

indemnity against those other producers of DES." Kroll, Intra-Industry Joint Liability, Ins LJ 185, 194 (Apr 1980).

Basic Unfairness Of Theory

Justice Richardson's dissenting opinion further highlighted some of the problems inherent in the *Sindell* majority opinion. He viewed the market share theory as basically unfair to some defendants who may have had nothing whatsoever to do with causing an alleged injury. Not only did the majority's theory shift the burden of proof to the defendant, but it effectively guaranteed that the plaintiffs would prevail on the causation issue because the defendants are no more capable of disproving causation than plaintiffs are of proving it. Furthermore, the plaintiff can recover from a small number of defendants — each of whom individually may account for only a small share of the market — so long as the aggregate business of those defendants is substantial. According to the dissent's analysis of this point:

In other words, a particular defendant may be held proportionately liable even though mathematically it is much more likely than not that it played no role whatever in causing plaintiff's injuries. 607 P2d at 939

The majority give no guidance as to what constitutes a "substantial" share of the relevant market, although it indicates that the percentage need not be as great as 75 per cent.

The dissent criticized the violence done to traditional tort principles by the drastic expansion of liability:

The majority now expressly abandons the ... traditional requirement of some causal connection between defendants' act and plaintiffs' injury in the creation of its new modified industry-wide tort. Conceptually, the doctrine of absolute liability which heretofore in negligence law has substituted only for the requirement of a breach of defendant's duty of care, under the majority's hand now subsumes the additional necessity of a causal relationship. 607 P2d at 939 Under the majority's new theory, a defendant may be held liable if he happens to be involved in a similar business and if causation is possible, even though remote.

Furthermore, under market share liability, an unwarranted preference is created for a particular class of plaintiffs. In the ordinary tort case the

defendant may be either insolvent or not amenable to process. Under the majority's theory, plaintiffs who wholly fail to prove any causation are rewarded by being offered a wider selection of defendants and a greater opportunity for recovery. Not only are the plaintiffs relieved of matching the conduct of a particular defendant to their injury, but the majority "sprinkles the rain of liability upon all the joined defendants." 607 P2d at 939 Additionally, market share liability will fall disproportionately on those defendants amenable to suit in California.

Finally, the dissent recognized the injury threatened to the public's interest in continued basic medical research. The opinion noted that Comment k to §402A "implicitly recognizes the social policy behind the development of new pharmaceutical preparations." 607 P2d at 941 Justice Richardson asked:

Must a drug manufacturer to escape this blanket liability wait for a generation of testing before it may disseminate drugs? If a drug has beneficial purposes for the majority of users but harmful side-effects are later revealed for a small fraction

The court has revised the requirements of a products liability action, leaving practical questions unanswered.

of consumers will the manufacturer be absolutely liable? If adverse medical consequences wholly unknown to the most careful and meticulous of present scientists, surface in two or three generations, will similar liability be imposed? 607 P2d at 942

Justice Richardson concluded that the majority's decision effectively makes the drug industry an insurer of all injuries attributable to drugs of unprovable origin.

Economic and Practical Effects

Serious economic effects can also be anticipated. When a manufacturer prices a product, it may now have to consider the liability it may incur for a defective product manufactured by another. Insurers of product manufacturers will be faced with answering for the tortious conduct of com-