73 N.Y.2d 487

[487]**Mindy HYMOWITZ, Respondent,**

v.

ELI LILLY AND COMPANY et al., Appellants, et al., Defendants.

Attorney-General of the State of New York, Intervenor-Respondent.

Elizabeth TIGUE et al., Respondents,

v.

E.R. SQUIBB & SONS, INC., et al., Appellants, et al., Defendants.

Jane DOLAN et al., Respondents,

v.

ELI LILLY AND COMPANY et al., Appellants.

(And Other Actions.)

Barbara HANFLING et al., Respondents,

v.

ELI LILLY AND COMPANY et al., Appellants, et al., Defendants.

Court of Appeals of New York.

April 4, 1989.

Persons claiming they were injured by the drug diethylstilbestrol (DES) ingested by their mothers during pregnancy filed action seeking relief against DES manufacturers. In one action the Supreme Court, 136 Misc.2d 467, 518 N.Y.S.2d 891, denied manufacturers motion to dismiss. On appeal, the Supreme Court, Appellate Division, 139 A.D.2d 431, 526 N.Y.S.2d 825, affirmed. In a second action, the Supreme Court, New York County, 136 Misc.2d 482, 518 N.Y.S.2d 996, denied manufacturers' motions for summary judgment and granted plaintiff's motion to strike affirmative defenses. The Supreme Court, Appellate Division, 139 A.D.2d 437, 526 N.Y.S.2d 922, affirmed. In a third action, the Supreme Court, Appellate Division, 139 A.D.2d 978, 527 N.Y.S.2d 331, affirmed orders of the Supreme Court, New York County, Gammerman, J., denying defendant's motions for summary judgment dismissing the complaint. In the fourth action, the Supreme Court, Appellate Division, 139 A.D.2d 977, 527 N.Y.S.2d 330, affirmed in order of the Supreme Court granting plaintiff's motion to strike defendants' affirmative defenses and denying defendant's motion for summary judgment dismissing the complaint. On certified question, the Court of Appeals, Wachtler, C.J., held that: (1) market share theory using national market for determining liability was appropriate method for determining liability and apportioning damages in DES cases in which identification of manufacturer was impossible, and (2) revival for one year of actions for injuries caused by DES which were previously barred by statute of limitations was constitutional.

Affirmed.

Mullen, J., filed opinion concurring in results as to two appeals and dissenting in part as to two appeals.

1. Drugs and Narcotics ⇐18
Trial ⇐335

The alternative liabilities theory of establishing a product liability defendant's liability was not an appropriate method for determining the liability and apportioning damages in cases involving injuries stemming from use of diethylstilbestrol (DES) in which the chance of identifying the particular producer which caused the injury was remote.

2. Drugs and Narcotics ⇐18
Trial ⇐335

The theory of concerted action could not be used for determining liability and apportioning damages between manufacturers of diethylstilbestrol (DES) in cases in which manufacturer identification was impossible or unlikely; there was nothing in the record beyond similar conduct showing any agreement to market DES for pregnancies without taking proper steps to insure the drug's safety.

3. Products Liability ⇐23

Parallel activity, without more, is insufficient to establish the agreement element necessary for a products liability plaintiff to maintain a concerted action claim.

4. Drugs and Narcotics ⇐18

In the case of a pregnancy drug made by manufacturers acting in a parallel manner to produce the identical, generically marketed product which caused injury many years later, it was appropriate that loss be born by those that produced drug for use during pregnancy, rather than by those injured by its use, even where precise manufacturer of the drug could not be identified in particular action.

5. Drugs and Narcotics ⇐18
Trial ⇐335

A market share theory using a national market was appropriate method for determining liability and apportioning damages in cases involving injuries from diethylstilbestrol (DES) in which manufacturer identification was impossible; apportionment of liability corresponded to overall culpability for each defendant as measured by the amount of risk of injury each defendant created to the public at large.

6. Drugs and Narcotics ⇐18

In products liability actions against manufacturers of diethylstilbestrol (DES) in which market share theory would be used to determine liability and apportion damages, the liability of DES producers was several only, and could not be inflated when all participants in the market were not before the court in the particular case.

7. Constitutional Law ⇐308
Limitation of Actions ⇐4(2)

Statute reviving for one year actions for injuries caused by diethylstilbestrol (DES) which were previously barred by statute of limitations did not violate due process; latent nature of DES injuries was well known and it was clear that previous exposure rule had prevented bringing of timely actions for recovery. U.S.C.A. Const.Amends. 5, 14; McKinney's Const. Art. 1, §§ 6, 11; Laws 1986, c. 682, § 4.

8. Constitutional Law ⇐308
Limitation of Actions ⇐4(2)

Statute reviving for one year actions for injuries caused by diethylstilbestrol (DES) which were previously barred by a statute of limitations did not violate due process as applied to cases in which plaintiff could have sued originally but did not; under the circumstances, legislature properly determined that it would be more fair for all plaintiffs to uniformly have one year to bring their actions. U.S.C.A. Const. Amends. 5, 14, § 1; McKinney's Const. Art. 1, §§ 6, 11; Laws 1986, c. 682, § 4.

9. Constitutional Law ⇐249(3)
Limitation of Actions ⇐4(2)

Fact that revival statute which instituted prospective only discovery rule for four of five substances designated for revival but did not institute prospective only discovery rule for DES, was the product of political compromise did not render revival statute unconstitutional as denial of equal protection. Laws 1986, c. 682, § 4; U.S.C.A. Const.Amend. 14, § 1; McKinney's Const. Art. 1, §§ 6, 11.

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[491] Russel H. Beatie, Jr., Sanford N. Berland and Susan A. Winston, New York City, for Eli Lilly and Co., appellant in the first above-entitled action.

Karl E. Seib, Jr., and Robert D. Wilson, Jr., New York City, for Abbott Laboratories, appellant in the first above-entitled action.

[492] Robert M. Dato, David J. Fleming, Santa Monica, Cal., Barry M. Epstein and Lindsay H. Lew, Newark, N.J., for E.R. Squibb & Sons, Inc., appellant in the first above-entitled action.

Robin J. Stout, Jay P. Mayesh and William A. Rome, New York City, for The Upjohn Company, appellant in the first above-entitled action.

[493] Paul D. Rheingold, New York City, for respondent in the first above-entitled action.

Robert Abrams, Atty. Gen. (Andrea Green and O. Peter Sherwood, New York

City, of counsel), intervenor-respondent pro se in the first above-entitled action.

Herbert Semmel, New York City, for New York Public Interest Research [494]Group, Inc., and others, amici curiae, in the first above-entitled action.

Alexander C. Cordes, Paul K. Stecker, Buffalo, Marc S. Klein, Lindsay H. Lew, Newark, N.J., David J. Fleming and Robert M. Dato, Santa Monica, Cal., for E.R. Squibb & Sons, Inc., appellant in the second above-entitled action.

[495]John L. McGoldrick, Newark, N.J., Karl E. Seib, Jr., Theodore V.H. Mayer, New York City, John F. Brenner, Newark, N.J., and Charles S. Lozow, New York City, for Abbott Laboratories and others, appellants in the second above-entitled action.

A. Edward Grashof, Thomas F. Clauss, Jr., Sheila Moeller Fessler and Paul A. Scrudato, New York City, for Rexall Drug Co., appellant in the second above-entitled action.

[496]Jay P. Mayesh, Burton N. Lipshie, Robin J. Stout and William A. Rome, New York City, for The Upjohn Co., appellant in the second above-entitled action.

[497]Charles M. McCaghey and William K. Dodds, New York City, for Boyle & Co., appellant in the second above-entitled action.

Paul D. Rheingold, New York City, for respondents in the second above-entitled action.

[498]Sharon E. Jaffe, Joseph A. DiBenedetto, New York City, and Lisa A. Schoolman, Setauket, for Rorer Pharmaceutical Corp., appellant in the third above-entitled action.

[499]Alexander C. Cordes, Paul K. Stecker, Buffalo, Barry M. Epstein, Marc S. Klein, Lindsay H. Lew, Newark, N.J., David J. Fleming and Robert M. Dato, Santa Monica, Cal., for E.R. Squibb & Sons, Inc., appellant in the third above-entitled action, relying upon its briefs in Hymowitz and Tigue.

Jay P. Mayesh, Burton N. Lipshie, Robin J. Stout, Carole W. Nimaroff and William A. Rome, New York City, for The Upjohn Co., appellant in the third above-entitled action. Same points as in Tigue.

Russell H. Beatie, Jr., Sanford N. Berland and Susan A. Winston, New York City, for Eli Lilly & Co., appellant in the third above-entitled action.

William D. Fireman and Alfred S. Julien, New York City, for Jane Dolan and others, respondents in the third above-entitled action.

Sybil Shainwald, Howard Eison, New York City, and Perry S. Reich, for Erin Murphy and another, respondents in the third above-entitled action.

[500]W. Burlette Carter, Theodore V.H. Mayer and Charles Lozow, New York City, for Merck & Co., Inc., appellant in the fourth above-entitled action.

Russell H. Beatie, Jr., Kenneth J. King and Charna L. Gerstenhaber, New York City, for Eli Lilly and Co., appellant in the fourth above-entitled action.

Karl E. Seib, Jr., and Robert D. Wilson, Jr., New York City, for Abbott Laboratories, appellant in the fourth above-entitled action.

[501]Robin J. Stout, James T. Conlon, David M. Covey and Ann L. Wilson, New York City, for The Upjohn Co., appellant in the fourth above-entitled action.

Herald Price Fahringer, Arthur M. Luxenberg, Morris J. Eisen and Perry Weitz, New York City, for respondents in the fourth above-entitled action.

[502]OPINION OF THE COURT

WACHTLER, Chief Judge.

Plaintiffs in these appeals allege that they were injured by the drug diethylstilbestrol (DES) ingested by their mothers during pregnancy. They seek relief against defendant DES manufacturers. While not class actions, these cases are representative of nearly 500 similar actions pending in the courts in this State; the rules articulated by the court here, therefore, must do justice and be administratively feasible in the context of this mass litigation. With this in mind, we now resolve the issue twice expressly left open by this

court, and adopt a market share theory, using a national market, for determining liability and apportioning damages in DES cases in which identification of the manufacturer of the drug that injured the plaintiff is impossible *(see, Kaufman v. Lilly & Co.*, 65 N.Y.2d 449, 456, 492 N.Y.S.2d 584, 482 N.E.2d 63; *Bichler v. Lilly & Co.*, 55 N.Y.2d 571, 580, 450 N.Y.S.2d 776, 436 N.E.2d 182). We also hold that the Legislature's revival for one year of actions for injuries caused by DES that were previously barred by the Statute of Limitations *(see,* L. 1986, ch. 682, § 4) is constitutional under the State and Federal Constitutions.

I.

The history of the development of DES and its marketing in this country has been repeatedly chronicled *(see, e.g., Bichler v. Lilly & Co., supra; Martin v. Abbott Labs.*, 102 Wash.2d 581, 689 P.2d 368; *Sindell v. Abbott Labs.*, 26 Cal.3d 588, 163 Cal.Rptr. 132, 607 P.2d 924, *cert. denied* 449 U.S. 912, 101 S.Ct. 285, 66 L.Ed.2d 140; Sheiner, *DES and a Proposed Theory of Enterprise Liability*, 46 Fordham L.Rev. 963). Briefly, DES is a synthetic substance that mimics the effect of estrogen, the naturally formed female hormone. It was invented in 1937 by British researchers, but never patented.

In 1941, the Food and Drug Administration (FDA) approved the new drug applications (NDA) of 12 manufacturers to market DES for the treatment of various maladies, not directly involving pregnancy. In 1947, the FDA began approving the NDAs of manufacturers to market DES for the purpose of preventing human miscarriages; by 1951, the FDA had concluded that DES was generally safe for pregnancy use, and stopped requiring the filing of NDAs when new manufacturers sought to produce the drug for this purpose. In 1971, however, the FDA banned the use of DES as a miscarriage preventative, when studies established the harmful latent effects of DES upon the offspring of mothers who took the drug. Specifically, tests indicated that DES caused vaginal adenocarcinoma, a form of cancer, and adenosis, a precancerous vaginal or cervical growth.

Although strong evidence links prenatal DES exposure to later development of serious medical problems, plaintiffs seeking relief in court for their injuries faced two formidable and fundamental barriers to recovery in this State; not only is identification of the manufacturer of the DES ingested in a particular case generally impossible, but, due to the latent nature of DES injuries, many claims were barred by the Statute of Limitations before the injury was discovered.

The identification problem has many causes. All DES was of identical chemical composition. Druggists usually filled prescriptions from whatever was on hand. Approximately 300 manufacturers produced the drug, with companies entering and leaving the market continuously during the 24 years that DES was sold for pregnancy use. The long latency period of a DES injury compounds the identification problem; memories fade, records are lost or destroyed, and witnesses die. Thus the pregnant women who took DES generally never knew who produced the drug they took, and there was no reason to attempt to discover this fact until many years after ingestion, at which time the information is not available.

We recognized this predicament in *Bichler v. Lilly & Co. (supra,* 55 N.Y.2d at 579, 450 N.Y.S.2d 776, 436 N.E.2d 182), where the court stated that in DES cases it is a "practical impossibility for most victims [to] pinpoint * * * the manufacturer directly responsible for their particular injury". We allowed plaintiff's recovery in that case, however, notwithstanding the failure of the plaintiff to identify the manufacturer of the injurious DES, on the limited basis that "the evidence was legally sufficient to support the jury verdict for the plaintiff" on the law as charged to the jury, and unobjected to by the defendant *(see, Kaufman v. Lilly & Co.*, 65 N.Y.2d 449, 456, 492 N.Y.S.2d 584, 482 N.E.2d 63, *supra).* The question, therefore, of whether nonidentification of the manufacturer precludes plaintiffs from recovering for

DES caused injuries, remained unresolved after *Bichler v. Lilly & Co. (supra).*

The second barrier to recovery, involving the Statute of Limitations, arose from the long-standing rule in this State that the limitations period accrued upon exposure in actions alleging personal injury caused by toxic substances *(Fleishman v. Lilly & Co.,* 62 N.Y.2d 888, 478 N.Y.S.2d 853, 467 N.E.2d 517, *cert. denied* 469 U.S. 1192, 105 S.Ct. 967, 83 L.Ed.2d 972). In *Fleishman v. Lilly & Co. (supra)* it became clear that this [504] exposure rule led to many DES cases being barred by the Statute of Limitations before the discovery of injury; we held, however, that any change in the accrual date from exposure to discovery was more properly the prerogative of the Legislature *(id.,* at 890, 478 N.Y.S.2d 853, 467 N.E.2d 517; *see, id.,* at 891, 478 N.Y.S.2d 853, 467 N.E.2d 517 [Cooke, Ch. J., dissenting]). Two years after *Fleishman v. Lilly & Co.* the Legislature addressed the Statute of Limitations problem, and instituted a discovery rule for "the latent effects of exposure to any substance" (L.1986, ch. 682, § 2). The Legislature also, for one year, revived causes of action for exposure to DES that had been time barred (L.1986, ch. 682, § 4).

It is estimated that eventually 800 DES cases will be brought under the revival portion of this recent statute. Moreover, as indicated in *Bichler v. Lilly & Co. (supra),* and as apparent from the record now before the court, in the vast majority of these cases identification of the manufacturer of the DES that injured the plaintiff will be impossible. The Legislature, however, while reviving these time-barred actions, did not resolve the identification problem.

The present appeals are before the court in the context of summary judgment motions. In all of the appeals defendants moved for summary judgment dismissing the complaints because plaintiffs could not identify the manufacturer of the drug that allegedly injured them. In three of the appeals defendants also moved on Statute of Limitations grounds, arguing that the revival of the actions was unconstitutional under the State and Federal Constitutions, and that the complaints, therefore, are time barred and should be dismissed. The trial court denied all of these motions. On the Statute of Limitations issue, the trial court also granted plaintiffs' cross motions, dismissing defendants' affirmative defenses that the actions were time barred. The Appellate Division affirmed in all respects and certified to this court the questions of whether the orders of the trial court were properly made. 139 A.D.2d 437, 526 N.Y.S. 2d 922, 139 A.D.2d 431, 526 N.Y.S.2d 825, 139 A.D.2d 978, 527 N.Y.S.2d 331, 139 A.D. 2d 977, 527 N.Y.S.2d 330. We answer these questions in the affirmative.

II.

In a products liability action, identification of the exact defendant whose product injured the plaintiff is, of course, generally required *(see, e.g., Morrissey v. Conservative Gas Corp.,* 285 App.Div. 825, 136 N.Y. S.2d 844, *affd.* 1 N.Y.2d 741, 152 N.Y.S.2d 289, 135 N.E.2d 45; Prosser and Keeton, Torts § 103, at 713 [5th ed]). In DES cases in which such identification is possible, actions may proceed under established [505] principles of products liability (*Bichler v. Lilly & Co., supra,* 55 N.Y.2d at 579, 450 N.Y.S.2d 776, 436 N.E.2d 182). The record now before us, however, presents the question of whether a DES plaintiff may recover against a DES manufacturer when identification of the producer of the specific drug that caused the injury is impossible.

A.

As we noted in *Bichler v. Lilly & Co. (supra,* at 580, n. 5, 450 N.Y.S.2d 776, 436 N.E.2d 182), the accepted tort doctrines of alternative liability and concerted action are available in some personal injury cases to permit recovery where the precise identification of a wrongdoer is impossible. However, we agree with the near unanimous views of the high State courts that have considered the matter that these doctrines in their unaltered common-law forms do not permit recovery in DES cases *(see, e.g., Sindell v. Abbott Labs., supra; Col-*

lins v. Lilly & Co., 116 Wis.2d 166, 342 N.W.2d 37; *Martin v. Abbott Labs., supra; but see, Abel v. Lilly & Co.*, 418 Mich. 311, 343 N.W.2d 164 [held that there was a question of fact presented as to alternative liability and concerted action]).

The paradigm of alternative liability is found in the case of *Summers v. Tice*, (33 Cal.2d 80, 199 P.2d 1). In *Summers (supra)*, plaintiff and the two defendants were hunting, and defendants carried identical shotguns and ammunition. During the hunt, defendants shot simultaneously at the same bird, and plaintiff was struck by bird shot from one of the defendants' guns. The court held that where two defendants breach a duty to the plaintiff, but there is uncertainty regarding which one caused the injury, "the burden is upon each such actor to prove that he has not caused the harm" (Restatement [Second] of Torts § 433B[3]; *Bichler v. Lilly & Co., supra*, 55 N.Y.2d at 580, n 5, 450 N.Y.S.2d 776, 436 N.E.2d 182; *cf., Ravo v. Rogatnick*, 70 N.Y.2d 305, 520 N.Y.S.2d 533, 514 N.E.2d 1104 [successive tort-feasors may be held jointly and severally liable for an indivisible injury to the plaintiff]). The central rationale for shifting the burden of proof in such a situation is that without this device both defendants will be silent, and plaintiff will not recover; with alternative liability, however, defendants will be forced to speak, and reveal the culpable party, or else be held jointly and severally liable themselves. Consequently, use of the alternative liability doctrine generally requires that the defendants have better access to information than does the plaintiff, and that all possible tort-feasors be before the court *(see, Summers v. Tice, supra*, at 86, 199 P.2d 1; Restatement [Second] of Torts [1506] § 433B, comment h). It is also recognized that alternative liability rests on the notion that where there is a small number of possible wrongdoers, all of whom breached a duty to the plaintiff, the likelihood that any one of them injured the plaintiff is relatively high, so that forcing them to exonerate themselves, or be held liable, is not unfair *(see, Sindell v. Abbott Labs., supra*, 26 Cal.3d at 603, 163 Cal. Rptr. 132, 607 P.2d 924).

[1] In DES cases, however, there is a great number of possible wrongdoers, who entered and left the market at different times, and some of whom no longer exist. Additionally, in DES cases many years elapse between the ingestion of the drug and injury. Consequently, DES defendants are not in any better position than are plaintiffs to identify the manufacturer of the DES ingested in any given case, nor is there any real prospect of having all the possible producers before the court. Finally, while it may be fair to employ alternative liability in cases involving only a small number of potential wrongdoers, that fairness disappears with the decreasing probability that any one of the defendants actually caused the injury. This is particularly true when applied to DES where the chance that a particular producer caused the injury is often very remote *(Sindell v. Abbott Labs., supra*, at 603, 163 Cal.Rptr. 132, 607 P.2d 924; *Collins v. Lilly & Co., supra*, 116 Wis.2d at 184, 342 N.W.2d 37). Alternative liability, therefore, provides DES plaintiffs no relief.

[2, 3] Nor does the theory of concerted action, in its pure form, supply a basis for recovery. This doctrine, seen in drag racing cases, provides for joint and several liability on the part of all defendants having an understanding, express or tacit, to participate in "a common plan or design to commit a tortious act" (Prosser and Keeton, Torts § 46, at 323 [5th ed.]; *see, Bichler v. Lilly & Co., supra*, 55 N.Y.2d at 580–581, 450 N.Y.S.2d 776, 436 N.E.2d 182; *De Carvalho v. Brunner*, 223 N.Y. 284, 119 N.E. 563). As we noted in *Bichler v. Lilly & Co.*, and as the present record reflects, drug companies were engaged in extensive parallel conduct in developing and marketing DES *(see, id.*, 55 N.Y.2d at 585, 450 N.Y.S.2d 776, 436 N.E.2d 182). There is nothing in the record, however, beyond this similar conduct to show any agreement, tacit or otherwise, to market DES for pregnancy use without taking proper steps to ensure the drug's safety. Parallel activity, without more, is insufficient to establish the agreement element necessary to maintain a concerted action

claim *(Sindell v. Abbott Labs., supra,* 26 Cal.3d at 605, 163 Cal.Rptr. 132, 607 P.2d 924; *Collins v. Lilly & Co., supra,* 116 Wis.2d at 185, 342 N.W.2d 37; *Martin v. Abbott Labs., supra,* 102 Wash.2d at 599, 689 P.2d 368). Thus this theory also fails in supporting an action by DES plaintiffs.

[507] In short, extant common-law doctrines, unmodified, provide no relief for the DES plaintiff unable to identify the manufacturer of the drug that injured her. This is not a novel conclusion; in the last decade a number of courts in other jurisdictions also have concluded that present theories do not support a cause of action in DES cases. Some courts, upon reaching this conclusion, have declined to find any judicial remedy for the DES plaintiffs who cannot identify the particular manufacturer of the DES ingested by their mothers *(see, Zafft v. Lilly & Co.,* 676 S.W.2d 241 [Mo] [en banc]; *Mulcahy v. Lilly & Co.,* 386 N.W.2d 67 [Iowa] [stating that any change in the law to allow for recovery in nonidentification DES cases should come from the Legislature]). Other courts, however, have found that some modification of existing doctrine is appropriate to allow for relief for those injured by DES of unknown manufacture *(e.g., Sindell v. Abbott Labs., supra; Collins v. Lilly & Co., supra; Martin v. Abbott Labs., supra).*

We conclude that the present circumstances call for recognition of a realistic avenue of relief for plaintiffs injured by DES. These appeals present many of the same considerations that have prompted this court in the past to modify the rules of personal injury liability, in order "to achieve the ends of justice in a more modern context" *(see, People v. Hobson,* 39 N.Y.2d 479, 489, 384 N.Y.S.2d 419, 348 N.E.2d 894; *Codling v. Paglia,* 32 N.Y.2d 330, 341, 345 N.Y.S.2d 461, 298 N.E.2d 622), and we perceive that here judicial action is again required to overcome the " 'inordinately difficult problems of proof' " caused by contemporary products and marketing techniques *(see, Bichler v. Lilly & Co., supra,* 55 N.Y.2d at 579–580, 450 N.Y.S.2d 776, 436 N.E.2d 182 [quoting *Caprara v. Chrysler Corp.,* 52 N.Y.2d 114, 123, 436 N.Y.S.2d 251, 417 N.E.2d 545]).

Indeed, it would be inconsistent with the reasonable expectations of a modern society to say to these plaintiffs that because of the isidious nature of an injury that long remains dormant, and because so many manufacturers, each behind a curtain, contributed to the devastation, the cost of injury should be borne by the innocent and not the wrongdoers. This is particularly so where the Legislature consciously created these expectations by reviving hundreds of DES cases. Consequently, the ever-evolving dictates of justice and fairness, which are the heart of our common-law system, require formation of a remedy for injuries caused by DES *(see, Woods v. Lancet,* 303 N.Y. 349, 355, 102 N.E.2d 691; *see, also,* Kaye, *The Human Dimension in Appellate Judging: A Brief Reflection on a Timeless Concern,* 73 Cornell L.Rev. 1004).

[4] [508] We stress, however, that the DES situation is a singular case, with manufacturers acting in a parallel manner to produce an identical, generically marketed product, which causes injury many years later, and which has evoked a legislative response reviving previously barred actions. Given this unusual scenario, it is more appropriate that the loss be borne by those that produced the drug for use during pregnancy, rather than by those who were injured by the use, even where the precise manufacturer of the drug cannot be identified in a particular action. We turn then to the question of how to fairly and equitably apportion the loss occasioned by DES, in a case where the exact manufacturer of the drug that caused the injury is unknown.

B.

The past decade of DES litigation has produced a number of alternative approaches to resolve this question. Thus, in a sense, we are now in an enviable position; the efforts of other courts provided examples for contending with this difficult issue, and enough time has passed so that the actual administration and real effects of these solutions now can be observed. With

these useful guides in hand, a path may be struck for our own conclusion.

First, this court's opinion in *Bichler v. Lilly & Co. (supra)* must be considered. There the jury was instructed on a modified version of concerted action, which, in effect, substituted the fact of conscious parallel activity by manufacturers for the usual common-law requirement that there be proof of an actual agreement between actors to jointly act tortiously *(id.,* 55 N.Y. 2d at 584, 450 N.Y.S.2d 776, 436 N.E.2d 182). The defendant in *Bichler* did not object to this instruction, and the modified concerted action theory became the law applicable to that particular case *(id.,* at 583–584, 450 N.Y.S.2d 776, 436 N.E.2d 182).

Now given the opportunity to assess the merits of this theory, we decline to adopt it as the law of this State. Parallel behavior, the major justification for visiting liability caused by the product of one manufacturer upon the head of another under this analysis, is a common occurrence in industry generally. We believe, therefore, that inferring agreement from the fact of parallel activity alone improperly expands the concept of concerted action beyond a rational or fair limit; among other things, it potentially renders small manufacturers, in the case of DES and in countless other industries, jointly liable for all damages stemming from the defective [509]products of an entire industry *(accord, Sindell v. Abbott Labs., supra,* 26 Cal.3d at 605, 163 Cal. Rptr. 132, 607 P.2d 924).

A narrower basis for liability, tailored more closely to the varying culpableness of individual DES producers, is the market share concept. First judicially articulated by the California Supreme Court in *Sindell v. Abbott Labs. (supra),* variations upon this theme have been adopted by other courts *(see, Collins v. Lilly & Co., supra; Martin v. Abbott Labs., supra).* In *Sindell v. Abbott Labs (supra),* the court synthesized the market share concept by modifying the *Summers v. Tice (supra)* alternative liability rationale in two ways. It first loosened the requirement that all possible wrongdoers be before the court, and instead made a "substantial share" sufficient. The court then held that each defendant who could not prove that it did not actually injure plaintiff would be liable according to that manufacturer's market share. The court's central justification for adopting this approach was its belief that limiting a defendant's liability to its market share will result, over the run of cases, in liability on the part of a defendant roughly equal to the injuries the defendant actually caused *(id.,* 26 Cal.3d at 612, 163 Cal.Rptr. 132, 607 P.2d 924).

In the recent case of *Brown v. Superior Ct.,* 44 Cal.3d 1049, 245 Cal.Rptr. 412, 751 P.2d 470, the California Supreme Court resolved some apparent ambiguity in *Sindell v. Abbott Labs.,* and held that a manufacturer's liability is several only, and, in cases in which all manufacturers in the market are not joined for any reason, liability will still be limited to market share, resulting in a less than 100% recovery for a plaintiff. Finally, it is noteworthy that determining market shares under *Sindell v. Abbott Labs.* proved difficult and engendered years of litigation. After attempts at using smaller geographical units, it was eventually determined that the national market provided the most feasible and fair solution, and this national market information was compiled *(see, In re Complex DES Litig.,* No. 830/109, Cal.Super.Ct.).

Four years after *Sindell v. Abbott Labs.,* the Wisconsin Supreme Court followed with *Collins v. Lilly & Co.,* 116 Wis.2d 166, 342 N.W.2d 37, *supra.* Deciding the identification issue without the benefit of the extensive California litigation over market shares, the Wisconsin court held that it was prevented from following *Sindell* due to "the practical difficulty of defining and proving market share" *(id.,* at 189, 342 N.W.2d, at 48). Instead of focusing on tying liability closely to the odds of [510]actual causation, as the *Sindell* court attempted, the *Collins* court took a broader perspective, and held that each defendant is liable in proportion to the amount of risk it created that the plaintiff would be injured by DES. Under the *Collins* structure, the "risk" each defendant is liable for is a question of fact in each case, with market shares being relevant to this deter-

mination *(id.,* at 191, 200, 342 N.W.2d 37). Defendants are allowed, however, to exculpate themselves by showing that their product could not have caused the injury to the particular plaintiff *(id.,* at 198, 342 N.W.2d 37).

The Washington Supreme Court, writing soon after *Collins v. Lilly & Co.,* took yet another approach *(see, Martin v. Abbott Labs.,* 102 Wash.2d 581, 689 P.2d 368, *supra).* The *Martin* court first rejected the *Sindell* market share theory due to the belief (which later proved to be erroneous in *Brown v. Superior Ct. [supra])* that California's approach distorted liability by inflating market shares to ensure plaintiffs of full recovery *(id.,* 102 Wash.2d at 601, 689 P.2d 368). The *Martin* court instead adopted what it termed "market share alternative liability," justified, it concluded, because "[e]ach defendant contributed to the *risk* of injury to the public, and, consequently, the risk of injury to individual plaintiffs" *(id.,* at 604, 689 P.2d, at 382).

Under the Washington scheme, defendants are first allowed to exculpate themselves by proving by the preponderance of the evidence that they were not the manufacturer of the DES that injured plaintiff. Unexculpated defendants are presumed to have equal market shares, totaling 100%. Each defendant then has the opportunity to rebut this presumption by showing that its actual market share was less than presumed. If any defendants succeed in rebutting this presumption, the liability shares of the remaining defendants who could not prove their actual market share are inflated, so that the plaintiff received a 100% recovery *(id.,* at 605–606, 689 P.2d 368).[1] The [511] market shares of defendants is a question of fact in each case, and the relevant market can be a particular pharmacy, or county, or State, or even the country, depending upon the circumstances the case presents *(George v. Parke-Davis,* 107 Wash.2d 584, 733 P.2d 507).

Turning to the structure to be adopted in New York, we heed both the lessons learned through experience in other jurisdictions and the realities of the mass litigation of DES claims in this State. Balancing these considerations, we are led to the conclusion that a market share theory, based upon a national market, provides the best solution. As California discovered, the reliable determination of any market smaller than the national one likely is not practicable. Moreover, even if it were possible, of the hundreds of cases in the New York courts, without a doubt there are many in which the DES that allegedly caused injury was ingested in another State. Among the thorny issues this could present, perhaps the most daunting is the spectre that the particular case could require the establishment of a separate market share matrix. We feel that this is an unfair, and perhaps impossible burden to routinely place upon the litigants in individual cases.

Nor do we believe that the Wisconsin approach of assessing the "risk" each defendant caused a particular plaintiff, to be litigated anew as a question of fact in each case, is the best solution for this State. Applied on a limited scale this theory may be feasible, and certainly is the most refined approach by allowing a more thorough consideration of how each defendant's actions threatened the plaintiff. We are wary, however, of setting loose, for application in the hundreds of cases pending in this State, a theory which requires

1. The actual operation of this theory proved more mathematically complex when the court was presented with the question of what to do about unavailable defendants. Recognizing that the possibility of abuse existed when defendants implead unavailable defendants, who would then be assumed to have had an equal share of the market, the court placed the burden upon appearing defendants to prove the market share of the absent ones *(George v. Parke-Davis,* 107 Wash.2d 584, 733 P.2d 507). If this can be proved, the plaintiff simply cannot recover the amount attributable to the absent defendant, and thus recovery in the case is less than 100%. If the market share of the absent defendant cannot be shown, the remaining defendants who cannot prove their market shares have their shares inflated to provide plaintiff with full recovery. Finally, if all appearing defendants can prove their market shares, their shares are never inflated, regardless of whether the market share of a nonappearing defendant can be proved or not; thus, in this situation, the plaintiff again will not recover her full damages *(id.).*

the fact finder's individualized and open-ended assessment of the relative liabilities of scores of defendants in every case. Instead, it is our perception that the injustices arising from delayed recoveries and inconsistent results which this theory may produce in this State outweigh arguments calling for its adoption.

[5] Consequently, for essentially practical reasons, we adopt a market share theory using a national market. We are aware that the adoption of a national market will likely result in a [512]disproportion between the liability of individual manufacturers and the actual injuries each manufacturer caused in this State. Thus our market share theory cannot be founded upon the belief that, over the run of cases, liability will approximate causation in this State *(see, Sindell v. Abbott Labs., supra,* 26 Cal.3d at 612, 163 Cal.Rptr. 132, 607 P.2d 924). Nor does the use of a national market provide a reasonable link between liability and the risk created by a defendant to a particular plaintiff *(see, Collins v. Lilly & Co., supra; Martin v. Abbott Labs., supra).* Instead, we choose to apportion liability so as to correspond to the over-all culpability of each defendant, measured by the amount of risk of injury each defendant created to the public-at-large. Use of a national market is a fair method, we believe, of apportioning defendants' liabilities according to their total culpability in marketing DES for use during pregnancy. Under the circumstances, this is an equitable way to provide plaintiffs with the relief they deserve, while also rationally distributing the responsibility for plaintiffs' injuries among defendants.

To be sure, a defendant cannot be held liable if it did not participate in the marketing of DES for pregnancy use; if a DES producer satisfies its burden of proof of showing that it was not a member of the market of DES sold for pregnancy use, disallowing exculpation would be unfair and unjust. Nevertheless, because liability here is based on the over-all risk produced, and not causation in a single case, there should be no exculpation of a defendant who, although a member of the market producing DES for pregnancy use, appears not to have caused a particular plaintiff's injury. It is merely a windfall for a producer to escape liability solely because it manufactured a more identifiable pill, or sold only to certain drugstores. These fortuities in no way diminish the culpability of a defendant for marketing the product, which is the basis of liability here.[2]

[6] Finally, we hold that the liability of DES producers is [513]several only, and should not be inflated when all participants in the market are not before the court in a particular case. We understand that, as a practical matter, this will prevent some plaintiffs from recovering 100% of their damages. However, we eschewed exculpation to prevent the fortuitous avoidance of liability, and thus, equitably, we decline to unleash the same forces to increase a defendant's liability beyond its fair share of responsibility.[3]

2. Various defendants argue here that although they produced DES, it was not sold for pregnancy use. If a defendant was not a member of the national market of DES marketed for pregnancy, it is not culpable, and should not be liable. Consequently, if a particular defendant sold DES in a form unsuitable for use during pregnancy, or if a defendant establishes that its product was not marketed for pregnancy use, there should be no liability. From the record before the court here, however, the facts are not developed well enough to establish that any defendants were not in the national market of DES sold for pregnancy use. Thus summary judgment cannot at this time be granted on this issue as to any defendants.

3. The dissenter misapprehends the basis for liability here. We have not by the backdoor adopted a theory of concerted action. We avoided extending this theory, because its concomitant requirement of joint and several liability expands the burden on small manufacturers beyond a rational or fair limit. This result is reached by the dissent, not by the majority, so that criticism on this front is misplaced.

We are confronted here with an unprecedented identification problem, and have provided a solution that rationally apportions liability. We have heeded the practical lessons learned by other jurisdictions, resulting in our adoption of a national market theory with full knowledge that it concedes the lack of a logical link between liability and causation in a single case. The dissent ignores these lessons, and, endeavoring to articulate a theory it perceives to be closer to traditional law, sets out a construct in

III.

The constitutionality of the revival statute remains to be considered *(see,* L.1986, ch. 682, § 4). This section revives, for the period of one year, actions for damages caused by the latent effects of DES, tungsten-carbide, asbestos, chlordane, and polyvinylchloride. Defendants argue that the revival of barred DES claims was unconstitutional as a denial of both due process and equal protection, under the State and Federal Constitutions *(see,* N.Y. Const. art. I, §§ 6, 11; U.S. Const., 14th Amend., § 1). We are concerned here only with the constitutionality of the statute as it pertains to DES; there are no |514 producers of the other substances, or plaintiffs alleging injury therefrom, before the court on these appeals.

The Federal Due Process Clause provides very little barrier to a State Legislature's revival of time-barred actions *(see, Chase Sec. Corp. v. Donaldson,* 325 U.S. 304, 65 S.Ct. 1137, 89 L.Ed. 1628). In *Chase,* the United States Supreme Court upheld the revival of a time-barred action, stating that Statutes of Limitation "represent a public policy about the privilege to litigate * * * the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control" *(id.,* at 314, 65 S.Ct. at 1142). Under State law, the level of review seems somewhat more stringent. In *Gallewski v. Hentz & Co.,* 301 N.Y. 164, 174, 93 N.E.2d 620 the court stated that "the Legislature may constitutionally revive a personal cause of action where the circumstances are exceptional and are such as to satisfy the court that serious injustice would result to plaintiffs not guilty of any fault if the intention of the Legislature were not effectuated." It appears, however, that we have applied a less strict test in other cases, and have been satisfied if there was an apparent injustice which "calls for [a] remedy," and which is "reasonable" and not "arbitrary." *(Robinson v. Robins Dry Dock & Repair Co.,* 238 N.Y. 271, 279–280, 144 N.E. 579.)

[7] We need not light upon a precise test here, however, because the Legislature's revival of DES claims meets the highest standard. For at least 25 years this court maintained an exposure rule for toxic substances, because it was felt that change in this area was the responsibility of the Legislature *(see, e.g., Schwartz v. Heyden Newport Chem. Corp.,* 12 N.Y.2d 212, 220, 237 N.Y.S.2d 714, 188 N.E.2d 142; *Fleishman v. Lilly & Co., supra,* 62 N.Y. 2d at 890, 478 N.Y.S.2d 853, 467 N.E.2d 517). Indeed, in *Fleishman v. Lilly & Co. (supra)* the Legislature's attention was drawn specifically to DES by the majority, which stated that any change in the exposure rule was the Legislature's role.

The Legislature has now revived DES actions that were time barred under the exposure rule, while also instituting a discovery rule for future application (L.1986, ch. 682, § 4; CPLR 241–c). The latent nature of DES injuries is well known, and it is clear that in the past the exposure rule prevented the bringing of timely actions for recovery. Thus we believe that exceptional circumstances are presented, that an injustice has been rectified, and that the requirements of *Gallewski v. Hentz & Co. (supra)* have been met.

[8] Defendants argue further that, even if the statute is |515 generally valid, it may be unconstitutionally applied in cases in which the plaintiff could have sued origi-

which liability is based upon chance, not upon the fair assessment of the acts of defendants. Under the dissent's theory, a manufacturer with a large market share may avoid liability in many cases just because it manufactured a memorably shaped pill. Conversely, a small manufacturer can be held jointly liable for the full amount of every DES injury in this State simply because the shape of its product was not remarkable, even though the odds, realistically, are exceedingly long that the small manufacturer caused the injury in any one particular case.

Therefore, although the dissent's theory based upon a "shifting the burden of proof" and joint and several liability is facially reminiscent of prior law, in the case of DES it is nothing more than advocating that bare fortuity be the test for liability. When faced with the novel identification problem posed by DES cases, it is preferable to adopt a new theory that apportions fault rationally, rather than to contort extant doctrines beyond the point at which they provide a sound premise for determining liability.

nally, but did not. It does seem that some plaintiffs may have known of their injuries a day, or a week, a month, or perhaps longer, before the original limitations period ran. Some may have known of their exposure, but did not develop injuries during the limitations period. Others may have known of some effect upon them of DES exposure, which became cancerous only after any action would have been time barred. Under these circumstances, the Legislature properly determined that it would be more fair for all plaintiffs to uniformly now have one year to bring their actions, rather than for the courts to begin drawing arbitrary lines transecting this area's shades of gray.

[9] Defendants also argue that the revival statute violates equal protection, because the Legislature designated only five substances for revival, including DES, while instituting a prospective only discovery rule for other substances. Defendants claim that this categorization is without sufficient basis, and that it is the result of a "political compromise." But most, if not all legislation is the product of some compromise, so that this objection surely is no basis for finding the revival statute unconstitutional. Instead, here we must proceed on the presumption that the law is constitutional, and will hold otherwise only if it is established that the distinction drawn has no reasonable basis (*Trump v. Chu*, 65 N.Y.2d 20, 489 N.Y.S.2d 455, 478 N.E.2d 971; *Montgomery v. Daniels*, 38 N.Y.2d 41, 61, 378 N.Y.S.2d 1, 340 N.E.2d 444). Moreover, because defendants allege no impairment of a fundamental right, the Legislature has substantial leeway in making classifications in this area of " 'economics and social welfare' " (*see, Montgomery v. Daniels, supra*, at 61, 378 N.Y.S.2d 1, 340 N.E.2d 444 [quoting *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 1161, 25 L.Ed.2d 491]).

As it pertains to DES, surely the revival statute has a rational basis, and the Legislature acted within its broad range of discretion in enacting the law. The number of DES-caused injuries was relatively well known by the Legislature, which allowed for the ramifications of revival of DES claims, such as the effect on insurance interests, and the other costs, to be reasonably predicted (Record of Proceedings, New York Assembly, June 24, 1986 [statement of Assemblyman M.H. Miller]). Furthermore, it was also well known, particularly after *Fleishman v. Lilly & Co. (supra)*, that DES victims were prejudiced under current law. This, we believe, is enough of a basis for the Legislature to revive DES claims now, and wait as to other substances until it is felt that these substances present a problem suitable for resolution. The Legislature [516] does not violate equal protection by providing a rational piecemeal remedy for what may be a larger problem (*Williamson v. Lee Opt. Co.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563).

Accordingly, in each case the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the affirmative.

MOLLEN, Judge * (concurring in *Hymowitz* and *Hanfling;* and dissenting in part in *Tigue* and *Dolan*).

The issue presented to the court in this appeal is to determine whether the revival statute for DES claims is constitutional and has properly "opened the window" to enable injured parties to recover for their injuries caused by DES and, if so, how to best enable such plaintiffs to overcome the practical impossibility of bearing their normal burden of proof of demonstrating that the defendants caused their injuries. The majority has selected one approach to meet this issue. However, I am compelled to concur in part and dissent in part because I am convinced that another more appropriate method of approaching this issue is fairer and more just and equitable to the plaintiffs and to those defendants who could not have caused the plaintiff's injuries, and which is consistent with established principles of tort law. I concur with the majority's conclusion that the revival statute is, in all respects, constitutional and

* Designated pursuant to N.Y. Constitution, article VI, § 2.

may be relied upon by the plaintiffs herein. I am also in complete agreement with the majority's view that the market share theory of liability, based upon a national market, is an appropriate means by which to accord DES plaintiffs an opportunity to seek recovery for their injuries. However, I respectfully disagree with the majority's conclusion that there should be no exculpation of those defendants who produced and marketed DES for pregnancy purposes, but who can prove, by a preponderance of the evidence, that they did not produce or market the particular pill ingested by the plaintiff's mother. Moreover, in order to ensure that these plaintiffs receive full recovery of their damages, as they are properly entitled to by any fair standard, I would retain the principle of imposing joint and several liability upon those defendants which cannot exculpate themselves.

The emergence of the market share concept of liability in the field of products liability reflects a recognition by several jurisdictions throughout the United States that due to the |517incidence of mass production and marketing of various drugs and fungible goods, consumers are many times harmed by a product which is not easily traceable to a specific manufacturer, particularly in those situations where the harm occurred many years prior to the discovery of the injuries and the cause thereof. Such is the situation in the DES cases now before us. Under traditional common-law tort principles, a plaintiff is required to establish the existence of a causal relationship between the act or omission of the defendant or defendants and the injury sustained (*see, Morrissey v. Conservative Gas Corp.*, 1 N.Y.2d 741, 152 N.Y.S.2d 289, 135 N.E.2d 45; Prosser and Keeton, Torts § 41, at 263 [5th ed.]). However, given the reality of the situation in DES cases, including the lengthy passage of time, the generic form of most DES pills and the unavailability of pharmaceutical and physician records, it is, as a practical matter, impossible for most DES plaintiffs to bear the burden of proof of establishing the traditional tort element of causation.

Moreover, as noted by the majority, the tort doctrines of alternative liability and concerted action, both of which provide for recovery in situations where a plaintiff, through no fault of his or her own, cannot identify the actual wrongdoer, do not provide appropriate relief to these DES plaintiffs. Unlike the scenario present in the DES cases, the principle of alternative liability presupposes that the number of possible wrongdoers are few in number, that one of the joined defendants had to have actually caused the plaintiff's injury and that the defendants are in a much better position than the plaintiff to identify the actual wrongdoer and, therefore, the burden is shifted to the defendants to prove who was the actual wrongdoer and who among them are to be exculpated (*see, Summers v. Tice*, 33 Cal.2d 80, 199 P.2d 1; Restatement [Second] of Torts § 433B[3]). However, in view of the difference in the factual circumstances, the theory of alternative liability does not provide a workable solution for DES plaintiffs.

The concept of concerted action liability requires, *inter alia*, that the plaintiff prove that all of the joined defendants had an understanding, expressed or implied, to participate in a common plan or design to commit a tortious act or to lend assistance to the wrongdoer (*see,* Prosser and Keeton, Torts § 46, at 323 [5th ed.]). Typically, DES plaintiffs allege that the concerted action of the DES manufacturers consisted of using one another's marketing techniques, relying upon each other's testing and encouraging one another to market DES without |518performing adequate testing or warnings. The courts, with few exceptions (*see, e.g., Abel v. Lilly & Co.*, 418 Mich. 311, 343 N.W.2d 164), have rejected the applicability of concerted action liability to DES cases because the plaintiffs cannot establish the existence of an express or tacit agreement among DES manufacturers to market or produce DES without proper testing or warnings (*see, e.g., Sindell v. Abbott Labs.*, 26 Cal.3d 588, 163 Cal.Rptr. 132, 607 P.2d 924, *cert denied* 449 U.S. 912, 101 S.Ct. 286, 66 L.Ed.2d 140; *Martin v. Abbott Labs.*, 102 Wash.2d 581, 689 P.2d 368; *Collins v. Lilly & Co.*, 116

Wis.2d 166, 342 N.W.2d 37). The parallel or imitative conduct of DES manufacturers in producing and/or marketing DES, as the majority expressly notes, is insufficient, in and of itself, to establish concerted action liability (majority opn., at 506, at 946 of 541 N.Y.S.2d, at 1074 of 539 N.E.2d).

The principle of market share liability in DES litigation was first espoused by the California Supreme Court in *Sindell v. Abbott Labs. (supra),* as a valid theory of manufacturer's liability based upon each manufacturer's share of the market. This approach provides DES plaintiffs with a means by which to recover damages for their injuries without the plaintiffs being held to the traditional tort requirement of identifying the actual wrongdoer. The public policy underpinnings of the *Sindell* rationale is that, from a perspective of fairness and equity, the DES manufacturers are in a better position than the innocent plaintiffs who have sustained grievous injuries to bear the cost of such injuries. Thus, the *Sindell* court held that once a plaintiff has joined a "substantial share" of the DES manufacturers of the relevant market in the action and has established that the sustained injuries were caused by the ingestion of DES by the plaintiff's mother during pregnancy, the burden of proof shifts to each defendant to demonstrate, by a preponderance of the evidence, that it did not produce or market the pill ingested by the plaintiff's mother. Those DES defendants who could not exculpate themselves, would then be liable for the proportion of the judgment which represented its share of the market. The intended result of the *Sindell* approach is that, "each manufacturer's liability for an [particular DES] injury would be approximately equivalent to the damage caused by the DES it manufactured" (*supra,* at 613, 607 P.2d, at 938).

The Wisconsin and Washington Supreme Courts subsequently adopted collective liability theories in DES cases based upon similar policy considerations; namely, as between the injured plaintiffs and the negligent defendants, the latter [519] should bear the cost of injury *(Collins v. Lilly & Co.,* 116 Wis.2d 166, 342 N.W.2d 37, *supra; Martin v. Abbott Labs.,* 102 Wash.2d 581, 689 P.2d 368, *supra).* Both the *Collins* and *Martin* courts reasoned that since all of the DES manufacturers and distributors contributed to the risk of injury to the public and, consequently, the risk of injury to individual plaintiffs, each defendant shared, in some measure, a degree of culpability in producing or marketing DES. In *Collins,* the Wisconsin Supreme Court adopted a "risk contribution" theory of liability, and, in *Martin,* the Washington Supreme Court adopted what it termed a "market share alternative liability" theory. These two approaches differ from the *Sindell* theory primarily in the manner in which the damages are apportioned. Significantly, both the Supreme Courts of Wisconsin and Washington in the *Collins* and *Martin* cases, as did the Supreme Court of California in *Sindell,* provided that the joined or impleaded defendants may exculpate themselves from liability if they can establish, by a preponderance of the evidence, that they did not produce or market the particular DES pill taken by the plaintiff's mother. Notably, in *Collins,* the Wisconsin Supreme Court explained that it would not adopt a risk contribution theory which would have imposed liability solely upon the DES defendants' participation in the creation of the risk of injury even though some of the defendants could establish that they could not have actually caused the plaintiff's injury. The *Collin's* court noted, "[w]e still require it be shown that the defendant drug company reasonably could have contributed in some way to the actual injury" (*supra,* at 191, n. 10, 342 N.W.2d, at 49, n. 10). In fact, *none* of the jurisdictions which have adopted varying theories of collective liability in DES cases, has refused to permit exculpation of those defendants which have been able to prove that they could not have produced or marketed the pill which caused the particular plaintiff's injuries, thereby recognizing that to preclude exculpation would directly and unnecessarily contravene the established common-law tort principles of causation *(see, Sindell v. Abbott Labs., supra; Collins v. Lilly & Co., supra; Martin v. Ab-*

bott Labs., supra; Abel v. Lilly & Co., supra; McCormack v. Abbott Labs., 617 F.Supp. 1521; *see also, Burnside v. Abbott Labs.*, 351 Pa.Super. 264, 505 A.2d 973).

Clearly, the development and underlying purpose of the various concepts of liability in DES cases has been to provide a means whereby the plaintiffs, who cannot identify the actual manufacturer of the pill ingested by their mother, are alleviated[520] of the traditional burden of proof of causation and to shift that burden to the defendants. The various theories of collective liability which have been adopted in the several jurisdictions in an effort to provide plaintiffs with a means to recovery for their injuries, were not intended to, and did not, provide DES plaintiffs with an unprecedented strict liability cause of action. However, the majority herein, by precluding exculpation of those defendants in DES cases who produced DES for pregnancy purposes but who can establish, by a preponderance of the evidence, that they did not and could not have produced or marketed the pill which caused the plaintiff's injuries, has created such a radical concept and purports to limit it to DES claims. In the majority's view, the defendant's liability in DES cases is premised upon the over-all risk of injury which they created to the public-at-large in producing and marketing DES for pregnancy purpose and, therefore, exculpation of those defendants who can establish that the plaintiff's mother did not ingest their pill, would be inconsistent with the over-all risk theory of liability. By taking this view, however, the majority, while stating that it is adopting a market share theory of liability, is, in essence, despite its disclaimer of doing so, adopting a concerted action theory of liability, but has eliminated therefrom the requirement that the plaintiffs establish that the defendants tacitly agreed to produce and market DES for pregnancy use without proper testing and without adequate warnings of the potential dangers involved. Such a result, represents a radical departure from fundamental tenets of tort law and is unnecessarily unfair and inequitable to the defendants who have proven, or can prove, that they did not produce the pill which caused the injury. Moreover, this result is directly contrary to the majority's own statement that it is rejecting the "conscious parallelism" theory utilized in *Bichler v. Lilly & Co.*, (79 A.D.2d 317, 436 N.Y.S.2d 625, *affd* 55 N.Y.2d 571, 450 N.Y.S.2d 776, 436 N.E. 2d 182), because, as stated by the majority herein, "[p]arallel behavior, the major justification for visiting liability caused by the product of one manufacturer upon the head of another under this analysis, is a common occurrence in industry generally. We believe, therefore, that inferring agreement from the fact of parallel activity alone improperly expands the concept of concerted action beyond a rational or fair limit; among other things, it potentially renders small manufacturers, in the case of DES and in countless other industries, jointly liable for all damages stemming from the defective products of an entire industry" (majority opn., at 508–509, at 947–948 of 541 N.Y.S.2d, at 1075–1076 of 539 N.E.2d).

[521]I fully concur with the above-stated position of the majority and thus, I cannot agree that the imposition of liability on drug companies, in this case DES manufacturers, solely upon their contribution, in some measure, to the risk of injury by producing and marketing a defective drug, without any consideration given to whether the defendant drug companies actually caused the plaintiff's injuries, is appropriate or warranted. Rather, I would adopt a market share theory of liability, based upon a national market, which would provide for the shifting of the burden of proof on the issue of causation to the defendants and would impose liability upon all of the defendants who produced and marketed DES for pregnancy purposes, except those who were able to prove that their product could not have caused the injury. Under this approach, DES plaintiffs, who are unable to identify the actual manufacturer of the pill ingested by their mother, would only be required to establish, (1) that the plaintiff's mother ingested DES during pregnancy; (2) that the plaintiff's injuries were caused by DES; and (3) that the defendant or defendants produced and marketed DES for pregnancy purposes.

Thereafter, the burden of proof would shift to the defendants to exculpate themselves by establishing, by a preponderance of the evidence, that the plaintiff's mother could not have ingested their particular pill. Of those defendants who are unable to exculpate themselves from liability, their respective share of the plaintiff's damages would be measured by their share of the national market of DES produced and marketed for pregnancy purposes during the period in question.

I would further note that while, on the one hand, the majority would not permit defendants who produced DES for pregnancy purposes to exculpate themselves, the majority at the same time deprives the plaintiffs of the opportunity to recover fully for their injuries by limiting the defendants' liability for the plaintiff's damages to several liability. In my view, the liability for the plaintiff's damages of those defendants who are unable to exculpate themselves should be joint and several thereby ensuring that the plaintiffs will receive full recovery of their damages. In addition to being fair to the DES plaintiffs, the imposition of joint and several liability is consistent with that portion of the revival statute which specifically exempted DES claims from those provisions which provide, with certain exceptions, for several liability of joint tort-feasors *(see,* L.1986, ch. 682, § 12; CPLR 1600 *et seq.).* [522]Moreover, in order to ease the financial burden on the specific defendants named in the lawsuit, the defendants would have the option of seeking contribution from their fellow defendants for damages in excess of each defendant's particular market share, and a defendant should be permitted leave to implead those DES manufacturers who the plaintiff has not joined, in order to ensure, where possible, full contribution *(see, e.g., Dole v. Dow Chem. Co.,* 30 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288). Admittedly, adherence to joint and several liability could result in a disproportion between a defendant's potential liability for the damages suffered by the plaintiff and defendant's actual national market share; however, the opportunity to present exculpatory evidence reduces the risk of imposing liability on innocent defendants.

The application of the aforesaid principles, although somewhat innovative and a modification of traditional tort law, (i.e., the burden of proof is on the plaintiff to prove proximate causation) would, in view of the exigent circumstances, be in furtherance of a valid public policy of imposing the burden of bearing the cost of severe injuries upon those who are responsible for placing into the stream of commerce the causative instrumentality of such injuries. Adherence to this principle would not be too dissimilar from the accepted doctrine of res ipsa loquitur which provides, in essence, that where an instrumentality which caused the plaintiff's injuries was in the exclusive control of the defendant and the accident which occurred is one which would not ordinarily happen without negligence, these facts are sufficient to justify an inference of negligence and to shift the burden upon the defendant of coming forward with an explanation *(see, e.g., Galbraith v. Busch,* 267 N.Y. 230, 234, 196 N.E. 36; Richardson, Evidence § 93, at 68 [Prince 10th ed.]). Thus, this approach, unlike that taken by the majority, does not represent an unnecessary and radical departure from basic principles of tort law. By characterizing this approach as "nothing more than advocating that bare fortuity be the test for liability" (majority opn., at 513, n. 3, at 950–951, n. 3 of 541 N.Y.S.2d, at 1078–1079, n. 3 of 539 N.E.2d) the majority fails to perceive that this is no more and no less than a basic principle of tort law; i.e., a plaintiff may not recover for his or her injuries from a defendant who could not have caused those injuries. When the majority eliminates this fundamental causative factor as a basis for recovery, it effectively indulges in the act of judicial legislating. I would further note that if the Legislature had intended to adopt this radical approach which is at total variance with traditional [523]tort law, it could readily have done so when it enacted the revival statute for, among others, DES plaintiffs. Its refusal to do so can certainly not be deemed to be an invitation to this court to assume the legislative role.

Judged by the aforesaid standard, I conclude that the trial courts' orders in *Tigue & Margolies v. Squibb & Sons* (decided herewith) and *Dolan v. Lilly & Co.* (decided herewith), to the extent that they denied the summary judgment motions of the defendant The Upjohn Company (Upjohn) in both actions and the defendant Rexall Drug Company (Rexall) in the *Tigue* action, were improper. In *Tigue*, Mrs. Tigue, the plaintiff's mother, testified that the DES pill she ingested while she was pregnant with the plaintiff was a white, round tablet (record on app., at 709–710). Similarly, Myrna Margolies' mother testified that the DES pill she ingested was a dark red, hard, round pill *(id.*, at 224–226). Mr. Margolies, the plaintiff's father, also recalled that the pills were a reddish color and Mrs. Margolies' obstetrician stated that the DES pill he prescribed to his patients was not an Upjohn product. Moreover, in the *Dolan* action, Mrs. Dolan, the plaintiff's mother, stated that the DES pill she took was a white, round, hard tablet *(id.*, at 321, 303). This fact was corroborated by Mr. Dolan's testimony *(id.*, at 414, 444). Finally, it was established that Upjohn's DES pill which was produced and marketed for pregnancy purposes, was in the form of a "perle" which is a pharmaceutical term for a dose form consisting of a soft elastic capsule containing a liquid center *(id.*, at 2182). Based on the evidence submitted in support of Upjohn's summary judgment motions in these two cases, I would conclude that the plaintiffs have failed to adduce sufficient proof in admissible form to raise a triable issue of fact as to whether their mothers ingested an Upjohn DES pill. Accordingly, Upjohn's motion for summary judgment in those actions should have been granted.

Additionally, in *Tigue & Margolies v. Squibb & Sons* (decided herewith), Rexall's motion for summary judgment should have been granted since the plaintiffs failed to raise a triable issue of fact as to whether their mothers could have ingested a Rexall DES product during the pregnancies in question. The evidence submitted in support of Rexall's motion established that until 1978, Rexall sold its products, including its DES pill, *exclusively* to Rexall Drug Stores (record, at 1934, 2203–2204, 2210). The testimony of the plaintiffs' parents, Mrs. Tigue and Mr. and Mrs. Margolies established that they had [524] purchased their DES prescriptions from non-Rexall pharmacies during the periods of their respective pregnancies, i.e., 1960 and 1953. Based on this uncontroverted evidence demonstrating Rexall's noninvolvement in these plaintiffs' injuries, Rexall's motion for summary judgment should have been granted.

As to those defendants which seek to exculpate themselves from liability in these various actions based upon the fact that they produced and marketed DES solely for nonpregnancy purposes, we agree with the majority's conclusion that the record before the court is factually insufficient to establish that they were not in the national market of DES sold for pregnancy use *(see,* majority opn., at 512, n. 2, at 950, n. 2 of 541 N.Y.S.2d, at 1078, n. 2 of 539 N.E.2d).

In *Hymowitz v. Lilly & Co.* and *Hanfling v. Lilly & Co.:* Order affirmed, etc.

ALEXANDER, TITONE and HANCOCK, JJ., concur with WACHTLER, C.J.

MOLLEN, J., concurs in a separate opinion.

SIMONS, KAYE and BELLACOSA, JJ., taking no part.

In *Tigue v. Squibb & Sons* and *Dolan v. Lilly & Co.:* Order affirmed, etc.

ALEXANDER, TITONE and HANCOCK, JJ., concur with WACHTLER, C.J.

MOLLEN, J., dissents in part and votes to modify in a separate opinion.

SIMONS, KAYE and BELLACOSA, J., taking no part.