share liability unavailable in DES cases); *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67 (Iowa 1986) (rejecting market share liability in a DES case and holding that in products liability cases, plaintiffs must prove which manufacturer made the product that caused the harm).

172. *Collins*, 342 N.W.2d 37.

173. *Thomas*, 701 N.W.2d 523.

has proceeded incrementally and slowly, as the common law is intended to proceed.

It would be unfortunate, however, if market share and risk contribution liability, as well as courts' willingness to modify the common law to create such doctrines, came to a permanent halt now, as some commentators advocate. The demise of common law modification that keeps tort principles in step with manufacturer negligence would result in anomalous and inequitable variations in tort law and would expose society to enormous, and perhaps unnecessary, cost.

A. Doctrines Such as Risk Contribution Prevent Anomalous and Inequitable Results in Tort Law

Industrial innovation resulting in new, previously unimagined products is certain to continue. Yet, regardless of the extent of those innovations, the "bedrock rule" of tort law, that all have a duty to refrain from engaging in conduct that may result in foreseeable harm, must apply in all situations. By decrying the modification of tort law elements to ensure the "bedrock rule" is observed in circumstances in which it may otherwise be outstripped by industrial innovation, however, Gray and Faulk—as well as the other critics of risk contribution liability—necessarily champion a common law that applies selectively. For, when industrial innovation outpaces—or transcends—the existing parameters of tort law, then those engaged in the novel industry are placed in the privileged and unprecedented position of being granted immunity from adherence to the "bedrock rule." In such circumstance, society would be left with an asymmetrical and inequitable tort law in which the "bedrock rule" applies to the vast majority, but does not apply to a select few.¹⁷⁴ Hence, in an ironic twist, it is not the Faulk-and-Gray-bemoaned willingness of courts

174. Gray and Faulk, and the critics of risk contribution, in effect sacrifice the element of duty on the altar of causation. The preservation of cause-in-fact, which they advocate, yields the result that lead pigment manufacturers are absolved of the pre-eminent element of tort law – duty: regardless of the foreseeable injury the lead pigment manufacturers' conduct created, the manufacturers are immune from accountability for instances of that foreseeable injury, because their conduct obscures the identity of the injury-causing party.

The position of the detractors of risk contribution is ironic. They claim to resist risk contribution, in part, out of keeping the traditional understanding of cause-in-fact intact, but in doing so precipitate a change to duty. *See, e.g.*, Gray & Faulk, *supra* note 10, at 149-42; Sykes, *supra* note 171, at 731. Duty is the element that must remain intact, however, to ensure that "the obligations of manufacturer to consumer" are maintained. *Sindell*, 607 P.2d at 935.

to modify tort that represents the radical departure in the law; rather, it is the *failure* of courts to modify tort law that ensures that the element of duty continues to apply uniformly to all that represents the departure. Doctrines such as risk contribution rightly preserve the status quo of the “bedrock rule” of duty.

B. Society’s Exposure to Enormous Costs

Industrial progress has given rise to varying useful products and medicines that were previously unimagined. Lamentably, the tortious production of a select few of these products, such as DES and lead-based paint, has proven widely harmful. It is likely that other products, unforeseen today but manufactured tortiously in the future, will cause additional mass latent injuries. Moreover, it is likely that even the current state of tort law, which recognizes such doctrines as market share and risk contribution liability, will be insufficient to address all future mass torts. The danger such products pose to society is so great, there must exist a mechanism for a civil means of resolution of the disputes that are sure to result from the potentially catastrophic consequences.

The threat tortiously-produced products pose to our medical and educational infrastructure cannot be intelligently discounted as pie-in-the-sky supposition. Courts and commentators have endeavored to quantify the costs associated with the harms wrought by DES and lead-based paint. Numerous estimates place the damages wrought by DES in the billions of dollars.¹⁷⁵

The cost of harm produced by lead-based paint is even more startling. Because elevated levels of lead deleteriously affect cognitive and social functions, researchers and governmental task forces have reasonably hypothesized that elevated lead levels will in turn affect education level, employment, and earnings.¹⁷⁶ The long-term monetary costs of childhood lead poisoning, “assuming

175. Mike D. Murphy, Note, *Market Share Liability New York Style: Negligence in the Air? Hymowitz v. Eli Lilly and Co.*, 55 MO. L. REV. 1047, 1048-49 (1990); David A. Fischer, *Products Liability: An Analysis of Market Share Liability*, 34 VAND. L. REV. 1623 (1981); Nlaraine R. Allen, Note, *A Remedy for the “DES Daughters”: Products Liability Without the Identification Requirement*, 42 U. PITT. L. REV. 669, 691 (1981); James A. Henderson, Jr., *Products Liability, DES Litigation: The Tidal Wave Approaches the Shore*, 3 CORP. L. REV. 143, 144 (1980); Naomi Sheiner, Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 968 n.21 (1978).

176. American Academy of Pediatrics, *supra* note 104, at 8.

that the effect of lead on IQ is linear and permanent,”¹⁷⁷ and also assuming “a specific economic value of increased IQs,” are astronomical.¹⁷⁸ One group of researchers estimated that the lifetime costs resulting from the number of children exposed to lead each year to be \$48 billion per annum.¹⁷⁹

Finally, the rhetoric and doomsday pronouncements from critics of these legal theories must be grounded in fact, and not in speculation. Contrary to the commentators’ dire predictions, the business environment as we know it has not ground to a halt as a result of any court determination on market share or risk contribution.¹⁸⁰ While critics claim that decisions such as *Thomas* will cause a sudden and dramatic decline in the number of enterprises willing to do business in states recognizing market share or risk contribution, those critics, including Gray and Faulk, have not produced any evidence that such decline has ever taken place.

CONCLUSION

To fully assess whether a court strikes an appropriate balance between competing interests in the course of defining the law, it is necessary to ascertain the degree to which the competing interests are fairly considered. In this instance, the *Thomas* court adhered to a time tested legal paradigm articulated over twenty years before and fairly considered the competing interests of the public, the hundreds of thousands of innocent victims, and the degree of culpable conduct involved in creating the risk of harm on the other:

177. Numerous studies have uncovered a consistent correlation between elevated blood lead levels and lower IQ. The Committee on Environmental Health recaps some of these studies:

Blood lead concentration is associated with lower IQ scores as IQ becomes testable reliably, which is at approximately five years of age. The strength of the association is similar from study to study; as blood lead concentrations increase by ten [micrograms per deciliter], the IQ at five years of age and later decreases two to three points. Canfield et al recently extended the relationship between blood lead concentration and IQ to blood lead concentrations less than ten [micrograms per deciliter]. They observed a decrease in IQ of more than seven points over the first ten [micrograms per deciliter] of lifetime average blood lead concentration. Bellinger and Needleman subsequently reported a similarly steep slope in a reanalysis of data from their study of children with blood lead concentrations similar to those in the Canfield et al study.

Id. at 6.

178. *Id.* at 8.

179. *Id.*

180. See, e.g., *Thomas*, 701 N.W.2d at 590-91 (Prosser, J., dissenting).

There is no dispute that Thomas is an innocent plaintiff who is probably not at fault and will be forced to bear a significant cost of his injuries if he is not allowed to sue the possibly negligent Pigment Manufacturers. Further given the disturbing numbers of victims of lead poisoning from ingesting lead paint, and given that white lead carbonate was the overwhelming pigment added to that paint, it is clear from the summary judgment record that we are not dealing with an isolated or unique set of circumstances. As far as the summary judgment record reveals, the problem of lead poisoning from white lead carbonate is real; it is widespread; and it is a public health catastrophe that is poised to linger for quite some time.

The main policy reasons identified by *Collins* warrant extension of the risk-contribution theory here.

First, the record makes clear that the Pigment manufacturers “contributed to the risk of injury to the public and, consequently, the risk of injury to individual plaintiffs such as” Thomas.

Many of the individual defendants or their predecessors-in-interest did more than simply contribute to a risk; they knew of the harm white lead carbonate pigments caused and continued production and promotion of the pigment notwithstanding that knowledge. Some manufacturers, paradoxically, even promoted their nonleaded based pigments as alternatives that were safe in that they did not pose the risk of lead poisoning. For those that did not have explicit knowledge of the harm they were engendering, given the growing medical literature in the early part of the century, Thomas’s historical experts, Markowitz and Rosner, submit that by the 1920s the entire industry knew or should have known of the dangers of its products and should have ceased producing the lead pigments, including white lead carbonate. In short, we agree with Thomas that the record easily establishes the Pigment Manufacturers’ culpability for, at a minimum, contribution to creating a risk of injury to the public.

Second, as compared to Thomas, the Pigment Manufacturers are in a better position to absorb the cost of the injury. They can insure themselves against liability, absorb the damage award, or pass the cost along to the consuming public as a cost of doing business. As we concluded in *Collins*, it is better to have the Pigment Manufacturers or consumers share the cost of the injury rather than place the burden on the innocent plaintiff.¹⁸¹

181. Thomas, 701 N.W.2d at 558.

This passage makes evident that the *Thomas* court strove to strike a balance between the competing interests only *after* a careful and exhaustive consideration of the factual record relevant to evaluating those competing interests. The *Thomas* court did not try to create a false sense of moral equivalency between the hundreds of thousands of innocent lead poisoned children and the culpable pigment manufacturers, all of whom created an unreasonable risk of harm. This reluctance by the majority stands in stark contrast to one of the dissents in the case, which betrays a desire to subordinate the interests of lead poisoned children to the interests of the pigment manufacturers who poisoned them.¹⁸²

A review of the often cited cases which have rejected the application of market share to lead poisoning cases demonstrates a similar bias in favor of the lead pigment manufacturers. For example, in *Santiago v. Sherwin Williams*, the trial court engaged in no meaningful discussion of the nature or scope of the public health catastrophe created by the use of white lead carbonate as a pigment in residential paints, nor did the court review the historical conduct of the pigment manufacturers.¹⁸³

The truly remarkable thing about the *Thomas* court's decision was that it resisted the inclination of other courts to ignore both the historical nature of the culpable conduct that created the risk of harm, as well as the scope of the harm actually created. Instead, by focusing on the true evidence in the voluminous record, the *Thomas* court was able to chart a course that remained true to the ideals of the risk contribution theory it had enunciated more than two decades before, and to the delicate balance that must be struck between the interest of the injured and the rights of the defendants.

182. "Today, the majority proclaims that if a plaintiff is sympathetic enough and the 'industry' of which a defendant was a part of is culpable enough, a plaintiff may dispense with proof of the third element and recover against a party even though it has not been shown that the party reasonably could have contributed in some way to the plaintiff's actual injury." *Id.* at 550-51 (Wilcox, J., dissenting).

183. 782 F.Supp. 186, 194 (D. Mass. 1992). The amazing degree to which this conclusion is at war with the historical facts is illustrated by the clear record set forth in *Federal Trade Commission v. National Lead*, 352 U.S. 419 (1957) and *Federal Trade Commission v. National Lead*, 227 F.2d 825 (7th Cir. 1955).