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## MARKET SHARE — A TALE OF TWO CENTURIES

Aaron D. Twerski\*

In 1980 market share descended like a bombshell on the American legal scene in response to a problem of considerable magnitude. The California Supreme Court in *Sindell v. Abbott Laboratories*<sup>1</sup> faced the specter of dismissing claims against the manufacturers of DES even though they were negligent in the manufacturing and marketing of a drug that caused cancer in the daughters of the users.<sup>2</sup> The crux of the problem was that several hundred manufacturers had produced and marketed the drug in the early forties. Some three decades had passed from the time that the drug was first taken until the time that the cancers developed in the children of the DES takers. The passage of time made it virtually impossible to identify which manufacturer was responsible for any given injury. It was clear that there was a significant amount of fault based injury caused by DES in the world at large. And there was no way in which any plaintiff could point her finger at any given defendant and say “you are the cause of my injury.”

It is not my function in this setting to express my opinion as to whether holding a defendant liable to the amount of its market share is an appropriate response to the problem. Courts and commentators have spoken to both sides of that issue.<sup>3</sup> Instead,

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<sup>1</sup> 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980).

<sup>2</sup> In *Sindell*, there was no factual finding of negligent testing and marketing of DES. The defendant demurred to the complaint on the grounds that plaintiffs could not identify which among the eleven named defendants had caused her harm. For a good description of the evidentiary base which supports a finding of negligent testing and marketing of DES, see *Bichler v. Eli Lilly & Co.*, 79 A.D.2d 317, 322, 333, 436 N.Y.S.2d 625, 628-29, 634-35 (1st Dep't 1981), *aff'd*, 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982).

<sup>3</sup> Several courts have directly adopted *Sindell* or some variation thereof. In addition to *Sindell*, see, e.g., *McCormack v. Abbott Laboratories*, 617 F. Supp. 1521 (D. Mass. 1985); *McElhaney v. Eli Lilly & Co.*, 564 F. Supp. 265 (D.S.D. 1983), *aff'd on other grounds*, 739 F.2d 340 (8th Cir. 1984); *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353 (E.D. Tex. 1981), *rev'd in part*, 681 F.2d 334 (5th Cir. 1982); *Smith v. Eli Lilly & Co.*, 173 Ill. App. 3d 1, 527 N.E.2d 333 (1988); *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 689 P.2d 368 (1984); *Collins v. Eli Lilly Co.*, 116 Wis. 2d 166, 342 N.W.2d 37,

I should like to address the tensions which have tugged at the courts in seeking to fashion the market share remedy. As I see it, the market share saga up until the recent decision of the New York Court of Appeals in *Hymowitz v. Eli Lilly & Co.*<sup>4</sup> demonstrates that the courts throughout the country have had their feet firmly planted in two different centuries — one foot in the nineteenth century and the other in the twenty-first century. *Hymowitz* is the first case to resolve the tensions with clarity and without paying senseless obeisance to tradition. It is the first market share case that reads well.

## I. EXPOSING THE TENSIONS

### A. *The Size of the Market*

*Sindell*, the first of the market share decisions, simply failed to address how the market would be defined. If a defendant was to be held liable for its percentage of the market there was a need to know whether the market was the city of Los Angeles, the state of California, or the United States of America. After years of agonizing, California finally decided that the percentage is to be calculated on the basis of sales in the national market.<sup>5</sup>

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*cert. denied sub nom. E.R. Squibb & Sons, Inc. v. Collins*, 469 U.S. 826 (1984). For favorable commentary, see Note, *Market Share Liability: A New Method of Recovery for D.E.S. Litigants*, 30 CATH. U.L. REV. 551 (1981); Note, *Market Share Liability: An Answer to the DES Causation Problem*, 94 HARV. L. REV. 668 (1981).

A substantial number of courts have, however, rejected the market share approach even in the DES cases. See, e.g., *Mizelli v. Eli Lilly & Co.*, 526 F. Supp. 589 (D.S.C. 1981); *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004 (D.S.C. 1981); *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67 (Iowa 1986); *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241 (Mo. 1984) (en banc). The attempt to apply market share to the asbestos litigation has been met with hostility. See *Celotex Corp. v. Copeland*, 471 So. 2d 533 (Fla. 1985), for a full listing of the cases. See also *Bateman v. Johns-Manville Sales Corp.*, 781 F.2d 1132 (5th Cir. 1986) (court rejected market share liability theory in asbestos case). For negative commentary on market share, see Fischer, *Products Liability — An Analysis of Market Share Liability*, 34 VAND. L. REV. 1623 (1981); Note, *Market Share Liability — The California Roulette of Causation Eliminating the Identification Requirement*, 11 SETON HALL L. REV. 610 (1981).

<sup>4</sup> 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941, *cert. denied sub nom. Rexall Drug Co. v. Tigue*, 110 S. Ct. 350 (1989).

<sup>5</sup> Technically the decision to utilize a national market in California appears to have been agreed upon by stipulation of the parties. Reference to the stipulation is found in *In re DES Litigation*, No. 830-109, General Order No. 12 (Aug. 16, 1985), at 2. The inference in *Hymowitz* that this was decided by the California courts appears to be erroneous.

*Hymowitz* has also wisely opted for the national market.<sup>6</sup>

Why has it taken so long for this issue to be resolved? More important, why have some courts still not seen the light? In *Martin v. Abbott Laboratories*,<sup>7</sup> the Washington Supreme Court opted for the narrowest definable market. Very simply, according to the Washington court, if the DES was purchased from a particular pharmacy (e.g., Joe's Pharmacy), and that pharmacy had purchased its DES from five manufacturers, then the market share would be calculated based on the percentage of sales to a single pharmacy. Why would any rational court choose the Joe's Pharmacy market over a national market? It is obvious that such a narrow definition of the market does violence to the fundamental market share liability theory. A defendant who pays a high percentage on a narrow market today on the happenstance that there is sufficient evidence to link it to a particular pharmacy will be taxed again in a later case where such a narrow definition of the market is impossible.<sup>8</sup> Market share requires that markets be fairly defined for all cases if the theory is to meet even a pretense of even handedness.

That the courts have had difficulty in resolving the market size issue is explained by the two-century tug that I made mention of earlier. Traditionally, causation required the plaintiff to identify the defendant that was the cause of the plaintiff's particular harm. Market share was a radical departure from that traditional norm. Under the new approach, causation would be decided by how much harm was caused in the aggregate in the world at large by three hundred manufacturers. Targeting several manufacturers out of three hundred for liability was most uncomfortable. The chance that the real culprit was made to pay was remote. If the pool was limited to five defendants who sold the drug to a particular pharmacy, plaintiffs were no longer suing the immediate world. The case appears more circumscribed

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<sup>6</sup> *Hymowitz*, 73 N.Y.2d at 511, 539 N.E.2d at 1077, 541 N.Y.S.2d at 949.

<sup>7</sup> 192 Wash. 2d 581, 605, 689 P.2d 368, 383 (1984). *Martin* was somewhat ambiguous as to how the market was to be determined. The ambiguity was cleared up in *George v. Parke-Davis*, 107 Wash. 2d 584, 592, 733 P.2d 507, 512 (1987), where the court held that "the relevant market for determining liability be as narrow as possible." In *Smith v. Eli Lilly & Co.*, 173 Ill. App. 3d 1, 527 N.E.2d 333 (1988), the court appears to also have adopted a narrow geographic market test.

<sup>8</sup> Fischer, *supra* note 3, at 1643-44.

and more traditional.<sup>9</sup> Of course, on reflection, it makes little difference if four non-causal defendants out of a pool of five are made to pay or two hundred ninety-nine out of a pool of three hundred. Logic did not easily emerge the victor over tradition.

### B. *Ability of Defendant to Prove Itself Out of the Case*

Closely related to the market size question is whether a defendant can free itself from paying its market share if it can establish that it was not responsible for the harm to the particular plaintiff. Until *Hymowitz*, the courts have answered the question in the affirmative.<sup>10</sup> With all due respect to the courts, I believe that this position is arrant nonsense. Market share posits the view that causation will be viewed writ large over a broad market. Of what importance is it that a defendant establishes that it did not sell a particular pill to a particular patient? Not only is it irrelevant to market share theory, it cuts against the fair administration of it. A defendant who exits a particular case because by chance it can establish that it did not sell to a particular pharmacy, dumps its percentage of the harm upon other defendants who cannot prove the negative. Those defendants end up paying a disproportionate share of the costs of DES harm.<sup>11</sup> Furthermore, the costs of litigating individual causation are very high. Defendants who have the defense available to them, expend large sums of money for the detective work necessary to establish the defense. And courts must decide whether

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<sup>9</sup> As the pool of defendants becomes smaller, the analogy to more established and traditional case law becomes closer. It will be recalled that the courts have refused to apply alternative liability based on *Summer v. Tice*, 33 Cal. 2d 80, 189 P.2d 1 (1948), to resolve the DES identification problem because the number of manufacturers who produced DES was so large that the chance that a particular producer caused the injury at hand was remote. See *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 603, 607 P.2d 924, 931, 163 Cal. Rptr. 132, 139, cert. denied, 449 U.S. 912 (1980); *Hymowitz*, 73 N.Y.2d at 506, 539 N.E.2d at 1074, 541 N.Y.S.2d at 946. Courts have, in special circumstances, been willing to overcome the defendant-identification issues. In all such cases there were a limited number of defendants. See, e.g., *Dement v. Olin-Mathieson Chem. Corp.*, 282 F.2d 76 (5th Cir. 1960); *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687 (1944); *Nichols v. Nold*, 174 Kan. 613, 258 P.2d 317 (1953); *Loch v. Confair*, 372 Pa. 212, 93 A.2d 451 (1953).

<sup>10</sup> See, e.g., *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980); *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 689 P.2d 368 (1984); *Collins v. Eli Lilly Co.*, 116 Wis. 2d 166, 342 N.W.2d 37, cert. denied sub nom. *E.R. Squibb & Sons v. Collins*, 469 U.S. 826 (1984).

<sup>11</sup> Fischer, *supra* note 3, at 1644.

they have met their burden of establishing no causation. And all this for what?

Ultimately, the court's fumbblings of this issue is explainable only because it made them feel better that in they were paying their dues to the "nineteenth century causation club." It is as if they were saying "Now we really aren't that radical after all. If you can prove that you did not cause harm to this particular plaintiff, we will let you walk." Old doctrine really does die hard. That *Hymowitz* has refused to play this charade is to its credit. It has honestly faced the fact that market share cannot be reconciled with traditional causation theory.

### C. *Joint and Several Liability*

Yet a third issue gives evidence of the two-century tug. Courts have been forced to struggle with the relationship between market share liability and the common law joint-tortfeasor doctrine. What is to be done if after all the allocation of market share is done, only 60% of the national market can be accounted for? Who bears the loss of the missing 40% of the market? The missing percentage may be explained by defendants who are insolvent and by shares of the market that can simply not be accounted for as a result of proof problems.<sup>12</sup> Plaintiffs contend that classic joint tortfeasor rules (or some variant thereof) should govern. Defendants argue that market share and the joint-tortfeasor doctrine do not fit together.

I have yet to hear a plausible argument for joint tortfeasor liability in the market share setting. The classic argument supporting joint tortfeasor liability is that each tortfeasor is the proximate cause of the entirety of plaintiff's harm.<sup>13</sup> Given an innocent plaintiff and a defendant who was the cause of the plaintiff's entire harm, it is argued that the defendant should not be allowed to escape liability merely because another

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<sup>12</sup> See Rheingold, *The Hymowitz Decision — Practical Aspects of New York DES Litigation*, 55 BROOKLYN L. REV. 883, 893-95 (1989).

<sup>13</sup> For a spirited defense of the common law joint tortfeasor doctrine emphasizing the point made in the text, see Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. DAVIS L. REV. 1141 (1988). This author responded in Twerski, *The Joint Tortfeasor Legislative Revolt: A Rational Response to the Critics*, 22 U.C. DAVIS L. REV. 1125 (1989).

tortfeasor turns out to be insolvent.<sup>14</sup> In the case of market share liability that argument simply does not wash. A market share defendant is not the cause of the plaintiff's entire harm. Indeed, the defendant is most often not the cause of any harm to the individual plaintiff. The only grounds for holding the defendant liable is that it contributed to a certain percentage of harm to the entire world and should pay its fair share of the damages in each individual case. No defendant bears any legal relationship to any other defendant in the case. All of the courts have found that there is no factual basis to support a finding of a common law conspiratorial tort. By what act of legerdemain can one defendant be held for the damage of another?

Once again the difficulties that the courts have faced with this issue stem from the attempt to "traditionalize" market share liability and make it appear as if it were a slight variation on the theme of classic liability. The protestations of the California Supreme Court in *Brown v. Superior Court*<sup>15</sup> notwithstanding, it was quite clear that *Sindell* did contemplate joint tortfeasor liability.<sup>16</sup> *Brown* spelled an outright retreat from the untenable position of *Sindell*. The *Hymowitz* court has correctly

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<sup>14</sup> See Wade & Smith, *Fairness: A Comparative Analysis of the Indiana and Uniform Comparative Fault Acts*, 17 IND. L. REV. 969, 963-76 (1984).

<sup>15</sup> 44 Cal. 3d 1049, 1072-76, 751 P.2d 470, 485-87, 245 Cal. Rptr. 412, 426-28 (1988).

<sup>16</sup> The argument of the *Brown* court that *Sindell* did not address the joint-tortfeasor issue rings hollow. The contention of the plaintiff that the requirement of *Sindell* that a "substantial share" of the market is required as a predicate to market share is explainable only by the imposition of joint-tortfeasor liability is very strong. The presence of a "substantial share" of the market makes it less onerous on each defendant who will be required to pay for absent market shares. The court's response to this argument was that a substantial share was mandated by *Sindell* to diminish the injustice of shifting the burden to defendant to prove that they could not have made the substance which injured the plaintiff. Though *Sindell* did offer the rationale it makes absolutely no sense whatsoever. Of what significance is it to a 10% market share defendant that here is another 50% of the market in the case as defendants? Why does the presence of additional defendants make it less onerous on the 10% than it would be if the other defendants were not named?

The *Brown* court also rejected the plaintiff's argument that by specifically providing for cross complaints against other manufacturers the court sought to assure that joint-tortfeasors have a mechanism available to recover from other defendants if they bore a disproportionate share of liability. The *Brown* court responded by suggesting several other reasons for providing a procedure for impleading other defendants. The reasons proffered by the court are strained if not simply implausible.

The court would have been far better off if had it said that in *Sindell* it had not fully thought through the implications of combining market share with joint-tortfeasor liability and that on further reflection they do not mesh well together.

followed suit. There is simply no reason why the risk of insolvency should fall on defendants, unrelated to each other in no way other than that they are parties named in the same caption of a law suit, rather than on plaintiffs. Both plaintiffs and defendants are legally strangers to the insolvent defendants. Absent traditional causation and absent any legal relationship between defendants, there is no rationale which can support the assessment of full or inflated damages against any market share defendant.<sup>17</sup>

## II. THE FRACTIONALIZATION OF THE LAW OF TORTS

The question that is uppermost on the minds of the practicing bar is what is the long-term effect of *Hymowitz*? How far can it be extended? My own sense is that *Hymowitz* will be restricted to its facts. A more interesting question is whether the courts will continue to fractionalize the law of torts.

### A. *Whereto Market Share*

It is not likely that the market share theory will spread like wildfire to free plaintiffs from having to meet their traditional burden of identifying the guilty defendant in product liability litigation. The case law throughout the country demonstrates that the courts have been unwilling to push market share beyond the very special facts of the DES litigation.<sup>18</sup> *Hymowitz* made it unmistakably clear that the New York court has no intention of expanding the scope of market share. The court said:

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<sup>17</sup> It should be noted that the *Hymowitz* decision not only rejected joint-tortfeasor liability but also rejected the concept of "grossing-up," by which each defendant's several liability would be increased proportionally so that plaintiff would recover 100% of her damages. *Hymowitz*, 73 N.Y.2d at 513, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950. The court earlier had described the complex procedure adopted by the court in *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 689 P.2d 368 (1984), and *George v. Parke-Davis*, 107 Wash. 2d 584, 733 P.2d 507 (1987), which provides that defendants who are not able to prove their market share have their share of the market inflated so that plaintiffs receive a 100% recovery.

<sup>18</sup> It has been disapproved in asbestos litigation, see *Thompson v. Johns-Manville Sales Corp.*, 714 F.2d 581 (5th Cir. 1983), *cert. denied*, 465 U.S. 1102 (1984); *Hannon v. Waterman S.S. Corp.*, 567 F. Supp. 90 (E.D. La. 1983); *In re Related Asbestos Cases*, 543 F. Supp. 1142 (N.D. Cal. 1982); *Mullen v. Armstrong World Indus., Inc.*, 200 Cal. App. 3d 250, 246 Cal. Rptr. 32 (1988); *Celotex v. Copeland*, 471 So. 2d 533 (Fla. 1985); and in DPT cases; *Shackil v. Lederle Laboratories*, 116 N.J. 155, 561 A.2d 511 (1989); *Senn v. Merrill-Dow Pharmaceuticals*, 305 Or. 256, 751 P.2d 215 (1988).



"We stress . . . that the DES situation is a *singular case*, with manufacturers acting in a parallel manner to produce an *identical, generically marketed product, which causes injury many years later*, and which has evoked a legislative response reviving previously barred actions."<sup>19</sup> It is thus highly unlikely that market share will be extended to non-generic products,<sup>20</sup> to products that do not have latency periods,<sup>21</sup> or to situations where plaintiffs have simply failed to secure the evidence which would have permitted them to identify the defendant.<sup>22</sup> That the *Hymowitz* court took the trouble of noting that DES was the subject of direct legislative action is of considerable interest. It is the kind of language which a court inserts to provide future litigants with an argument that DES was *sui generis* and cannot be used to expand the common law in the usual incremental fashion.

### B. *Proportional Liability*

For the present, it is clear that market share is a theory of rather limited utility. What remains to be decided is how far courts will go in proportionalizing liability. Market share is not an isolated phenomenon in the law of torts. It is part of a general tendency to deal with difficult proof problems by assigning a percentage to the issue in question and calculating damages according to the percentage. Admittedly, the kinds of cases to which proportionalization has taken place are not of one cloth. The policy ramifications differ substantially depending on the issue. Nonetheless, the fractionalization of tort liability can no longer be viewed as a series of discrete phenomena. In addition to market share, the following areas have either been proportionalized or are considered to be prime candidates for proportionalization.

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<sup>19</sup> *Hymowitz*, 73 N.Y.2d at 508, 539 N.E.2d at 1075, 541 N.Y.S.2d at 947 (emphasis added).

<sup>20</sup> See asbestos cases *et al.*, *supra* note 18, and *Sheffield v. Eli Lilly & Co.*, 144 Cal. App. 3d 583, 192 Cal. Rptr. 870 (1983).

<sup>21</sup> See *Sheffield*, 144 Cal. App. 3d at 594, 192 Cal. Rptr. at 877, setting forth that market-share should not be applied when "the delay in discovering the alleged causation was in no way related to the nature of the defective product or any other act or omission of the unknown tortfeasor."

<sup>22</sup> *Long v. Krueger, Inc.*, 686 F. Supp. 514 (E.D. Pa. 1988).

## 1. Comparative Fault

At last count, some 43 states have adopted some form of comparative fault.<sup>23</sup> In many jurisdictions, reasonable assumption of the risk (a non-fault concept) is treated as a form of comparative fault or comparative responsibility.<sup>24</sup> A strong majority applies comparative fault or comparative responsibility concepts to strict products liability cases<sup>25</sup> even though they freely admit that comparing the faulty conduct of the plaintiff with the no-fault defect of the manufacturer is conceptually flawed.<sup>26</sup>

## 2. Joint Tortfeasor Liability

A natural outgrowth of the comparative fault phenomenon was the application of a fault percentage comparison among defendants in working out their relative liabilities in contribution actions.<sup>27</sup> A large number of states' legislatures have now acted to limit the liability of joint tortfeasors to the fault percentage allocated to each individual defendant.<sup>28</sup> In some states, the abo-

<sup>23</sup> See generally V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 3.1-3.5 (2d ed. 1986); H. WOODS, *COMPARATIVE FAULT* § 1.11, 4.1-4.13 (2d ed. 1987).

<sup>24</sup> See, e.g., *Blackburn v. Dorta*, 348 So. 2d 287 (Fla. 1977); *W.M. Bashlin Co. v. Smith*, 277 Ark. 406, 643 S.W.2d 526 (1982); *Springrose v. Willmore*, 292 Minn. 23, 192 N.W.2d 826 (1971); *Lyons v. Redding Constr. Co.*, 83 Wash. 2d 86; 515 P.2d 821 (1973).

<sup>25</sup> See, e.g., *Murray v. Fairbanks Morse*, 610 F.2d 149 (1979); *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978). See also V. SCHWARTZ, *supra* note 23, § 12.2, listing thirty states that apply comparative fault to strict products liability cases.

<sup>26</sup> Thode, *Comparisons in Products Liability*, 1981 UTAH L. REV. 3; Twerski, *The Use and Abuse of Comparative Negligence in Products Liability*, 10 IND. L. REV. 797 (1977).

<sup>27</sup> The leading case is *Dole v. Dow Chemical Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). Contribution according to fault percentage is provided for in the Uniform Comparative Fault Act, section 4 (1979), 12 U.L.A. 39, 49 (Supp. 1989), and by the statutes of numerous jurisdictions. See, e.g., ARIZ. REV. STAT. ANN. § 12-2502 (Supp. 1989); MICH. COMP. LAWS § 600.2925b (1986); N.Y. CIV. PRAC. L. & R. § 1502 (McKinney 1976); OKLA. STAT. ANN. tit. 12, § 832 (West 1988); OR. REV. STAT. § 18.445 (1989); PA. STAT. ANN. tit. 17, § 2102 (Purdon 1962).

<sup>28</sup> Of 34 states that have somewhat modified the common-law joint tortfeasor doctrine, ten have abolished joint tortfeasor liability for both economic and noneconomic losses. See ALASKA STAT. § 09.17.080(d) (1989); ARIZ. REV. STAT. ANN. § 12-2506 (Supp. 1988); COLO. REV. STAT. § 13-21-111.5 (1987); IDAHO CODE § 6-803(3) (Supp. 1989); IND. CODE ANN. § 34-4-33-5 (West Supp. 1988); KAN. STAT. ANN. § 60-258a(d) (Supp. 1987); N.D. CENT. CODE §§ 32-03.2-02-03 (Supp. 1989); UTAH CODE ANN. § 78-27-40 (1987); VT. STAT. ANN. tit. 12, § 1036 (Supp. 1988); WYO. STAT. § 1-1-109 (1988). Two abolition states allow joint liability if the fault of the tortfeasor exceeds 50%. See IOWA CODE ANN. § 668.4 (West 1987); MONT. CODE ANN. § 27-1-703(2) (1989). One other state provides that

lition of the joint tortfeasor doctrine has been limited to non-economic loss,<sup>29</sup> and in others the abolition of the doctrine takes place only when the defendant's fault is below a certain percentage of total fault.<sup>30</sup> Nonetheless, the availability of easy percentage apportionment has had the effect of sharply limiting the workings of the classic common law joint tortfeasor doctrine.

### 3. Seat Belt Cases

Many courts have applied comparative fault or apportionment principles to reduce the verdicts of plaintiffs who have suf-

if the fault of any defendant is less than 50%, that defendant cannot be liable for more than twice the fault allocated to her. S.D. CODIFIED LAWS ANN. § 15-8-15.1 (Supp. 1989). For a comprehensive review of the statutes enacted as of the date of this Article, see Pressler & Schieffer, *Joint and Several Liability: A Case for Reform*, 64 DEN. U.L. REV. 651, 656-59 (1988).

<sup>29</sup> A good number of states have only eliminated the joint tortfeasor doctrine for noneconomic loss (i.e., pain and suffering). See, e.g., CAL. CIV. CODE §§ 1431 to 1431.5 (West Supp. 1989) (added by Proposition 51, approved by electorate on June 3, 1986); FLA. STAT. ANN. § 768.81(3) (West 1989); ILL. REV. STAT. ch. 110, § 2-1117 (1989) (defendant over 25% at fault is jointly and severally liable); N.Y. CIV. PRAC. L. & R. 1600 (McKinney 1986) (defendant over 50% at fault jointly and severally liable); OHIO REV. CODE ANN. § 2315.19 (Anderson 1987) (applies only when plaintiff is at fault).

A recently enacted New Jersey statute sets forth an interesting compromise. The statute states:

Except as provided in subsection d. of this section, the party so recovering may recover as follows:

- a. The full amount of the damages from any party determined by the trier of fact to be 60% or more responsible for the total damages.
- b. The full amount of economic damages plus the percentage of noneconomic damages directly attributable to that party's negligence from any party determined by the trier of fact to be more than 20% but less than 60% responsible for the total damages.
- c. Only that percentage of the damages directly attributable to that party's negligence from any party determined by the trier of fact to be 20% or less responsible for the total damages.
- d. With regard to environmental tort actions, the party so recovering may recover the full amount of the damage award from any party determined to be liable.
- e. Any party who is compelled to pay more than his percentage share may seek contribution from the other joint tortfeasors.

N.J. STAT. ANN. § 2A:15-5.3 (West 1989) (amended 1987).

Several states have followed the Uniform Comparative Fault Act and have enacted reallocation statutes which reallocate uncollectible shares among all the responsible parties, including the plaintiff if the plaintiff were negligent. See, e.g., MINN. STAT. ANN. § 604.02 Subd. 1 (West Supp. 1989); MO. ANN. STAT. §§ 537.067, 538.230, 538.300 (Vernon 1988 & Supp. 1989). Michigan applies its reallocation statute only if the plaintiff was contributorily negligent. See MICH. COMP. LAWS ANN. § 600.6304 (West 1987).

<sup>30</sup> See statutes cited in notes 28-29 *supra*.

ferred greater injury because they have failed to wear their seat belts.<sup>31</sup> There has been considerable confusion as to whether the reduction is to be accomplished based on 'causation principles'<sup>32</sup> or is to be reckoned using a more general comparative fault approach.<sup>33</sup> Courts that have not insisted on a rigid separation of first and second collision injuries as a necessary prerequisite to assessing plaintiff's fault seem to have created a unitary "cause-fault" reduction which blurs the discrete issues.<sup>34</sup>

#### 4. Proximate Cause

Under classic tort doctrine whether a defendant is or is not the proximate cause of a plaintiff's harm is an all or nothing question.<sup>35</sup> The Uniform Comparative Fault Act, however, suggests that in comparing the fault of plaintiff and defendant, that proximate cause may legitimately factor into the percentage of fault allocated to each party.<sup>36</sup> It takes no great leap in imagination to apply this reasoning to cases where plaintiff fault is not involved. Thus, the Model Uniform Product Liability Act provides that where a non-claimant misused a product in a manner in which the product seller could not anticipate the plaintiff's recovery against the manufacturer of the defective product be reduced to the extent that the misuse was the cause of the

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<sup>31</sup> See, e.g., *Insurance Co. of North Am. v. Pasakarnis*, 451 So. 2d 477 (Fla. 1984); *Lowe v. Estate Motors, Ltd.*, 428 Mich. 439, 410 N.W.2d 706, *reh'g denied*, 429 Mich. 1207 (1987); *Waterson v. General Motors Corp.*, 111 N.J. 238, 544 A.2d 357 (1988); *Spier v. Barker*, 35 N.Y.2d 444, 323 N.E.2d 164, 363 N.Y.S.2d 916 (1974); *Foley v. City of West Allis*, 113 Wis. 2d 475, 335 N.W.2d 824 (1983).

<sup>32</sup> See, e.g., *Waterson v. General Motors Corp.*, 111 N.J. 238, 544 A.2d 357 (1988), and *Spier v. Barker*, 35 N.Y.2d 444, 323 N.E.2d 164, 363 N.Y.S.2d 916 (1974). For an excellent discussion of the differing approaches to seat-belt damages reduction, see Note, *A Compromise Between Mitigation and Comparative Fault?: A Critical Assessment of the Seat Belt Controversy and a Proposal for Reform*, 14 *HOFSTRA L. REV.* 319 (1986).

<sup>33</sup> See, e.g., *Lowe v. Estate Motors, Ltd.*, 428 Mich. 439, 410 N.W.2d 706, *reh'g denied*, 429 Mich. 1207 (1987); *Foley v. City of West Allis*, 113 Wis. 2d 475, 335 N.W.2d 824 (1983).

<sup>34</sup> See, e.g., *Lowe v. Estate Motors, Ltd.*, 428 Mich. 439, 410 N.W.2d 706, *reh'g denied*, 429 Mich. 1207 (1987); *Foley v. City of West Allis*, 113 Wis. 2d 475, 335 N.W.2d 824 (1983).

<sup>35</sup> See generally W. PROSSER & W. KEETON, *PROSSER & KEETON ON TORTS* § 42 (5th ed. 1984). But see Twerski, *The Many Faces of Misuse: An Inquiry Into the Emerging Doctrine of Comparative Causation*, 29 *MERCER L. REV.* 403 (1978).

<sup>36</sup> UNIF. COMPARATIVE FAULT ACT § 1(b), 12 U.L.A. 39, 41-43 (Supp. 1989) (and accompanying comment).

harm.<sup>37</sup>

## 5. Protecting the Chance Interest

The prototype for this category is *Herskovits v. Group Health Cooperative of Puget Sound*.<sup>38</sup> In that case, plaintiff's decedent had consulted defendant for a bad cough. The doctor negligently failed to diagnose lung cancer. Approximately six months later, the cancer was properly diagnosed. Expert testimony established that had the plaintiff been timely diagnosed when his cancer was at Stage 1, his chances for five-year survival would have been 39%. His chances for survival at Stage 2 when the cancer was finally diagnosed were only 25%. The defendant's negligence had effected a 14% reduction of plaintiff's chance for survival. Scholars have argued that damages should be calculated on the basis of the percentage reduction caused by the defendant's negligence.<sup>39</sup> Again, it takes no imagination to recognize that such "chance apportionment" could be put into place whenever causation becomes a thorny issue. In some cases, such proportionalization would be more favorable to plaintiffs than would be the case if classic causation concepts governed and in others defendants would be favored.<sup>40</sup> In any event, proportionalizing cause will dramatically alter the legal landscape in tort litigation.

## 6. The Indeterminate Plaintiff

Yet another possible occasion for proportionalizing cause was raised by Judge Jack Weinstein in the famous *Agent Orange*

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<sup>37</sup> MODEL UNIF. PRODUCT LIABILITY ACT § 112(c) and (d), 44 Fed. Reg. 62,714, 62,740 (1979).

<sup>38</sup> 99 Wash. 2d 609, 664 P.2d 474 (1983).

<sup>39</sup> King, *Causation, Valuation, and Chance in Personal Injury Torts Involving Pre-existing Conditions and Future Consequences*, 90 YALE L.J. 1353 (1981); Robinson, *Multiple Causation in Tort Law: Reflections on the DES Cases*, 68 VA. L. REV. 713 (1982). The approaches of King and Robinson are not identical. King would hold defendants liable for the present value of the increased risk that the victim bears because of exposure. Robinson would allow recovery based on risk contribution or probability of causation.

<sup>40</sup> Whenever plaintiffs are unable to establish liability by a more probable than not standard, they would benefit from a propositional causation rule. If they can meet the traditional standard the adoption of proportional causation will reduce recovery from what it is under present law.

litigation.<sup>41</sup> In that case, the court noted that defendant might have been able to establish that the use of Agent Orange in Vietnam was responsible for an increased number of cancers to veterans over and above that which could be expected from a random group of persons not exposed to the toxic agent. However, no individual plaintiff might be able to prove that his cancer was a result of the exposure to the Agent Orange rather than a random cancer. If we assume that plaintiffs can establish a higher incidence of cancer for those exposed to the cancer-causing toxic agent, some form of proportional recovery might be fashioned to reflect the harm actually caused by the defendant.<sup>42</sup> The indeterminate plaintiff cases are, of course, a mirror image of the indeterminate defendant cases which brought about the market share theory. If defendants are to be charged for the harm which they brought about to the world at large even though cause cannot be established for any individual injury, there is no good reason that the selfsame logic should not be utilized to force defendants to pay when proof problems do not permit an individual plaintiff to demonstrate that his particular harm was caused by the defendant's toxic agent. If cause to the world becomes the basis for proportional recovery, in one case there is a strong argument for proportional recovery in the other.

Ultimately, I have serious doubts that the move to proportionalization is wise.<sup>43</sup> That does not mean that I believe that defendants who have brought about injury in situations where classical cause cannot be established should walk away scot free. Alternative compensation systems will have to be developed to deal with the kinds of tragedies which they have brought about. The attempts to proportionalize have not been effective. Some nine years after *Sindell*, we are still bogged down in complex and costly litigation. Injured plaintiffs will see too little too late. Legal costs will devour a significant portion of the final recoveries. Ultimately, market share has failed because it has attempted to graft a novel theory of recovery against a matrix of tort concepts which do not easily mesh with it.

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<sup>41</sup> *In re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740, 833-42 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert denied*, 484 U.S. 1004 (1988).

<sup>42</sup> *Id.* at 837-39.

<sup>43</sup> For a thorough discussion of the practical and jurisprudential difficulties caused by proportionalization, see Bush, *Between Two Worlds: The Shift from Individual to Group Responsibility in the Law of Causation of Injury*, 33 UCLA L. REV. 1473 (1986).

Courts cannot be faulted for seeking proportional solutions to otherwise intractable problems. They cannot be expected to sit back and turn seriously injured claimants away without some hope that other responsible governmental agencies will step into the breach. If market share was a necessary evil, then *Hymowitz* provides the clearest guidelines for its administration. However, I believe that mass tort litigation cannot proceed with a pot-pourri of classic tort law and radical resolution of causation related problems. We cannot continue to live in a tort world that straddles two centuries.