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In Purse-Suit of Liability

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The patient is responsible for bills for medical treatment and it is inappropriate for the attorney to agree to be personally responsible for those bills. However, the physician may request the attorney to secure the patient's agreement that outstanding medical bills be satisfied from any settlement, judgment or insurance proceeds. If such an agreement is obtained, the attorney is personally responsible to see that it is carried out and is liable to the physician for failure to do so.

It is the duty of an attorney to see that a physician is promptly compensated for his time devoted to the proceeding. It is preferable for both the attorney and the physician to reach an agreement in advance concerning the amount of fees and expenses for time devoted to preparation or testimony. Neither the attorney nor the physician should enter into any agreement in which the physician's compensation is contingent upon the outcome of a case.

Section Five

Medicolegal Committee

The Medical and Chirurgical Faculty of the State of Maryland and the Maryland State and City of Baltimore Bar Associations maintain a standing joint committee on interprofessional relationships. The committee is known as the Medicolegal Committee. Its purpose is to promote a close and more harmonious relationship between the two professions. The committee membership is composed of twelve attorneys and twelve physicians.

The Committee will consider all matters concerning interprofessional relationships between the two professions, including, but not limited to, the following:

1. Promotion and perpetuation of harmony between the professions.
2. Achieving a fuller understanding of mutual problems.
3. Promotion of educational programs of interest to both professions.
4. Publish guidelines regarding fees for record reproduction, preparation of medical reports, and time spent in preparation for and the giving of depositions and trial testimony.
5. Consideration of disputes arising from interprofessional relationships including violations of the above Code.
6. Referral of legal or ethical violations, including violations of this code, to the Commission on Medical Discipline or the Attorney Grievance Commission in appropriate situations.

In dealing with problems which arise between individuals, physicians, and attorneys, the Committee will recommend a course of action based upon the principles in the Medicolegal Code. Matters already in litigation between an attorney and a physician will not be considered by the Committee.

Section Six

General Provisions

Nothing contained in this statement of principles is intended to be inconsistent with provisions of law or rules of ethical conduct for attorneys or physicians, or to permit attorneys to gain undue advantage in furtherance of a medical/legal claim against a physician.

Approvals:

1. Bar Association of Baltimore City, Executive Committee, May 11, 1981.
2. Maryland State Bar Association, Board of Governors, June 11, 1981.
3. Medical and Chirurgical Faculty of the State of Maryland, Council Meeting, June 25, 1981.

In Purse—Suit of Liability

by Stephanie Melnicove

Diethylstilbestrol (DES) is a synthetic hormone that was initially manufactured to help menopausal women. After continued research, DES was found to be an aid for problem pregnancies and especially effective in the prevention of miscarriages.

Prior to 1952, the Food and Drug Administration (FDA) approved the use of DES on an experimental basis for problem pregnancies. The FDA required that a notice of potential danger be given with each DES product. By 1954, more than 267 companies marketed DES "On an unlimited basis rather than as an experimental drug, and they failed to warn of its potential danger." *Sindell v. Abbott Laboratories*, 163 Cal.Rptr. 132, 134 607 P.2d 924, 926 (1980).

In 1971, the connection was made between DES ingestion during pregnancy and gynecological cancer, in the female offspring. Subsequently, the FDA banned the use of DES for problem pregnancies.

What remains of the unbridled disregard for the FDA requirements is diagnoses of young women with various forms of gynecological cancer, whose mothers have no recollection of the precise manufacturer responsible for the DES taken. In most of the suits against the DES manufacturers, the crucial problem is that of identifying the manufacturer of the ingested pill.

The Defendants in the DES suits have all been DES manufacturers. Some have been able to exclude themselves by proving they did not market their product in the vicinity or at the time the drug was taken.

Because courts are primarily concerned with having the proper parties before the bench, many cases have

been dismissed due to the Plaintiff's inability to identify the exact Defendant. Other courts have permitted the Plaintiffs to go beyond the identification problem by employing at least one of three theories of liability: concert of action, alternative liability, and enterprise liability.

Below is an attempt to distinguish the three forms of joint liability most often used in cases where the precise Defendant is not identifiable.

A. CONCERT OF ACTION

The most quoted way of describing concert of action is: "All coming to do an unlawful act, and of one party. The act of one is the act of all of the same party being present." The threshold aspect to this theory is that in most concert of action cases an express or tacit agreement is found to have existed among the Defendants. This is precisely why all Defendants are liable for damages.

In cases where the precise Defendant cannot be ascertained, concert of action is a particularly advantageous form of liability. The Plaintiffs' argument would be that the first manufacturers pooled their information when applying for NDAs in order to "rush into production without adequate testing." If they knew, or should have known, that this created the risk of an unreasonably dangerous product, their original cooperative behavior was tortious. It can be argued that the later FDA approval of DES for use in pregnancy depended on this earlier joint submission of clinical data. Parallel, imitative practices among many of the manufacturers of DES, as well as actual agreement in some cases, resulted in uniform cautions, lists of contraindications and dosage schedules, and reliance on the same dubious scientific articles in promotional materials. . . . Thus each individual Plaintiff's injuries resulted from the tortious, concerted activities of all DES manufacturers. . . . Since each DES manufacturer is a 'substantial factor' causing each Plaintiff's injuries, he is jointly and severally liable regardless of whether he manufactured the particular drug which the



Plaintiff's mother ingested." Sheiner, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 980 (1978), hereinafter referred to as Sheiner.

This theory, termed "Conscious Parallelism," was used in *Bichler v. Eli Lilly & Co.*, 79 A.D. 2d 317, 436 N.Y.S. 2d 625 (1981), where the Plaintiff recovered \$500,000.00. Although recognizing that such a recovery under the concert theory was an expansion of the doctrine, the *Bichler* Court held that product liability law must "continue to adopt to the exigencies of rapidly developing technologies." 24 ATLA Rep. 178 (1981).

The Michigan Court of Appeals in, *Abel v. Eli Lilly & Co.*, 94 Mich. App. 59 289 N.W.2d 20 (1980), held that stating the Defendants had acted in concert was sufficient to survive a Motion for Summary Judgment. "Liability is imposed on all because all have joined in breaching their duty of care to Plaintiff, and he was injured as a result of that breach."

However, the Supreme Court of California in *Sindell v. Abbott Laboratories*, 163 Cal.Rptr. 132, 607 P.2d 924 (1980) declined to apply the concert doctrine holding that to do so would be an unwarranted expansion of the doctrine. Even though the *Sindell* court would not permit recovery based on concert, it did render a verdict for Plaintiff (reversed judgment for Defendants) by extending another theory of liability.

One last hurdle to overcome in using the concert theory is that this doctrine is traditionally employed to deter hazardous group behavior. The Courts that have expanded the doctrine to permit recovery in DES cases have done so to cure the Plaintiff's inability to identify the manufacturer who produced the DES ingested. This expanded use shifts the burden of causation to Defendants, making it their burden to exculpate themselves. It could be argued that the burden of causation is satisfied by the Plaintiff once joint liability (via concert theory) has been proved. Therefore, the only shifting to Defendant is from inculcation to exculpation. This argument should be used when a court is reluctant to shift the burden of causation.

To reiterate the above, a concert of action is the parallel behavior of the manufacturers that permits the use of the doctrine and the crucial element placed on Plaintiff is proving the tacit agreement of the Defendants. To overcome this a Plaintiff must prove that all Defendants shared data used to prepare the DES and any other evidence that would show parallel behavior.

B. ALTERNATIVE LIABILITY

Where concert of action has a primary purpose of deterring anti-social behavior, alternative liability imposing joint and several liability, has a purpose of relaxing the Plaintiff's burden of proof as to causation. Plus,

there is no tacit agreement requirement. The best explanation of alternative liability is in Sheiner, at 985. "This theory has been applied to cases where all Defendants are at fault in that all behaved tortiously, but only one unidentifiable Defendant caused Plaintiff's injury. Since the Defendants acted independently, there is no concert of action. In order to solve the problem of causation, once all tortfeasors are joined, the courts have shifted the burden of proof of cause-in-fact to Defendants. Where Defendants cannot meet this burden and absolve themselves, joint and several liability results."

The leading case in this area is *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948). The Plaintiff in *Summers* was injured by one of two hunters, both having fired simultaneously. Because it would have been impossible for the Plaintiff to discover which one was responsible for the injury, the California Court held that "where Defendants are all wrongdoers and their negligence has caused a situation in

which the innocent Plaintiff cannot identify the cause of his injury, the fairness dictates that he should not be required to do so or go remediless." Sheiner, at 985.

The RESTATEMENT (SECOND) OF TORTS 433B (2) & (3) (1965) states:

(2) Where the tortious conduct of two or more actors has combined to bring about harm to the Plaintiff, and one or more of the actors seeks to limit his liability on the grounds that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.

(3) 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.

The courts using the alternate

liability theory in DES cases shift the burden of causation to the Defendants to limit their liability. The courts often hold the drug manufacturers liable only for the percentage of DES marketed at a given period, the period being the one in which the Plaintiff's mother ingested DES. The purpose behind the *Summers* holding and the Restatement is to allow the innocent Plaintiff a remedy when at least one of the Defendants is culpable.

The *Summers* court denied recovery to the Plaintiffs in *Sindell*, based on a strict *Summers* rule. The Court distinguishing the DES cases from *Summers* said as to *Summers*, "There, all the parties who were or could have been responsible for the harm to the Plaintiff were joined as Defendants. Here, by contrast, there are approximately 200 drug companies which made DES, any of which might have manufactured the injury-producing drug." *Sindell*, 163 Cal. Rptr. at 139, 607 P.2d at 931. The problem for the Plaintiff, otherwise stated, is that due to the number of manufacturers, it would be unfair to make all Defendants liable for the harm when obviously only one, and perhaps even none of the Defendants before a court, was responsible.

In spite of these policy reasons, the court fashioned a way for the Plaintiff to recover. "We hold it to be reasonable in the present context to measure the likelihood that any of the Defendants supplied the product which allegedly injured Plaintiff by the percentage which the DES sold by each of them for the purpose of preventing miscarriage bears to the entire production of the drug sold by all for that purpose. . . . Each Defendant will be held liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product which caused Plaintiff's injuries." 163 Cal. Rptr. at 145, 607 P.2d at 937.

A different approach to alternative liability can be found in *Erllich v. Abbott Laboratories*, 24 ATLA Rep. 226 (1981). The Pennsylvania Court denied Defendant's Motion for Summary Judgment and held that the Plaintiff could proceed on the theory of alternative

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liability. Four elements were needed to permit the application of RESTATEMENT (SECOND) OF TORTS 433 B(3) (1965).

(1) Plaintiff, through no fault of her own, cannot identify the manufacturer.

(2) Those manufacturers who produced substantially all of the defective product in the relevant time and geographic area have been joined as Defendants.

(3) All Defendants engaged in wrongful conduct, here the marketing of a dangerous drug without adequate warnings.

(4) All of the products of Defendants were identical and shared the same defective qualities, precluding the liability of all members of an industry for the poor quality of a single manufacturer.

The Court in *Abel v. Eli Lilly*, 94 Mich. App 59, 289 N.W.2d 20 (1980) permitted the Plaintiffs to recover based on alternative liability even though it cited an *accord with Sindell*. As to burdens placed on the parties, the *Abel* court stated, "Plaintiffs must establish that they suffered a certain amount of damages at the hands of Defendants, all of whom are tortfeasors. Should Plaintiffs succeed in establishing that Defendants are alternatively liable for this amount of damages, Defendants are left to apportion the damages among themselves. Each Defendant is free to present proof, absolving itself from liability as to any particular Plaintiff or as to all Plaintiffs. Defendants are also free to implead any third party whom they believe liable for all or part of the damages." 94 Mich. App. 59, —, 289 N.W.2d 20, 26.

Alternative liability was not permitted in *Lyons v. Premo Pharmaceutical Labs, Inc.*, 170 N.J. Super. 183, 406 A.2d 185 (1979), basically because the Plaintiff could identify the manufacturer. But the court commented on the theory as to the element of shifting the burden of exculpation to the Defendants by stating, "Such a radical shifting of burdens from a Plain-

tiff to a Defendant is not undertaken lightly, but necessitated only by strong policy which favors recovery by innocently injured Plaintiffs who could not otherwise recover because they cannot identify the source of injuries." *Lyons*, 170 N.J. Super. 183, 192-193, 406 A.2d 185, 190.

The basic pitfall in applying alternative liability and assessing damages by market share is that of making sure the proper Defendants are before the court. Ultimately, it is a convincing argument that the policy reasons of permitting the innocent Plaintiff to recover outweigh the "radical shifting" of the burden to the Defendants.

C. ENTERPRISE LIABILITY

Enterprise liability is a hybrid theory combining both concert of action and alternative liability. It seems to have its roots (at least for the modern trend of cases) in, *Hall v. E.I. Du Pont De Nemours*, 345 F.Supp. 353 (E.D.N.Y. 1972). *Hall* involved a number of Plaintiffs suing many explosives manufacturers for injuries resulting from blasting caps. The U.S. District Court in New York held, "If Plaintiffs can establish by a preponderance of the evidence that the injury-causing caps were the product of some unknown one of the named Defendants, that each named Defendant breached a duty of care owed to Plaintiffs and that these breaches were substantially concurrent in time and of a similar nature, they will be entitled to a shift of a burden of proof on the issue of causation. *Id* at 380.

The elements of enterprise liability are:

(1) Plaintiff is not at fault for his inability to identify the causative agent and such liability is due to the nature of the defendants' conduct.

(2) A generically similar defective product was manufactured by all the defendants.

(3) Plaintiff's injury was caused by this product defect.

(4) The Defendants owed a duty to the class of which Plaintiff was a member.

(5) There is clear and convincing evidence that Plaintiff's injury was caused by the product of some one of the defendants. For example, the joined defendants accounted for a high percentage of such defective products on the market at the time of Plaintiff's injury.

(6) There existed an insufficient, industrywide standard of safety as to the manufacture of this product.

(7) All defendants were tortfeasors satisfying the requirements of whichever cause of action is proposed: negligence, warranty, or strict liability.

"Once Plaintiff proves these elements, the burden of proof as to causation shifts to Defendants, each of which can exonerate itself only by showing, according to the standards of proof already proposed, that its product could not have been the one which injured this particular Plaintiff." Sheiner, at 995.

The above elements sound much like concert of action and/or alternative liability but there are differences. In enterprise liability, the Plaintiff need not prove a tacit agreement which is required in concert of action. In enterprise liability the concern for having only a few tortfeasors and the need to have all before the court is eliminated. "Enterprise Liability is derived from alternative liability because its basic premise is that some one of the Defendants probably caused, in the traditional sense, the Plaintiff's injury. Therefore, any Defendant who can show that his product could not have caused the injury, even though he also adhered to inadequate industry standards, may exculpate himself. Such exculpation would not be allowed under the concert approach. (No defendant that participated in the concerted plan or activity



Struggle Continues for Rights of Developmentally Disabled

by Gloria Barnhart

is exonerated from liability for its result.) Enterprise and alternative liability are also alike because the primary purpose of both theories is to cure Plaintiff's inability to identify the injurious product, and both accomplish this purpose by shifting the burden of proof of causation to Defendants.

Unlike the theory of alternative liability, however, enterprise liability emphasizes certain activities of the industry as a whole; adherence to an inadequate safety standard and manufacture of an identically defective product." Sheiner, DES and a Proposed Theory of Enterprise Liability, 46 FORDHAM L. REV. 963, 966. In enterprise liability the parallel behavior of the Defendants, absent a tacit agreement is sufficient.

The Plaintiff must prove an insufficient industrywide safety standard. This element of proof was established in *Hall* where the court determined that there existed a "national body of State Tort Law" and then went on to establish an industrywide safety standard.

Many of the decisions in the DES cases show a definite reluctance to apply this new doctrine of liability. See, *Ferrigno v. Eli Lilly & Co.*, 175 N.J. Super 551, 570, 420 A.2d 1305, at 1315. *Lyons v. Premo Pharmaceutical Labs*, 107 N.J. Super 183, 193, 406 A.2d 185, at 190. *Sindell v. Abbott Laboratories*, 163 Cal. Rptr. 132, 143, 607 P.2d 924, at 935. In fact, none of the DES cases have supported a recovery based on enterprise liability. Nevertheless, it could be argued successfully as its principles are well-rooted in traditional strict liability, products liability, and tort law rules. Plus, with increasing scientific and technological advancements there will be more and more cases involving Plaintiffs who will be unable to identify the precise manufacturer of the causative agent. Enterprise liability is an available avenue that should be argued because the policy behind permitting the innocent Plaintiff to recover against negligent Defendants is or should be weighted more than the burden of identifying the precise manufacturer or causation.

Maud is a feminine name derived from old high German meaning powerful in battle. MAUDD, pronounced the same, is an acronym for the Maryland Advocacy Unit for the Developmentally Disabled, a non-profit corporation that often does battle to protect and defend the rights of the developmentally disabled. Developmentally disabled means a person who has a severe, chronic disability which occurred before the age of 22, is likely to continue indefinitely and results in a substantial limitation to the person's ability to function normally in society. See: 49 USCA §6001 (7) (1974) for the federal definition of developmental disability. Unfortunately some of MAUDD's power or at least one of its most important weapons has been weakened by a recent Supreme Court decision.

The existence of MAUDD is mandated by an amendment to the Developmental Disabilities and Bill of Rights Act, 42 USC §6001-6080 (1974), which requires any state receiving funds under the Act to provide an independent agency capable of protecting and advocating the rights of persons with developmental disabilities, §49 USCA 6012 (1974). In the past MAUDD has provided a variety of services for the developmentally disabled, including reviewing state plans, designing volunteer programs and acting as a resource and information center, but foremost is the service MAUDD has provided as an advocate in individual cases. In 1980 it handled over 1300 cases involving the right of the developmentally disabled in the areas of educational rights, employment discrimination, transportation and architectural barriers, guardianship, and the rights of people within institutions. The task

of MAUDD, already hampered by budget cuts, has been made even more difficult by a Supreme Court decision last spring which unfavorably interpreted the Developmental Disabilities Assistance and Bill of Rights Act.

The Court in *Pennhurst State School v. Halderman*, 101 S. Ct. 1531 (1981), reversed the Third Circuit Court of Appeals which has held that the Developmental Disabilities Assistance and Bill of Rights Act, 42 USC §6000 (1974) had created substantive rights in favor of the mentally retarded and that those rights were judicially enforceable. The case was a class action brought by a minor retarded resident of Pennhurst State School and Hospital, and all persons who have been or may become residents of Pennhurst. The findings of fact were undisputed: the conditions at Pennhurst were dangerous and inhumane, with the residents often physically abused or drugged by staff members. The District Court had found that the physical, intellectual and emotional skills of some of the residents had actually deteriorated at Pennhurst.

The plaintiffs claimed there were various state, federal and constitutional violations including the denial of rights confirmed by the Developmental Disabilities Assistance and Bill of Rights Act. In addition to seeking injunctive and monetary relief, the plaintiffs urged that Pennhurst be closed and that community living arrangements—smaller less isolated residences where retarded people are treated as much as possible like non-retarded people—be established for its residents. The District Court found for the plaintiffs and ordered that Pennhurst eventually be closed and, that individual treatment plans be