Cleveland State Law Review

Volume 56 | Issue 4 Note

2008

Alternative Liability and Deprivation of Remedy: Teaching Old Tort Law New Tricks

Adam L. Fletcher

ALTERNATIVE LIABILITY AND DEPRIVATION OF REMEDY: TEACHING OLD TORT LAW NEW TRICKS

ADAM L. FLETCHER*

I. INTRODUCTION

As with many areas of the law, an exploration of tort theory often resembles an attempt to penetrate a labyrinth filled with dizzying turns, dead ends, and paths that lead back to where you began. Compared to "proximate causation" with its winding corridors filled with policy and foreseeability, the realm of "cause-in-fact" might seem trivial to navigate. Directions have been posted, and many of the pitfalls and Punji traps have been covered over.

---

*J.D. expected, May 2009, Cleveland State University, Cleveland-Marshall College of Law; B.F.A. Bowling Green State University. The author would like to thank Professor Christopher Sagers for his insightful comments and advice on this Note. The author would also like to thank Melanie Shwab, who endured more discussion of tort causation rules than any one person should have to bear.

The problems presented by "tortfeasor indeterminacy" are perhaps the greatest remaining point of contention in the otherwise generally overlooked requirement of cause-in-fact.[1] The issue is deceptively simple; several defendants have breached a duty to the plaintiff and one of their breaches is the cause-in-fact of plaintiff's injury, but it is impossible to tell which one.[2] As a result, the plaintiff cannot meet his evidentiary burden on the element of cause-in-fact and is unable to recover.[3] In response to the plaintiff's dilemma, courts have developed the doctrines of "alternative liability" and "market-share liability."[4] Yet many courts and commentators have rejected these solutions as threats to the very structure of the tort law system.[5] Attempts to conceptualize the doctrines have produced a multitude of conflicting explanations, many of which invoke the very rationales that have led to judicial reluctance in utilizing the doctrines.[6]

This Note will argue that previous attempts to explain alternative liability are unsatisfactory because they are inconsistent with traditional notions of cause-in-fact. Rather than attempting to explain alternative liability as a revolutionary concept, this examination will demonstrate that alternative liability can be completely explained by a careful application of traditional tort principles. That result will depend on recognition of a distinction between the original injury suffered by the plaintiff and the secondary injury that alternative liability allows recovery for—the loss of remedy for the original injury. Once this distinction is recognized, the current limitations on alternative liability are diminished and its modification into market-share liability is rendered unnecessary.

In reaching its conclusion, Part II.A of this Note will discuss the general requirements of cause-in-fact, define the problem of tortfeasor indeterminacy, and explore the difficulties it creates. Part II.B will examine alternative liability, the judicial solution developed by courts in response to tortfeasor indeterminacy. Part II.C will then examine the modification of alternative liability into market-share liability. Part III.A will examine previous explanations promulgated for alternative liability and market-share liability, showing why each is unsatisfactory. Part III.B will present a new explanation for alternative liability based on application of traditional tort rules to an independent cause of action for plaintiff's loss of remedy. Parts III.C and III.D will propose potential legal bases for this cause of action. Part III.E will examine the operation of this new cause of action. Part III.F will then demonstrate how this new explanation leads to the conclusion that joint and several liability, rather than the market-share modification, is the appropriate means for apportioning liability under alternative liability.

---

[1]Indeed, one commentator has called market-share liability, one of the doctrinal responses to tortfeasor indeterminacy, "one of the most controversial doctrines in tort law." Mark A. Geistfeld, *The Doctrinal Unity of Alternative Liability and Market-Share Liability*, 155 U. PA. L. REV. 447, 447 (2006).

[2]*See infra* notes 17–26 and accompanying text.

[3]*See infra* note 27.

[4]*See infra* Parts II.B–C.

[5]*See infra* Part III.A.

[6]*See infra* Part III.A.

II. JUDICIAL SOLUTIONS TO THE DILEMMA OF TORTFEASOR INDETERMINACY

A. Identifying the Dilemma

A generally recognized element of any plaintiff's prima facie tort cause of action is causation.[7] Professors Prosser and Keeton define the causal analysis as a determination of whether there is "some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered."[8] The causal analysis consists of two parts: the initial determination of cause "in-fact" and the subsequent determination of "proximate" or "legal" cause.[9] Although not the sole basis for imposing liability, cause-in-fact is traditionally considered one of the requirements for liability to attach to the tortious conduct of a defendant.[10] This Note is primarily concerned with a problematic issue that arises as part of the cause-in-fact analysis.

At its most basic level, the cause-in-fact analysis is a determination of whether the particular conduct of the defendant was a "necessary antecedent" to the harm that the plaintiff has suffered.[11] This relation between conduct and harm is normally expressed in terms of a "but-for" test. The harm to the plaintiff would not have occurred *but for* the actions of the defendant or, phrased differently, if the defendant had not acted as he did, the harm to the plaintiff would not have occurred.[12] On a practical level then, the cause-in-fact requirement acts to prevent liability from attaching to conduct that is not essential to the occurrence of the harm plaintiff has suffered.[13]

---

[7]While causation problems are often most pronounced in cases of negligence, it is clear that the element of causation is not confined to negligence. The requirement extends in some form to every tort cause of action, including strict liability and the intentional torts. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 263 (5th ed. 1984).

[8]*Id.*

[9]*Id.* at 263-65. In practice, the distinction may be somewhat artificial. It can be difficult to determine where the cause-in-fact analysis ends and the proximate cause analysis begins. As Prosser and Keeton note, the confusion is in part the result of a lack of precision in language used to describe the two parts of the analysis, as well as a failure to recognize that the cause-in-fact analysis necessarily involves a degree of non-factual hypothesizing. *Id.* This hypothesizing "creates a mental picture of a situation identical to the actual facts of the case in all respects save one: the defendant's wrongful conduct is now 'corrected' to the minimal extent necessary to make it conform to the law's requirements." David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1770 (1997).

[10]KEETON ET AL., *supra* note 7, at 268.

[11]*Id.* at 265.

[12]*Id.* at 266. For illustrative purposes, it is helpful to break the cause-in-fact analysis down into its five distinct steps:

> (a) identify the injuries in suit; (b) identify the wrongful conduct; (c) mentally correct the wrongful conduct to the extent necessary to make it lawful, leaving everything else the same; (d) ask whether the injuries would still have occurred had the defendant been acting correctly in that sense; and (e) answer the question.

Robertson, *supra* note 9, at 1771.

[13]KEETON ET AL., *supra* note 7, at 266. It is important to note that necessity does not always equate to sufficiency. The conduct of two tortfeasors might combine to work an

In the simplest case of a single plaintiff and a single defendant tortfeasor, the but-for test functions with little problem. However, the introduction of a second defendant tortfeasor derails the function of the test entirely in many cases. For example, the conduct of two tortfeasors simultaneously affects the plaintiff, and either tortfeasor's conduct alone would produce the resulting harm to the plaintiff.[14] While it is correct to say that either tortfeasor's conduct was sufficient to cause the resulting harm to the plaintiff, application of the but-for test leads to the immediate conclusion that *neither* tortfeasor's conduct can correctly be termed necessary to the occurrence of the resulting harm to the plaintiff. If either tortfeasor had not acted as he did, the other's conduct would still have produced the harm. Dogmatic adherence to the but-for test would render neither tortfeasor liable despite the fact that either's conduct would be independently sufficient to create the harm to plaintiff. In response to this anomalous result, the courts generally make an exception to the but-for test and substitute a "substantial factor" test in cases of multiple sufficient causes, allowing liability to attach to the conduct of both tortfeasors.[15] The result is a conception of the cause-in-fact inquiry in which the element of cause-in-fact is established if the conduct is *either* necessary for the occurrence of the result or sufficient for its occurrence.

This solution to the issue of multiple sufficient causes has been well received, and it is not the purpose of this Note to question that warm reception or dissect the substantial factor doctrine.[16] However, multiple sufficient causation is not the only problematic issue that the requirement of but-for causation generates. Tortious activity involving multiple potential tortfeasors may give rise to a variety of distinct but related but-for causation issues. In response to those issues, courts have adopted

---

aggregate injury to plaintiff that neither tortfeasor's conduct would have accomplished alone. In such a case, both tortfeasors' conduct is necessary to the resulting harm, but neither taken individually is sufficient. However, the fact that neither tortfeasor's conduct is sufficient by itself would not protect either from liability. Under well-established principles of causation, "[e]ach of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm." RESTATEMENT (SECOND) OF TORTS § 875 (1979); *see also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARMS (TENTATIVE DRAFTS) § 27 (Proposed Final Draft No. 1, 2005). Thus, liability attaches to all necessary causes of an aggregate harm and sufficiency of the cause to the resulting harm is not required.

[14]Professors Prosser and Keeton give this helpful illustration: "A stabs C with a knife and B fractures C's skull with a rock; either wound would be fatal, and C dies from the effects of both." KEETON ET AL., *supra* note 7, at 266.

[15]*Id.* at 266–67. This exception is arguably based on concerns of policy as much as concerns of fact.

[16] *Id.* at 267. The readiness of courts to accept a modification to traditional notions of but-for causation may be attributable, in no small part, to Professors Prosser and Keeton's reformulation of the substantial factor test in terms of but-for causation:

> When the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them, the conduct of each is a cause in fact of the event.

Id. at 268. The willingness of courts to accept this modification of but-for causation in cases of multiple sufficient causes will be of tremendous aid in understanding and justifying the conclusion about alternative liability reached below.

a corresponding variety of doctrinal solutions. This Note will refer to that loosely affiliated group of doctrines as doctrines of "collective liability."

The focus of this Note is to examine and explain the related collective liability doctrines of "alternative liability" and "market-share liability" adopted by some courts to address the problems unique to the but-for causation issue of "tortfeasor indeterminacy."[17] In a prototypical case involving tortfeasor indeterminacy, two defendants have each behaved tortiously towards an injured plaintiff, but only one of the defendants could possibly have caused the harm. Tortfeasor indeterminacy then arises when circumstances render the plaintiff incapable of determining which of the two defendants' conduct actually caused the harm, although it is clear that one of them did.[18]

Summers v. Tice[19] illustrates the situation well. The plaintiff, Summers, and the two defendants, Tice and Simonson, were hunting for quail.[20] During the course of the hunt, Tice and Simonson, shooting at a quail that had been flushed, both discharged their shotguns in Summers' direction.[21] Summers was hit with birdshot in the lip and in the eye.[22] At trial, Summers had little difficulty establishing that both Tice and Simonson had breached a duty of care towards him.[23]

Instead, the evidential difficulty arose at the cause-in-fact stage of the analysis. While Summers had been hit twice, the pellet that lodged in his eye was the "major factor in assessing damages," and in analyzing the tortfeasor indeterminacy issue the

---

[17]At least one commentator refers to this but-for causation issue as "defendant indeterminacy." *See* M. Stuart Madden & Jamie Holian, *Defendant Indeterminacy: New Wine into Old Skins*, 67 LA. L. REV. 785 (2007). However, "tortfeasor indeterminacy" is a preferable alternative because it better reflects the crux of the issue under a traditional conception of but-for causation; that issue being that the identity of the *tortfeasor* among the defendants cannot be determined by the plaintiff. Therefore, the remainder of this Note will refer to the issue by that label.

[18]It is important to distinguish tortfeasor indeterminacy from the deceptively similar situation where circumstances make it impossible for the plaintiff to make the initial determination whether *any* of multiple defendants has behaved tortiously towards him *at all*, but the nature of the injury points towards the likelihood that someone has behaved tortiously. *See, e.g.*, Ybarra v. Spangard, 154 P.2d 687 (Cal. 1945) (allowing plaintiff who suffered suspicious injury while anesthetized to use doctrine of res ipsa loquitur against group of hospital staff involved in his surgery). In contrast, all defendants have breached a tort duty in a case involving tortfeasor indeterminacy; causation rather than breach of duty is the problematic issue.

[19]199 P.2d 1 (Cal. 1948).

[20]*Id.* at 2.

[21]*Id.*

[22]*Id.*

[23]*See id.* Summers had cautioned Tice and Simonson before the hunt to "keep in line" when shooting. *Id.* At the time of the shooting Summers had ascended a hill, putting him in front of Tice and Simonson in a triangular pattern. *Id.* The evidence established that Tice and Simonson could see Summers and knew his location at the time the shots were fired. *Id.* The court found that evidence sufficient to establish a breach of the duty of care owed to Summers by Tice and Simonson. *Id.*

court concerned itself only with that pellet.[24] The pellet that lodged in Summers' eye could have come from the gun of Tice or Simonson and had certainly come from one of them.[25] However, it was impossible to make any determination that the pellet more likely than not had come from the gun of one rather than the other.[26] As the situation stood, Summers was unable to meet his burden of proof on cause-in-fact with regard to either Tice or Simonson.[27]

If Summers was to meet his burden of proof, he would have to resort to some form of collective liability theory that would allow him to prove cause-in-fact against Tice and Simonson as a group, rather than individually. The court first examined whether the doctrine of concert of action[28] would allow Summers to attach liability to the conduct of both defendants.[29] If Summers could make a case for application of concert of action liability, it would be unnecessary for him to prove that one defendant, rather than the other, was the cause-in-fact of the injury to his eye.[30]

---

[24]*Id.* at 3. The court's decision to disregard the second pellet that lodged in Summers' lip is inconsequential for purposes of exploring the issue of tortfeasor indeterminacy because, even if the court had concerned itself with both pellets, there was the distinct possibility that both pellets had come from the same gun. *Id.*

[25]*Id.* Applying the but-for test, it is clear that the conduct of the defendant whose shot hit Summers was both the necessary and sufficient cause of the injury to Summers' eye. The other defendant's conduct was neither a necessary nor a sufficient cause of the injury to the eye. *See id.*

[26]Tice and Simonson were both using 12 gauge shotguns and 7½ size birdshot. *Id.* at 2.

[27]The burden of proof borne by the plaintiff with regards to causation is the typical preponderance of the evidence standard that it is "more likely than not that the conduct of the defendant was a cause in fact of the result." KEETON ET AL., *supra* note 7, at 269. Thus, when the "probabilities . . . are evenly balanced" the plaintiff fails to meet his burden of proof and cannot establish the prima facie case. *Id.* The addition of a hypothetical third defendant would further decrease the probability that any one defendant was the cause-in-fact of the harm. Geistfeld, *supra* note 1, at 455. The result is that because tortfeasor indeterminacy always involves an even balance of probabilities between two or more defendants, the plaintiff will never be able to meet his burden of proof and make his prima facie case.

[28]The doctrine of concert of action liability states that:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
>
> (a) does a tortious act in concert with the other or pursuant to a common design with him, or
>
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
>
> (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

RESTATEMENT (SECOND) OF TORTS § 876 (1979).

[29]*Summers*, 199 P.2d at 2-3.

[30]This result becomes clear in light of the commentary. Once concert of action has been established each defendant becomes vicariously "liab[le] for the acts of the others, as well as for his own acts." RESTATEMENT (SECOND) OF TORTS § 876 cmt. a (1979). Therefore, it is irrelevant which defendant was actually the cause-in-fact of the harm because one defendant is liable as the true cause-in-fact and the other defendant is vicariously liable under concert of action liability.

Ultimately, the court concluded that application of concert of action in similar cases had "strain[ed] that concept."[31] If Summers was to succeed, it would have to be on some other theory of collective liability.

B. The Summers *Solution: Alternative Liability*

The California Supreme Court was faced with a dilemma because, under traditional tort principles, either Tice or Simonson was liable to Summers for his injury, but it was impossible to tell which one. Then-existing theories of collective liability were of no aid. In response, the court developed and applied a new theory of collective liability that has come to be known as alternative liability.

The doctrine of alternative liability conceived by the *Summers* court allows an injured plaintiff to shift the burden of proof to the defendants in cases of tortfeasor indeterminacy.[32] Rather than require the plaintiff to "pin the injury" on a particular defendant, all defendants are presumed liable, and a defendant must "absolve himself if he can."[33] In this way, the plaintiff's evidentiary problem is solved by exempting him from the requirement of identifying the tortfeasor among the defendants.[34]

The *Summers* court justified this result on several grounds. The foremost justification given by the court was the "practical unfairness" that Summers would be left without redress for his injury simply because he could not identify which defendant had most likely injured him.[35] The court emphasized that both Tice and Simonson had breached the duty of care owed to Summers and that one of the two had certainly caused the injury to Summers' eye.[36] Given the "relative position of

---

[31]*Summers*, 199 P.2d at 3. The court did not elaborate on precisely why application of concert of action liability to the facts of the case would be inappropriate, but an examination of the requirements of the doctrine are revealing. Section (a) requires tortious conduct that is "in concert" or "pursuant to a common design" between the defendants and sections (b) and (c) require that the second defendant give "substantial assistance" or "encouragement" to the tortious conduct of the first. RESTATEMENT (SECOND) OF TORTS § 876 (1979). Tice and Simonson were clearly not acting as part of a common design to shoot Summers; there is no apparent reason to believe that they even acted as part of a common design to shoot at the quail. Likewise, there is nothing to compel a conclusion that one assisted the other or encouraged him. The shots were independent of each other and either simultaneous or in quick succession. The conduct is simply not indicative of the explicit or implicit "agreement to cooperate in a particular line of conduct or to accomplish a particular result" that the doctrine is meant to address. RESTATEMENT (SECOND) OF TORTS § 876 cmt. a (1979).

[32]*Summers*, 199 P.2d at 4.

[33]*Id.*

[34]The American Law Institute adopted the California Supreme Court's alternative liability theory in this formulation:

> Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm.

RESTATEMENT (SECOND) OF TORTS § 433B(3) (1965).

[35]*Summers*, 199 P.2d at 3–4 (quoting JOHN H. WIGMORE, SELECT CASES ON THE LAW OF TORTS § 153 (1912)).

[36]*Id.* at 4.

the parties," the fair solution was to place the burden of an unjust loss on the defendant that, while he had not caused the injury, had certainly breached a duty to Summers, rather than place the burden of an unjust loss on the totally innocent Summers.[37] The court also stressed that in most cases the defendants will be better able to offer evidence as to who caused the injury and would be free to introduce such evidence in an effort to extricate themselves from liability.[38]

With the aid of the new alternative liability rule, Summers was able to make his prima facie case of liability against Tice and Simonson.[39] For the same reasons that it shifted the burden regarding causation to the defendants, the court further held that Tice and Simonson were jointly liable for the whole harm and shifted the burden of proof on apportionment to them as well.[40] Summers was free to collect his full recovery from the defendants in any way he could, and it would then be up to Tice and Simonson to litigate apportionment between each other.[41]

C. Expanding the Solution: Market-Share Liability

Thirty-two years after the *Summers* decision, the California Supreme Court expanded the doctrine of alternative liability in *Sindell v. Abbott Laboratories*.[42] Once again, the court was faced with a troubling case of tortfeasor indeterminacy. Sindell and her fellow class members were suffering from cancer[43] as a result of their mothers' use of the drug diethylstilbesterol (DES) during pregnancy.[44] The complaint named eleven manufacturers of DES.[45] However, Sindell was unable to identify the manufacturer of the DES taken by her mother due to the nature of the drug and the circumstances surrounding its distribution.[46] Therefore, the trial court

---

[37]*Id.*

[38]*Id.* It seems unlikely that this was the primary justification in the mind of the court. Indeed, it has been pointed out that in *Summers* itself the defendants did not appear to have any "better access to the evidence than the plaintiff." Geistfeld, *supra* note 1, at 473.

[39]*Summers*, 199 P.2d at 5.

[40]*Id.*

[41]*Id.*

[42]607 P.2d 924 (Cal. 1980).

[43]The plaintiffs exhibited adenocarcinoma, a form of cancer with a minimum ten to twelve year latency period, after which deadly cervical and vaginal growths quickly begin to spread. *Id.* at 925. In addition, the plaintiffs exhibited precancerous cervical and vaginal growths called adenosis. *Id.*

[44]DES is a synthetic form of estrogen that was marketed for the prevention of miscarriages from 1947 until 1971. *Id.*

[45]*Id.*

[46]DES was an unpatented fungible drug, "produced from a common . . . formula" and customarily prescribed by its "generic rather than its brand name." *Id.* at 926. Identification of a particular manufacturer was made even more difficult because as many as 300 companies manufactured DES during the twenty-four years it was marketed for use by pregnant women. Geistfeld, *supra* note 1, at 477. Moreover, manufacturers came and went from the DES market throughout the relevant period. *Id.* These factors combined with the long latency

dismissed the complaint for failure to identify the defendant whose product had caused the injury.[47] On appeal, the California Supreme Court examined and found inapplicable several theories of collective liability, including *Summers*' alternative liability rule. Instead, the court opted to apply a new variant of alternative liability that is now known as market-share liability.

As in *Summers*, one of the alleged theories of recovery against the multiple defendants was concert of action liability. Sindell sought to hold the defendant drug companies jointly liable under a concert of action theory based on "express and implied agreements" and "collaboration" in the development, approval, and marketing of DES.[48] The court rejected the concert of action theory on grounds that there was no agreement between the defendants to commit the tortious act.[49] The defendants had acted in a "parallel" but independent manner, and the composition of the drug was dictated by its scientific formula rather than by any understanding between the defendants.[50]

Likewise, the court considered but rejected recovery against all defendants based on the theory of enterprise liability first developed in *Hall v. E.I. du Pont de Nemours & Co.*[51] Unlike the defendants in *Hall*, the DES manufacturers had not "delegated some functions relating to safety to a trade association"; rather, the industry standard was dictated to a significant degree by the Food and Drug Administration.[52] Therefore, the court refused to apply industry-wide liability under the *Hall* rationale because there was no indication that the DES manufacturers had jointly controlled the risk.[53]

The court also considered alternative liability as a possible solution in the DES scenario, ultimately concluding that the *Summers* formulation could not be fairly applied.[54] The sheer number of possible tortfeasors was the decisive factor militating against application of alternative liability in *Sindell*.[55] The court observed that in *Summers* there was a fifty percent probability that each defendant was the tortfeasor because there were only two defendants who had breached a duty to the plaintiff.[56]

---

period of the injury resulted in tortfeasor indeterminacy problems in much of the DES litigation.

[47] *Sindell*, 607 P.2d at 926.

[48] *Id.* at 932.

[49] *Id.*

[50] *Id.* at 932-33.

[51] 345 F. Supp. 353 (E.D.N.Y. 1972). In *Hall*, the district court contemplated shifting the burden on causation to members of an industry after it was established that a product manufactured by some member of the industry had caused an injury but the manufacturer could not be identified. *Id.* at 374. This result was justified by the defendants' joint control of the risk of injury through delegation of certain safety concerns to the industry's trade association. *Id.* at 374-78.

[52] *Sindell*, 607 P.2d at 935.

[53] *Id.*

[54] *Id.* at 931.

[55] *Id.*

[56] *Id.*

In contrast, hundreds of manufacturers had produced DES; the probability that any of the named defendants had produced the specific DES that caused Sindell's injury was so low that "it would be unfair to require each defendant to exonerate itself."[57]

Despite finding *Summers*' pure alternative liability inapplicable to the DES scenario, the court recognized that the same concerns of fairness were present because defendants who had behaved tortiously might escape liability, and the innocent plaintiff would be left without any remedy.[58] Therefore, the situation called for some modification of alternative liability that would compensate for the reduced probability that a particular defendant's product was truly the cause-in-fact of Sindell's injury. The court's solution was to allow the burden on causation to shift to the defendants if a "substantial share" of the market was joined in the action, limiting the liability of each defendant in proportion to its share of the DES marketed for use in preventing miscarriages.[59] So long as a "substantial share" of the market was joined, the probability that the true tortfeasor was among the defendants would increase, and the unfairness of requiring each defendant to exonerate himself from liability would be "significantly diminished."[60] The court acknowledged that under this new doctrine, some defendants would be held liable for an injury despite that injury being caused by a different manufacturer, but justified this result on the grounds that "each manufacturer's liability for an injury would be approximately equivalent to the [total] damages caused by [all] the DES it manufactured."[61]

III. MAKING SENSE OF ALTERNATIVE LIABILITY AND MARKET-SHARE LIABILITY

A. Previous Explanations for Alternative Liability and Market-Share Liability

Alternative liability and market-share liability raise significant questions as to their compatibility with the current tort regime in which establishing the defendant's conduct as the cause-in-fact of plaintiff's injury is still generally regarded as a requirement for a plaintiff to make out a prima facie case for liability. While a fair number of jurisdictions have adopted alternative liability and/or market-share liability,[62] the perceived inconsistency with traditional tort law has led many other

---

[57]*Id.*

[58]*Id.* at 936.

[59]*Id.* at 937. At first blush, the market-share theory adopted by the court bears a great resemblance to the enterprise liability theory first proposed in *Hall*, 345 F. Supp. at 374. However, the court was quick to point out that it was not allowing plaintiff to proceed on enterprise liability. *Sindell*, 607 P.2d at 933-36. Market-share liability as adopted by the California Supreme Court can be distinguished from enterprise liability by the absence of a requirement that the defendants exercise some form of joint control over the risk of injury posed by the industry's product. Despite this distinction, significant similarities between the two theories are still present because the court, when creating market-share liability, was highly influenced by a law review comment proposing a modified version of enterprise liability. *Id.* For the article relied on by the court, see Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963 (1978).

[60]*Sindell*, 607 P.2d at 937.

[61]*Id.* at 938.

[62]*See, e.g.*, Menne v. Celotex Corp., 861 F.2d 1453 (10th Cir. 1988) (applying Nebraska law to find alternative liability applicable against asbestos manufacturers); McCormack v.

courts to reject one or both of the doctrines.[63] Even among courts that are less hostile to alternative liability or market-share liability, the inherent limitations of the doctrines as currently formulated often preclude their application in cases where they are sorely needed.[64] The sharp divide between courts that praise the doctrines as

---

Abbott Labs., 617 F. Supp. 1521 (D. Mass. 1985) (applying Massechusetts law to allow use of market-share liability in DES context); McElhaney v. Eli Lilly & Co., 564 F. Supp. 265 (D.S.D. 1983) (applying South Dakota law to allow use of market-share liability in DES context); Conley v. Boyle Drug Co., 570 So. 2d 275 (Fla.1990) (allowing use of market-share liability in DES context); Smith v. Cutter Biological, Div. of Miles Inc., 823 P.2d 717 (Haw. 1991) (allowing use of market-share liability against manufacturers of tainted blood product); Wysocki v. Reed, 583 N.E.2d 1139 (Ill. App. Ct. 1991) (finding alternative liability applicable against heparin manufacturers); Abel v. Eli Lilly & Co., 343 N.W.2d 164 (Mich. 1984) (allowing use of alternative liability in DES context); McGuinness v. Wakefern Corp., 608 A.2d 447 (N.J. Super. Ct. Law Div. 1991) (finding alternative liability applicable to case involving tainted lasagna); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y. 1989) (allowing use of market-share liability in DES context); Minnich v. Ashland Oil Co., 473 N.E.2d 1199 (Ohio 1984) (allowing use of alternative liability against suppliers in ethyl acetate explosion); Martin v. Abbott Labs., 689 P.2d 368 (Wash. 1984) (allowing use of market-share liability in DES context); Collins v. Eli Lilly Co., 342 N.W.2d 37 (Wis. 1984) (allowing use of market-share liability in DES context).

[63]*See, e.g.*, Jefferson v. Lead Indus. Ass'n, Inc., 106 F.3d 1245 (5th Cir. 1997) (applying Louisiana law to reject application of market-share liability to manufacturers of lead paint); Jackson v. Anchor Packing Co., 994 F.2d 1295 (8th Cir. 1993) (applying Arkansas law to reject application of alternative liability to manufacturers of asbestos); Doe v. Cutter Biological, Div. of Miles, Inc., 852 F. Supp. 909 (D. Idaho 1994) (applying Idaho law to reject application of alternative liability to manufacturers of tainted blood products); Tidler v. Eli Lilly & Co., 851 F.2d 418 (D.D.C. 1988) (applying Maryland and District of Columbia law to reject market-share liability in DES context); Griffin v. Tenneco Resins, Inc., 648 F. Supp. 964 (W.D.N.C. 1986) (applying North Carolina law to reject application of market-share liability to manufacturers of benzidine congener dyes); Nutt v. A.C. & S. Co., 517 A.2d 690 (Del. Super. Ct. 1986) (rejecting application of market-share liability to manufacturers of asbestos); Smith v. Eli Lilly & Co., 560 N.E.2d 324 (Ill. 1990) (rejecting use of market-share liability in DES context); Mulcahy v. Eli Lilly & Co., 386 N.W.2d 67 (Iowa 1986) (rejecting use of market-share liability in DES context); Zafft v. Eli Lilly & Co., 676 S.W.2d 241 (Mo. 1984) (rejecting use of market-share liability in DES context); Shackil v. Lederle Labs., Div. of Am. Cyanamid Co., 561 A.2d 511 (N.J. 1989) (rejecting application of market-share liability to manufacturers of DTP vaccine); Sutowski v. Eli Lilly & Co., 696 N.E.2d 187 (Ohio 1998) (rejecting use of market-share liability in DES context); Case v. Fibreboard Corp., 743 P.2d 1062 (Okl. 1987) (rejecting application of market-share liability to manufacturers of asbestos); Senn v. Merrell-Dow Pharms. Inc., 751 P.2d 215 (Or. 1988) (rejecting application of market-share liability to manufacturers of DTP vaccine); Gorman v. Abbott Labs., 599 A.2d 1364 (R.I. 1991) (rejecting application of market-share liability to drug manufacturers).

[64]*See, e.g.*, Santiago v. Sherwin Williams Co., 3 F.3d 546 (1st Cir. 1993) (applying Massachusetts law to hold market-share liability inapplicable to products liability action involving lead paint); Sanderson v. Int'l Flavors and Fragrances, Inc., 950 F. Supp. 981 (C.D. Cal. 1996) (applying California law to hold alternative liability and market-share liability inapplicable to products liability action involving fragrance products); Marshall v. Celotex Corp., 651 F. Supp. 389 (E.D. Mich. 1987) (applying Michigan law to hold alternative liability inapplicable to products liability action involving asbestos); Rutherford v. Owens-Illinois, Inc., 941 P.2d 1203 (Cal. 1997) (holding alternative liability inapplicable to products liability action involving asbestos); Murphy v. E. R. Squibb & Sons, Inc., 710 P.2d 247 (Cal. 1985)

revolutionary and those that decry them as an abandonment of fundamental tort law can be explained, in part, by the lack of consensus on the precise rationale that underlies the doctrines.[65]

Even a cursory examination of the facts in *Summers* and *Sindell* quickly illuminates why alternative liability and market-share liability are so problematic from a traditional tort law perspective. In both cases, the plaintiff's injury was most likely the result of the acts of only one defendant, but other defendants were also held liable.[66] Such a result seems to fly in the face of the cause-in-fact requirement.[67] This has led some commentators to suggest that the doctrines, especially market-share liability, represent an abandonment of the traditional cause-in-fact requirement in favor of liability based purely on creation of unreasonable risk.[68] Another possible explanation is that the doctrines simply relax the plaintiff's burden of proof of cause-

---

(holding that failure to join substantial share of manufacturers made market-share liability inapplicable in DES action); Edwards v. A.L. Lease & Co., 54 Cal. Rptr. 2d 259 (Cal. Ct. App. 1996) (holding alternative liability and market-share liability inapplicable to products liability action involving defective residential drain pipe); Setliff v. E.I. du Pont de Nemours & Co., 38 Cal. Rptr. 2d 763 (Cal. Ct. App. 1995) (holding alternative liability and market-share liability inapplicable in action brought by paint store employee against manufacturers of various harmful chemicals); Mullen v. Armstrong World Indus., Inc., 246 Cal. Rptr. 32 (Cal. Ct. App. 1988) (holding market-share liability inapplicable to products liability action involving asbestos); Bly v. Tri-Continental Indus., Inc., 663 A.2d 1232 (D.C. 1995) (holding alternative liability inapplicable to action against manufacturers of petroleum products); King v. Cutter Labs., Div. of Miles, Inc., 685 So. 2d 1358 (Fla. Dist. Ct. App. 1996) (holding market-share liability inapplicable to action against manufacturers of tainted blood product); James v. Chevron U.S.A., Inc., 694 A.2d 270 (N.J. Super. Ct. 1997) (holding alternative liability inapplicable to action against manufacturers of petroleum products); Goldman v. Johns-Manville Sales Corp., 514 N.E.2d 691 (Ohio 1987) (holding alternative liability inapplicable to products liability action involving asbestos); Skipworth by Williams v. Lead Indus. Ass'n, Inc., 690 A.2d 169 (Pa. 1997) (holding alternative liability and market-share liability inapplicable to products liability action involving lead paint).

[65]Professor Geistfeld states that neither the courts nor academia has presented a clear and convincing rationale for alternative liability and market-share liability thus far and that this leads courts to be "understandably wary." Geistfeld, *supra* note 1, at 452.

[66]Porat and Stein opine that:

> [t]he evidential remedy that shifts the persuasion burden to the defendant would be unsuitable in many cases. This remedy can be effective only when the plaintiff's direct damage and evidential damage are attributable to the same defendant. When the direct and evidential wrongdoers are two different persons, . . . shifting the burden of persuasion would not be justified: a person allegedly responsible for the plaintiff's direct damage must not bear liability for another person's wrong.

ARIEL PORAT & ALEX STEIN, TORT LIABILITY UNDER UNCERTAINTY 165 (2001).

[67]*See supra* note 25.

[68]*See, e.g.*, Glen O. Robinson, *Multiple Causation in Tort Law: Reflections on the DES Cases*, 68 VA. L. REV. 713 (1982) (proposing that market-share liability represents attachment and apportionment of liability based on each defendant's contribution to the aggregate risk of harm); *accord* David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849, 866-68 (1984); Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735, 1819-20 (1985).

in-fact in cases of tortfeasor indeterminacy.[69] As Professor Geistfeld points out, both of these explanations are "problematic."[70]

A conception of alternative liability and market-share liability in which liability is determined purely by creation of unreasonable risk suffers from several faults. Initially, it fails to explain convincingly why creation of unreasonable risk should expand the set of liable parties in cases of tortfeasor indeterminacy, but not in other cases, such as when only one person has behaved tortiously or when several persons have behaved tortiously but cause-in-fact can be demonstrated against the true tortfeasor. If taken to its logical conclusion, a risk-contribution regime need not require that the conduct in question ever injure anyone at all so long as it creates an unreasonable risk that such an injury might occur.[71] Indeed, a tort system that adopts risk-contribution on more than a superficial level would probably resemble a social-insurance scheme rather than the current adversarial system in place today.[72] Moreover, it is clear that many courts are unwilling to impose a regime in which liability attaches based purely on exposure to risk.[73]

Likewise, explaining alternative liability and market-share liability as a relaxation of the plaintiff's burden of proof with regard to cause-in-fact raises similar

---

[69]Geistfeld, *supra* note 1, at 456-57.

[70]*Id.* at 457.

[71]"A deterrence-based torts system devises liability rules in order to reduce unreasonable risks. That objective does not depend upon the occurrence of physical harm, because an actor who faces liability for creating an unreasonable risk has an incentive to act reasonably." Geistfeld, *supra* note 1, at 449. While such a result can be defended as furthering deterrence goals, the administrative costs of maintaining private litigation in the courts might lead to the conclusion that a system of pure regulatory penalties would be more efficient in terms of cost of enforcement versus resulting deterrence.

[72]*See* Mulcahy v. Eli Lilly & Co., 386 N.W.2d 67, 75–76 (Iowa 1986); *accord* PORAT & STEIN, *supra* note 66, at 192. One can imagine enforcement through assessment of regulatory fines against persons creating unreasonable risks of harm to others. Those fines could be aggregated into a common fund (or funds) from which compensation would be paid out to persons injured by the fruition of those unreasonable risks. PORAT & STEIN, *supra* note 66, at 104. Such a system suffers from a multitude of practical concerns beyond the immediate administrative costs, including defining the scope of relevant risks for purposes of aggregating recovered penalties into common funds for compensation purposes, as well as loss of a truly adversarial forum in which the defendant's motivation to defeat liability is directly balanced against the plaintiff's motivation to establish liability and recover. Moreover, such a system is unlikely to function properly because almost all persons creating unreasonable risks would need to be prosecuted and pay into the system. *Id.* at 109. Yet, persons who have not suffered harm may be unlikely to notice their exposure to risk and have less incentive to report violations because they will not be entitled to compensation from the common fund. *Id.* at 109-10. For a detailed discussion of the problems inherent in administrative replacements for common law tort actions, see Kenneth S. Abraham, *Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform*, 73 VA. L. REV. 845, 885–898 (1987).

[73]*See* Geistfeld, *supra* note 1, at 452. Even the Wisconsin Supreme Court, the only court to explicitly adopt any form of risk-contribution theory, stated that it "d[id] not agree that [risk contribution] is a sufficient basis *in itself* for liability," instead requiring some indication that a defendant "reasonably could have contributed in some way to the actual injury." Collins v. Eli Lilly Co., 342 N.W.2d 37, 49 n.10 (Wis. 1984) (emphasis added).

issues. There is seemingly no justification for why such relaxation of the burden of proof is permissible in cases of tortfeasor indeterminacy, but not in situations where other factors make it difficult for plaintiff to prove cause-in-fact under the more likely than not standard.[74] The arbitrariness of such an explanation is further highlighted by many courts' insistence that at some undefined point there are simply too many defendants and relaxation of the burden then becomes "unfair."[75]

Whether explained by relaxation, risk-contribution, or some other novel theory for attachment of liability, the case law indicates that many courts are unwilling to indulge a theory that diverges significantly from traditional tort concepts.[76] In light of that reluctance, it seems prudent to determine if either alternative liability or market-share liability can be explained using traditional tort concepts, rather than a novel approach.

Professor Geistfeld offers a theory of how the doctrines function that at first appears to comport with traditional tort law. He argues that alternative liability can be entirely explained by evidential grouping[77] and that market-share liability is simply alternative liability modified to apportion liability between the defendants fairly.[78] Put simply, evidential grouping allows a plaintiff to group the defendants

---

[74]*See* Senn v. Merrell-Dow Pharmaceuticals, Inc., 751 P.2d 215, 222 (Or. 1988). Professor Geistfeld notes that "tortious conduct routinely creates factual uncertainty regarding causation," yet in most of these cases plaintiff still bears the burden of proof. Geistfeld, *supra* note 1, at 456-57.

[75]*See Senn*, 751 P.2d at 222.

[76]*See supra* note 63.

[77]Geistfeld, *supra* note 1, at 471–77.

[78]*Id.* at 452. Even under the traditional conceptions of alternative liability and market-share liability, the latter is often viewed as a variation of the former. The *Sindell* court's explanation for its adoption of market-share liability clearly indicates that the court believed that market-share liability was a logical outgrowth of alternative liability. Sindell v. Abbott Labs., 607 P.2d 924, 936-37 (Cal. 1980). Nonetheless, the *Sindell* court acknowledged that an "undiluted *Summers* rationale [was] inappropriate" because the number of DES manufacturers created "a possibility that none of the five defendants in this case produced the offending substance." *Id.* In response, the court chose to "approach the issue of causation from a different perspective" and allow recovery based on the "corresponding likelihood" that the "percentage [of] DES sold by each [defendant] for the purpose of preventing miscarriage" was the same as the "likelihood that any of the defendants supplied the product which allegedly injured plaintiff." *Id.* at 937. This probabilistic explanation for market-share liability has led other courts to conclude that market-share liability cannot be justified by reference to its forerunner. For example, the Ohio Supreme Court concluded that its previous adoption of alternative liability could not justify adoption of market-share liability. Sutowski v. Eli Lilly & Co., 696 N.E.2d 187, 191 (Ohio 1998). The critical distinction for the court was that alternative liability did not "relieve the plaintiff of the burden of identifying the tortfeasors." *Id.* To recover under alternative liability the plaintiff was required to point to all the tortfeasors and demonstrate that they had behaved tortiously *toward him*. *Id.* The typical justification for market-share liability, that there is a likelihood that all defendants have behaved tortiously towards some victim, was not compatible with this requirement. *Id.*; *see also* New York Tel. Co. v. AAER Sprayed Insulations, Inc., 679 N.Y.S.2d 21, 25 (N.Y. App. Div. 1998) (stating that "[i]n contrast [to market-share liability], under alternative liability, a nexus between each defendant's conduct and the plaintiff's injury is fundamental"); *accord* Thompson v. Johns-Manville Sales Corp., 714 F.2d 581, 583 (5th Cir. 1983) (stating that

together and prove that, more likely than not, the conduct of the group was the cause-in-fact of the plaintiff's injury.[79] Professors Prosser and Keeton's reformulation of the substantial factor test used in cases of multiple sufficient causes is a prime example of the evidentiary grouping principle.[80] Geistfeld argues that evidential grouping properly explains alternative liability in cases of tortfeasor indeterminacy because requiring "proof of individualized, but-for causation would absolve each defendant" despite the fact that the true tortfeasor is among the defendants.[81] Although this explanation looks promising, there is a major flaw in the analogy between tortfeasor indeterminacy and the situation of multiple sufficient causation in which evidentiary grouping is traditionally applied.

Evidentiary grouping is justified in cases of multiple sufficient causation because the normal evidentiary burden would absolve both defendants, even though the conduct of *either* was sufficient to bring about the harm.[82] Such a situation is not present in cases of tortfeasor indeterminacy.[83] In essence, Geistfeld argues that it is justifiable in cases of tortfeasor indeterminacy to disallow use of exculpatory evidence by a defendant whose conduct is not the cause-in-fact of the harm in order to prevent the escape of the defendant whose conduct is the cause-in-fact of the harm.[84] Such a result is inherently less equitable than allowing use of evidentiary grouping in multiple sufficient causation where either defendant taken alone would be a but-for cause of the harm.[85]

---

application of alternative liability in the absence of "such connection would beg the question of causation entirely"). This result does not arise under the conception of alternative liability proposed in this note because even if plaintiff cannot demonstrate that he was exposed to a particular defendant's breach of duty with regard to the primary injury, plaintiff can still recover if he can show that he suffered a secondary injury through obfuscation of the causal analysis as a result of defendant's conduct. *See infra* Part III.B. Whether or not a particular defendant caused the primary injury, all defendants "certainly inflicted the plaintiff's evidential damage and wrongfully so." PORAT & STEIN, *supra* note 66, at 169.

[79]Geistfeld, *supra* note 1, at 460. Evidentiary grouping can be differentiated from doctrines of liability grouping. Liability grouping allows one defendant to be held liable for the tortious conduct of another because the defendants have "acted as a group in causing plaintiff's injury," as in a case of concert of action or conspiracy. *Id.* In contrast, evidentiary grouping simply aids the plaintiff in proving his prima facie case, with liability attaching to each defendant's conduct based on its own tortious nature. *Id.*

[80]*See supra* note 16.

[81]Geistfeld, *supra* note 1, at 464, 469-73.

[82]*See* sources cited *supra* notes 14-16 and accompanying text.

[83]*See* discussion *supra* note 25.

[84]Geistfeld, *supra* note 1, at 463-64.

[85]As one commentator has noted, the substantial factor test, from which the principle of evidentiary grouping is derived, should only be used in "'combined force' situations in which we are morally certain that the but-for test stubbornly persists in yielding the wrong answer." Robertson, *supra* note 9, at 1778-80. Application of the substantial factor test outside the narrow realm of multiple sufficient causation is completely inappropriate. *Id.* at 1779-80.

Geistfeld justifies his conclusion by examining the "evidentiary inconsistency produced by this form of exculpatory proof."[86] He argues that because the defendant is a member of a group that has caused the harm, a defendant that points to the probability that another group member was just as likely the cause would "effectively den[y] that the plaintiff was harmed by any of the defendants."[87] This justification is unsatisfactory because it *presupposes* that the plaintiff *should* be allowed to group the defendants for evidentiary purposes.

B. Understanding Alternative Liability as an Independent Cause of Action

The inequity in Geistfeld's approach can be resolved by redefining the injury to the plaintiff that allows grouping the defendants together. Geistfeld conceives of alternative liability as a doctrine that shifts the burden of proof on cause-in-fact with regard to the plaintiff's injury in the same manner and for the same reasons that burden shifting is applied in cases of multiple sufficient causation. This explanation fails because multiple sufficient causation and tortfeasor indeterminacy are not sufficiently analogous. However, if the defendants are grouped together based on their contribution to the plaintiff's inability to determine the true tortfeasor, rather than the statistical probability that each defendant might be the true tortfeasor, shifting the burden of proof on cause-in-fact to the defendants can be rationally justified.

A defensible explanation of alternative liability then initially requires recognition that the doctrine is in reality an independent cause of action for the plaintiff's loss of remedy. Professor Prosser proposed a very similar idea as the solution to a particularly troublesome variation of multiple sufficient causation.[88] Likewise, Porat and Stein propose a broad tort cause of action for what they refer to as "evidential damage."[89] While neither of those theories focus on the loss of remedy itself in the

---

[86]Geistfeld, *supra* note 1, at 466.

[87]*Id.*

[88]In that case, the first defendant had leased the second defendant a car with defective breaks. Saunders Sys. Birmingham Co. v. Adams, 117 So. 72, 73 (Ala. 1928). While later driving the car, the second defendant collided with the plaintiff, and it was shown that the second defendant had failed to even apply the brakes. *Id.* at 74. The Alabama Supreme Court refused to allow liability against either defendant because the brakes, though defective, were never used, and if they had been used they would not have worked. *Id.* In effect, "each defendant's wrongful conduct kept the other's from becoming operative," derailing the determination of cause-in-fact. Robertson, *supra* note 9, at 1787. Commenting on *Saunders*, Prosser suggested that both defendants might have been held accountable because "each, by his negligence, has deprived the plaintiff of a cause of action against the other, and so should be liable." WILLIAM L. PROSSER, THE LAW OF TORTS § 41, at 239-40 n.25 (4th ed. West 1971). The precise scenario is somewhat different than that presented in cases of tortfeasor indeterminacy because in *Saunders* either defendant's conduct would have been a but-for cause of the harm in the absence of the other defendant's conduct. Nonetheless, the essence of Prosser's independent tort against one wrongdoer for deprivation of the case against another wrongdoer functions just as well in a case of tortfeasor indeterminacy.

[89]PORAT & STEIN, *supra* note 66, at 160-206. The "evidential damage doctrine" they propose focuses on an offending party's "infring[ing] the plaintiff's legitimate interest in . . . information" that is "necessary for ascertaining the cause of her or his direct damage." *Id.* at 167. Thus, their theory is much broader than the theory put forth in this Note and would apply

way proposed in this note, they demonstrate that a tort action based on defendant's interference with plaintiff's successful pursuit of a legitimate suit is not such a radical idea.

An understanding of alternative liability as a distinct cause of action begins with the widely accepted principle that tortious conduct can create a "bundle" of risks any of which the tortfeasor will be liable for if they come to fruition.[90] In a prototypical case of tortfeasor indeterminacy, the plaintiff has suffered two distinct injuries. Initially, plaintiff suffers the "primary" injury as a result of the tortious conduct of a single tortfeasor. Plaintiff then suffers a "secondary" injury that is to some degree derivative, the loss of his remedy for the primary injury due to the inability to demonstrate cause-in-fact.[91] There is always the risk of the primary injury, but in cases of tortfeasor indeterminacy, there is also a risk of the secondary injury. While the proposition may seem peculiar, loss of remedy as a distinct injury is consistent with the definition of the term injury as "the violation of another's legal right, for which the law provides a remedy."[92] Assuming that persons have a legally protected right to redress for injury, then it logically follows that wrongful deprivation of that right is, in itself, also an injury. There are strong indications that, in cases of tortfeasor indeterminacy, the plaintiff has a legally protected right to redress for injury.

C. Equitable and State Constitutional Guarantees as a Source for the Legal Right to a Remedy

One possible source of a legal right to redress for injury might be found in state constitutional protections. Equity jurisdiction is predicated on the maxim that "equity will not suffer a wrong, or, as sometimes stated, a right, to be without a remedy."[93] This maxim is concretized in many state constitutions in so-called "right to remedy clauses."[94] Thirty-nine state constitutions contain right to remedy clauses that "expressly guarantee every person remedies for all tortious injuries to 'their persons, property, and reputation.'"[95]

---

in many cases outside the realm of tortfeasor indeterminacy. *Id.* at 185. Nonetheless, their theory applies to cases of tortfeasor indeterminacy in a similar fashion to that proposed in this note, but ultimately reaches the opposing conclusion regarding the appropriateness of allocating liability based on market-share. *Id.* at 162, 186-87.

[90]*See* Marshall v. Nugent, 222 F.2d 604, 610-11 (1st Cir. 1955).

[91]"Evidential damage must thus be perceived as an indirect or adjective damage: its existence will always depend on the actual . . . occurrence of a directly actionable damage." PORAT & STEIN, *supra* note 66, at 161.

[92]BLACK'S LAW DICTIONARY 801 (8th ed. 2004).

[93]30A C.J.S. *Equity* § 130 (2007).

[94]*See* Holland *ex rel.* Williams v. Mayes, 19 So. 2d 709, 711 (Fla. 1944); *see also* 16B AM. JUR. 2D *Constitutional Law* § 623 (2007); Robert S. Peck & Ned Miltenberg, *Right to a Complete Remedy; Open Courts*, in 3 ATLA'S LITIGATING TORT CASES § 29:15 (Roxanne Barton Colin & Gregory S. Cusimano eds., 2007).

[95]Robert S. Peck & Ned Miltenberg, *Right to a Complete Remedy; Open Courts*, in 3 ATLA'S LITIGATING TORT CASES § 29:15 (Roxanne Barton Colin & Gregory S. Cusimano eds., 2007). *See, e.g.*, ALA. CONST. art. I, § 13; ARK. CONST. art. II, § 13; COLO. CONST. art. II, § 6; CONN. CONST. art. I, § 10; DEL. CONST. art. I, § 9; FLA. CONST. art. I, § 21; IDAHO CONST.

A right to remedy provision of a state constitution has already been utilized in at least one case of tortfeasor indeterminacy. In *Collins v. Eli Lilly Co.*,[96] the Wisconsin Supreme Court justified its adoption of market-share liability, in part, on that state's constitutional guarantee of a remedy at law.[97] Indeed, the court concluded that by virtue of the right to remedy provision of the Wisconsin Constitution the plaintiff was "entitled to a remedy at law for her injuries."[98] However, the manner in which the *Collins* court utilized the right to remedy clause appears inconsistent with the court's own interpretation that the provision allows "the common law . . . to grow . . . within the doctrine of stare decisis . . . applying principles of common law to new situations as the need [arises]."[99] Rather than applying established common law principles in an attempt to fashion a remedy, the *Collins* court adopted market-share liability under a conception of that doctrine that it acknowledged "deviate[d] from traditional notions of tort law."[100] The result is unfortunate because the *Collins* court had before it adequate law that, if applied creatively, would have allowed the court to circumvent the plaintiff's tortfeasor indeterminacy problem and provide a remedy using established tort principles.

Right to remedy provisions originally found their way into state constitutions, in large part, as a bulwark against perceived legislative curtailment of common law rights.[101] Hence, courts often employ such provisions to invalidate statutory abridgment of common law rights when a legislature "impose[s] an impossible condition on plaintiff's access to courts and ability to pursue an otherwise valid tort claim."[102] Often, a constitutional right to remedy is recognized only as a guarantee of remedy for rights already recognized by statute or common law.[103] Thus, such a provision is typically not interpreted to confer any quasi-legislative power upon courts, but rather emphasizes that courts must be free to "exercise the recognized judicial power of applying established principles of law to new conditions and new facts as they arise" so long as the injury "constitutes an invasion of a legal right."[104] This interpretation appears consistent with the notion that equity jurisdiction is

---

art. I, § 18; ILL. CONST. art. I, § 12; LA. CONST. art. I, § 22; ME. CONST. art. I, § 19; MISS. CONST. art. III, § 24; MO. CONST. art. I § 14; MONT. CONST. art. II, § 16; NEB. CONST. art. I, § 13; N.C. CONST. art. I, § 18; N.D. CONST. art. I, § 9; OHIO CONST. art. I, § 16; OKLA. CONST. art. II, § 6; OR. CONST. art. I, § 10; PA. CONST. art. I, § 11; S.C. CONST. art. I, § 9; S.D. CONST. art. VI, § 20; TENN. CONST. art. I, § 17; TEX. CONST. art. I, § 13; UTAH CONST. art. I, § 11; W. VA. CONST. art. III, § 17; WIS. CONST. art. I § 9; WYO. CONST. art. I, § 18.

[96]342 N.W.2d 37 (Wis. 1984).

[97]*Id.* at 45.

[98]*Id.*

[99]*Id.*

[100]*Id.*

[101]*See* Peck & Miltenberg, *supra* note 94.

[102]Martin v. Richey, 711 N.E.2d 1273, 1284 (Ind. 1999) (holding application of two-year statute of limitations unconstitutional as applied to plaintiff whose latent breast cancer precluded discovery of the injury prior to the expiration of the limitation period).

[103]Barnes v. Kyle, 306 S.W.2d 1, 3 (Tenn. 1957).

[104]Cason v. Baskin, 20 So. 2d 243, 250-51 (Fla. 1945).

limited to situations in which established law is in some way incapable of vindicating a plaintiff's rights.[105]

Despite the limitation that they cannot create entirely new means of redress, right to remedy provisions are adequate to provide a means to protect plaintiffs in cases of tortfeasor indeterminacy. As Professor Geistfeld points out, in cases of tortfeasor indeterminacy the plaintiff has already sufficiently demonstrated that he is legally entitled to a remedy at law against some member of the group of indeterminate tortfeasors.[106] The plaintiff is deprived of a remedy at common law that he would otherwise be entitled to by an evidentiary difficulty that results from the wrongful conduct of the indeterminate tortfeasors.[107]

The historical backdrop of right to remedy provisions does not necessitate a conclusion that they can only be used as a shield against legislative obstruction of legal redress. The same concern that a plaintiff will be faced with "impossible conditions" to recovery are present when the plaintiff is deprived of his legal remedy by the nature of some private party's conduct. In *Collins*, the court noted that the evidentiary difficulty created by the nature of the defendants' conduct resulted in an "insurmountable obstacle" for the plaintiff "even if she can establish all the remaining elements of her cause of action."[108] There is little practical difference between attempted legislative curtailment and the evidentiary difficulty created by tortfeasor indeterminacy. Tortfeasor indeterminacy confronts a plaintiff with hurdles to recovery that are just as "impossible" and "insurmountable" as statutory abridgement of a common law right. Thus, by the nature of their conduct, indeterminate tortfeasors have violated plaintiff's legal right to a remedy as surely as a legislature that imposes an unconstitutional statute of limitations or repose. *Collins* seems to support this conclusion.

Because no legislative curtailment was involved in *Collins*, it appears the court broadly interpreted the right to remedy provision of the Wisconsin Constitution as a protection against curtailment of existing legal rights by both public and private

---

[105]The maxim that "equity will not suffer a wrong to be without a remedy" generally provides for equitable jurisdiction only where (1) "the right itself" is "not recognized as existing by the law," (2) the right exists at law but the remedy is "one which the law cannot or does not administer at all," or (3) the right exists at law but "the remedy *as administered by the law* [is] inadequate, incomplete, or uncertain." Ver Brycke v. Ver Brycke, 843 A.2d 758, 774 n.12 (Md. 2004) (quoting 2 POMEROY, EQUITY JURISPRUDENCE §§ 423, 424 (5th ed.)).

[106]Geistfeld, *supra* note 1, at 471. In other words, the plaintiff has demonstrated that he can prove every single element of the underlying tort against the indeterminate tortfeasors, save cause-in-fact. Moreover, the plaintiff has shown that only the nature of the indeterminate tortfeasors' conduct prevents him from proving cause-in-fact against one of them and recovering compensation. PORAT & STEIN, *supra* note 66, at 174-75.

[107]The *Sindell* court examined and rejected this explanation, stating that "although the absence of such evidence is not attributable to the defendants either, their conduct in marketing a drug the effects of which are delayed for many years played a significant role in creating the unavailability of proof." Sindell v. Abbott Labs., 607 P.2d 924, 936 (Cal. 1980). The court patently contradicted itself by asserting that the plaintiff's inability to prove cause-in-fact was not "attributable" to the defendants, while simultaneously noting the "significant role" their conduct played in creating that result.

[108]Collins v. Eli Lilly Co., 342 N.W.2d 37, 45 (Wis. 1984).

actors when it concluded that the plaintiff was "entitled to a remedy."[109] This then lays the foundation for a defensible justification of why the court could have applied alternative liability in *Collins*. Plaintiff was entitled to her remedy at common law by virtue of the right to remedy provision of the Wisconsin Constitution.[110] However, the nature of the defendants' conduct made it impossible for plaintiff to establish cause-in-fact against the true tortfeasor, thereby infringing her right to remedy under the Wisconsin Constitution. This violation of the plaintiff's constitutionally protected right to a remedy constituted a distinct injury from the primary injury. The court could then have used its equitable power under the right to remedy provision itself to allow recovery for violation of that right against all the indeterminate tortfeasors because the conduct of all of them contributed to plaintiff's loss of remedy.[111] In this way, the court could have provided the plaintiff with a remedy while remaining faithful to its previous interpretation that the Wisconsin Constitution's right to remedy provision allowed the court to craft a remedy using established tort principles.[112]

While right to remedy provisions of state constitutions provide a potentially weighty source for the legal rights violated by the actions of defendants in cases of tortfeasor indeterminacy, complete reliance on such provisions may not be possible in every state. Initially, it is important to remember that not all state constitutions contain a right to remedy provision.[113] In states with constitutions that *do* contain right to remedy provisions, there is still the possibility that such a provision will not be held applicable to the actions of private parties.[114] However, even if a state's constitutional right to remedy provision does not provide a directly actionable right that can form the basis of a tort action against private parties, it might still support a convincing public policy argument in favor of recognizing a cause of action for deprivation of remedy.[115] In states with no constitutional right to remedy provision at all, a court might still be swayed by the underlying equitable maxim that such a provision represents.[116] Moreover, in states with right to remedy provisions, it seems

---

[109]*Id.*

[110]*Id.*

[111]This result may appear a little odd in that the right to remedy provision provides both the legal right that is violated and the means to vindicate that right, but there is nothing that indicates such a result is wrong.

[112]*See supra* notes 98-99 and accompanying text.

[113]*See supra* note 95 and accompanying text.

[114]For example, many provisions of the North Carolina Constitution have been interpreted "chiefly to protect the individual from the State." State v. Ballance, 51 S.E.2d 731, 734 (N.C. 1949). In a subsequent appellate opinion, the court relied on this justification in rejecting several claims under the state constitution by a private employee against his employer. Teleflex Info. Sys., Inc. v. Arnold, 513 S.E.2d 85 (N.C. Ct. App. 1999).

[115]Despite the *Teleflex* court's general disapproval of a constitutional right of action against private parties, the court appeared to entertain an argument that the employer's actions had violated public policy embodied in the North Carolina Constitution's right to remedy provision, although ultimately concluding that the employer had made no such violation. *Id.* at 88.

[116]*See supra* notes 93-94 and accompanying text.

logical that the weight of the underlying equitable maxim could only be strengthened by such constitutional support.

D. Judicially Recognized Common Law Duty as a Source for the Legal Right to a Remedy

Even completely absent any constitutional or equitable guarantee of a legal remedy, an independent tort cause of action for deprivation of remedy could also operate on the basis of a judicially recognized common law duty to refrain from conduct that could foreseeably deprive an injured party of a remedy for injury to his person or property by confusing the cause-in-fact determination. In *Summers*' Canadian doppelganger, *Cook v. Lewis*,[117] the Canadian Supreme Court imposed alternative liability, in part, on grounds that each defendant had "impaired the [plaintiff's] remedial right of establishing liability . . . in effect, destroy[ing] the victim's power of proof."[118] Implicit in that statement is recognition that the legal right to redress for injury creates a corresponding duty not to interfere with that right, at least with regard to persons who have behaved tortiously to an injured party.

In a variety of contexts, courts have addressed similar issues and held that persons have a duty not to impair a plaintiff's lawsuit or otherwise deprive plaintiff of a remedy for injury. For example, federal courts have recognized a cause of action against a government official whose conduct interferes with or deprives a plaintiff of the ability to bring suit.[119] Likewise, some courts have recognized an independent cause of action for negligent spoliation of evidence by a party to the underlying action.[120] Other courts have also recognized an independent cause of action for negligent spoliation of evidence by a nonparty to the underlying action.[121] Still other courts do not recognize

---

[117][1951] S.C.R. 830 (Can.).

[118]*Id.* at 832.

[119]*See* De Nardo v. Schowen, 944 F.2d 908, 908 (9th Cir. 1991) (stating that "[i]t is certainly correct that the unlawful deprivation of a cause of action may rise to the level of a constitutional tort"); *see also* Pritchard v. Norton, 106 U.S. 124, 132 (1882) (stating that "a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away"); *accord* Barrett v. United States, 798 F.2d 565, 575 (2d Cir. 1986).

[120]*See, e.g.*, *In re* Smartalk Teleservices, Inc. Sec. Litig., 487 F. Supp. 2d 947 (S.D. Ohio 2007) (applying Ohio law); Foster v. Lawrence Mem'l Hosp., 809 F. Supp. 83 (D. Kan. 1992) (applying Kansas law); Holmes v. Amerex Rent-A-Car, 710 A.2d 846 (D.C. 1998); Bondu v. Gurvich, 473 So. 2d 1307 (Fla. Dist. Ct. App. 1984), *disapproved by* Martino v. Wal-Mart Stores, Inc., 908 So. 2d 342 (Fla. 2005); Welton v. Ambrose, 814 N.E.2d 970 (Ill. App. Ct. 2004); Swick v. New York Times Co., 815 A.2d 508 (N.J. Super. Ct. App. Div. 2003); Gicking v. Joyce Int'l Inc., 33 Pa. D. & C.4th 208 (Pa. Com. Pl. 1996).

[121]*See, e.g.*, Poynter v. Gen. Motors Corp., 476 F. Supp. 2d 854 (E.D. Tenn. 2007) (applying Tennessee law); Cont'l Ins. Co. v. Herman, 576 So. 2d 313 (Fla. Dist. Ct. App. 1990); Thompson ex rel. Thompson v. Owensby, 704 N.E.2d 134 (Ind. Ct. App. 1998); Oliver v. Stimson Lumber Co., 993 P.2d 11 (Mont. 1999); Callahan v. Stanley Works, 703 A.2d 1014 (N.J. Super. Ct. Law Div. 1997); Hannah v. Heeter, 584 S.E.2d 560 (W. Va. 2003).

negligent spoliation of evidence as an independent cause of action, but still allow such claims under general negligence principles.[122]

A cause of action for negligent spoliation of evidence is not precisely analogous to the situation presented by tortfeasor indeterminacy. Spoliation of evidence, as the term is used by most courts, refers to destruction of evidence after the tortious action has already occurred. In contrast, tortfeasor indeterminacy results from evidential obfuscation that arises concurrently with the tortious action itself. The evidential obfuscation is not the result of some person's subsequent act, but rather it is an inherent consequence of the combined conduct of the indeterminate tortfeasors. Nonetheless, this discontinuity between negligent spoliation of evidence and tortfeasor indeterminacy is not problematic. The willingness of some courts to recognize a cause of action for negligent spoliation of evidence is still persuasive precedent for a duty not to obfuscate a victim's ability to prove cause-in-fact and prevent recovery, at least in certain circumstances.

While agreeing that an underlying duty not to negatively affect a victim's lawsuit through evidential obfuscation could explain alternative liability, Professor Geistfeld questions whether such an explanation can account for *Summers* and *Sindell* in light of later California precedent.[123] At one time, California precedent clearly recognized a tort cause of action for negligent spoliation of evidence.[124] The validity of that precedent was later cast into doubt by the California Supreme Court's refusal to recognize an action for intentional spoliation of evidence in *Cedars-Sinai Medical Center v. Superior Court*[125] and *Temple Community Hospital v. Superior Court.*[126] Thus, while the California Supreme Court did not directly address the existence of a cause of action for negligent spoliation of evidence, the appellate courts have assumed that the rationale of *Cedars-Sinai* and *Temple* preclude its further existence.[127]

---

[122]*See, e.g.*, Tietjen v. Hamilton-Beach/Proctor-Silex, Inc., Nos. 97-CV-188, 97-CV-949, 1998 WL 865586 (N.D.N.Y. Nov. 25, 1998) (applying New York law); Smith v. Atkinson, 771 So. 2d 429 (Ala. 2000); Boyd v. Travelers Ins. Co., 652 N.E.2d 267 (Ill. 1995); Guillory v. Dillard's Dep't Store, Inc., 777 So. 2d 1 (La. Ct. App. 2000); Gilleski v. Cmty. Med. Ctr., 765 A.2d 1103 (N.J. Super. Ct. App. Div. 2001); Coleman v. Eddy Potash, Inc., 905 P.2d 185 (N.M. 1995); Elias v. Lancaster Gen. Hosp., 710 A.2d 65 (Pa. Super. Ct. 1998).

[123]Geistfeld, *supra* note 1, at 484 n.102.

[124]*See* Williams v. State, 664 P.2d 137 (Cal. 1983) (holding that, upon amendment of the complaint, plaintiff might be able to establish facts sufficient to show that police officer undertook a duty to preserve evidence necessary for plaintiff to recover civil damages for auto accident); Velasco v. Commercial Bldg. Maint. Co., 215 Cal. Rptr. 504 (Cal. Ct. App. 1980) (holding that complaint against maintenance company for disposal of broken bottle needed for subsequent products liability action stated a recognized claim for negligent destruction of evidence); Clemente v. State, 161 Cal. Rptr. 799 (Cal. Ct. App. 1980) (allowing action against police officer whose "negligence in his conduct of [a] discretionary investigation" of an auto accident resulted in "virtual destruction of any opportunity on [plaintiff's] part to obtain compensation for his physical injuries from the apparent tortfeasor").

[125]954 P.2d 511 (Cal. 1998) (holding that no cause of action exists for intentional spoliation of evidence by a party to the underlying lawsuit).

[126]976 P.2d 223 (Cal. 1999) (holding that no cause of action exists for intentional spoliation of evidence by a third party not involved in the underlying lawsuit).

[127]*See, e.g.*, Coprich v. Superior Court, 95 Cal. Rptr. 2d 884, 887-91 (Cal. Ct. App. 2000); Farmers Ins. Exchange v. Superior Court, 95 Cal. Rptr. 2d 51, 55-56 (Cal. Ct. App. 2000).

Nonetheless, that a particular jurisdiction has not previously recognized a duty to prevent evidential obfuscation and the resulting loss of remedy in cases of tortfeasor indeterminacy need not prevent it from doing so in the future. As the California Supreme Court has noted:

> [t]he assertion that liability must nevertheless be denied because defendant bears no "duty" to plaintiff "begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct. . . . It (duty) is a shorthand statement of a conclusion, rather than an aid to analysis in itself. . . . But it should be recognized that 'duty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."[128]

This conception of the element of duty virtually compels a court to make a careful analysis that is sensitive to not only preexisting law, but also policy ramifications when determining the existence of a duty. In the particular sphere of issues that tortfeasor indeterminacy involves, the *Summers* and *Sindell* courts came to the conclusion that persons deprived of their traditional remedy by the nature of the underlying tortious conduct that injured them were entitled to protection. Thus, recognition of a limited duty particular to cases involving tortfeasor indeterminacy would not be an extension of previously unknown protection to plaintiffs, but only an explanation of existing protection that comports with traditional notions of how tort law functions.

Furthermore, an examination of the rationale behind *Cedars-Sinai* and *Temple* demonstrates that these cases should not control the California Supreme Court's determination of whether to recognize a duty to prevent evidential obfuscation in cases of tortfeasor indeterminacy. The key policy considerations that led the court to reject a cause of action for negligent spoliation of evidence are not applicable to cases involving tortfeasor indeterminacy. The court pointed to three policy considerations that weighed heavily against recognizing negligent spoliation of evidence: "the conflict between a tort remedy for intentional first party spoliation and the policy against creating derivative tort remedies for litigation-related misconduct; the strength of existing nontort remedies for spoliation; and the uncertainty of the fact of harm in spoliation cases."[129]

Unlike in *Cedars-Sinai* and *Temple*, the evidential obfuscation in cases of tortfeasor indeterminacy is not the result of subsequent litigation-related misconduct. The evidential spoliation in *Cedars-Sinai* and *Temple* is factually distinguishable from the evidential obfuscation in cases involving tortfeasor indeterminacy. *Cedars-Sinai* and *Temple* involved conduct that was both intentional and subsequent to the primary injury. On the other hand, tortfeasor indeterminacy involves a secondarily negligent aspect of already tortious conduct. Moreover, imposition of a duty to prevent evidential obfuscation in cases of tortfeasor indeterminacy would not lead to the potential cycle of "endless litigation" that is a concern in cases of spoliation of

---

[128]Dillon v. Legg, 441 P.2d 912, 916 (Cal. 1968) (quoting WILLIAM L. PROSSER, THE LAW OF TORTS 332-33 (3d ed. 1964)).

[129]*Cedars-Sinai*, 954 P.2d at 515.

evidence.[130] The court also determined that sufficient non-tort remedies for evidential spoliation existed in the form of evidential inferences with regard to destroyed evidence, civil sanctions, and criminal penalties.[131] The factual differences between evidence spoliation and tortfeasor indeterminacy render all of these non-tort remedies inapplicable. Finally, the court pointed to the factual uncertainty of harm that would require a "retrial within a trial" in some cases of spoliation of evidence.[132] This would not be of concern in cases of tortfeasor indeterminacy because the causal scenario itself will demonstrate the factual certainty of plaintiff's secondary injury.[133] Therefore, previous precedent that declined to recognize a cause of action for spoliation of evidence should not preclude the California Supreme Court from explaining alternative liability in terms of a common law duty to prevent one's already tortious conduct from obfuscating the determination of cause-in-fact and thereby depriving the victim of a remedy.

E. Operation of Alternative Liability as an Independent Cause of Action

Once loss of remedy is recognized as a distinct secondary injury, alternative liability can be conceptualized without resort to novel theories of liability for the primary injury. Rather, alternative liability is actually shorthand for the application of several traditional tort law doctrines in a separate cause of action for the negligent deprivation of remedy.[134]

To comport with traditional tort law, the risk of the secondary injury would have to be foreseeable, or else the defendants would have no duty to guard against it.[135] Therefore, to apply alternative liability it is necessary to determine whether, given the nature of the defendants' tortious conduct and the circumstances surrounding the conduct, there was a foreseeable risk that a potentially injured party might be unable to determine the responsible tortfeasor.[136] An examination of the case law shows that there is such a foreseeable risk in most cases when alternative liability has been applied.[137] Alternative liability can then be understood as imposing a duty on

---

[130] *Id.* at 516-17.

[131] *Id.* at 517-18.

[132] *Id.* at 520.

[133] *See* sources cited *supra* notes 106-07 and accompanying text.

[134] This characterization of the cause of action for deprivation of remedy as a species of negligence should not be confused with the underlying tortious nature of the primary injury. As application of cause of action in the DES scenario makes clear, alternative liability is just as applicable when the cause of action for the primary injury sounds in strict products liability.

[135] KEETON ET AL., *supra* note 7, at 162.

[136] Clearly, this is a consideration that bears on the existence of duty and concerns of proximate causation, not cause-in-fact.

[137] The plaintiff in *Sindell* had argued that her inability to prove cause-in-fact was a foreseeable consequence of the defendants' failure to label DES as experimental. Sindell v. Abbott Labs., 607 P.2d 924, 930 n.14 (Cal. 1980). The court rejected this argument, stating that the lack of evidence was the result of "the passage of time" rather than inadequate warning labels. *Id.* at 930. Thus, Sindell's inability to prove cause-in-fact was not a "'direct and foreseeable result' of defendants' failure to provide a warning label." *Id.* at 930 n.14. This conclusion ignores the potential foreseeability of duplicative tortious conduct in general.

persons to refrain from tortious conduct that could prevent a person injured by such conduct from determining the identity of the responsible party.[138]

Conceptualizing alternative liability in this way explains why evidentiary grouping is permissible. Each defendant owed the plaintiff a duty to refrain from conduct that could foreseeably combine with the conduct of other defendants to obfuscate the cause-in-fact determination and deprive plaintiff of a remedy for his primary injury. Each defendant has breached this duty to plaintiff and the conduct of the defendants has combined to cause the plaintiff's loss of remedy.[139] The defendants may be grouped because they have affected a single injury.

This also explains why a defendant may not escape liability by asserting the statistical probability that another defendant is just as likely the cause-in-fact of the primary injury—the defendants are not being held liable for the primary injury. With regard to the secondary injury, the reason defendants may not rely on exculpatory evidence depends on the number of defendants. If there are only two defendants, then both are necessary causes of the confusion and the resulting loss of remedy; both are but-for causes and neither will be allowed to escape liability simply because the other's conduct was also necessary.[140] If there are three or more defendants, then the result is a case of multiple sufficient causation,[141] and a defendant will not be permitted to assert the sufficiency of the other defendants' conduct to relieve himself from liability.[142] As Professor Geistfeld points out, the plaintiff makes his prima facie case against a defendant by proving that the group's conduct was the cause-in-fact of his injury and that defendant is a member of the

---

Arguably, there was a foreseeable risk that a person potentially injured by exposure to DES would be unable to identify the manufacturer given the fungible nature of DES, its production by a multitude of manufacturers, the fact that it was prescribed and distributed generically, the lack of knowledge about its long-term effects, and its use by pregnant women. Porat and Stein argue that in most cases a "defendant's (actual or imputed) awareness of the fact that their actions may or may not end up in damage entails the (actual or imputed) awareness of the ensuing causal uncertainty." PORAT & STEIN, *supra* note 66, at 173. "A potential wrongdoer ought to foresee the possibility that his action will inflict a traceless physical damage." *Id.*

[138]Others have also noted that alternative liability functions to hold one defendant "responsible for the way in which his tortious conduct interacted with the tortious conduct of the other defendant." Geistfeld, *supra* note 1, at 476; *see also* PORAT & STEIN, *supra* note 66, at 134. This would then mean that when a defendant's actions have created a case of tortfeasor indeterminacy he "might find himself under the duty to take reasonable steps to eliminate the uncertainty of the case." PORAT & STEIN, *supra* note 66, at 171.

[139]This explains why the *Summers* court was able to conclude that both "defendants were jointly liable and that thus the negligence of both was the cause of the injury or to that legal effect." Summers v. Tice, 199 P.2d 1, 2 (Cal. 1948). Such a statement is only coherent if the injury referred to is the loss of remedy, rather than the injury to Summers' eye.

[140]*See* discussion *supra* note 13.

[141]The situation is slightly more complicated than traditional multiple sufficient causation because at least two indeterminate tortfeasors are necessary for deprivation of plaintiff's remedy. Regardless, any individual defendant is a multiple sufficient cause as against any other individual defendant.

[142]*See* discussion *supra* note 16. The flaw in Professor Geistfeld's explanation is simply that the application of the evidentiary rule of multiple sufficient causation is direct rather than by analogy.

group.[143] Once the plaintiff proves his prima facie case, the burden shifts to the defendant just as it would after *any* standard plaintiff makes his prima facie case.[144]

Recognition of loss of remedy as the injury that alternative liability is meant to redress explains why the doctrine is limited to cases involving tortfeasor indeterminacy. Alternative liability is not necessary in cases involving multiple defendants where cause-in-fact can be demonstrated because there is no potential for the loss of remedy. Likewise, alternative liability is inappropriate in cases where the plaintiff simply cannot provide evidence that a lone defendant was actually the cause-in-fact of his harm because the plaintiff has failed to demonstrate that he was ever entitled to a remedy at all.[145] This explains why courts applying alternative liability and market-share liability tend to emphasize the plaintiff's loss of remedy, not the defendants' superior access to evidence.[146]

F. Effect of this Explanation on the Viability of Market-Share Liability

Explaining alternative liability as providing redress for loss of remedy for the primary injury leads to a two-fold conclusion regarding apportionment of liability. Initially, this explanation of alternative liability demonstrates that joint and several liability is the appropriate method for apportioning liability among the defendants regardless of their number. Each defendant is equally responsible for the resulting loss of remedy for the primary injury and because the loss of remedy is a single and indivisible harm, traditional tort doctrine will hold each defendant liable for the entire harm.[147] Moreover, because each defendant is liable for the entire harm there is no reason to require joinder of all defendants. Nevertheless, since all defendants are equally responsible, there is no equitable reason why the defendants should not be free to apportion liability among themselves on a pro-rata basis.[148]

---

[143]Geistfeld, *supra* note 1, at 474.

[144]A defendant can then refute the plaintiff's prima facie case against him in one of two ways. First, a defendant might demonstrate that he could not be the cause-in-fact of the plaintiff's primary injury. *Id.* at 475. By doing so, the defendant demonstrates that his conduct did not contribute to the confusion and resulting loss of remedy; in essence, he proves that he is not part of the group and should not bear their shared liability. Alternatively, a defendant might demonstrate which defendant *was* the cause-in-fact of the plaintiff's primary injury. *Id.* In doing this, the defendant essentially nullifies the effect of the group's conduct in depriving plaintiff of a remedy, negating the grounds for group liability.

[145]*See* sources cited *supra* note 106 and accompanying text.

[146]The confusion results from the *Summers* court's reference to *Ybarra*, which it found "quite analogous" to the facts of *Summers*. Summers v. Tice, 199 P.2d 1, 4 (Cal. 1948). Defendants' superior access to evidence was the motivation for allowing the plaintiff to utilize the doctrine of res ipsa loquitur against multiple defendants. Ybarra v. Spangard, 154 P.2d 687, 690 (Cal. 1945). In *Summers*, by contrast, the defendants did not have superior access to evidence. *See* Geistfeld, *supra* note 1, at 473. Allowing the plaintiff to group defendants together because the nature of their conduct had all contributed to the loss of remedy was what made *Ybarra* and *Summers* analogous, not defendants' superior access to evidence. *Id.*

[147]*See* discussion *supra* note 13.

[148]*See* RESTATEMENT (SECOND) OF TORTS § 886A (1965). Reapportionment of liability between defendants might result from named defendants impleading other potential tortfeasors or from subsequent actions for contribution. The frequency of either situation would probably

Conversely, this shows that market-share liability as a modification of alternative liability is both unnecessary and inconsistent with the underlying rationale. Apportioning liability based on market-share is unnecessary because that approach is based on the faulty assumption that as the number of defendants increases the probability that any one defendant caused the injury decreases.[149] This problem is nullified by redefining alternative liability as compensating for loss of remedy, an injury to which all defendants have contributed equally. Likewise, market-share liability is inconsistent with alternative liability because a given defendant's share of the relevant market, if one even exists, has no proportional bearing on his contribution to the plaintiff's loss of remedy.[150]

Porat and Stein reach a seemingly unjustifiable rejection of this result in applying their "evidential damage doctrine" to the prototypical DES market-share scenario.[151] After concluding that an independent action for evidential obfuscation and loss of remedy could provide a means for recovery by plaintiffs faced with tortfeasor indeterminacy, Porat and Stein conclude that liability should be apportioned on "the value of the plaintiff's entitlement to information" as reflected in the "amount of money that the plaintiff would be willing to pay to each manufacturer to ascertain whether it is the one which actually inflicted her injury."[152] They then make an unexplained jump to the conclusion that this value is reflected in the magnitude of each defendant's risk-contribution and by derivation each defendant's share of the relevant market.[153] Such a result is logically incomprehensible and appears antithetical to their original proposition that recovery be based on the secondary evidential damage rather than the primary tortious conduct. Further, it would negate any potential benefit that could be derived from redefining the cause of action as an independent tort for deprivation of remedy by arbitrarily re-injecting market-share with its necessity of joining all potential tortfeasors and problematic determinations of relevant markets. This can only lead to a conclusion that Porat and Stein have erred and that joint and several liability is the appropriate means of apportionment rather than market-share liability.

IV. CONCLUSION

The benefits of recognizing alternative liability as an independent cause of action for deprivation of remedy are numerous. This explanation demonstrates that the theoretical underpinnings of alternative liability are consistent with the traditional

---

not be so high as to burden the court system. Given the potential for defendant insolvency, as well as the potential that a defendant might be able to demonstrate that he could not have caused the injury, the plaintiff has every incentive to join as many defendants as practicable.

[149] *See* sources cited *supra* notes 58-61 and accompanying text.

[150] The duplicative aspect of the multiple defendants' conduct, not the quantity of that conduct, results in the loss of remedy. A defendant contributes equally to the indeterminacy whether his share of the market is 5% or 95%.

[151] Viewing all the defendants who have confused the cause-in-fact inquiry as multiple sufficient causes of the resulting injury to the plaintiff is rejected as "problematic" with no other explanation. PORAT & STEIN, *supra* note 66, at 187 n.5.

[152] *Id.* at 187.

[153] *Id.*

tort law requirement that a defendant's conduct must be the cause-in-fact of a plaintiff's harm; alternative liability is not truly novel because it merely relies on careful application of pre-existing law. As shown above, alternative liability does not hold innocent defendants liable for harm caused by others. Rather, it holds each defendant responsible for the way in which his conduct has contributed to the loss of plaintiff's remedy for the primary injury.

Perhaps just as important, explaining alternative liability as a separate cause of action for loss of remedy provides a justification why alternative liability in its "pure" form can be applied across the board. Each defendant has contributed equally to the plaintiff's loss of remedy and so application of alternative liability remains equitable regardless of how many defendants are involved. Further, this shows that market-share liability is an unnecessary and inequitable extension of alternative liability.

If courts understand alternative liability in this way, perhaps they will be more likely to apply the doctrine in cases where it is needed. While this analysis may vindicate courts that have rejected market-share liability as inconsistent with traditional tort law, it also stands as a caution against discounting the possibility that pre-existing legal concepts, if understood fully and applied correctly, can often resolve new issues as they arise.