establish that the caps were manufactured by one of the defendants, the burden of proof as to causation would shift to all of the defendants. The industry-wide standard itself, therefore, became the cause of the plaintiff's injury. Since each industry member had adhered to the standard, according to *Hall*, each member had contributed to the plaintiff's injury.

This critique of *Sindell* was edited by DRI Acting Research Director Donald J. Hirsch, with editorial comments by Assistant Research Director Susan M. Danielski. It is based upon research memoranda by Kay Ann Hunt and Mary L. Schuette, DRI Student Research Assistants.

The *Sindell* court rejected the application of industry-wide liability by distinguishing this case from *Hall*. The court in *Hall* had cautioned that this theory of liability applied to industries composed of a small number of producers, such as the blasting cap industry within the United States, which was composed of six manufacturers. In contrast, there were at least 200 manufacturers of DES. Furthermore, there were no allegations, as in *Hall*, that DES producers had delegated some functions relating to safety to a trade association and, therefore, had jointly controlled the risk. Finally, since the drug industry is so closely regulated by the FDA, the court concluded it would be unfair to impose on a manufacturer liability for injuries resulting from the use of a drug which it did not supply, simply because it followed standards suggested or compelled by the government.

Market Share Liability

Having ruled out all three exceptions upon which the plaintiff based her cause of action, the majority admitted that, under traditional tort law, the plaintiff (being unable to identify the specific manufacturer of the DES used by her mother) would be "precluded from any recovery."

The court did not stop there, but went on to deal with this situation — one involving fungible goods which can harm consumers but cannot be traced to the specific producer — by fashioning an entirely new theory of liability, "market share liability." In the words of dissenting Justice Richardson, the majority adopted

> a wholly new theory which contains these ingredients: The plaintiffs were not alive at the time of the commission of the tortious acts. They sue generations later. They are permitted to receive substantial damages from multiple defendants without any proof that any defendant caused or even probably caused plaintiff's injuries. 607 P2d at 938.

No sound academic analysis justified this major innovation in strict tort liability. In a scant column and one-half, the court set forth its "forceful arguments in favor of holding that the plaintiff has a cause of action," which may be summarized as follows: In light of an increasingly complex industrialized society, it is virtually impossible to trace fungible goods harmful to consumers to a specific producer. Rather than adhering rigidly to prior doctrine the majority felt compelled to fashion a remedy to meet these changing needs by "some adaptation of the rules of causation and liability."

The only two justifications for so major a change involved the "deep pockets" of corporate defendants. The court's "most persuasive reason," based on *Summers*, was that "as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury." The second justification was the broader policy argument that defendants are better able to bear the cost of injury. Justice Richardson argued that a defendant's wealth is surely not a reliable indicator of fault and should play no conscious part in the legal analysis of the problem. In applying this new theory of market share liability, the court concluded that it would be reasonable

> to measure the likelihood that any of the defendants supplied the product which allegedly injured the plaintiff by the percentage which the DES sold by each of them for the purpose of preventing miscarriages bears to the entire production of the drug sold by all for that purpose. 607 P2d at 937

Market share liability imposes only several liability upon the defendants. Each defendant will be held liable for a percentage of the judgment, as determined by that defendant's market share, unless a particular defendant can demonstrate that it could not have made the DES which injured the plaintiff. The plaintiff has the burden of joining in one action the manufacturers of a substantial market share of DES. Once the plaintiff has met her burden, the defendants may cross-complain against other manufacturers not joined in the action. Unfortunately, this is of little consolation. As one commentator has stated: "Since no other state has recognized such a theory, if a defendant in California cannot secure jurisdiction over another manufacturer of DES in that state, there will be no basis for contribution or

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