

*Fall 1988*

## Adding Smoke to the Cloud of Tobacco Litigation - A New Plaintiff: The Involuntary Smoker

Bradley M. Soos

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Law Commons](#)

---

### Recommended Citation

Bradley M. Soos, *Adding Smoke to the Cloud of Tobacco Litigation - A New Plaintiff: The Involuntary Smoker*, 23 Val. U. L. Rev. 111 (1988).

Available at: <https://scholar.valpo.edu/vulr/vol23/iss1/9>

This Notes is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at [scholar@valpo.edu](mailto:scholar@valpo.edu).



## ADDING SMOKE TO THE CLOUD OF TOBACCO LITIGATION—A NEW PLAINTIFF: THE INVOLUNTARY SMOKER

Liability of cigarette manufacturers for smoking related diseases has become a focal point of controversy in the area of products liability. As a result of the fatal health risks involved with cigarette smoking, commentators have advocated imposing liability against cigarette manufacturers under a strict liability theory.<sup>1</sup> Nevertheless, cigarette smokers have unsuccessfully sued cigarette manufacturers for over two decades. A recent case in New Jersey marked the tobacco industry's first loss ever in a suit over a cigarette smoker's death.<sup>2</sup> Suits brought by smokers in the 1960s were defeated by such defenses as assumption of risk<sup>3</sup> and unforeseeable consequences.<sup>4</sup> Smoker suits in the 1980s have failed because federal circuit courts have held that the Federal Cigarette Labeling and Advertising Act of 1965 preempts state common law tort actions based on a failure to warn of the dangers of cigarette smoking.<sup>5</sup>

---

1. See generally Levin, *The Liability of Tobacco Companies—Should Their Ashes be Kicked?*, 29 ARIZ. L. REV. 195 (1987); Comment, *Strict Products Liability on the Move: Cigarette Manufacturers May Soon Feel the Heat*, 23 SAN DIEGO L. REV. 1137 (1986).

2. Burne, *Cigarette Firm is Found Guilty in Death Suit*, Ariz. Republic, June 14, 1988, at A1, col. 5. A federal court jury found Liggett Group, Inc. partially to blame for the 1984 death of the plaintiff who smoked the company's Chesterfields and L & M filter cigarettes from 1942 to 1968. The jury decided that Liggett Group, knowing that cigarettes were potentially dangerous, falsely guaranteed in its advertising that its products were safe and awarded \$400,000 damages to the plaintiff's widower. The jury also decided that the company failed in its duty to warn smokers of the health risk they were taking in using cigarettes until warnings were legally required in 1966. *Cipollone v. Liggett Group, Inc.*, No. 83-2864 (D.N.J. Aug. 22, 1988).

3. *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292 (3d Cir. 1961), *aff'd on rehearing*, 350 F.2d 479 (3d Cir. 1965), *cert. denied*, 382 U.S. 987 (1966), *modified*, 370 F.2d 95 (3d Cir. 1966), *cert. denied*, 386 U.S. 1009 (1967). For a definition of assumption of risk, see *infra* text accompanying note 208.

4. *Lartigue v. R.J. Reynolds Tobacco Co.*, 317 F.2d 19 (5th Cir. 1963), *cert. denied*, 375 U.S. 865 (1963) (a cigarette manufacturer could be liable for a defective condition only if the harmful consequences are, based on common knowledge, foreseeable).

5. Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331-1335 (1970 & Supp. IV 1986)). In 1984, Congress further amended the Act by the Comprehensive Smoking Education Act, Pub. L. No. 98-474, 98 Stat. 2200 (1984). Section 5(b) of the original 1965 Act read as follows: "No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are in conformity with the provisions of this Act." 79 Stat. 282 (1965); see also *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987); *Stephen v. American*

While the cigarette smoker has encountered difficulty in maintaining a suit against a cigarette manufacturer, this note suggests adding a new plaintiff to the arena of tobacco litigation: the third party involuntary smoker.<sup>6</sup> This note demonstrates that a third party involuntary smoker who contracts lung cancer, emphysema, or any hazardous disease as a result of prolonged exposure to passive cigarette smoke, should be able to sue cigarette manufacturers under the modern tort theory of enterprise liability.<sup>7</sup> The first section of this note briefly examines the health risks faced by the involuntary smoker and the recent social responses related to those risks.<sup>8</sup> The second section examines tort theories that have led to the development of enterprise liability.<sup>9</sup> An analysis of recent cases that have applied theories similar to enterprise liability will follow.<sup>10</sup> The final section analyzes asbestos cases that have imposed liability on the basis of enterprise liability.<sup>11</sup>

Modern tort theory has produced the relaxation of such rules as proper defendant identification and causation. The relaxation of such rules has provided an avenue of recovery for those injured by defective products. This note proposes that an involuntary smoker should be able to assert a cause of action against a cigarette manufacturer and recover under the enterprise theory of liability.<sup>12</sup>

## I. HEALTH RISKS POSED BY EXPOSURE TO PASSIVE SMOKE

Recent scientific data and studies clearly indicate the significant health risks posed by a nonsmoker's exposure to passive cigarette smoke.<sup>13</sup> The

Brands, Inc., 825 F.2d 312 (11th Cir. 1987); Cipollone v. Liggett Group, Inc., 593 F. Supp. 1146 (D.N.J. 1984), *rev'd*, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 107 S.Ct. 907 (1987). For an explanation of the preemption issue, see *infra* text accompanying notes 212-216.

6. An involuntary smoker is one who involuntarily inhales cigarette smoke as a consequence of another's direct or active smoking.

7. See generally Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153 (1976). The basic premise of the enterprise theory of liability is that losses caused by an enterprise or activity should be borne by those who have some logical connection with that enterprise or activity creating the loss. *Id.* at 158. See *infra* text accompanying notes 95-207 for a more thorough analysis of enterprise liability.

8. See *infra* text accompanying notes 13-26.

9. See *infra* text accompanying notes 27-54.

10. See *infra* text accompanying notes 59-94.

11. See *infra* text accompanying notes 95-118. (Asbestos cases present an appropriate application of the enterprise theory of liability due to the nature of asbestos related injuries).

12. See *infra* text accompanying notes 119-216.

13. U.S. Department of Health and Human Services, *The Health Consequences of Involuntary Smoking: A Report of the Surgeon General 1986* [hereinafter *Surgeon General's Report*]; Marshall, *Involuntary Smokers Face Health Risks*, 234 SCIENCE 1066 (Nov. 1986); Hirayama, *Non-Smoking Wives of Heavy Smokers Have a Higher Risk of Lung Cancer: A Study from Japan*, 282 BRIT. MED. J. 183 (1981); White & Froeb, *Small Airways Dysfunc-*

Surgeon General's Report of 1986 has led to three major conclusions concerning a nonsmoker's inhalation of passive cigarette smoke. First, involuntary smoking is a cause of lung cancer and other diseases in healthy nonsmokers; second, the children of parents who smoke compared with children of nonsmoking parents have an increased frequency of respiratory infections, an increase in respiratory symptoms, and slightly smaller rates of increase in lung function as the lungs mature; third, the separation of smokers and nonsmokers within the same airspace may reduce, but does not eliminate, the exposure of nonsmokers to passive smoke.<sup>14</sup>

According to the Surgeon General's findings, a substantial number of annual lung cancer deaths occurring among nonsmokers are medically attributed to involuntary smoking.<sup>15</sup> Acute and chronic respiratory diseases are also linked to exposure to passive smoke, and the evidence of this link is notably strongest in infants.<sup>16</sup> The American Cancer Society estimates that eighty-five percent of the more than 135,000 deaths from lung cancer in 1986 were directly attributable to active cigarette smoking.<sup>17</sup> According to the Surgeon General's report, even if the number of lung cancer deaths caused by involuntary smoking is a small fraction of those deaths, there is still a significant enough health risk to warrant substantial public concern.<sup>18</sup>

The serious health risks posed by exposure to passive cigarette smoke have significantly heightened public awareness. As of 1986, all but nine states have some form of legislation restricting smoking in public places.<sup>19</sup> Most state laws restrict smoking in places ranging from public transportation to libraries.<sup>20</sup>

Several states have also restricted smoking at the workplace.<sup>21</sup> Many

---

*tion in Non-Smokers Chronically Exposed to Tobacco Smoke*, 302 NEW ENG. J. MED. 720 (1980); Tager, Weiss, Rosner, & Speizer, *Effect of Parental Smoking on the Pulmonary Function of Children*, 110 AM. J. EPID. 15 (1979).

14. Surgeon General's Report, *supra* note 13, at 7.

15. *Id.* at 10.

16. *Id.*

17. *Id.* at 8.

18. *Id.*

19. *Id.* at 270. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-601.01 (1986) (The Arizona legislature has declared smoking to be both a public nuisance and a danger to public health).

20. State laws most often restrict smoking in public transportation (35 states, *see, e.g.*, CAL. HEALTH & SAFETY CODE §§ 25948-25949.8 (West Supp. 1988)), hospitals (33 states, *see, e.g.*, N.J. STAT. ANN. § 26:3D-11 (West 1987)), elevators (31 states, *see, e.g.*, ARIZ. REV. STAT. ANN. § 36-601.01(A)(1) (1986)), indoor cultural or recreational facilities (29 states, *see, e.g.*, N.Y. PUB. HEALTH LAW § 1399-a (McKinney 1988)), schools (27 states, *see, e.g.*, IND. CODE ANN. § 13-1-13-1 (Burns 1987)), public meeting rooms (21 states, *see, e.g.*, MICH. COMP. LAWS ANN. § 333.12601 (West Supp. 1988)), and libraries (19 states, *see, e.g.*, CONN. GEN. STAT. ANN. § 1-21b (West Supp. 1988)). Surgeon General's Report, *supra* note 13, at 269.

21. Twenty two states restrict smoking at the workplace for public sector employees

cases have been filed by employees seeking injunctive relief from their employer.<sup>22</sup> In addition, an employee claiming she contracted lung disease through exposure to passive cigarette smoke at her workplace brought a \$4 million suit against her employer alleging that her employer failed to provide a safe workplace, and then discriminated against her as a handicapped employee since her health hindered her ability to perform physically.<sup>23</sup>

While Congress has enacted no federal legislation restricting smoking in public places, a number of bills have been introduced since 1973.<sup>24</sup> However, Congress recently approved legislation that bans smoking on domestic airflights of two hours or less.<sup>25</sup> Such legislation indicates substantial public concern for the significant health risks posed by exposure to passive cigarette smoke.<sup>26</sup>

## II. THEORIES OF TORT LAW PRECEDING ENTERPRISE LIABILITY

Based on the theory of enterprise liability,<sup>27</sup> an involuntary smoker should be able to assert a cause of action against a cigarette manufacturer for injuries caused by prolonged exposure to passive cigarette smoke. Nevertheless, the involuntary smoker plaintiff would encounter several obstacles in suing a cigarette manufacturer. First, since there are several cigarette manufacturers, and such a plaintiff is likely to have been exposed to smoke from several brands of cigarettes, he would be unable to identify a single, specific defendant. Second, since there would be multiple defendants in such a suit, a plaintiff would have difficulty proving causation. Before the development of modern tort theories, an injured plaintiff who faced such problems of proof could not assert a cause of action and recover for his

---

and nine states for private sector employees. *Id.* at 270. See, e.g., N.J. STAT. ANN. § 26:3D-28 (West 1987); see also Comment, *Limited Relief for Federal Employees Hypersensitive to Tobacco Smoke: Federal Employers Who'd Rather Fight May Have to Switch*, 59 WASH. L. REV. 305 (1984).

22. See *infra* text accompanying notes 23, 146.

23. *Environmental Exposure*, Toxic Law Rep. (BNA) No. 14, at 203 (July 22, 1987). The suit, filed in the U.S. District Court for the District of Columbia, sought injunctive and monetary relief based on the plaintiff's claim that her employer negligently caused injury by its continuing failure to provide her with a smoke-free environment. The suit stated that the defendants knew or should have known that breathing passive cigarette smoke is harmful to one's health and causes disease, including pulmonary disease. *Id.* Carrol v. Tenn. Valley Auth., No. 87-1957 (D.D.C. filed March 7, 1988).

24. Surgeon General's Report, *supra*, note 13, at 266.

25. Continuing Appropriations, Fiscal Year 1988, Pub. L. No. 100-202, § 328, 101 Stat. 1329-382 (1987).

26. Northwest Airlines recently became the first major airline to prohibit smoking on all domestic flights. *All Fired Up over Smoking*, TIME, Apr. 18, 1988, at 64. For a further discussion of social policy issues related to involuntary smoking, see *infra* text accompanying notes 165-207.

27. See *infra* text accompanying notes 95-207.

injuries. Over the years, however, theories of tort law preceding enterprise liability have diminished some of the problems that plaintiffs face in suits involving multiple defendants and suits in which precisely establishing causation is difficult.

### A. *Res Ipsa Loquitur*

The development of the doctrine of *res ipsa loquitur*<sup>28</sup> helps a plaintiff prove negligence<sup>29</sup> when he is injured as a result of an accident, but is unable to prove who, if anybody, caused his injury. This doctrine gives rise to the inference that in light of ordinary experience, someone must have been negligent for an injury to have occurred. In order for the doctrine to apply, the plaintiff must show that: (1) the defendant had exclusive control of the instrumentality that caused the injury; and (2) the accident is one that ordinarily does not occur in the absence of negligence by the defendant.<sup>30</sup> An early case that applied the doctrine of *res ipsa loquitur* was *Escola v. Coca Cola Bottling Co.*<sup>31</sup> An innocent plaintiff's inability to conclusively prove the defendant's negligence in cases such as *Escola* provides a foundation for the application of *res ipsa loquitur* and has had a persuasive effect in making courts more willing to apply the doctrine.<sup>32</sup> Moreover, the doctrine of

28. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON TORTS* 243 (5th ed. 1984) [hereinafter *PROSSER*]. Historically, the Latin phrase means simply, "the thing speaks for itself." This phrase originated in an English case in 1863 in which a barrel of flour rolled out of a warehouse window and fell on a pedestrian. The principle is nothing more than a reasonable conclusion, from the circumstances of an accident, that it was probably the defendant's fault. *Id.*

29. The traditional elements necessary to prove negligence are: (1) A duty, or obligation, recognized by law, requiring a person to conform to a certain standard of conduct for the protection of others against unreasonable risks; (2) a failure on the person's part to conform to the standard of care required: a breach of duty; (3) a reasonably close causal connection between the conduct and the resulting injury, or "proximate cause"; and (4) actual loss or damage resulting from a person's breach of duty. *PROSSER, supra* note 28, at 164.

30. *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 457-58, 150 P.2d 436, 438 (1944).

31. 24 Cal. 2d 453, 150 P.2d 436 (1944). In *Escola*, a waitress in a restaurant was injured when a pop bottle exploded in her hand. *Id.* at 456, 150 P.2d at 437. The court held that the injury was caused by either an excessive charge of gas or a defect in the glass, and that neither cause would ordinarily have been present if the bottler had used due care. *Id.* at 459, 150 P.2d at 440. Consequently, the manufacturer was liable notwithstanding the fact that the plaintiff could not prove the defendant's negligence. The court also eliminated the technical requirement of privity of contract by stating that the manufacturer is responsible for an injury caused by a defective product to any person who comes in contact with it. *Id.* (Traynor, J. concurring). Privity is the connection or relationship which exists between two or more contracting parties, e.g., buyer and seller. *BLACK'S LAW DICTIONARY* 1079 (5th ed. 1979).

32. *PROSSER, supra* note 28, at 255. See also *Emerick v. Raleigh Hills Hospital-Newport Beach*, 133 Cal. App. 3d 575, 184 Cal. Rptr. 92 (1982) (plaintiff entitled to presumption of liability even though instrumentality causing the injury was not within the "exclusive" control of the defendant); *Oakdale Building Corp. v. Smitheren Co.*, 322 Ill. App. 222, 54

res ipsa loquitur allows the risk of injury to be insured by the manufacturer and the loss distributed to the general public as a cost of doing business.<sup>33</sup> The purpose of imposing liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturer of the product rather than by innocent "injured persons who are powerless to protect themselves."<sup>34</sup>

The doctrine of res ipsa loquitur also relaxes rules of causation.<sup>35</sup> The plaintiff is seldom able to present direct evidence as proof of negligence due to the obscure nature of the accident. Nevertheless, the doctrine is intended to apply when circumstantial evidence indicates the probability that the defendant's negligence is the most plausible explanation for the injury.<sup>36</sup>

N.E.2d 231 (1944) (Res ipsa loquitur doctrine applicable where the apartment in good condition was given to exterminating company and a fire started in the apartment shortly after the company employee left).

33. Justice Traynor, in his famous concurring opinion in *Escola v. Coca Cola Bottling Co.* stated:

Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a consistent risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.

*Escola*, 24 Cal. 2d at 461-62, 150 P.2d at 441 (Traynor, J. concurring). See also Priest, *The Invention of Enterprise Liability: A Critical History of The Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985). Justice Traynor's concurring opinion in *Escola* set forth the framework for a strict product liability standard that was adopted by the California Supreme Court and the large majority of the United States jurisdictions nearly twenty years later. *Id.* at 498.

34. *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962).

35. The defendant's conduct is a cause of the plaintiff's injury if it was a material element and a substantial factor in bringing the harm about. PROSSER, *supra* note 28, at 267. For an analysis of causation under enterprise liability, see *infra* text accompanying notes 126-164.

36. PROSSER, *supra* note 28, at 257; see also *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687 (1945). In *Ybarra*, the plaintiff suffered injuries during the course of an appendectomy. Before the operation, the plaintiff had experienced no pain or injury to his right shoulder, but after awakening he felt sharp pain between the neck and shoulder. After his release from the hospital, the condition grew worse and he developed paralysis and atrophy of the muscles around the shoulder. *Id.* at 488, 154 P.2d at 688. The plaintiff argued the theory of res ipsa loquitur. The defendants argued, however, that since there were several defendants, there was a division of the responsibility in the use of the instrumentality causing the injury. Thus, the injury might have resulted from the separate acts of one or more persons. Moreover,

Thus, the doctrine of *res ipsa loquitur* represents one major step in a gradual trend of expanding tort liability theories to provide relief for injured plaintiffs who are unable to either identify a specific defendant or prove definite causation.<sup>37</sup>

### B. Alternative Liability

Where the conduct of two or more actors is tortious and harm to the plaintiff is caused by only one, the burden is on each defendant to prove that he did not cause the harm.<sup>38</sup> In order to assert this theory of liability when injured by a defective product, the plaintiff is required to prove: (1) that the defendants acted tortiously; (2) that the plaintiff was harmed by the conduct of at least one of the defendants; and (3) that the plaintiff, through no fault of his own, is unable to identify the specific manufacturer that caused his injury.<sup>39</sup>

The alternative liability theory was first recognized in *Summers v. Tice*.<sup>40</sup> The plaintiff in *Summers* brought an action against two defendants for injuries sustained in a hunting accident.<sup>41</sup> The court held that each defendant was negligent but was unable to conclusively determine from which defendant's gun the shots originated. The court expanded on traditional tort principles holding that both defendants were jointly and severally liable for several reasons.<sup>42</sup> First, the *Summers* court reasoned that practical unfairness would result in denying the injured person redress because he cannot prove how much damage each defendant caused, when it is certain that one

the defendants claimed that since the plaintiff made no showing as to which defendant caused the injury, the doctrine of *res ipsa loquitur* should not apply. *Id.* at 489, 154 P.2d at 688-89.

The court rejected the defendants' arguments, holding that it should be enough for the plaintiff to show injury resulting from an external force applied while he lay unconscious in surgery and that clearer identification could not be possible. *Id.* at 492-93, 154 P.2d at 690-91. The court expanded the doctrine of *res ipsa loquitur* because, if the defendants' arguments were accepted, patients injured while unconscious would never recover for their injuries. *Id.*

37. See also *Anderson v. Somberg*, 67 N.J. 291, 338 A.2d 1, cert. denied, 423 U.S. 929 (1975). Plaintiff was injured when a surgical instrument broke off in his spinal cord during an operation. The court extended the *Ybarra* holding to a manufacturer and distributor. *Id.*

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

39. *Abel v. Eli Lilly & Co.*, 418 Mich. 311, 331-32, 343 N.W.2d 164, 173 (1984). (Daughters of women who had taken DES during pregnancy and their spouses brought suit against manufacturers of estrogen products. The Supreme Court of Michigan held that those plaintiffs who demonstrated inability to identify the manufacturer of the product that injured them and who sustained remaining burdens of proof could take advantage of the burden shifting feature of alternative liability theory to withstand summary judgment on the causation issue of negligence claims).

40. 33 Cal. 2d 80, 199 P.2d 1 (1948).

41. *Id.* at 82, 199 P.2d at 2 (both defendants were shooting in the direction of the plaintiff when the plaintiff was hit with two shots, one in the eye and one in the lip).

42. *Id.* at 84, 199 P.2d at 3.

of the defendants caused the harm.<sup>43</sup> Second, the *Summers* court asserted that relaxation of the proof required of the plaintiff is appropriate when he is injured as a result of more than one independent force and is unable to establish which force was the cause of this injury.<sup>44</sup> Finally, the defendants were ordinarily in a better position to offer evidence to determine between them which one in fact caused the injury.<sup>45</sup>

Thus, instead of dismissing a plaintiff's cause of action against multiple defendants for lack of proof against any of the defendants, courts have followed a trend in relaxing traditional causation rules and permitting plaintiffs to recover against multiple defendants.<sup>46</sup> A shift in the burden of proof to the defendants is appropriate when the plaintiff has proven a prima facie case against the defendants. The court is then left with the alternative of placing the loss on the culpable defendants rather than innocent plaintiffs.<sup>47</sup>

### C. *Strict Liability in Tort for Defective Products*

Traditionally, in order to recover damages a plaintiff injured by a defective product was required to prove negligence<sup>48</sup> on the part of the manufacturer. In 1964, The American Law Institute adopted Section 402A of the Restatement (Second) of Torts which assigns liability to sellers for injuries caused by products in a defective condition and unreasonably dangerous,<sup>49</sup> though the seller has exercised all possible care in preparing the

43. *Id.*

44. *Id.* at 86, 199 P.2d at 4.

45. *Id.*

46. PROSSER, *supra* note 28, at 271. *See also* Kuhn v. Bader, 89 Ohio App. 203, 101 N.E.2d 322 (1951) (defendants found jointly and severally liable for injuries sustained by plaintiff and caused by defendants negligently firing a high-powered rifle into a target with a backstop composed of gravel); Murphy v. Taxicabs of Louisville, Inc., 330 S.W.2d 395 (Ky. 1959) (plaintiff sustained injuries when his vehicle was struck twice from the rear by three negligent drivers, but was unable to prove which one. The court placed the burden of proof on the issue of causation on the defendants).

47. PROSSER, *supra* note 28, at 271.

48. *See supra* note 29 for the elements required to prove negligence.

49. Whether a product is "unreasonably dangerous" depends on considerations of foreseeability, seriousness of injury, and costs of prevention. A plaintiff does not have to identify and prove a particular failure to exercise reasonable care on the part of the manufacturer. Nor can the defendant assert that the product was manufactured with reasonable care. Hall v. E.I. Du Pont De Nemours & Co., Inc., 345 F. Supp. 353, 368 (E.D.N.Y. 1972). RESTATEMENT (SECOND) OF TORTS § 402A comment g (1965) defines "defective condition" as, "where the products is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965) defines "unreasonably dangerous" as "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." A product is defective if it is marketed in a way that makes it unreasonably dangerous for any of the following reasons: (1) A flaw in the product that was present at the time the defendant sold it;

product.<sup>50</sup> Thus, under Section 402A the plaintiff was no longer required to prove negligent conduct on the part of the manufacturer in strict product liability cases.

Three broad policy reasons convinced the courts to accept the theory of strict liability in tort pronounced in Section 402A: First, the costs of injuries due to defective products can be borne by manufacturers who are able to shift the costs to purchasers by charging higher prices for the product. Second, the adoption of strict liability promotes accident prevention and eliminates the necessity of proving negligence. Finally, fault or negligence in the manufacturing process is often present but difficult to prove.<sup>51</sup> Consequently, proof of such fault in the sale of a defective product was no longer required under strict product liability. Thus, courts have adopted a less stringent standard for the plaintiff when asserting a cause of action based on a strict product liability theory by focusing not on the conduct of the manufacturer but rather on the product itself.<sup>52</sup>

Moreover, expansion of traditional tort principles has also resulted in the extension of Section 402A to provide relief for bystanders who are injured by defective or unreasonably dangerous products.<sup>53</sup> Courts have held

(2) a failure by the producer or manufacturer of a product to adequately warn of a risk or hazard related to the way the product was designed; or (3) a defective design. PROSSER, *supra* note 28, at 695.

50. PROSSER, *supra* note 28, at 695; RESTATEMENT (SECOND) OF TORTS § 402A (1965). Section 402A is stated as follows:

§ 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer.

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

*Id.*

51. PROSSER, *supra* note 28, at 693; Phipps v. General Motors Corp., 278 Md. 337, 363 A.2d 955 (1976). See also Owen, *Rethinking the Policies of Strict Liability*, 33 VAND. L. REV. 681 (1980) for a critical analysis of the conventional justifications of strict liability.

52. See Weinstein, Twerski, Piehler & Donaher, *Products Liability: An Interaction of Law and Technology*, 12 DUQ. L. REV. 425, 429 (1974).

53. While the American Law Institute originally expressed no opinion as to whether § 402A extended to those other than users or consumers, many courts have extended the coverage of § 402A to bystanders injured by defective products. See Haumersen v. Ford Motor Co., 257 N.W.2d 7 (Iowa 1977) (car went out of control in a school yard and ran over a child); Ethicon, Inc. v. Parten, 520 S.W.2d 527, 533 (Tex. Civ. App. 1975) (patient in whose body

that bystanders are entitled to greater protection than the consumer where injury to a bystander from a defect is reasonably foreseeable.<sup>54</sup> Thus, by adopting strict liability and extending its protection to bystanders, the courts have clearly followed the modern trend in expanding traditional tort principles and providing relief for those injured by defective or unreasonably dangerous products.

### III. MODERN TRENDS

Modern tort theories are based on three general concepts. First, manufacturers are able to control the rate of product-related injuries by investing in safety features or quality control, while consumers are basically powerless to prevent injuries caused by modern and complex products.<sup>55</sup> Second, spreading the risk of product-related injuries through manufacturer provided insurance is justified in order to reduce the harshness of such a loss to a specific individual.<sup>56</sup> Finally, imposing liability on manufacturers for defective products and forcing them to purchase insurance may be described as "internalization of injury costs."<sup>57</sup> Such an internalization policy will produce incentives for manufacturers to make investments for research and product safety.<sup>58</sup> These three basic social policy considerations lay the foundation for modern tort theory and the application of the enterprise theory of liability.

#### A. Industry-Wide Liability

Under modern tort law, the theory of multiple defendant liability has expanded to the extent of holding an entire industry liable for injuries resulting from a defective product. The industry-wide liability theory holds an entire industry jointly and severally liable to a plaintiff who cannot prove which particular defendant manufactured the product that injured the plaintiff.<sup>59</sup> The industry-wide theory proposes a shift in the burden of proof

---

surgical needle broke was a "consumer" under § 402A); *Passwaters v. General Motors Corp.*, 454 F.2d 1270 (8th Cir. 1972) (motorcycle passenger's leg lacerated by Ben-Hur-type ornamental wheel cover protrusions on car manufactured by defendant); *Jorgensen v. Meade Johnson Labs., Inc.*, 483 F.2d 237 (10th Cir. 1973) (children born in mongoloid condition allegedly due to altered chromosome structure in mother's body from defendant's birth control pills). For a discussion of strict liability protection to bystanders, see Note, *Strict Products Liability to The Bystander: A Study in Common Law Determinism*, 38 U. CHI. L. REV. 625 (1971).

54. *Elmore v. American Motors Corp.*, 70 Cal. 2d 578, 586, 451 P.2d 84, 89, 75 Cal. Rptr. 652, 657 (1969). See also cases cited *supra* note 53.

55. *Priest*, *supra* note 33, at 520.

56. *Id.*

57. *Id.*

58. *Id.*

59. Note, *Industry-Wide Liability*, 13 SUFFOLK U.L. REV. 980 (1979).

on the identification issues from the plaintiff to the defendant-manufacturer.<sup>60</sup> The shift occurs if the plaintiff, through no fault of his own, is unable to identify the specific manufacturer of the product that caused his injury, but can prove factors tending to demonstrate that all of the defendants manufactured a product similar to the injury-causing product.<sup>61</sup> The plaintiff is also required to show that all of the defendants adhered to an insufficient industry-wide standard of safety and a probability that one of the defendants caused the injury.<sup>62</sup>

A case representative of the industry-wide liability theory is *Hall v. E.I. Du Pont De Nemours & Company*.<sup>63</sup> The plaintiffs brought an action for damages against explosive manufacturers and their trade associations for eighteen separate accidents in which children were injured by blasting caps. Plaintiffs' allegations were that the practice of the explosive industry of not placing any warning upon individual blasting caps and the failure to take other safety measures, although uniform throughout the industry, created an unreasonable<sup>64</sup> risk of harm to third parties.<sup>65</sup>

The *Hall* court held that an entire industry may be held liable for harm caused by the dangerous operations of one of its members.<sup>66</sup> Although the plaintiffs could not identify the specific manufacturer that caused their injuries, the court shifted the burden of proving causation to the defendants.<sup>67</sup> However, the *Hall* court stated that the plaintiffs were still required to show by a preponderance of the evidence that the caps involved in the accident were manufactured by one of the named defendants.<sup>68</sup> Thus, the court made it apparent that it required more than a showing of injury by the plaintiffs.

The *Hall* court asserted that the main reasons for justifiably imposing strict liability on manufacturers are "incentive" and "risk allocation."<sup>69</sup> In addition, regardless of safety measures that manufacturers may take, injuries will inevitably occur that may be wholly or partially caused by some defect in the product. Such accidents are a statistically inevitable and fore-

---

60. *Id.* at 983.

61. *Id.*

62. *Id.*

63. 345 F. Supp. 353 (E.D.N.Y. 1972).

64. *See supra* note 49 for a definition of "unreasonably dangerous."

65. 345 F. Supp. at 358.

66. *Id.*

67. 345 F. Supp. at 379.

68. *Id.*

69. *Id.* at 368. Such a rule of strict liability is an incentive for manufacturers to maximize safe design, or a deterrence to dangerous design or manufacture. *Id.* *See also* *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 260-63, 391 P.2d 168, 170-72, 37 Cal. Rptr. 896, 898-900 (1964); Katz, *The Function of Tort Liability in Technology Assessment*, 38 U. CIN. L. REV. 587, 607-08, 631-36 (1969).

seeable cost of the product's consumption and use.<sup>70</sup> The purpose of imposing industry-wide strict liability is to insure that the costs of such injuries are borne by the manufacturers that put such products on the market rather than by the injured person who is powerless to protect himself.<sup>71</sup> The *Hall* court stated that imposition of strict liability theories such as industry-wide liability was further justified because the theory protects injured plaintiffs and works no injustice to the defendants since they can adjust the cost of such protection by including the cost of liability insurance in the price of the product.<sup>72</sup> Thus, based on a thorough analysis of social policy, fairness, and justice, the decision in *Hall* was yet another progressive step in the modern trend of expanding traditional tort theories that often left plaintiffs without a remedy after being injured from defective or unreasonably dangerous products.

### B. Market Share Liability

Another modern theory of strict liability that holds an entire industry liable for injuries caused by defective products is market share liability. This form of multiple defendant liability is essentially the same as industry-wide liability,<sup>73</sup> except that liability is apportioned among the defendants in accordance with their percentage of the relevant market.<sup>74</sup> Under this theory, the plaintiff must first prove that an injury was caused by a product made identically by all the defendants. Second, the plaintiff must prove that an injury was caused by the same type of product sold in a manner that made it unreasonably dangerous. Third, the plaintiff must prove his inability to identify the specific manufacturer of the product that caused the plaintiff's injuries. Finally, the plaintiff must join enough of the manufacturers of the identical product to represent a substantial share of the market.<sup>75</sup>

The California Supreme Court first adopted market share liability in *Sindell v. Abbott Laboratories*.<sup>76</sup> In *Sindell* the plaintiff was injured as the result of diethylstilbestrol (DES) administered to her mother while the mother was carrying the plaintiff during pregnancy.<sup>77</sup> Plaintiff brought an

70. *Hall*, 345 F. Supp. at 368.

71. *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962).

72. 345 F. Supp. at 375.

73. *See supra* text accompanying notes 59-68.

74. PROSSER, *supra* note 28, at 714.

75. *Id.*

76. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980).

77. Diethylstilbestrol (DES) is a synthetic compound of the female hormone estrogen and was administered to pregnant women for the purpose of preventing miscarriages. DES has been found to cause cancerous vaginal and cervical growths in daughters exposed to it before

action against eleven drug companies who manufactured DES on behalf of herself and other women similarly situated. The plaintiff knew the type of drug involved in the injury, but could not identify the specific manufacturer of the product.<sup>78</sup> Over two hundred manufacturers produced DES.<sup>79</sup> Consequently, the plaintiff could not meet the traditional common law burden of identifying a proper defendant. Furthermore, without a proper defendant traditional tort principles posed a significant barrier to proving causation.

The *Sindell* court expanded existing tort theories to provide relief for the plaintiff based on the basic premise that, "as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury."<sup>80</sup> The court noted that modern technology may create injuries caused by defective products and that, as a result, the court was left with a choice; to maintain rigid traditional tort principles and deny recovery to those injured by such products, or to adopt a new theory to meet the changing needs of society.<sup>81</sup> The court also expanded on the rule in *Summers v. Tice*<sup>82</sup> by holding that the plaintiff need not offer evidence of causation since the defendant's conduct played a significant role in the plaintiff's inability to produce proof of harm.<sup>83</sup> In addition, from a broader policy standpoint, the court stated that the defendants were better able to bear the cost of injuries caused by the manufacture of a defective product.<sup>84</sup> The *Sindell*

birth because their mothers ingested it during pregnancy. *Sindell*, 26 Cal. 3d 588, 594, 607 P.2d 924, 925, 163 Cal. Rptr. 132, 133. For a detailed discussion of DES and the effects of the drug on its victims see Biebel, *DES Litigation and the Problem of Causation*, 51 INS. COUNS. J. 223 (1984).

78. The eleven defendants joined in the suit manufactured a drug produced from a formula identical to that which caused the injury. *Sindell*, 26 Cal. 3d 588, 595, 607 P.2d 924, 925, 163 Cal. Rptr. 132, 133.

79. *Id.* at 609, 607 P.2d at 935, 163 Cal. Rptr. at 143.

80. *Id.* at 610-11, 607 P.2d at 936, 163 Cal. Rptr. at 144.

81. The *Sindell* court cited Justice Traynor's famous concurring opinion in *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 467-68, 150 P.2d 436, 443-44 (1944) as support. See *supra* note 33 for Justice Traynor's opinion.

82. 33 Cal. 2d 80, 199 P.2d 1 (1948).

83. 26 Cal. 3d at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144.

84. *Id.* The court held that it was reasonable to measure the likelihood that any of the defendants supplied the injury-causing product by the percentage which the DES sold by each of them bears to the entire production of the drugs sold for the purpose of preventing miscarriages. *Id.* at 611-12, 607 P.2d at 937, 163 Cal. Rptr. at 145. The court held, however, that the plaintiff must join a substantial share of the DES market. If the plaintiff was forced to join in the action a substantial share of the DES manufacturers from which her mother was likely to have obtained the drug, the injustice of shifting the burden of proof to the defendants would be greatly diminished. Finally, the court held that each defendant would be held liable for the proportion of the judgment represented by its share of that market. However, a defendant could relieve itself from liability if it demonstrates it could not have made the product. While the court adopted this theory to relieve the plaintiff of the burden of identifying a specific defendant, the case was still in the pleadings stage. For a DES case in which a plaintiff received a jury verdict, see *Bichler v. Eli Lilly & Co.*, 55 N.Y.2d 571, 436 N.E.2d 182, 450

court modified the rules of causation and identification of a specific defendant in applying the market share theory of liability. Consequently, the courts have provided an avenue of recovery for injured plaintiffs who, through no fault of their own, are unable to identify the specific manufacturer that caused their injury.<sup>85</sup>

The market share theory of liability adopted in *Sindell* has drawn criticism from both legal scholars and commentators.<sup>86</sup> However, additional criticism persuasively generating strong arguments against the imposition of market share liability is addressed in the *Sindell* dissent. First, the dissent stated that the holding violated well established rules of causation requiring that there be some reasonable connection between the defendant's act and the injury sustained by the plaintiff.<sup>87</sup> The dissent reasoned that the long standing tradition of tort principles and rules of causation were substantially eroded in that the plaintiffs joined only five of the approximately two hundred drug companies that manufactured DES.<sup>88</sup> According to the dissent, the possibility that any of the named defendants actually caused the plaintiffs' injuries were purely speculative and conjectural.<sup>89</sup>

In addition to expressing concern about the departure from the traditional principles of tort law, the dissent also focused on the social utility of the drug and argued against the majority's application of market share liability. The social and economic benefits derived from utilizing the economy's resources in the fight against disease and reducing costs of medical care are enormous and the development of new drugs produces many social

N.Y.S.2d 776 (1982). See also Justice Traynor's concurring opinion in *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 467-68, 150 P.2d 436, 443-44 (1944) for further social policy reasons justifying the imposition of strict liability. See *supra* note 33, for an excerpt of Justice Traynor's opinion.

85. See *Abel v. Eli Lilly & Co.*, 418 Mich. 311, 343 N.W.2d 164 (1984). Plaintiffs in this case were also injured daughters whose mothers ingested DES while pregnant. While the court did not apply the market share theory established in *Sindell*, the court did adopt a modified rule of alternative liability as established in *Summers*. The court held that the plaintiff must show; (1) that the defendants acted tortiously; (2) that the plaintiffs have been harmed by the conduct of one of the defendants; and (3) the plaintiffs, through no fault of their own, were unable to identify the specific manufacturer that caused the injury. The court stated that if the plaintiffs met these requirements they could be able to avail themselves of the DES modified alternative liability theory and would be relieved of the traditional burden of proving causation in fact. *Id.* at 332, 343 N.W.2d at 173. However, this case was also in the pleadings stage and the court explicitly reserved judgment as to the validity of a potential jury verdict. *Id.* at 340, 343 N.W.2d at 177.

86. See generally Note, *supra* note 59; Fisher, *Products Liability-An Analysis of Market Share Liability*, 34 VAND. L. REV. 1623 (1981); Comment, *Manufacturer's Liability Based on a Market Share Theory: Sindell v. Abbott Laboratories*, 16 TULSA L.J. 286 (1980).

87. *Sindell*, 26 Cal. 3d 588, 614, 607 P.2d 924, 938, 163 Cal. Rptr. 132, 146 (Richardson, J., dissenting).

88. *Id.* at 615, 607 P.2d at 939, 163 Cal. Rptr. at 147.

89. *Id.*

benefits.<sup>90</sup> The dissent also emphasized that the court imposed liability for the manufacture of a drug that was carefully tested and had the full approval of the United States Food and Drug Administration.<sup>91</sup> The dissent argued that if a drug has beneficial purposes for the majority of the users, but only a small fraction of users experience harmful side effects, liability should not be imposed since such liability will inevitably inhibit the research, development, and dissemination of new pharmaceutical drugs.<sup>92</sup> Such liability, the dissent reasoned, is wholly inconsistent with traditional tort theory.<sup>93</sup>

As a result of the expansion of modern tort theory in *Sindell*, those people injured by defective drugs but unable to identify a specific defendant-manufacturer were provided with an avenue of recovery. However, the market share theory may seem to have some negative social ramifications, particularly in the pharmaceutical industry. If the imposition of such liability results in decreased incentive for research, development, and manufacturing of new drugs, courts may take cognizance of such consequences and may refuse to adopt the theory.<sup>94</sup>

### C. Enterprise Liability as Applied in Asbestos Litigation

The basic premise of the enterprise theory of liability is that losses ought to be borne by those who have some logical connection with the enterprise or activity creating the loss.<sup>95</sup> The theory considers such factors as the relationship between product manufacturers and consumers, the role of internalizing costs to affect accident levels, and the most effective methods of distributing the risk of loss.<sup>96</sup> An effective way for society to decide how to allocate its limited resources in order to satisfy the greatest number of its members' individual wants and desires is through an open competitive mar-

---

90. *Id.* at 619, 607 P.2d at 941-42, 163 Cal. Rptr. at 149-50.

91. *Id.* Moreover, the dissent took cognizance of the fact that the incidence of vaginal cancer among "DES daughters" was estimated at one-tenth of one percent to four-tenths of one percent.

92. *Id.*

93. *Id.*

94. *Id.* See also *Namm v. Charles E. Frosst Co.*, 178 N.J. Super. 19, 427 A.2d 1121 (App. Div. 1984) (The court refused to modify proper defendant identification requirements in the absence of legislative or higher court authority). For other DES cases in which the court refused to apply the *Sindell* market share theory of liability, see *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004 (D.S.C. 1981); *Morton v. Abbott Laboratories*, 538 F. Supp. 593 (M.D. Fla. 1982); *Payton v. Abbott Laboratories*, 386 Mass. 540, 437 N.E.2d 171 (1982); *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241 (Mo. 1984).

95. The enterprise liability theory applies to losses historically recoverable under tort law when caused by an enterprise or activity, such as the production and distribution of products. *Klemme, supra* note 7, at 158.

96. *Priest, supra* note 33, at 463.

ket system.<sup>97</sup>

Cases involving asbestos related injuries present a justifiable basis for the application of enterprise liability.<sup>98</sup> Two recent cases that applied this theory are *Hardy v. Johns-Manville Sales Corp.*<sup>99</sup> and *Lockwood v. AC & S, Inc.*<sup>100</sup> In *Hardy*,<sup>101</sup> the court applied principles of market share liability outlined in *Sindell*.<sup>102</sup> As with DES cases, asbestos-related injuries present causation problems for the plaintiff because the latency period, or the length of time between exposure to the product and the resulting injury, makes it legally and medically impossible to state with certainty which asbestos exposure caused or contributed to the disease.<sup>103</sup> Nevertheless, courts have relaxed traditional tort law principles to redress the significant injuries sustained by asbestos victims. The plaintiff's burden of proving causation has consequently been modified. Courts only require that the plaintiff prove exposure to the product and resulting injury, then the burden shifts to the defendants to isolate causation and exculpate themselves.<sup>104</sup> If the defendants are unable to do so, liability is apportioned among the defendants in accordance with their percentage share of the relevant market.

Courts impose liability in asbestos cases even though asbestos has significant social utility in an industrialized society.<sup>105</sup> The potential harm posed by exposure to asbestos, however, is similarly significant.<sup>106</sup> Thus, courts are often faced with a classic utility versus danger analysis.<sup>107</sup> Never-

97. The underlying justification for the enterprise liability theory is based on a premise of classical economics, in recognizing that at any one point in time the total resources available to a society are limited. Klemme, *supra* note 7, at 158-59.

98. More than 67,000 lives are taken each year by asbestos related injuries. Comment, *Asbestos Litigation: The Dust Has Yet to Settle*, 7 FORDHAM URBAN L.J. 55 (1978).

99. 509 F. Supp. 1353 (E.D. Tex. 1981).

100. 44 Wash. App. 330, 722 P.2d 826 (1986).

101. The plaintiffs, consisting of insulation workers, pipefitters, carpenters, and factory workers, had contracted asbestosis as a result of prolonged exposure to asbestos. 509 F. Supp. at 1354. For a detailed explanation of this fatal disease, see Note, *The Causation Problems in Asbestos Litigation: Is There an Alternative Theory of Liability?*, 15 IND. L. REV. 679 n.5 (1982). Asbestos is an insulation material which consists of hydrated silicate minerals which occur naturally as masses of fibers and is relatively indestructible and highly resistant to fire. *Id.*

102. See *supra* text accompanying note 75.

103. *Hardy*, 509 F. Supp. at 1355.

104. *Id.* at 1357.

105. Asbestos is highly useful in insulation and pipe covering because of its heat resistant property. In addition, the U.S. industry alone consumes one million tons of asbestos annually. *Id.* at 1355.

106. See *supra* note 98.

107. In applying this analysis, the court weighs the social utility of the product against the probability and seriousness of potential harm or danger that the product poses to society. For a further discussion of social utility versus risk of harm see *infra* text accompanying notes 165-83.

theless, courts justify the imposition of liability based on an analysis of social policy considerations.

First, the imposition of liability will result in a wide distribution of the risks of product-related injuries because manufacturers can include the costs of insurance in the price of the product. This result is justified when one considers the harshness of forcing innocent victims to bear such costs.<sup>108</sup> Second, manufacturers are in a better position than the consumer to avoid such injuries by conducting research to discover new dangers and reduce the danger that defective products present to society.<sup>109</sup> Finally, the burden of illness and death that result from dangerous products such as asbestos should be placed upon those who profit from placing such products on the market.<sup>110</sup>

Consequently, courts relax the plaintiff's burden of proving causation not only for such social policy reasons, but also because it is practically impossible for the plaintiff to determine which particular exposure to asbestos dust caused his injury.<sup>111</sup> As a result of the cumulative nature of asbestosis, identifying a specific causative agent is inconsistent with traditional legal concepts of causation.<sup>112</sup> Thus, circumstantial evidence may present a sufficient basis for imposing liability under the enterprise theory of liability.<sup>113</sup>

Courts have used the enterprise theory to impose liability in other cases involving asbestos related injuries.<sup>114</sup> As in *Hardy*, the defendants in

108. *Beshada v. Johns-Manville Prod. Corp.*, 90 N.J. 191, 205-06, 447 A.2d 539, 547 (1982).

109. *Id.* at 207, 447 A.2d at 548.

110. *Id.* at 209, 447 A.2d at 549.

111. In *Lockwood*, the court stated that the sufficiency of the evidence to prove causation was a factual determination that is up to the jury to decide. *Lockwood*, 44 Wash. App. 330, 353, 722 P.2d 826, 840. Direct evidence in such cases is not necessary, and circumstantial evidence may provide the entire basis for recovery. Inferences drawn from the testimony established that if the asbestos products were located in the shipyard where the plaintiff worked, they were actually used on the jobsite. First, the expert testimony tended to prove the existence of asbestos fibers in the air because of the product's ability to drift and remain in the ambient air for long periods of time once it is released into the air. Second, the plaintiff had asbestosis, which is only caused by exposure to asbestos dust. Third, the testimony of co-workers that asbestos products were on the job site tended to prove that the plaintiff was exposed to the asbestos dust. *Id.* at 353, 722 P.2d at 840.

112. *Hardy*, 509 F. Supp. at 1358.

113. Testimony of the plaintiff, and testimony of co-workers who rely on memory with regards to products used over a twenty year period may be all the evidence that is available. *Id.* at 1358-59.

114. See *Lockwood v. AC & S, Inc.*, 44 Wash. App. 330, 722 P.2d 826 (1986). The plaintiff worked in Seattle shipyards from 1942 to 1972 when he took disability retirement after being diagnosed as having asbestosis. *Id.* at 332-33, 722 P.2d at 829. Until 1952, the plaintiff had worked in nearly every shipyard in the area and had been exposed to similar amounts of asbestos from job to job. From 1952 to 1972 he had worked at the same location

*Lockwood* unsuccessfully argued that the plaintiffs were unable to specifically identify the defendants' products as the ones to which they were directly exposed, and thus failed to establish proximate cause.<sup>115</sup> Nevertheless, courts have applied the enterprise theory of liability based on an analysis of social policy<sup>116</sup> holding that accepting such an argument would present an impossible task for a plaintiff who suffers asbestos related injuries.<sup>117</sup> Consequently, courts have expanded on traditional tort theory to provide a plaintiff with a realistic probability of recovery.<sup>118</sup>

#### IV. THE INVOLUNTARY SMOKER

WARNING: The Surgeon General has determined that cigarette smoking is dangerous to your health *and the health of others*.<sup>119</sup>

Based on the basic theory of enterprise liability, an involuntary smoker should be able to assert a cause of action against a cigarette manufacturer for injuries due to prolonged exposure (a period of years) to passive cigarette smoke. The purpose of this section is to outline the stages that an involuntary smoker plaintiff must pursue to assert a cause of action against cigarette manufacturers and to address the problems a plaintiff may confront in such a suit.<sup>120</sup>

---

and had similar exposure there. His work consisted of direct contact with insulation workers who installed or removed asbestos materials. Also noteworthy was the fact that the plaintiff had smoked cigarettes from his early teens until 1972, because asbestos exposure combined with cigarette smoking presents a greater potential for health complications. *Id.* at 334, 722 P.2d at 830. The original complaint named nineteen defendants, of which all but three were dismissed or settled prior to appeal. The plaintiff claimed that the asbestos manufacturers were strictly liable for placing an unreasonably dangerous product on the market which was not accompanied by an adequate warning. *Id.*

115. *Id.* at 352, 722 P.2d at 839. The court ruled that there was sufficient credible testimony or inferences which could be drawn therefrom to establish that if the asbestos products were located in the shipyard they were actually used on the jobsite. *Id.*

116. See *supra* text accompanying notes 98-114.

117. *Lockwood v. AC & S, Inc.*, 44 Wash. App. 330, 354, 722 P.2d 826, 840 (1986).

118. *Lockwood v. AC & S, Inc.*, 44 Wash. App. 330, 722 P.2d 826 (1986); *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353 (E.D. Tex. 1981); *Beshada v. Johns-Manville Products Corp.*, 90 N.J. 191, 447 A.2d 539 (1982).

119. Note, *The Non-Smoker in Public: A Review and Analysis of Non-Smokers' Rights*, 7 SAN. FERN. V.L. REV. 141, 172 (1979).

120. In order to present an effective analysis, the author wishes to make it clear that there are limited situations that would provide an opportunity to present such a case. Such situations would include an employee exposed to passive cigarette smoke at the workplace for a prolonged period of years, or a child raised in a home in which both parents were heavy smokers. Much of the analysis of this section focuses on the plaintiff in the workplace since such a situation would provide for a more appropriate application of the enterprise liability theory. In the situation where a child raised by parents who were heavy smokers would be the plaintiff, identification would not present significant problems since the parents are likely to remember what brand of cigarettes they smoked over the years. Since the inability to identify a specific defendant is an essential part of enterprise liability, the plaintiff in the workplace would pre-

### A. Identifying the Proper Defendant

In order for an involuntary smoker plaintiff to assert a cause of action against a cigarette manufacturer, he must join the proper manufacturers as defendants. The key problem of proof in DES and asbestos cases is the inability of the plaintiff to identify a precise causative agent.<sup>121</sup> Similarly, it would be difficult, if not impossible, for an involuntary smoker plaintiff to identify which specific cigarette brand caused his lung cancer, since all cigarettes consist of virtually the same carcinogenic agents and toxic compounds.<sup>122</sup>

A plaintiff in such situations is not at fault for failing to identify a specific defendant. Consequently, courts fashion a way around product

sent a more appropriate analysis because he was most likely exposed to smoke from many brands of cigarettes.

121. Perhaps the most persuasive argument against imposing liability based on an enterprise theory is the selection of fewer than all manufacturers as defendants. This argument is most tenable in DES cases since there are over two hundred companies that manufactured DES. *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 609, 607 P.2d 924, 935, 163 Cal. Rptr. 132, 144, cert. denied, 449 U.S. 912 (1980). As a result, a plaintiff may find it impractical, perhaps impossible, to join all potential tortfeasors in one cause of action. Those who are opposed to the application of enterprise liability in DES cases offer several arguments against allowing fewer than all potential tortfeasors.

First, if just one tortfeasor is absent, and it is he who actually caused the harm, then the other defendants may be held liable even though they are innocent. Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 *FORDHAM L. REV.* 963, 991 (1978). Second, a standard of proof depends on the joinder of all defendants, and joining fewer than all defendants destroys any presumption of liability. *Id.* Finally, the plaintiff should be at fault for failing to identify the proper defendants since the mother's choice of drug, doctor, pharmacist, and such records were all more within the control of the plaintiff than of the defendants. *Id.* at 992.

Those in favor of imposing liability on DES manufacturers offer several responses to refute such arguments. First, once the plaintiff meets the burden of joining the required defendants, the defendants can in turn file a cross complaint against other DES manufacturers which they allege may have supplied the injury-causing products. *Sindell*, 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. Second, if only a small portion of DES manufacturers dominated the market, joinder of only these manufacturers has a great probability of constituting the most responsible parties. Comment, *supra* note 121, at 984-85. Such a standard is logical since it is virtually impossible for all potential causes of an event to be before the court, and a court must be satisfied with the most probable causative agents. *Id.* at 992. Finally, the failure of the plaintiff to identify a proper defendant is due largely to the fault of the DES manufacturers. The very tortiousness of the defendants' conduct in failing to discover or warn of the dangers of the drug was the reason that all parties failed to keep records or remember the drug prescribed, since they were unaware of any need to do so. *Id.* at 993.

122. Surgeon General's Report, *supra* note 13, at 169, 252. Undiluted sidestream smoke (smoke emitted from a smoldering cigarette) is characterized by significantly higher concentrations of the toxic and carcinogenic compounds found in mainstream smoke (smoke that the smoker inhales from the cigarette) including ammonia, volatile amines, volatile nitrosamines, certain nicotine decomposition products, and aromatic amines.

identification, a traditional requirement of proof in products liability.<sup>123</sup> The traditional rule would place an impossible burden on plaintiffs, particularly in asbestos cases, since the victim has little or no opportunity to identify products used twenty or more years earlier.<sup>124</sup>

In contrast, however, the burden of identifying all potential tortfeasors would not present a problem to an involuntary smoker plaintiff. Since there are only fourteen cigarette companies,<sup>125</sup> a plaintiff would not face an undue burden in joining all defendants. Thus, all responsible parties would be before the court, and any concerns that the guilty party is not present are unwarranted, so long as the plaintiff is able to provide evidence establishing a link between his lung cancer and prolonged exposure to passive cigarette smoke.

### B. Causation

In order for an involuntary smoker to assert a cause of action against a cigarette manufacturer, he must be able to prove causation. Causation would present the most significant and salient issue in such a case. Simply stated, the defendant's conduct is a cause of the plaintiff's injury if it was a material element and a substantial factor in bringing the harm about.<sup>126</sup> Such a statement is undoubtedly more complex than it appears. There is nothing in the entire field of tort law that has elicited such overwhelming confusion, and there is yet to be any general agreement as to the best approach to a solution.<sup>127</sup> Consequently, proximate cause must be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy, and precedent.<sup>128</sup> A court must conduct a thorough analysis of many social policy issues in cases where causation is difficult to precisely establish. This section addresses those issues and shows that, based on the enterprise theory of liability, courts should follow the recent trend in relaxing rules of causation and provide relief for an involuntary smoker.

123. *Hardy*, 509 F. Supp. at 1358. *See also* *Brochu v. Ortho Pharmaceutical Corp.*, 642 F.2d 652 (1st Cir. 1981); *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974); *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980); *Abel v. Eli Lilly & Co.*, 418 Mich. 311, 343 N.W.2d 164 (1984); *Lockwood v. AC & S, Inc.*, 44 Wash. App. 330, 722 P.2d 826 (1986).

124. *Lockwood*, 44 Wash. App. at 354, 722 P.2d at 840.

125. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1987* 724 (107th ed.) Washington, D.C. 1986.

126. PROSSER, *supra* note 28, at 267. If the defendant's conduct was a substantial factor in causing the plaintiff's injury, it follows that he will not be absolved from liability merely because other causes have contributed to the result, since such causes, innumerable, are always present. *Id.* at 268.

127. *Id.* at 263.

128. *Id.* at 279.

Plaintiffs in DES cases face significant burdens in proving causation due to the nature of the product and the nature of the plaintiffs' injuries. One of the main problems in the DES cases was the passage of time between the mother's ingestion of the drug and the discovery of DES-associated abnormalities in the offspring.<sup>129</sup> In addition, twenty-nine percent of the reported adenocarcinoma cases apparently occurred even though the patient's mother did not ingest DES. Thus, it was not clear in all cases of that particular disease associated with DES use that DES was actually the cause.<sup>130</sup> Also, although doctors prescribed synthetic estrogens for millions of pregnant women between the late 1940s and 1971, only 389 reported cases of clear cell adenocarcinoma have been reported in the offspring of all women born throughout the world during that period.<sup>131</sup> Finally, the incidence of vaginal cancer among "DES daughters" was estimated at one-tenth of one percent to four-tenths of one percent.<sup>132</sup> However, the incidence of the types of cancer linked with DES is extremely rare in persons *other* than DES daughters.<sup>133</sup>

Plaintiffs in asbestos cases faced similar, although not as substantial, burdens of proving causation. Again, such problems are related to the nature of the product and the type of injury involved. The latency period of asbestosis makes it legally and medically impossible to determine with any degree of certainty when the disease was contracted or which exposure caused or contributed to the disease.<sup>134</sup> Such a condition is due to many years of exposure to asbestos dust, with past and present exposures contributing to the disease.<sup>135</sup> Consequently, it is virtually impossible for a plaintiff to prove which exposure or exposures caused his disease.

Similar to the plaintiffs in DES and asbestos cases, the involuntary smoker faces a significant burden of proving causation due to the cumulative effect of exposure to passive cigarette smoke and the nature of diseases such as lung cancer. One factor in favor of the asbestos plaintiff is that only exposure to asbestos causes asbestosis.<sup>136</sup> On the contrary, while it has

129. Biebel, *supra* note 77, at 226. For example, adenocarcinoma has a latency period of ten to twenty years. *Id.* at 227 (citing Note, *DES: Judicial Interest Balancing and Innovation*, 22 B.C. L. REV. 747, 749 (1981)).

130. Fischer, *Products Liability: An Analysis of Market Share Liability*, 34 VAND. L. REV. 1623 (1981).

131. Note, *Beyond Enterprise Liability in DES Cases-Sindell*, 14 IND. L. REV. 695, 713 (1981).

132. *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 620, 607 P.2d 924, 942, 163 Cal. Rptr. 132, 150, *cert. denied*, 449 U.S. 912 (1980).

133. Biebel, *supra* note 77, at 225.

134. *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353, 1355 (E.D. Tex. 1981). Asbestosis is a slow and cumulative disease. The continued exposure to asbestos dust and fibers increases the risk and severity of the disease. *Id.*

135. *Borel v. Fibreboard Paper Prod. Corp.*, 493 F.2d 1076, 1083 (1973).

136. *Lockwood v. AC & S, Inc.*, 44 Wash. App. 330, 353, 722 P.2d 826, 840 (1986).

clearly been established that involuntary smoking causes lung cancer,<sup>137</sup> it is not certain that all people who contract lung cancer have been exposed to passive cigarette smoke for prolonged periods of time. In addition, the nature of lung cancer and other related diseases reflects numerous factors such as genetic make-up, occupation, age, diet, and exposure of a person during his life to a complex mixture of bacteria, viruses, radiation, and chemicals.<sup>138</sup> Moreover, more data on the dose and distribution of environmental tobacco smoke exposure in the population are needed in order to accurately estimate the magnitude of the risk in the U.S. population.<sup>139</sup>

Despite the apparent causation problems an involuntary smoker plaintiff is likely to encounter, courts have followed a current trend by relaxing traditional rules of causation in order to provide relief for plaintiffs in DES and asbestos cases.<sup>140</sup> Broadly stated, liability in these cases arises from the presumption that each defendant is a cause because, jointly, there is a high probability that the product manufactured by one of the defendants, all of whom behaved tortiously, caused the plaintiff's injury.<sup>141</sup> In addition, circumstantial evidence may establish the entire basis for recovery under negligence or strict products liability<sup>142</sup> since such evidence may be all the plaintiff has to offer. A plaintiff need not establish with absolute certainty that the defendant caused his injury. He must simply persuade the jury by a preponderance of the evidence that his injury occurred in the manner he contends that it did.<sup>143</sup> Thus, as in *Hardy*, the *Lockwood* court imposed liability based on presumptions and circumstantial evidence. In *Hardy*, the

137. Surgeon General's Report, *supra* note 13, at 13.

138. Orloff, *Theories of Cancer and Rules of Causation*, 27 JURIMETRICS J. 255, 256 (1987).

139. Surgeon General's Report, *supra* note 13, at 107.

140. See *supra* text accompanying notes 76-118.

141. Comment, *supra* note 121, at 998.

142. *Lockwood*, 44 Wash. App. at 354, 722 P.2d at 840-41.

143. The court in *Lockwood v. AC & S, Inc.*, 44 Wash. App. 330, 722 P.2d 826 applied the following standard:

It is sufficient if his [the plaintiff's] evidence affords room for . . . reasonable minds to conclude that there is a greater probability that the accident causing the injury happened in such a way as to fix liability upon the person charged with such liability, than it is that it happened in a way for which the person so charged would not be liable. There are very few things in human affairs . . . that can be established with such absolute certainty as to exclude the possibility, or even some probability, that another cause or reason may have been the true cause or reason for the damage, rather than the one alleged by the plaintiff. But such possibility, or even probability, is not to be allowed to defeat the right of recovery, where the plaintiff has presented to the jury sufficient facts and circumstances surrounding the occurrence as to justify a reasonable juror in concluding that the thing charged was the prime and moving cause. In other words, the plaintiff is only required to satisfy the jury, by a fair preponderance of the evidence, that the accident . . . occurred in the manner he contends it did.

*Id.* at 355, 722 P.2d at 841.

court relied on the worker's testimony, and testimony of co-workers who relied on memory with regard to asbestos products used over a twenty or thirty year period.<sup>144</sup> Similarly, the *Lockwood* court held that there was sufficient credible testimony or inferences that could be drawn to establish the presumption that if asbestos products were located in the shipyard, they were actually used on the jobsite, and did not remain in the warehouse.<sup>145</sup>

Similar to the plaintiffs in the DES and asbestos cases, an involuntary smoker would not face an insurmountable burden in establishing a lessened but requisite causal connection between his lung cancer and prolonged exposure to passive cigarette smoke.<sup>146</sup> On a broader but perhaps more significant scale, an involuntary smoker suing cigarette manufacturers for damages can rely on physicians' testimony along with other circumstantial evidence to establish causation.<sup>147</sup> When an injured party shows that he worked at a certain job for a period of years, that there was cigarette smoke on the jobsite, that this could be verified by the employer and co-workers, and provides the testimony of physicians confirming that the plaintiff's lung cancer was due substantially to prolonged exposure to passive cigarette smoke, he would fit the standard set forth in *Lockwood*.<sup>148</sup> Circumstantial evidence would lead a reasonable juror to conclude either that the plaintiff's prolonged exposure to passive cigarette smoke was a substantial factor in bringing about cancer of the lung, or that there is a greater probability that the lung cancer was due to the prolonged exposure to passive smoke than to other factors.<sup>149</sup>

Opponents of enterprise liability argue, however, that the relaxation of the rules of causation abandons the traditional requirement of a causal connection between the defendant's acts and the plaintiff's injury.<sup>150</sup> Thus, opponents of enterprise liability argue that since only a small number of potential defendants are joined, it remains wholly speculative and conjectural whether any of the named defendants in fact caused the plaintiff's inju-

144. *Hardy*, 509 F. Supp. at 1358.

145. *Lockwood*, 44 Wash. App. at 352, 722 P.2d at 839.

146. See *Shimp v. New Jersey Bell Telephone*, 145 N.J. Super. 516, 368 A.2d 408 (Ch. Div. 1976). The plaintiff relied on affidavits of attending physicians who confirmed her sensitivity to cigarette smoke and the negative effect it had on her health. *Id.* at 520-21, 368 A.2d at 410.

147. See also *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353 (E.D. Tex. 1981); *Lockwood v. AC & S, Inc.*, 44 Wash. App. 330, 722 P.2d 826 (1986). In both cases the court allowed the plaintiff to offer circumstantial evidence to prove causation and imposed liability on the defendant manufacturers.

148. *Lockwood*, 44 Wash. App. at 355, 722 P.2d at 841. See *supra* note 143 for the standard the court applied in *Lockwood*.

149. *Lockwood*, 44 Wash. App. at 355, 722 P.2d at 841.

150. *Sindell*, 26 Cal. 3d at 615, 607 P.2d at 939, 163 Cal. Rptr. at 146 (Richardson, J., dissenting).

ries.<sup>151</sup> These arguments are not without merit, particularly in the DES cases.<sup>152</sup> This argument loses plausibility, however, even in DES cases, when the court's analysis is premised on the theory of enterprise liability.

Under the enterprise theory of liability, the standard of "clear and convincing evidence" is satisfied by joining those manufacturers that accounted for a high percentage of the defective products on the market, approximately seventy-five to eighty percent.<sup>153</sup> In addition, relaxing rules of causation in the asbestos cases is justified by the fact that since the disease of asbestosis is cumulative, exposure to all asbestos products contributes substantially to the plaintiff's overall condition.<sup>154</sup>

Similarly, due to the cumulative nature of lung cancer, exposure to the smoke from all brands of cigarettes contributes substantially to the overall result of lung cancer. Over thirty years of research has conclusively established cigarette smoke as a carcinogen, and it is certain that a substantial portion of all lung cancers that occur in nonsmokers is due to exposure to passive cigarette smoke.<sup>155</sup> Also, a number of American and foreign courts allow plaintiffs to use statistical or epidemiological evidence to prove that their injuries resulted from exposure to a carcinogen.<sup>156</sup> Epidemiological statistics may constitute the best, if not the sole, available evidence in cases where a causal link is difficult to precisely establish since it is impossible to pinpoint the actual cause of the disease.<sup>157</sup>

Consequently, relaxed rules of causation are proper in cases involving injuries that may have been caused by more than one factor. In a nuclear test blast case, a federal district court in Utah recognized that cancer results from a multiplicity of factors, and that the law does not necessarily recognize only one proximate cause of an injury.<sup>158</sup> This standard is similarly reflected in Agent Orange cases, where courts have ruled that a plaintiff must show that it is "more likely than not" that his disease was caused by exposure to the chemical.<sup>159</sup> Similarly, the same test is applicable to an

151. *Id.*

152. Very few DES cases have reached trial, and only one has resulted in a jury verdict for the plaintiff. Biebel, *supra* note 77, at 226.

153. Comment, *supra* note 121, at 996.

154. *Borel v. Fibreboard Paper Prod. Corp.*, 493 F.2d 1076, 1105 (1973).

155. Surgeon General's Report, *supra* note 13, at x.

156. See *In re Agent Orange Products Liability Litigation*, 635 F.2d 987 (2d Cir. 1980); *Insurance Co. of North America v. Forty Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980) (asbestos); *Reserve Mining Co. v. EPA*, 514 F.2d 492 (8th Cir. 1975) (chemical wastes); *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292 (3d Cir. 1961) (smoking and cancer).

157. *In re Agent Orange Products Liability Litigation*, 597 F. Supp. 740, 834 (E.D.N.Y. 1984).

158. *Allen v. United States*, 588 F. Supp. 247, 412 n.155 (D. Utah 1984).

159. Orloff, *supra* note 138, at 260.

involuntary smoker case, since lung cancer may be the result of more than one source. Thus, when a plaintiff proves a prolonged period of exposure to passive smoke (i.e. at the worksite), a jury could reasonably conclude that "more likely than not" the lung cancer was a result of heavy exposure to passive cigarette smoke.

Relaxing the rules of causation is even further justified in the involuntary smoker case. As opposed to the high number of DES and asbestos manufacturers, there are only fourteen cigarette companies.<sup>160</sup> Thus, if a plaintiff proves injury from prolonged exposure to passive smoke, a presumption of liability is justified because, since all manufacturers can feasibly be joined, there is a 100% probability of causation collectively.<sup>161</sup>

Moreover, due to the nature of enterprise liability, and the nature of the injury involved, a relaxation of the rules of causation is not only justified under current trends, but is also appropriate to provide a plaintiff with a remedy. Products liability law is dynamic and should not stand still where innocent victims face "inordinate difficult problems of proof."<sup>162</sup> The modification of the rules of causation imposes liability and compensates victims in proportion to the likelihood that they were injured by the defendant's conduct.

Finally, under traditional rules of causation, defendants can more readily escape liability and thus lack incentive to conduct research into injury causation.<sup>163</sup> Thus, imposing liability will encourage defendants to conduct research as to the ways in which their products endanger the public so that they may potentially escape liability by exculpating themselves.<sup>164</sup>

### 1. Social Utility v. Magnitude of Risk

In any products liability case in which causation is a significant issue, a court must weigh the balance between the social utility of the product and the magnitude of the risk involved.<sup>165</sup> A court will hold that a product is

160. STATISTICAL ABSTRACT OF THE UNITED STATES 1987, *supra* note 125, at 724.

161. Comment, *supra* note 121, at 986.

162. Bichler v. Eli Lilly & Co., 55 N.Y.2d 571, 579-80, 436 N.E.2d 182, 185, 450 N.Y.S.2d 776, 779 (1982). *But cf.* Priest, *The Monsanto Lectures: Modern Tort Law and Its Reform*, 22 VAL. U.L. REV. 1 (1987) (suggesting that modern tort theory has adversely affected the welfare of United States citizens).

163. Delgado, *Beyond Sindell: Relaxation of Cause-in-Fact Rules For Indeterminate Plaintiffs*, 70 CAL. L. REV. 881, 894 (1982).

164. *Id.* As to either manifest injustice or inexact justice, the law should prefer the latter. *Id.* at 895. In *Sindell*, the court adopted market share liability and imposed liability on the defendants as opposed to maintaining rigid traditional tort principles and denying relief to the injured plaintiff. *Sindell*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132.

165. Donaher, Piehler, Twerski & Weinstein, *The Technological Experts in Products Liability Litigation*, 52 TEX. L. REV. 1303, 1307 (1974). The issue in a products liability case

“unreasonably dangerous”<sup>166</sup> and therefore impose liability only if, on balance, the utility of the product does not outweigh the magnitude of the danger.<sup>167</sup>

While there was undoubtedly a high magnitude of risk involved in the use of DES and asbestos, the utility of such products was also substantial.<sup>168</sup> Consequently, opponents of enterprise liability argue that the threat of liability will discourage people from engaging in useful but potentially dangerous activities.<sup>169</sup> However, this concern loses its significance in the context of an involuntary smoker case. Cigarettes and the activity of smoking have an insignificant social utility value,<sup>170</sup> while the risks they pose to society are overwhelming.<sup>171</sup> Perhaps the only plausible social utility that cigarettes may have is the industry's effect on the economy. In adopting the Federal Cigarette Labeling and Advertising Act,<sup>172</sup> Congress sought to strike a balance between warning the public of the hazards of cigarette smoking and protecting the interests of the national economy.<sup>173</sup>

However, the risks involved with the use of cigarettes are overwhelming.<sup>174</sup> Besides the array of harms that direct cigarette smoking poses, pas-

is whether, given the risks and possible benefits of and possible alternatives to the product, society will live with the product as it is or will require an altered, less dangerous form. *Id.* Although automobiles cause thousands of deaths each year, their social utility is so significant that society permits their use.

166. See *supra* note 49.

167. *Borel v. Fibreboard Paper Prod. Corp.*, 493 F.2d 1076, 1087 (1973).

168. The dissent in *Sindell* argued that the social and economic benefits in fighting the war against disease and reducing medical care costs are enormous. *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 619, 607 P.2d 924, 941-42, 163 Cal. Rptr. 132, 149-50, *cert. denied* 449 U.S. 912 (1980). Since the incidence of vaginal cancer in DES daughters was estimated at less than ½ percent, the dissent argued that if a drug is beneficial to the majority of its users but later has harmful side effects to only a small fraction, the enterprise theory of liability simply goes too far in imposing liability on the manufacturer. (The court analyzed the case on the basis of market share liability. However, since market share liability is an inherent part of enterprise liability, the author makes no distinction). Similarly, products containing asbestos and its heat resistant property have significant utility in an industrial society. *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353 (E.D. Tex. 1981).

169. *Fischer*, *supra* note 130, at 1629.

170. One might argue that in a free society one should have the right to smoke, just as one has the right to read pornographic material. However, when one reads *Hustler* or *Penthouse*, he does not immediately and directly endanger the health of others, as one does when he smokes in public places.

171. See *infra* note 174.

172. See *supra* note 5.

173. *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 187 (3rd Cir. 1986).

174. Smoking causes the deaths of more than 350,000 Americans annually. Levin, *supra* note 1, at 198. Evidence consisting of over 50,000 studies establish cigarette smoking as the single largest preventable cause of premature death and disability in the United States. Surgeon General's Report, *supra* note 13, at ix. Cigarette smoking has also been established as a major cause of cancer of the lung, larynx, oral cavity, esophagus, bladder, and is associated

sive smoke poses similarly significant dangers. Over thirty years of studies have established cigarette smoke as a carcinogen.<sup>176</sup> Undiluted sidestream smoke (smoke emitted from a cigarette between puffs) contains higher concentrations of many of the toxic and carcinogenic compounds found in mainstream smoke (the smoke the cigarette smoker inhales while puffing from a cigarette).<sup>176</sup> Also, existing data suggest that more carcinogenic activity per milligram of cigarette smoke may be found in sidestream smoke than in mainstream smoke.<sup>177</sup> Passive smoke contains irritants that can damage the conjunctiva of the eyes, the mucous membranes of the nose, throat, and respiratory tract and creates poor air quality indoors.<sup>178</sup> Finally, children of parents who smoke are hospitalized for bronchitis and pneumonia during the first year of life more than children of nonsmokers. Moreover, the children of parents who smoke suffer a variety of acute respiratory illnesses, such as bronchitis, tracheitis, and laryngitis before two years of age at a higher frequency than children of nonsmoking parents.<sup>179</sup>

Congress and the state legislatures, in recognition of the dangers of cigarette smoking and the harmful effects it has on society, have passed legislation that regulates cigarette smoking. Forty states and the District of Columbia have some form of legislation, regulation, and voluntary action that restricts smoking in various public settings.<sup>180</sup> Smoking in the workplace has also been regulated. Legislation in twelve states regulates smoking by government employees, and nine states and over seventy communities regulate smoking in the private sector workplace.<sup>181</sup> Arizona was the first of several states to pass a law declaring smoking to be both a public nuisance and a danger to public health.<sup>182</sup> Such policies may alter public

---

with cancer of the liver and pancreas. U.S. Department of Health Education and Welfare, Smoking and Health, Report of the Surgeon General, ch. 5 at 31, 36, 42, 44, 49, 53 (1979) [hereinafter *Smoking and Health*]. From a broader social utility standpoint, cigarettes pose a significant risk by causing fires and property damage. According to the United States Fire Administration, cigarettes cause approximately 93,000 fires a year, resulting in more than 2,100 deaths, 3,900 injuries and more than \$300 million in property damage. Podgers, *Attack on Cigarettes as Fire Cause Grows*, 67 A.B.A. J. 282, 283 (1981).

175. Surgeon General's Report, *supra* note 13, at x.

176. *Id.* at 169.

177. *Id.* at 252.

178. *Id.*

179. *Id.* at 107.

180. *Id.* at xi. *See, e.g., CAL. HEALTH & SAFETY CODE* § 25948 (West Supp. 1988) (prohibiting smoking on public transportation).

181. Surgeon General's Report, *supra* note 13, at 324. *See, e.g., N.J. STAT. ANN.* § 26:3D-23 (West 1987) (prohibiting smoking in places of employment, except in designated areas).

182. *ARIZ. REV. STAT. ANN.* § 36-601.01 (1986). In addition, it has been argued that people have a constitutional right to a smoke-free environment. *See Reynolds, Extinguishing Brushfires: Legal Limits on the Smoking of Tobacco*, 53 U. CIN. L. REV. 435, 451-55 (1984). An amendment to the U.S. Constitution that recognizes an inalienable right to a decent envi-

attitudes about smoking and may contribute to a reduction of smoking in the United States.<sup>183</sup> Courts should follow the trend of state legislatures and public sentiment by recognizing the rights and health of nonsmokers by allowing a cause of action by an involuntary smoker, thereby imposing liability on cigarette manufacturers for injuries caused by prolonged exposure to passive cigarette smoke.

## 2. Other Policy Considerations

When analyzing issues of causation, courts also consider broad social policy implications and the ramifications of imposing liability or denying recovery. The enterprise theory of liability is concerned with the conservation of the community's limited resources.<sup>184</sup> When accidents or injuries occur, the judicial system must determine how those losses should be distributed. Such an analysis of loss distribution must involve establishing a standard for determining how the initial burden should be allocated between the parties as well as how the ultimate burden will be allocated among the various segments of society.<sup>185</sup>

The enterprise theory presupposes that as people carry on their lives they ought to be permitted to rely on normal expectations.<sup>186</sup> One such normal expectation is that all activities will be conducted in such a manner that will not disrupt the normally expected status quo by causing tort-like losses that will frustrate the normal expectations of other community members.<sup>187</sup>

The enterprise theory operates on the premise that an enterprise should take appropriate preventive action to avoid losses as a result of personal injury or, in the alternative, insure against those losses that will inevitably

---

ronment has been proposed by Senator Gaylord Nelson of Wisconsin. Note, *supra* note 119, at 169-70. A bar in Chicago recently went so far as to ban smoking on its premises every Wednesday night. Kay and Conklin, *Ins*, Chicago Tribune, Oct. 21, 1987, § 4, at 3, col. 1. Finally, public opinion polls indicate strong support in favor of banning smoking in a wide range of public places. Surgeon General's Report, *supra* note 13, at 324.

183. Surgeon General's Report, *supra* note 13, at 324.

184. Klemme, *supra* note 7, at 175.

185. *Id.* at 177.

186. *Id.* at 180.

187. *Id.* For example, one should be entitled to normally expect that, if he crosses an intersection when the light is green, another driver will not ignore a red light and cross the intersection from the right or left. If the cars crash, resulting in physical injury and property damage, the normal expectations of the driver who had the green light are disrupted. Similarly, the presence of cigarette smoke arguably affects the normal expectations of nonsmokers. Many people avoid public places such as nightclubs, restaurants, and sporting events because cigarette smoke causes discomfort. Cigarette smoke causes clothes and hair to smell, irritates the eyes and throat, and often makes breathing difficult. In addition, people sensitive or allergic to cigarette smoke may be forced to seek medical attention to alleviate their symptoms.

occur.<sup>188</sup> This in turn requires a determination of who may be the most effective preventer of injuries and who can most efficiently distribute the costs of such injuries.<sup>189</sup> Often, however, these entities are not one in the same. The entities in an enterprise include manufacturer, distributor, employee, and the consumer. Clearly the most effective preventers of harm inflicted on involuntary smokers are the smokers themselves. However, it is also necessary to determine how effective the cigarette manufacturer can be in preventing harm to involuntary smokers.

There are several ways cigarette manufacturers could attempt to prevent the harms posed to involuntary smokers. First, they could make cigarettes less harmful and reduce the risks involved by producing only filtered cigarettes. Filtered cigarettes, however, still pose a significant health threat and would not eliminate the risk posed to involuntary smokers,<sup>190</sup> since filters only protect the smoker. Cigarette manufacturers could also provide warnings on the labels to warn of the harmful effects of exposing others to passive smoke.<sup>191</sup> Such a warning presumably would not be very effective, however, since involuntary smokers do not use the product and would have no reason to read the label. In addition, even if the nonsmokers would read such a labeled warning, they still are forced to *involuntarily* inhale passive cigarette smoke.

Nevertheless, these precautions would not eliminate the risk of exposure to passive smoke. Thus, injuries to involuntary smokers are simply an unavoidable and inevitable result of a lawful, or "not illegal" enterprise, the cigarette industry. These losses, however, should be borne by those who derive some fairly direct economic gain or benefit from carrying on an enterprise that poses significant health risks to nonsmokers.<sup>192</sup>

The initial burden of bearing such a loss would fall on the cigarette manufacturers. Such a result compensates the injured plaintiff and does no injustice to the cigarette manufacturers, since they can distribute the loss among the purchasing consumers of the enterprise as a cost of doing business.<sup>193</sup> Thus, if liability is placed on the cigarette manufacturer, it can spread the costs of insurance on to the consumers of the product, the smokers.

Opponents of enterprise liability argue that such a theory extends too far in providing potential plaintiffs with an avenue of recovery.<sup>194</sup> However,

---

188. *Id.* at 181.

189. *Id.* at 183.

190. Surgeon General's Report, *supra* note 174, at 14-29.

191. *See, e.g.*, warning given *supra* note 119 and accompanying text.

192. *See supra* note 95.

193. *Hall v. E.I. Du Pont De Nemours & Co.*, 345 F. Supp. 353, 375 (E.D.N.Y. 1972).

194. Note, *supra* note 59, at 1011.

if the involuntary smoker plaintiff were forced to bear the loss, inequity would result. While the plaintiff may have some form of casualty insurance, an insurance claim would improperly shift the burden of compensation to a group consisting of those who buy medical casualty insurance rather than the cigarette industry.<sup>195</sup> A purchasing consumer of goods and services, such as those who purchase medical and casualty insurance, should not be expected to bear the burden of a loss caused by an enterprise, the cigarette industry, which fails to meet normal expectations unless he is a purchasing consumer of that enterprise.<sup>196</sup> To force purchasing consumers of casualty insurance to pay for losses caused by the cigarette industry is contrary to the conservation of a community's limited resources, since the costs of insurance would not be reflected as accurately as possible in the pricing structure of the goods produced by the enterprise that actually caused the injury.<sup>197</sup> Consequently, the enterprise theory of liability properly places the economic burden of purchasing insurance on the manufacturers of the injury-causing enterprise, and ultimately on its consumers.<sup>198</sup>

Another countervailing policy concern in enterprise liability is protecting the manufacturer from unduly burdensome liability.<sup>199</sup> Involuntary smoker plaintiffs, however, are not likely to be significant in number. People are unlikely to begin suing cigarette manufacturers for damages as a result of smelly clothes or temporarily irritated eyes.<sup>200</sup> A more likely case would involve a serious injury where an involuntary smoker contracts lung cancer, emphysema, or some other fatal disease as a result of being exposed for *prolonged* periods (years) of time. Since causation is a significant hurdle,<sup>201</sup> such cases are unlikely to arise frequently.

Also, principles of enterprise liability are traditional in that they are apparent in other tort law areas such as respondeat superior and vicarious liability.<sup>202</sup> The rationale of enterprise liability is also analogous to cases

---

195. Klemme, *supra* note 7, at 198.

196. *Id.* at 208-09.

197. *Id.* at 188. Thus, if an involuntary smoker plaintiff were forced to bear the loss, he would be forced to collect through his casualty insurance company. As a result, those who purchase casualty insurance would be forced to pay higher premiums for a loss caused by the cigarette industry. If the cigarette industry were forced to bear the loss, the loss would ultimately be reflected in the price of the cigarettes, a more logical and fair result since the cigarette industry was the cause of the injury.

198. *Id.* at 189.

199. Biebel, *supra* note 77, at 243.

200. The Federal Rules of Civil Procedure allow a court to impose sanctions against those who file frivolous lawsuits. FED. R. CIV. P. 11.

201. *See supra* text accompanying notes 126-64.

202. In a vicarious liability case, an employer is held liable not because he violated a standard of care, but because, despite reasonable precautions, his employee violated the applicable standard of care. *Hall*, 345 F. Supp. at 376.

involving workmen's compensation.<sup>203</sup> Cigarette manufacturers choose to participate in an industry that puts an unreasonably dangerous<sup>204</sup> product on the market and thus should bear the costs of harm done to involuntary smokers, since such injuries are typically associated with the cigarette industry.

The enterprise theory of liability involves highly significant and complex social and economic issues. Opponents of such a theory argue that such solutions are more properly within the province of the legislature.<sup>205</sup> However, any products liability case involves the application of a standard which cannot be specifically codified but must require the considerations and weighing of a number of factors based on a case by case basis.<sup>206</sup> Such factors include an analysis of the social policy factors outlined in this note.<sup>207</sup> Only then can a court reach an equitable and fair decision that the enterprise theory of liability seeks to achieve.

### C. Potential Barriers

#### 1. Assumption of Risk

One potential barrier an involuntary smoker plaintiff may face is the defense of assumption of risk. A plaintiff may not recover in a strict product liability action for an injury received when he voluntarily and unreason-

203. In such cases courts focus not on the employer's fault but rather on the risk that may be fairly regarded as typical to the enterprise he has undertaken. *Id.* (quoting HARPER AND JAMES, *THE LAW OF TORTS*, § 26.7 at 1376-78 (1956)).

204. *See supra* note 49.

205. Comment, *supra* note 121, at 1007. The author does not wish to propose any legislation on the effects of involuntary smoking, but simply suggests judicial standards that would provide an injured involuntary smoker with an avenue of recovery.

206. Wade, *On the Nature of Strict Tort Liability for Products*, 44 *Miss. L.J.* 825, 837 (1973). Professor Wade considers the following factors to be of significance in applying the standard in a products liability case:

(1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.

(2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.

(3) The availability of a substitute product which would meet the same need and not be as unsafe.

(4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.

(5) The user's ability to avoid the danger by the exercise of care in the use of the product.

(6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

*Id.*

207. *See supra* text accompanying notes 120-206.

ably encounters a known danger.<sup>208</sup> Defendants consistently assert this defense in asbestos cases.<sup>209</sup>

Since one generally must work to earn a living, the argument that one unreasonably<sup>210</sup> exposes himself to cigarette smoke while working in an office is simply untenable. Employees exposed to cigarette smoke at the work-site have successfully sued their employer for injunctive relief and have refuted the defense of assumption of risk.<sup>211</sup> Consequently, an involuntary smoker plaintiff would appear to have little difficulty in surmounting the potential hurdle of the defense of assumption of risk, since cigarette smoke is not the by-product of any office job. Nonsmokers do not unreasonably expose themselves to the risk of contracting lung disease when there is cigarette smoke in the office where they are employed.

## 2. The Preemption Issue

Federal circuit courts have recently held that the Federal Cigarette Labeling and Advertising Act preempts state common law tort actions by cigarette smokers.<sup>212</sup> These recent suits have been brought by cigarette smokers against cigarette manufacturers for lung cancer and other smoking related illnesses. Plaintiffs in recent suits have relied on the theory of failure to warn of the dangers of cigarette smoking as a cause of action. Based on the holdings of these recent cases, however, the preemption doctrine arguably applies only to suits brought by users of the products, i.e. the cigarette smokers. In *Palmer v. Liggett*<sup>213</sup> the court held that a suit for damages based on a common law theory of inadequate warning is preempted as frustrating the purposes of Congress when the warning complies with the Fed-

208. RESTATEMENT (SECOND) OF TORTS § 402A comment n (1965).

209. See, e.g., *Borel v. Fibreboard Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974). The defendants contended that the plaintiff knew of the dangers of the asbestos products in connection with his insulation work, appreciated the danger, and with such knowledge assumed the risk by continuing his work. *Id.* at 1098. The court rejected this argument and held that such a defense applies in a strict products liability action only where the plaintiff's conduct is voluntary and unreasonable. *Id.*

210. Unreasonable: Irrational, foolish, unwise, absurd, silly, preposterous, senseless, stupid. BLACK'S LAW DICTIONARY 1379 (5th ed. 1979).

211. See *Shimp v. New Jersey Bell Telephone*, 145 N.J. Super. 516, 368 A.2d 408 (Ch. Div. 1976). A telephone company secretary sought an injunction requiring the employer to enact a smoking ban on the job. In upholding the injunction, the Supreme Court of New Jersey held that cigarette smoke is not a natural by-product of New Jersey Bell Telephone's business, and cannot be regarded as a risk which the plaintiff has voluntarily assumed in pursuing a career as a secretary. *Id.* at 523, 368 A.2d at 411.

212. See *Palmer v. Liggett*, 825 F.2d 620 (1st Cir. 1987); *Stephen v. American Brands*, 825 F.2d 312 (11th Cir. 1987); *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146 (D.N.J. 1984), rev'd and remanded, 789 F.2d 181 (3d Cir. 1986), cert. denied, 107 S. Ct. 907 (1987).

213. 825 F.2d 620.

eral Cigarette Labeling and Advertising Act.<sup>214</sup> In addition, the court focused on the fact that smoking, at least initially, is a voluntary act, and that in other cases where state remedies were not preempted, the victims had little or no choice in their participation in the regulated fields.<sup>215</sup>

While a suit by an involuntary smoker could potentially be based on a failure to warn of the hazards of cigarette smoke, since the labels on cigarette packages only mention the hazards of direct or active cigarette smoking, the Act should not preempt a suit based on an enterprise theory of liability since the failure of an adequate warning is not a relevant issue.<sup>216</sup> Because cigarette smoke exists in virtually all public places ranging from restaurants to sports arenas, a person exposed to passive cigarette smoke has little or no choice but to confront the danger, unless he never leaves his home, or lives and stays in an isolated rural area.

## V. CONCLUSION

The hazards of cigarette smoking have been documented for over twenty years, and it is commonly known that smoking is dangerous to a person's health and causes cancer. Recent studies have found that smoke emitted from cigarettes poses a similar health hazard to nonsmokers. Smokers can choose to quit; nonsmokers have no choice and are often forced to breath passive cigarette smoke and risk severe health consequences.

This note has analyzed the basis and principles of the enterprise theory of liability and has proposed that a nonsmoker who suffers a severe injury due to prolonged exposure to passive cigarette smoke should be able to assert a cause of action and recover against the cigarette manufacturers. Modern industry has produced many useful and beneficial products for society, yet unfortunately industry has also produced defective<sup>217</sup> products that have caused significant injuries to both those who use them and those who come into contact with them. As a result, modern tort theories have developed and expanded over the years to provide injured victims with a remedy against the manufacturers of such products. Often, injured plaintiffs are unable to accurately establish causation and are unable to identify a specific defendant through no fault of their own.

214. *Id.* at 626.

215. *Id.* at 627. *See, e.g.,* *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) (nuclear energy development); *United Construction Workers v. LaBurnum Construction Corp.*, 347 U.S. 656 (1954) (employment).

216. A full discussion of the preemption issue is beyond the scope of this article. For an excellent analysis, see Comment, *Common Law Claims Challenging Adequacy of Cigarette Warnings Preempted under the Federal Cigarette Labeling and Advertising Act of 1965: Cipollone v. Liggett Group, Inc.*, 60 ST. JOHN'S L. REV. 754 (1986).

217. *See supra* note 49 for a definition of "defective."

The enterprise theory of liability is an expansion of modern tort law that allows plaintiffs a chance of recovery. Such a theory provides relief for a plaintiff injured by prolonged exposure to passive cigarette smoke. If cigarette manufacturers choose to put an unreasonably dangerous<sup>218</sup> product on the market which causes injury to society, they should pay for the inevitable harm that will result from its use and bear the initial burden of such a loss. Cigarette smokers will likely bear the ultimate burden if they are forced to pay for the loss when it is reflected in the increased price of the product. Such a result is equitable since the cigarette smokers pose a threat to the health of nonsmokers and are partially at fault when injuries occur.

The enterprise theory of liability has been applied to cases involving DES and asbestos and has achieved fair and equitable results. An involuntary smoker has yet to enter the arena of tobacco litigation, but victory is possible through the theory of enterprise liability.

BRADLEY M. SOOS

---

218. See *supra* note 49 for a definition of "unreasonably dangerous."