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The DES Manufacturer Identification Problem: A Florida Public Policy Approach

John J. Grundhauser

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I. INTRODUCTION

Terri Lynn Conley suffered from cervical adenosis.[1] She underwent surgery for removal of most of her cervix, as well as removal of other precancerous and cancerous tumors.[2] Conley's mother ingested the drug diethylstilbestrol (DES)[3] twenty years before while Conley

1. Adenosis is defined as "a more or less generalized glandular disease." STEDMAN'S MEDICAL DICTIONARY 24 (23d ed. 1976). The more severe complication associated with exposure to diethylstilbestrol is adenocarcinoma, usually of the clear cell type. 13A A. FRANK, COURTROOM MEDICINE: CANCER § 20.31 (1985). Adenocarcinoma is defined as "[a] malignant neoplasm of epithelial cells in glandular or glandlike pattern." STEDMAN'S MEDICAL DICTIONARY 22 (23d ed. 1976). It is not known whether adenosis is a precursor of malignancy. PHYSICIAN'S DESK REFERENCE 1126 (38th ed. 1984).

2. Initial Brief for Appellant at 2, Conley v. Boyle Drug Co., 477 So. 2d 600 (Fla. 4th DCA 1985).

3. Diethylstilbestrol is a synthetic hormone which duplicates the activity of estrogen. Collins v. Eli Lilly Co., 116 Wis. 2d 166, 177, 342 N.W.2d 37, 43, *cert. denied*, 105 S. Ct. 107 (1984). DES is also known generically as dienestrol and diethylstilbestrol dipropionate (DSD). Abel v. Eli Lilly & Co., 418 Mich. 311, 317 n.1, 343 N.W.2d 164, 166 n.1, *cert. denied*, 105 S. Ct. 123 (1984). Before doctors prescribed DES as a miscarriage preventative, they prescribed it for treatment of menopausal symptoms, senile vaginitis, gonorrheal vaginitis, and suppression of lactation. *Collins*, 116 Wis. 2d at 178, 342 N.W.2d at 43. For a time, ironically, DES was used a a postcoital contraceptive ("morning after" pill). Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 963 n.2 (1978). Today, DES is indicated in the treatment of certain menopausal problems, atrophic vaginitis, kraurosis vulvae, female hypogonadism, female castration, primary ovarian failure, breast

was present *in utero*.[4] Doctors commonly prescribed DES as a miscarriage preventative around the time period that Conley's mother was pregnant,[5] but subsequent research linked *in utero* exposure to DES to the kind of cancer that Conley developed.[6]

Conley brought an action against eleven manufacturers who had produced DES both before and during her mother's pregnancy.[7] She alleged that the DES her mother ingested during pregnancy caused her own medical complications.[8] She was unable to identify the specific manufacturer of the DES that her mother ingested,[9] but she suggested four alternative theories of recovery in lieu of the traditional tort requirement that the plaintiff identify specific tortfeasors.[10]

The trial court granted motions to dismiss and judgments on the pleadings for the defendants because of Conley's inability to identify the specific manufacturer.[11] On appeal, the Fourth District Court of Appeal affirmed, *held*: failure to allege legal causation by identifying the specific tortfeasors precludes recovery. The district court recog-

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cancer in selected women and men, and prostatic carcinoma. PHYSICIAN'S DESK REFERENCE 1126 (38th ed. 1984).

4. Initial Brief for Appellant at 2, Conley v. Boyle Drug Co., 477 So. 2d 600 (Fla. 4th DCA 1985).

5. *See supra* note 3.

6. *See* Herbst, Ulfelder & Poskanzer, *Adenocarcinoma of the Vagina: Association of Maternal Stilbestrol Therapy with Tumor Appearance in Young Women*, 284 N. ENG. J. MED. 878 (1971).

7. Initial Brief for Appellant at 2, Conley v. Boyle Drug Co., 477 So. 2d 600 (Fla. 4th DCA 1985).

8. *Id.*

9. *Id.* at 7.

10. *Id.* at 7-8. The four theories listed were: (1) alternative liability; (2) concert of action; (3) enterprise liability; and (4) market share liability.

11. *Id.* at 10. A brief history of the development and marketing of DES is helpful in understanding the nature of the manufacturer identification problem. In the 1930's, British researchers synthesized DES, but the formula was never patented and so it remained in the public domain. DES could be administered orally, and could also be produced at a fraction of the cost of isolating natural estrogens. By the end of 1940, ten drug companies had applied to the Federal Food and Drug Administration (FDA) for authorization to market DES for treatment of four medical complications. For a list of these complications, see *supra* note 3. The FDA approved the use of DES as a miscarriage preventative in 1947. The number of companies that produced DES between 1947 and 1971 has been estimated at up to 300, with the number fluctuating greatly from year to year. The drug was marketed under trade names and generically, and some companies were known to supply it to their competitors. The FDA required that DES be produced under a single chemical formula; therefore, the complications associated with it cannot be traced to any one manufacturer's formulation. Drug companies may not have kept records of when and where they had marketed DES, and the pharmacies that dispensed the drug may have lost or destroyed their records. In 1971, researchers linked DES to the development of cancer in young women who were daughters of women who had ingested DES during pregnancy. The cancer develops many years after the exposure to the drug. Collins v. Eli Lilly Co., 116 Wis. 2d 166, 177-81, 342 N.W.2d 37, 43-45, *cert. denied*, 105 S. Ct. 107 (1984).

nized, however, the compelling argument in favor of relaxing the identification requirement in DES-like situations, and considered various theories fashioned by courts of other jurisdictions.[12] The court proposed its own theory of liability for adoption in Florida, and urged its serious consideration by the supreme court. The court concluded, however, that it lacked authority to approve a new theory of liability before the Supreme Court of Florida had done so.[13] It certified the following question to the supreme court as an issue of great public concern: "Does Florida recognize a cause of action against a defendant for marketing defective DES when the plaintiff admittedly cannot establish that a particular defendant was responsible for the injury?" *Conley v. Boyle Drug Co.*, 477 So. 2d 600 (Fla. 4th DCA 1985) (petition for review filed Sept. 10, 1985) (No. 67,626).

II. POLICY CONSIDERATIONS FROM OUTSIDE OF FLORIDA

American courts have approved various theories of recovery when confronted with cases where the plaintiff was unable to identify the specific tortfeasor responsible for causing his or her injury.[14] Certain policy considerations justify these courts looking beyond the boundaries of accepted tort law to fashion new remedies. The policies

12. 477 So. 2d 600, 602-06 (Fla. 4th DCA 1985) (petition for review filed Sept. 10, 1985) (No. 67,626). The court discussed these cases: Hall v. E. I. Du Pont De Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972) (enterprise liability); Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980) (market share liability); Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948) (alternative liability); Bichler v. Eli Lilly & Co., 79 A.D.2d 317, 436 N.Y.S.2d 625 (1981), *aff'd*, 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982) (concert of action); Martin v. Abbott Laboratories, 102 Wash. 2d 581, 689 P.2d 368 (1984) (market-share alternate liability).

13. *But see* Copeland v. Celotex Corp., 447 So. 2d 908, 913 n.5 (Fla. 3d DCA 1984), *quashed on other grounds*, 471 So. 2d 533 (Fla. 1985) (noting that a Florida district court is not precluded from fashioning new theories in an area the supreme court has not yet explored).

14. *See, e.g.*, Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980) (allowed cause of action for DES plaintiff under market share liability theory); Abel v. Eli Lilly & Co., 418 Mich. 311, 343 N.W.2d 164, *cert. denied*, 105 S. Ct. 123 (1984) (allowed cause of action for DES plaintiff under modified alternative liability theory and concert of action theory); Martin v. Abbott Laboratories, 102 Wash. 2d 581, 689 P.2d 368 (1984) (allowed cause of action for DES plaintiff under market share-alternative liability theory); Collins v. Eli Lilly Co., 116 Wis. 2d 166, 177, 342 N.W.2d 37, 43, *cert. denied*, 105 S. Ct. 107 (1984) (allowed cause of action for DES plaintiff under risk contribution theory); *see also* Annot., 22 A.L.R. 4th 183 (1983) (collection of cases in which courts have considered new theories of liability in manufacturer identification cases). *But see, e.g.*, Morton v. Abbott Laboratories, 538 F. Supp. 593 (M.D. Fla. 1982) (cause of action denied for DES plaintiff when applying Florida law); Ryan v. Eli Lilly & Co., 514 F. Supp. 1004 (D.S.C. 1981) (recovery denied for DES plaintiff when applying South Carolina law); Zafft v. Eli Lilly & Co., 676 S.W.2d 241 (Mo. 1984) (cause of action denied for DES plaintiff); Namm v. Charles E. Frosst & Co., 178 N.J. Super. 19, 427 A.2d 1121 (1981) (cause of action denied for DES plaintiff).

identified and discussed in this note are separated into two major categories: (1) general tort law policy considerations that blend and complement one another, and (2) two major policies for the imposition of liability on manufacturers of defective products in products liability cases.[15] These policy considerations will have a major effect on a DES case. Various courts have recognized them as appropriate guideposts when trying to accommodate the "competing demands for change and stability."[16] The Supreme Court of Florida must consider these policy considerations in the DES context because it presents the court with a factual circumstance that strains the current boundaries of accepted tort doctrine. Because these general tort law and products liability policies are the reasons behind the doctrines that courts accept now, it necessarily follows that the court must use them to guide its analysis of this DES products liability case. Application of these policies may lead to recovery for a DES plaintiff.

A. *General Tort Law Policies*

1. THE CHANGING NEEDS OF SOCIETY

Unfortunately, courts often face factual circumstances where justice and equity compel the resolution of a dispute in favor of one party, but established tort law doctrines are inadequate to effect such a resolution. These situations are products of an ever-changing society; therefore, the court must use policy considerations when deciding whether or not to create a new doctrine of liability, or to modify an existing one, in order to meet the needs of a changing society.

The Supreme Court of California confronted such a situation in *Sindell v. Abbott Laboratories.*[17] In *Sindell*, the plaintiff had a malignant bladder tumor surgically removed.[18] The cancer was a result of the DES which her mother ingested during pregnancy. The plaintiff

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15. The general tort law policies are: (1) the law should be ready to fashion new remedies to meet the changing needs of society; (2) the purpose of tort law is to compensate the plaintiff for injuries resulting from the wrongful actions of others; and (3) the law should prefer innocent plaintiffs over possibly culpable defendants. *See infra* notes 17-55 and accompanying text.

The two major underlying policies in products liability law are: (1) the imposition of liability on manufacturers is an incentive for the manufacturers to adequately test their products in order to ensure their safety; and (2) the imposition of liability is appropriate because the manufacturers, by passing on the cost to the consumers, are better able to spread the risk of loss caused by defective design. *See infra* notes 56-73 and accompanying text.

16. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 463 (1962), *reprinted in* ESSAYS ON THE LAW OF TORTS 314, 314 (1964).

17. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980).

18. *Id.* at 594-95, 607 P.2d at 926, 163 Cal. Rptr. at 134. Sindell also suffered from adenosis and must be regularly monitored by biopsy or coloscopy in order to have early warning of further malignancy. *Id.* at 595, 607 P.2d at 926, 163 Cal. Rptr. at 134.

could not identify the specific manufacturer of the DES, and suggested three theories of recovery for the court to consider.[19] The court rejected all three theories for various reasons,[20] but fashioned its own theory of recovery in response to her situation.[21] Justice Mosk, writing for the court, recognized the need for the law to adapt to new situations created by a changing society:

> In our contemporary complex industrialized society, advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer. The response of the courts can be either to adhere rigidly to prior doctrine, denying recovery to those injured by such products, or to fashion remedies to meet these changing needs. Just as Justice Traynor . . . in *Escola v. Coca Cola Bottling Co.* . . . recognized that in an era of mass production and complex marketing methods the traditional standard of negligence was insufficient to govern the obligations of manufacturer to consumer, so should we acknowledge that some adaptation of the rules of causation and liability may be appropriate in these recurring circumstances.[22]

The court's willingness to adapt the law to new circumstances is indicative of a judicial philosophy that sees the law as a servant of society, not as its master. Law remains useful only so long as it undergoes a metamorphosis that parallels that of society. "Any legal system, to remain viable over a span of time, must have the flexibility to admit change."[23] The *Sindell* court used policy considerations to reach its result. Although many may disagree with the method chosen by the *Sindell* court to resolve the defendant-identification issue, the importance of *Sindell* is that a court, to responsibly fulfill its obli-

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19. Sindell advanced the theories of alternative liability, concert of action, and enterprise liability. *Id.* at 598, 607 P.2d at 928, 163 Cal. Rptr. at 136.

20. The *Sindell* court found that the facts of the case could not be accommodated within the confines of the proffered theories. *Id.* at 598-610, 607 P.2d at 928-35, 163 Cal. Rptr. at 136-43.

21. The court fashioned the "market share" theory of liability, which required that only a "substantial share" of the DES market be joined in the action, with liability for each defendant approximating its market share of the DES market. *Id.* at 610-13, 607 P.2d at 936-38, 163 Cal. Rptr. at 144-46. Commentators have favored the market share theory, outlined in *Sindell*. *See, e.g.*, Note, *Market Share Liability: An Answer to the DES Causation Problem*, 94 HARV. L. REV. 668 (1981); Note, *Risk Contribution: An Undesirable New Method for Apportioning Damages in the DES Cases*, 1985 J. CORP. L. 743. The market share theory has also been met with considerable disfavor. *See, e.g.*, R. EPSTEIN, MODERN PRODUCTS LIABILITY LAW 159-60 (1980); Fern & Sichel, *Evolving Tort Liability Theories: Are They Taking the Pharmaceutical Industry Into an Era of Absolute Liability?*, 29 ST. LOUIS U.L.J. 763 (1985); Comment, *Market Share Liability: Is California A Mere Gadfly On The Products Liability Scene Or Is It A Harbinger Of A National Trend?*, 11 OHIO N.U.L. REV. 129 (1984).

22. *Sindell*, 26 Cal. 3d at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144 (citation omitted).

23. Keeton, *supra* note 16, at 463.

gations, must see the scope of its role in society as encompassing the power to modify existing legal doctrines to meet the needs of the society it serves.[24]

2. PLAINTIFF COMPENSATION

When fashioning a new remedy, or modifying an existing one to meet the needs of society, a court will look to general policies to guide it in its task. One such policy courts recognize is that the purpose of tort law is to compensate an injured plaintiff for wrongs others commit.

Abel v. Eli Lilly & Co.[25] presented the Supreme Court of Michigan with a DES case which had a manufacturer identification problem.[26] The court considered the applicability of two theories of recovery: (1) alternative liability, and (2) concert of action.[27] It found that their application would be appropriate in the DES context because Michigan courts already had adopted the policies underlying these theories.[28] One of the underlying policy reasons the court identified was that the "purpose of tort law is to compensate injured persons."[29]

In its analysis, the *Abel* court referred to *Holloway v. General*

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24. Professor Keeton noted the following passage for consideration:

> [T]he judge who has discovered the freedom and the power which are his should be chastened rather than elated by the discovery. It is possible to harbor this knowledge without deriving from it the conclusion that the judge should convert himself into a ruler, a manipulator of those who have reposed in him a very special trust.

Id. at 471 n.19 (quoting Cooperrider, *The Rule of Law and the Judicial Process*, 59 MICH. L. REV. 501, 513 (1961)).

25. 418 Mich. 311, 343 N.W.2d 164, *cert. denied*, 105 S. Ct. 123 (1984).

26. The *Abel* plaintiffs sued 16 manufacturers that had distributed DES in Michigan. The plaintiffs alleged that the DES had caused their cancerous and precancerous growths. Some of them were unable to identify the specific manufacturer of the DES that they were exposed to *in utero*, so they sought to impose liability on the whole group as an alternative method of recovering damages. *Id.* at 319-21, 343 N.W.2d at 167-68.

27. *Id.* at 324-39, 343 N.W.2d at 170-76. The *Abel* analysis differs from that of many other courts because the plaintiffs alleged that all manufacturers who marketed DES in Michigan were before the court, and the court, reviewing the issue in the context of a motion for summary judgment, must accept as true all well-pleaded facts. *Id.* at 321-24, 343 N.W.2d at 169.

The court also pointed out the difference between the case before it and the classic alternative liability case, exemplified by Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948): "[I]n *Summers*, each defendant was negligent toward *the* plaintiff; here, each defendant was negligent toward *a* plaintiff, but each defendant was not negligent toward *each* plaintiff. Thus, all defendants were not negligent toward each plaintiff, and each defendant could not have caused each plaintiff's injury." *Abel*, 418 Mich. at 330, 343 N.W.2d at 172-73.

28. *Abel*, 418 Mich. at 327, 337-38, 343 N.W.2d at 172, 176.

29. *Id.* at 328, 343 N.W.2d at 171.

Motors Corp.,[30] in which the question arose whether the plaintiff had the burden of proving the specific cause of a defect when alternative causes were possible. In *Holloway*, a woman was injured and her father killed when the vehicle in which they were riding left the road and struck a utility pole.[31] The plaintiffs alleged that a defective ball joint assembly broke, causing the driver to lose control of the car.[32] This all occurred while the plaintiffs drove the car across chuckholes in the road. The court, in response to a policy argument advanced by General Motors,[33] stated that "[i]t is the injury inflicted on the plaintiff that entitles him to a remedy, not his skill in discovering precisely where defendant's manufacturing process went wrong."[34] The court held that as long as the plaintiffs presented evidence from which a jury could reasonably infer that some defect in the manufacturing process caused the accident, their burden of proof had been met even though they were unable to isolate the specific cause.[35] The court also noted that an alternative liability situation presented a "somewhat analogous situation" in which the "rule is that a plaintiff need not prove which person among alternative negligent tortfeasors caused his injury."[36] The implication of this discussion by the court is that in order to give meaning to the policy that tort law should compensate injured plaintiffs, it is reasonable to shift burdens of proof in unusual factual circumstances where failure to do so would preclude recovery. If there is a proof problem that is difficult to resolve, the law should stand ready to compensate the injured plaintiff unless the defendant can exonerate himself.

The *Holloway* decision was an easy one because the question on rehearing was premised on the fact that some defect in the defendant's product caused the accident. The only issue in that case was whether the plaintiff must prove which one. The *Abel* case presented a more difficult question because the problem involved proving *which* defend-

30. 403 Mich. 614, 271 N.W.2d 777 (1978).

31. *Id.* at 619, 271 N.W.2d at 779.

32. *Id.*

33. General Motors (GM) moved for a directed verdict on the grounds that the plaintiff had failed to identify the specific cause of the defect. GM contended that it needed specific identification of the cause so it could effect corrective measures. It admitted that the only possible causes of the break occurred during the manufacturing, but advanced the argument that "one of the purposes of tort law is to encourage those engaged in activity which causes injury to adopt remedial measures to avoid so injuring other persons," and that this purpose would not be served if the plaintiff did not specifically identify the cause. *Id.* at 618, 625-26, 271 N.W.2d at 779, 783.

34. *Id.* at 626, 271 N.W.2d at 783.

35. *Id.* at 618, 271 N.W.2d at 779.

36. *Id.* at 625 n.15, 271 N.W.2d at 782 n.15.

ant manufactured the DES that harmed the plaintiffs.[37] The *Abel* court recognized that the proof problem in this DES case was "substantially and significantly distinguishable" from the classic alternative liability case.[38] The court also recognized that the same policy consideration which compels it to use this theory in the classic case also compels it to adapt the theory to variations of the original fact pattern, such as the DES cases, which present similar, but not identical, problems of proof.

3. PLAINTIFF PREFERENCE

The law should show a preference for an innocent plaintiff over a possibly culpable defendant. The policy presented by this statement is a corollary of the policy that tort law should compensate the injured plaintiff. These two policies are entirely intertwined. If the purpose of tort law is to compensate the injured plaintiff, then the effect is a legal preference for an innocent plaintiff over a possibly culpable defendant in an appropriate circumstance. Likewise, if the law shows a preference for innocent plaintiffs, then the end result will be a judicial tendency to compensate injured plaintiffs rather than to deny recovery. Each policy seems to be the natural consequence of the other.

In the landmark case of *Summers v. Tice*,[39] the Supreme Court of California recognized the policy of preferring the injured plaintiff over a possibly culpable defendant. In *Summers*, the plaintiff and defendants were hunting quail. The plaintiff was standing seventy-five yards from the defendants when one of them flushed a bird into flight between themselves and the plaintiff. Both defendants shot at the quail with shotguns at the same time, and two shots hit the plaintiff.[40] It was impossible to determine whether the shots that hit the plaintiff were from one gun or the other, or one from each.[41] The trial court found that both defendants were negligent toward the plaintiff, and that the negligence of both defendants was the legal cause of the plaintiff's injuries.[42] The defendants appealed, arguing "that there [was] not sufficient evidence to show which defendant was guilty of the negligence which caused the injuries."[43] The court upheld the lower

37. *Abel*, 418 Mich. at 318, 343 N.W.2d at 167.

38. *Id.* at 329, 343 N.W.2d at 172. *See supra* note 25.

39. 33 Cal. 2d 80, 199 P.2d 1 (1948).

40. *Id.* at 82, 199 P.2d at 1-2. Even though the gunshot struck the plaintiff in two places, the one shot that entered his eye was the major injury for the purposes of damage assessment.

41. *Id.* at 83, 199 P.2d at 3.

42. *Id.*

43. *Id.* at 82, 199 P.2d at 2.

court judgment, and reasoned that:

> When we consider the relative position of the parties and the results that would flow if the plaintiff was required to pin the injury on one of the defendants only, a requirement that the burden of proof on that subject be shifted to defendants becomes manifest. They are both wrongdoers—both negligent toward plaintiff. They brought about a situation where the negligence of one of them injured the plaintiff, hence it should rest with them each to absolve himself if he can. The injured party has been placed by defendants in the unfair position of pointing to which defendant caused the harm. If one can escape the other may also and plaintiff is remediless.[44]

In the *Sindell* case, the same court adapted the *Summers* alternative liability framework to fashion what is popularly known as the market share liability theory.[45] The court stated that "[t]he most persuasive reason for finding plaintiff states a cause of action is that advanced in *Summers*: as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury."[46] The court added that failure to provide evidence of causation was not the fault of either the plaintiff or defendants, but that the defendants' "conduct in marketing a drug the effects of which are delayed for many years played a significant role in creating the unavailability of proof."[47]

In *Collins v. Eli Lilly Co.*,[48] the Supreme Court of Wisconsin confronted the DES causation problem. The *Collins* court recognized that available tort doctrines would be inadequate to allow recovery for the plaintiff because of the insurmountable problem of manufacturer identification.[49] The court noted that the Wisconsin Constitu-

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44. *Id.* at 83, 199 P.2d at 4.

45. Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980). *See supra* note 20.

46. *Id.* at 610-11, 607 P.2d at 936, 163 Cal. Rptr. at 144. *But see* Zafft v. Eli Lilly & Co., 676 S.W.2d 241 (Mo. 1984) (citations omitted) (DES case):

> Plaintiffs are innocent and claim serious injuries alleged to result from their mothers' use of DES. Yet simply to state, as have courts ruling in favor of plaintiffs, that as between an innocent plaintiff and negligent defendants, the latter should bear the cost of injury, . . . and that defendants can better absorb the cost, . . . ignores strong countervailing considerations.
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> . . . Competing with the interests of appellants are legitimate concerns that liability will discourage desired pharmaceutical research and development while adding little incentive to production of safe products, for all companies face potential liability regardless of their efforts.

Zafft, 676 S.W.2d at 246-47.

47. *Sindell*, 26 Cal. 3d at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144.

48. 116 Wis. 2d 166, 342 N.W.2d 37, *cert. denied*, 105 S. Ct. 107 (1984).

49. *Collins*, 116 Wis. 2d at 181-82, 342 N.W.2d at 45.

tion provides that " '[e]very person is entitled to a certain remedy for all injuries, or wrongs which he may receive in his person, property or character,' "[50] and that this provision authorized the courts to fashion a new remedy when an adequate remedy does not exist.[51] In making the decision whether to fashion a new remedy, the court stated:

> We are faced with a choice of either fashioning a method of recovery for the DES case which will deviate from traditional notions of tort law, or permitting possibly negligent defendants to escape liability to an innocent, injured plaintiff. In the interests of justice and fundamental fairness, we choose to follow the former alternative.[52]

The court considered the various theories submitted by the plaintiff, and then rejected all of them.[53] The court found the defendants liable on its own theory which it based on the notion that "[e]ach defendant contributed to the *risk* of injury to the public and, consequently, the risk of injury to individual plaintiffs."[54]

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50. *Id.* (quoting WIS. CONST. art. I, § 9). *Cf.* FLA. CONST. art. I, § 21 ("The courts shall be open to every person for redress for any injury, and justice shall be administered without sale, denial or delay.").

51. *Collins*, 116 Wis. 2d at 182, 342 N.W.2d at 45.

52. *Id.* at 181, 342 N.W.2d at 45.

53. The Wisconsin court is not alone in rejecting various alternative theories before fashioning its own theory of recovery. *See, e.g.*, Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980) (fashioned market share liability theory); Conley v. Boyle Drug Co., 477 So. 2d 600 (Fla. 4th DCA 1985) (petition for review filed Sept. 10, 1985) (No. 67,626) (fashioned its own market share-alternative liability theory and certified a question to the supreme court); Martin v. Abbott Laboratories, 102 Wash. 2d 581, 689 P.2d 368 (1984) (fashioned market share-alternative liability theory).

Courts which have dealt with the question of whether or not to fashion a new theory of recovery for DES plaintiffs have followed different formulas in calculating that answer. Those who fashioned new theories saw the question as a two-part problem: Is the plaintiff legitimately entitled to a remedy? If yes, what is the most equitable way of apportioning damages among the defendant manufacturers? The first determination is all-important. If it is determined that the plaintiff should recover, then the court examines the various theories pled. If all are inadequate, the court then fashions its own theory of recovery. *See, e.g.*, Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980); Abel v. Eli Lilly & Co., 418 Mich. 311, 343 N.W.2d 164, *cert. denied*, 105 S. Ct. 123 (1984); Bichler v. Eli Lilly & Co., 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982); Martin v. Abbott Laboratories, 102 Wash. 2d 581, 689 P.2d 368 (1984). Courts that have denied recovery see the question as having only one part: Will existing and accepted tort doctrines allow recovery under the facts of a given case? The answer is always negative because the essential element of manufacturer identification is missing. These courts will often admit that a deserving plaintiff must go without a remedy. *See, e.g.*, Morton v. Abbott Laboratories, 538 F. Supp. 593 (M.D. Fla. 1982) (applying Florida law); Ryan v. Eli Lilly & Co., 514 F. Supp. 1004 (D.S.C. 1981) (applying South Carolina law); Namm v. Charles E. Frosst & Co., 178 N.J. Super. 19, 427 A.2d 1121 (1981).

54. *Collins*, 116 Wis. 2d at 191, 342 N.W.2d at 49 (footnote omitted). The *Collins* risk contribution theory is premised on the concept that society should not at any time tolerate the creation of the risk. Participation in the creation of the risk is the tortious activity that resulted in injury to the plaintiff. *Id.* at 191 n.10, 342 N.W.2d at 49 n.10. *See* Robinson,

These cases embody the important concept that the policy considerations of meeting the changing needs of society, plaintiff compensation, and plaintiff preference, compelled the courts first to make the decision as to whether the plaintiff was entitled to a remedy. The courts did not consider the difficulty of constructing a remedy. If the plaintiff was entitled to recover, then the courts, guided by these policy considerations, were obligated to find a theory which would afford an appropriate remedy. If one did not exist among traditional tort theories, then the courts fashioned a new theory. The fact that this task was difficult was no excuse for not fulfilling this duty.

Courts must not restrain themselves within the confines of existing tort doctrines, thereby sacrificing legitimate claims to stare decisis. The driving force behind any decision should be applicable public policy, not simply fitting a set of facts to the template of an existing doctrine.[55]

B. *Underlying Products Liability Policies*

1. SAFETY INCENTIVE

The law of products liability has changed dramatically over the last century. The changes are the result of a major philosophical upheaval in the courts in response to the industrialization of America. The strict rules, which courts designed to protect industry from destruction by numerous lawsuits, have given way to strict liability, which courts designed to protect the consumer from the excesses of industry.[56] There are several policy reasons behind this shift. One major consideration is that imposing liability on a manufacturer for injuries caused by defects in its products will be an incentive to adequately test its products to ensure they are safe before marketing them.[57] Several courts considered this policy in their deliberations in

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Multiple Causation in Tort Law: Reflections on the DES Cases, 68 VA. L. REV. 713 (1982). *But see* Note, *supra* note 21, at 743 (describing theory of risk contribution that the *Collins* court ultimately used).

55. This is not intended to mean that policy considerations should prevail over doctrine. Doctrine is merely a means of putting policy into action. *See infra* note 131.

56. Professor Epstein traces the development of products liability law through three stages. The first stage "had as its major premise the belief that the grave administrative complications and adverse social consequences of products liability suits were so manifest that strenuous efforts were needed to fashion 'fixed and definite' rules to prevent the economic ruin of product suppliers." *See* EPSTEIN, *supra* note 21, at 5. The second stage places the responsibility on the manufacturer to supply the product it had promised and on the consumer to use the product in the manner in which it was intended. *Id.* at 6. The third stage places almost the entire responsibility on the manufacturer and little or no responsibility on the consumer. *Id.*

57. *But see id.* at 40-44 (1980). Professor Epstein argues that:

> [T]here is good reason to assume that the only difference between negligence and

DES and DES-like cases.[58]

The Supreme Court of California, in *Sindell v. Abbott Laboratories*,[59] based its decision to fashion a new remedy for the plaintiff, in part, on the safety incentive aspect of modern products liability law. The *Sindell* court concluded that:

> The manufacturer is in the best position to discover and guard against defects in its products and to warn of harmful effects; thus, holding it liable for defects and failure to warn of harmful effects will provide an incentive to product safety. . . . These considerations are particularly significant where medication is involved, for the consumer is virtually helpless to protect himself from serious, sometimes permanent, sometimes fatal, injuries caused by deleterious drugs.[60]

A New York federal district court, in *Hall v. E. I. Du Pont De Nemours & Co.*,[61] faced a manufacturer identification problem similar to that of DES cases. In *Hall*, exploding blasting caps, in unrelated incidents, injured several children. Each child found an unlabeled

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> strict liability will be not the number of accidents that occur but the number of accidents that receive compensation. Thus if the rule of negligence is defined in classical cost-benefit analysis, the defendant will cease to take precautions when it becomes cheaper socially to permit accidents than it is to avoid them. Under a strict liability system the defendant will in theory opt for the same point of safety, ceasing to take precautions when they are no longer cost-effective, even if he will have to pay for the accidents that do occur. The only difference between the two rules therefore goes to the issue of compensation for victims, which, however important, only involves the wealth distribution between parties *after* accidents and not the conduct of parties *before* them. With the negligence rule the defendant who takes cost-effective precautions need never pay damages. With strict liability, the defendant must pay damages no matter what precautions are taken. The differences between the two theories do raise serious ethical issues, but those are by definition immaterial in an inquiry that focuses solely upon incentive effects.

Id. at 40-41 (footnote omitted). One problem with Professor Epstein's analysis is that the ethical issues that he claims are immaterial when focusing solely upon the incentive effects of liability theories cannot and should not be so easily ignored. Product manufacturers do not exist in a vacuum, with their actions governed only by a pure cost-benefit analysis without taking these ethical issues into account. This world that he describes does not exist anywhere outside the economists' imaginations. The act of intentionally allowing into the market a product that has a known propensity for consumer injury would serve to expose the manufacturer to liability for punitive damages. This liability would fall above the compensatory damage award planned for in the cost-benefit analysis. A manufacturer would not be able to plan for punitive damages, because a jury is instructed to award such damages in amounts calculated to punish the manufacturer. This would, by definition, be an amount in excess of what had been planned for in the original cost-benefit analysis.

58. *See infra* notes 59-68 and accompanying text.

59. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980).

60. *Id.* at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144 (citations omitted).

61. 345 F. Supp. 353 (E.D.N.Y. 1972).

blasting cap, which they were able to detonate with ease.[62] The plaintiffs could not identify the particular manufacturers of the caps that injured them individually; therefore, their complaint alleged that "each cap in question was designed and manufactured jointly or severally by the six corporate defendants or by other unnamed manufacturers, and by their trade association."[63] They further alleged that the manufacturers knew that blasting caps frequently caused injury to children, and that they had jointly considered and rejected the option of labeling the caps.[64] Because the plaintiffs could not identify the specific manufacturer responsible for their injuries, the defendants moved to dismiss the claims on the grounds that the plaintiffs did not state claims upon which relief could be granted. The court denied the defendants' motion[65] and shifted the burden of proof on the issue of causation to the manufacturers. Before reaching its conclusion, the *Hall* court noted the reasons for imposing strict liability on manufacturers:

> A manufacturer is in the best position to discover defects or dangers in his product and to guard against them through appropriate design, manufacturing and distribution safeguards, inspection and warnings. . . . A rigorous rule of liability with enhanced possibilities of large recoveries is an "incentive" to maximize safe design or a "deterrence" to dangerous design, manufacture, and distribution.[66]

By imposing joint liability on each member of the blasting cap industry, the court shifted the burden of proof to each manufacturer—each manufacturer had to exonerate itself to escape liability. This burden acts as an incentive for manufacturers to take necessary precautions to ensure the safety of persons who might foreseeably come into contact with their products.

The *Collins v. Eli Lilly Co.*[67] court expressed the same reasoning that the *Sindell* and *Hall* courts did to justify imposing liability on the DES manufacturers:

> [T]he cost of damages [sic] awards will act as an incentive for drug companies to test adequately the drugs they place on the market for general medical use. This incentive is especially important in the case of mass-marketed drugs because the consumers and their physicians in most instances rely upon advice given by the supplier

62. *Id.* at 359.
63. *Id.*
64. *Id.*
65. *Id.* at 386.
66. *Id.* at 368 (citations omitted).
67. 116 Wis. 2d 166, 342 N.W.2d 37, *cert. denied*, 105 S. Ct. 107 (1984).

> and the scientific community and, consequently, are virtually helpless to protect themselves from serious injuries caused by deleterious drugs.[68]

All of these courts found that imposing liability on manufacturers was a legitimate vehicle for giving them incentive to ensure the safety of the consuming public. These courts also recognized that consumers have an inherent difficulty in protecting themselves from defective products. In light of these factors, all of these courts have reasoned that it was appropriate to impose liability in these cases because the manufacturers were in a better position than the consumer to take necessary safety precautions.

2. RISK SPREADING

Another major consideration in products liability law when a court must decide whether or not to impose liability on manufacturers is that the manufacturers are better able to spread the risk of loss by passing on the cost to consumers.[69] This consideration is often

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68. *Id.* at 192-93, 342 N.W.2d at 49-50 (footnote omitted).

69. *But see* EPSTEIN, *supra* note 21, at 44-48 (1980). The most serious argument that Professor Epstein raises is that:

> The ability of any particular [manufacturing] firm to shoulder the risks of liability insurance depends in very large measure upon the substantive content of the products liability law for which the insurance is written. Where . . . the manufacturer is in essence held liable for products which fail to live up to his own standards of construction or performance, it should not be too difficult to calculate the risk associated with marketing a defective product and to test or inspect the product in advance of sale in order to reduce the likelihood of the occurrence of the insurable event. . . .
>
> The recent extensions of products liability law have, however, vastly complicated the task of underwriting. Where, for example, a manufacturer can be held responsible because a jury . . . decides that its product . . . could have been designed better than it was, or sold with warnings more comprehensive than those provided, it becomes difficult if not impossible for the usual techniques of inspection and underwriting to yield any adequate assessment of the additional risks to be insured. When product modifications do not insulate the manufacturer from responsibility for subsequent injuries, the underwriting judgment must not only take into account the dangers in the product as it is, but also the dangers of the product as it might be transformed. And when all forms of "foreseeable" misuse no longer constitute a defense against liability, the risk involved . . . depends as much on the skill and training of the user as it does on the intrinsic merit of the product.
>
> These and other substantive difficulties are further compounded because the product liability rules apply not only to new products but also to those long in the stream of commerce. If it is a nightmare to estimate the contingent liability costs for ancient machines in unknown condition and in unknown hands, those difficulties are not solved by the institution of insurance. Insurance only transfers and pools the risks. It cannot reduce the costs associated with those risks or the uncertainties involved in their measurement.

Id. at 47-48 (footnotes omitted). Professor Epstein's arguments certainly point out the difficul-

accompanied by the safety incentive consideration, and the courts have used them together to justify a relaxation of the traditional element of defendant identification.

Another DES case substantially similar in its facts to *Sindell* and *Collins* is *Martin v. Abbott Laboratories.*[70] The Supreme Court of Washington, in deciding *Martin*, expressed the risk spreading policy in this way:

> [A]s between the injured plaintiff and the possibly responsible drug company, the drug company is in a better position to absorb the cost of the injury. The drug company can either insure itself against liability, absorb the damage award, or pass the cost along to the consuming public as a cost of doing business. We conclude that it is better to have drug companies or consumers share the cost of the injury than to place the burden solely on the innocent plaintiff.[71]

The *Sindell* court stated the policy in much the same way, and pointed out that " '[t]he cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.' "[72] The *Hall* court pointed out that loss distribution is a reasonable policy because accidents and injuries are seen as an inevitable, and therefore foreseeable, cost of consumers using a product.[73]

Manufacturers are aware that injuries to consumers caused by their products are an inevitable consequence of placing products into the stream of commerce. For this reason, they take into account their foreseeable liability for injuries when they price their products for sale. They pass the cost of insuring themselves against this liability on to their consumers—the cost is reflected in the prices consumers pay. This is a legitimate cost of putting a product on the market. Consumers, on the other hand, are not in a position to insure themselves against the potential catastrophic consequences of using presumably

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ties in insuring products to cover liability for foreseeable and unforeseeable injuries caused by their use. The arguments do not, however, answer the question of who is better able to absorb the cost of the risk of injury—the consumer or the manufacturer. Many courts have logically concluded that the manufacturer is in a far superior position to do so because of its ability to spread the cost of this insurance to all of its customers, no matter how difficult it is to value the risk.

70. 102 Wash. 2d 581, 689 P.2d 368 (1984).

71. *Id.* at 604, 689 P.2d at 382.

72. *Sindell*, 26 Cal. 3d at 611, 607 P.2d at 936, 163 Cal. Rptr at 144 (quoting Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring)).

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

safe products. Their insurance is often inadequate to compensate them for the total amount of their loss. Because manufacturers are in a better position to insure themselves for these losses, it is appropriate that they bear this burden.

III. FLORIDA TORT LAW POLICY CONSIDERATIONS

The Supreme Court of Florida has not yet passed on the issue of whether a plaintiff must identify the specific manufacturer in a DES-like case to maintain a cause of action.[74] The policy considerations previously discussed, however, have been expressed in Florida case law. The Florida courts, in particular the supreme court, have relied on these considerations to justify fashioning new remedies or to reconsider the usefulness of accepted doctrines.[75]

The supreme court faces a major policy decision in the *Conley v. Boyle Drug Co.*[76] case. Existing tort doctrines will not afford Terri Lynn Conley a remedy.[77] If the court, however, applies the policy considerations identified in the DES and DES-like decisions, which are part of Florida common law, then the court can and should find

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74. The market share theory was found, however, to be an inappropriate vehicle for apportioning liability in an asbestos case. Celotex Corp. v. Copeland, 471 So. 2d 533 (Fla. 1985), *quashing* 447 So. 2d 908 (Fla. 3d DCA 1984). The district court had applied the theory even though the plaintiff could identify some of the manufacturers of the asbestos that allegedly caused his injury. *Id.* The supreme court disagreed, finding that where the plaintiff can identify at least one manufacturer, the reason for imposition of market share liability does not exist. *Id.* at 537. The court went on to say that:

> [I]t is important to note there are inherent differences between asbestos products and the drug DES, for which the market share theory was developed, which further make the market share theory extremely difficult to apply in asbestos-injury cases. DES was produced by hundreds of companies *pursuant to one formula*. As a result, all DES had identical physical properties and chemical compositions and, consequently, all DES prescribed to pregnant women created the same risk of harm to the women's female offspring. . . .
>
> Asbestos products, on the other hand, have widely divergent toxicities, with some asbestos products presenting a much greater risk of harm than others.

Id. at 537-38. The court stressed the difficult administrative problems that would face the courts if they had to determine what constitutes a substantial share of the market. This problem was further complicated by the fact that "the various asbestos products have different toxicities, [and] the courts would have to determine how to apportion liability for the differing harmful effects of the different products." *Id.* at 538. The court was careful, however, to clearly point out that "we do not find it necessary to accept or reject the market theory approach." *Id.* at 539. *See generally*, Note, *Market Share Theory and the Asbestos Suits: Should the Industry Bite the Dust?*, 14 STETSON L. REV. 239 (1984) (noting Copeland v. Celotex Corp., 447 So. 2d 908 (Fla. 3d DCA 1984))

75. *See, e.g.*, Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973) (discarded contributory negligence doctrine in favor of comparative negligence doctrine). *See also infra* note 86.

76. 477 So. 2d 600 (Fla. 4th DCA 1985) (petition for review filed Sept. 10, 1985) (No. 67,626).

77. *Id.* at 602.

that she is entitled to a remedy. This section will discuss Florida's application of the identified policies in various settings, and show how their application to a DES case may permit recovery for DES plaintiffs.

A. *General Tort Law Policies*

1. THE CHANGING NEEDS OF SOCIETY

To meet the changing needs or perceptions of society, Florida courts have fashioned new remedies or modified existing ones. Courts form and shape legal doctrines in the context of their contemporaneous society. This is necessary for the law to continue to respond to society, which it serves. Justice Holmes explained it this way:

> The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened scepticism [sic], that is, towards a deliberate reconsideration of the worth of those rules. . . . For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics. It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[78]

Florida courts have expressed a similar philosophy. The plaintiff filed suit against the administrator of the estate of a man who had blown up the plaintiff's house in *Waller v. First Savings & Trust Co.*;[79] he sought compensation for the damage to his house. The circuit judge sustained the defendant's demurrer, and held that a cause of action "sounding in tort" could not survive the death of the tortfeasor.[80] Before ruling on the issue, the supreme court discussed its role in reexamining common law doctrines:

> [I]t does not necessarily follow that when this court has before it a case on writ of error from a judgment, the affirmance of which will crystallize into a precedent for the future an unrighteous rule of decision which is shocking to every conception of justice and fairness, that this court is thereby precluded from re-examining the law which may be applicable to this case, even to the extent of re-

78. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897), *reprinted in* O. W. HOLMES, COLLECTED LEGAL PAPERS 186-87 (1920).

79. 103 Fla. 1025, 138 So. 780 (1931) (en banc).

80. *Id.* at 1029-30, 138 So. at 782.

> examining the correctness of the conclusions announced in previous cases, for the purpose of determining whether or not the rule previously announced is sound, or if sound as a general principle, whether its application to a case like the one before the court is not subject to modification in the light of demonstrably unequitable consequences which have never before been considered or taken into account.[81]

Ultimately, the court, guided by this principle, held that a right of action in tort for compensatory damages does not die with the tortfeasor.[82]

The Supreme Court of Florida receded from prior decisions recognizing tort immunity for municipal corporations for the wrongful acts of their police officers in *Hargrove v. Town of Cocoa Beach*.[83] The *Hargrove* court realized that blind loyalty to stare decisis was improvident. The court declared that "we must recognize that the law is not static. The great body of our laws is the product of progressive thinking which attunes traditional concepts to the needs and demands of changing times. . . . Judicial consistency loses its virtue when it is degraded by the vice of injustice."[84]

The Supreme Court of Florida abrogated the common law rule that contributory negligence is a complete bar to recovery for a plaintiff in favor of comparative negligence in *Hoffman v. Jones*.[85] The court cited numerous instances from the past when it had receded from common law doctrines in response to the changing times.[86] It further explained its obligation to reconsider these doctrines:

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81. *Id.* at 1032, 138 So. at 783.

82. *Id.* at 1047, 138 So. at 789.

83. 96 So. 2d 130 (Fla. 1957) (en banc).

84. *Id.* at 133. The court, in demonstrating the continuity of its decisions, pointed out that it was possible to bring new life to an old precedent: "[W]e therefore point out that instead of disregarding the rule of stare decisis, we now merely restore the original concepts of our jurisprudence to a position of priority in order to eradicate the deviations that have in our view detracted from the justice of the initial view." *Id.* at 134.

85. 280 So. 2d 431 (Fla. 1973). *See also* Blackburn v. Dorta, 348 So. 2d 287 (Fla. 1977) (assumption of risk absorbed into comparative negligence); Lincenberg v. Issen, 318 So. 2d 386 (Fla. 1975) (abolishing doctrine of no contribution among tortfeasors).

86. The court cited a number of cases as support: Gates v. Foley, 247 So. 2d 40 (Fla. 1971) (established right of wife to recover for loss of consortium resulting from husband's injuries); *Hargrove*, 96 So. 2d 130 (Fla. 1957) (held municipal corporations could be held liable for torts of their police); Randolph v. Randolph, 146 Fla. 491, 1 So. 2d 480 (1941) (modified common law doctrine that had given the father the superior right to custody of a child); Banfield v. Addington, 104 Fla. 661, 140 So. 893 (1932) (removed common law exemption for married women from causes of action sounding in contract); *Waller*, 103 Fla. 1025, 138 So. 780 (1931) (action in tort does not die with tortfeasor). *Hoffman*, 280 So. 2d at 435-36. *But cf.* Raisen v. Raisen, 379 So. 2d 352 (Fla.), *cert. denied*, 449 U.S. 886 (1980) (interspousal immunity retained).

> All rules of the common law are designed for application to new conditions and circumstances as they may be developed by enlightened commercial and business intercourse and are intended to be vitalized by practical application in advanced society. . . .
>
> The contemporary conditions must be met with contemporary standards which are realistic and better calculated to obtain justice among all of the parties involved, based upon the circumstances applying between them at the time in question. . . .
>
> We are, therefore, of the opinion that we do have the power and authority to reexamine the position we have taken in regard to contributory negligence and to the rule we have adopted previously in light of current "social and economic customs" and modern "conceptions of right and justice."[87]

DES manufacturer identification presents the kind of problem that the flexibility of the common law was designed to meet. If the supreme court accepts review of the *Conley* case,[88] it would have to modify the traditional tort law requirement of specific tortfeasor identification in "light of [the] demonstrably unequitable consequences which have never before been considered or taken into account."[89] Widespread use of generic drugs creates numerous identification problems, and these problems are examples of those "contemporary conditions [that] must be met with contemporary standards which are . . . better calculated to obtain justice among all of the parties involved, based upon the circumstances applying between them at the time in question."[90]

2. PLAINTIFF COMPENSATION

One force behind modifying existing law is a court's recognition that it should focus on finding a way to compensate the injured plaintiff in a fashion which is equitable to all parties. This represents a shift from the early common law when courts focused on punishing the tortfeasor.[91] Using the "compensation" model rather than the

87. *Hoffman*, 280 So. 2d at 436.

88. The decision to grant review is pending. Telephone interview with the Office of Clerk of the Court, Supreme Court of Florida (Feb. 20, 1986). Several of the defendants petitioned for a rehearing in the district court on the issue of in personam jurisdiction. For a description of the issue, see the Combined Initial Brief for Cross-Appellants and Answer Brief of Appellees at 36-40, Conley v. Boyle Drug Co., 477 So. 2d 600 (Fla. 4th DCA 1985). The fourth district denied the rehearing. These defendants raised the same issue before the supreme court. *See* Combined Initial Brief of Respondents/Cross-Petitioners Boyle Drug Co. & Ortho Pharmaceutical Corp., and Brief of Respondents, E. R. Squibb & Sons, Inc. & Sandoz, Inc. at 42-46, Conley v. Boyle Drug Co., __ So. 2d __ (Fla. 1986).

89. *Waller*, 103 Fla. at 1032, 138 So. at 783.

90. *Hoffman*, 280 So. 2d at 436.

91. This has not always been the focus of the courts. A discussion of the focus of prior case

"punishment" model, the *Waller* court abrogated the common law rule that tort actions did not survive the death of the tortfeasor. The court recognized that the only reason for disallowing such an action at common law was that the punishment effect had been lost because of the tortfeasor's death.[92] If the court was no longer motivated by punishing the tortfeasor and was, in fact, motivated by compensating the injured plaintiff, then the reason for the rule no longer existed.

In the recent case of *Champion v. Gray*,[93] the supreme court considered whether to modify or abrogate the "impact rule"[94] with

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law is helpful in understanding their current focus. The *Waller* court presented such a discussion:

> Torts, under the ancient common law, were regarded as *delicts* or wrongs against the individual who was allowed to seek vengeance against the wrongdoer by mulching him in damages.
>
> . . . .
>
> The ancient Jewish law . . . referred to a vast number of wrongs and injuries, many of which are now also most exclusively dealt with as crimes. The wrongs, or torts, were redressed by personal retaliation. . . . Later a money compensation seems to have been allowed to serve the purpose of this personal retaliation, and thus was first recognized the recovery of damages for torts. . . .
>
> The penal law of other ancient communities was not the law of crimes but was the law of wrongs, or . . . the law of "Torts". The person injured proceeded in retaliation against the wrongdoer by seeking the recovery of damages against him for the wrong done.
>
> At the head of the civil wrongs recognized by the Roman Law stood *fortum* or theft. Other offenses which we now regard exclusively as crimes were there treated as "torts" to be avenged by the recovery of damages as a retaliation or in other words as *satisfaction*,—not recompense. Money compensation for homicide and for assaults and violent robbery were provided for.
>
> The criterion of a delict, or tort, under the ancient law was that it was the person injured, and not the state, which suffered the wrong. So in the infancy of our jurisprudence, the individual subject injured by a tort depended for protection against violence or fraud, not on the law of crime, but on the law of TORT. . . .
>
> The concept of vengeance and not recompense therefore became so interwoven into the English common law of torts that it was not to be unexpected that the English common law would regard the tort as having died with a defendant tort feasor just as a crime now dies with the defendant criminal.
>
> But this concept is opposed to our American theory of jurisprudence where *recompense* to the injured for a tort, and not mere vengeance for the wrong is the object of the right to sue. Our [Declaration] of Rights seems to recognize this theory in terms, for it preserves to the injured one his "remedy", not his vengeance for wrongs done him in person or property. Certainly this statement . . . means something more than a mere empty platitude placed there as a simple anachronism.

Waller, 103 Fla. at 1040-41, 138 So. at 786 (citations omitted).

92. *Id.* at 1038, 138 So. at 785 ("When the reason for a rule has passed the rule itself should no longer stand, and a new rule in harmony with changed conditions should be recognized . . . .").

93. 478 So. 2d 17 (Fla. 1985).

94. Before allowing recovery for negligent infliction of emotional distress in any context,

regard to negligent infliction of emotional distress. Joyce Champion heard the impact of a drunken driver's car hitting her daughter and rushed to the accident scene. She collapsed and died after becoming overcome with shock and grief at the sight of her daughter's dead body.[95] The trial court, relying on precedent,[96] dismissed the complaint, and the Fifth District Court of Appeal affirmed.[97] Guided by the perception that "the public policy of this state is to compensate physical injuries . . . and physical and mental suffering which flow from the consequences of the physical injuries,"[98] the Supreme Court of Florida modified the "impact rule" to recognize a cause of action for emotional distress when discernible physical injuries had resulted from it. These Florida cases illustrate the influence which the policy to compensate injured plaintiffs has on the shaping of the law. The *Conley* DES case presents another situation where this policy should exert its influence. If the court's focus is on punishing the appropriate defendant, then it will deny recovery because the punishment purpose would not be served if the truly culpable defendant escaped liability. This possibility is the essence of the difficulty in the DES cases. If the court's focus is on providing compensation to an injured plaintiff, however, then relaxation of the identification requirement is appropriate. It would allow compensation to a plaintiff with a legitimate claim from defendants who were definitely responsible for creating the harmful risk and possibly responsible for the plaintiff's specific injury.

3. PLAINTIFF PREFERENCE

The courts often do not expressly state their policy of preferring an innocent plaintiff over possibly culpable defendants. Some court decisions imply the existence of just such a preference. Florida case law presents several examples of this policy.

An injury occurred in *Groves v. Florida Coca-Cola Bottling Co.*,[99] when a bottle exploded while in the plaintiff's hand. The trial court granted a motion for a directed verdict for the defendant because the plaintiff failed to submit any direct evidence of negligence on the part

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the plaintiff must prove that the defendant's negligence caused some sort of actual physical "impact," or touching, upon his person. *See* Gilliam v. Stewart, 291 So. 2d 593 (Fla. 1974), *holding modified in* Champion v. Gray, 478 So. 2d 17 (Fla. 1985).

95. *Champion*, 478 So. 2d at 18.

96. The trial court relied on Gilliam v. Stewart, in which the supreme court denied recovery to a woman who suffered a heart attack when a vehicle struck her home. 291 So. 2d 593 (Fla. 1974).

97. *Champion*, 478 So. 2d at 18.

98. *Id.* at 20.

99. 40 So. 2d 128, *petition for reh'g denied*, 40 So. 2d 775 (Fla. 1949) (per curiam).

of the defendant. The supreme court reversed and remanded.[100] It reasoned that the doctrine of res ipsa loquitur did not require the plaintiff to eliminate every remote possibility of injury to the bottle after it left the defendant's control and up to the time of the explosion.[101] The court said that it was enough for the plaintiff to produce evidence that would permit a reasonable inference that the bottle was not subjected to "extraneous harmful influences" before it reached her.[102] This reasonable inference created a prima facie case of negligence, and shifted the burden of proof to the defendant.[103] By shifting this burden of proof to the defendant, the court implicitly showed a preference for the injured plaintiff over the possibly culpable defendant. By enhancing the possibility of recovery for the plaintiff, the court gave meaning to this policy consideration.

The First District Court of Appeal of Florida confronted the plaintiff preference issue in *Skroh v. Newby,*[104] a classic "concert of action" case. The defendants were racing each other, and one of them struck and killed a man on a motorcycle. In this wrongful death case, the court held that even the defendant who did not actually collide with the motorcycle could be liable for the man's death because his actions in racing constituted negligence proximately causing the accident.[105] The effect of this decision was to assure compensation for the plaintiff in the event the "colliding" defendant was insolvent. By

100. *Id.* at 130.

101. In Goodyear Tire & Rubber Co. v. Hughes Supply, Inc., 358 So. 2d 1339 (Fla. 1978), the Supreme Court of Florida rejected the use of res ipsa loquitur in a case where a tire had blown out after limited use, causing injuries to the plaintiff. The court "restore[d] the inference of negligence to its historically proper bounds—that is, when direct evidence of negligence is unavailable to the plaintiff *due to the unusual circumstances of the injuring incident.*" *Id.* at 1341 (emphasis added). The *Conley* case, though not necessarily premised on negligence, warrants a res ipsa loquitur-like inference because of the unusual manufacturer identification circumstance. *See also* Zyferman v. Taylor, 444 So. 2d 1088 (Fla. 4th DCA), *petition for rev. denied sub. nom.* ITT General Controls v. Zyferman, 453 So. 2d 44 (Fla. 1984) (holding that plaintiff does not have the burden of proving the product has been used and maintained properly till the time of malfunction); Cassisi v. Maytag Co., 396 So. 2d 1140 (Fla. 1st DCA 1981) (holding that evidence of a malfunction creates the inference that a product was defective, relieving plaintiff of burden of proving there were no other causes). *But cf.* Gooding v. University Hospital Building, Inc., 445 So. 2d 1015 (Fla. 1984) (holding that plaintiff in medical malpractice action must present evidence showing that injury more likely than not resulted from defendant's actions); Vecta Contract, Inc. v. Lynch, 444 So. 2d 1093 (Fla. 4th DCA), *petition for rev. denied,* 453 So. 2d 44 (Fla. 1984) (when weight of evidence affords nothing more than rank speculation as to who the manufacturer of defective product was, directed verdict for defendant manufacturer is appropriate) (same court as in *Conley*).

102. *Groves,* 40 So. 2d at 130.

103. *Id.*

104. 237 So. 2d 548 (Fla. 1st DCA 1970).

105. *Id.* at 550.

implication, the court was expressing its policy determination that it is better to prefer the innocent plaintiff over the negligent defendants.

Another example of the relaxation of a plaintiff's burden of proof is *Davis v. Sobik's Sandwich Shops, Inc.*[106] In *Davis*, the plaintiff was injured in a three-vehicle rear-end collision. She "was an innocent passenger, free of any contributory negligence."[107] She joined in the action everyone who could have caused the accident.[108] The supreme court held that the plaintiff did not have to identify specifically the individual responsible for her injuries because the evidence showed that at least one of them must have been responsible.[109] This decision relieved the plaintiff of the burden of proving which particular defendant (or defendants) caused her injuries. If the court had ruled otherwise, it would have left open the possibility that she would be uncompensated in a situation where she was entitled to a remedy.[110] By ruling this way, the court implicitly recognized a policy of preferring innocent plaintiffs over possibly culpable defendants, thus extinguishing the possibility of nonrecovery for the plaintiff.

The *Conley* case presents problems for both the plaintiff and the defendants. Neither can overcome the problem with more fact-finding. In this situation, guided by the policy of preferring innocent plaintiffs over possibly culpable defendants, the court should authorize recovery by relaxing the traditional requirement of specific tortfeasor identification so that the plaintiff can maintain a cause of action.

B. *Underlying Products Liability Policies*

1. SAFETY INCENTIVE

The Supreme Court of Florida, in *West v. Caterpillar Tractor Co.*,[111] recognized that imposing strict liability on manufacturers would encourage them to produce safe products. A caterpillar grader, while backing up on a street under construction, ran over Gwendolyn

106. 351 So. 2d 17 (Fla. 1977).

107. *Id.* at 18.

108. The trial court directed a verdict on the issue of liability and instructed the jury to assess damages and determine which defendants were responsible. *Id.* The Fourth District Court of Appeal reversed, stating that the trial court erred by entering a directed verdict for the plaintiff but against no particular defendant. Sobik's Sandwich Shops, Inc. v. Davis, 330 So. 2d 223 (Fla. 4th DCA 1976) (opinion quashed).

109. Davis v. Sobik's Sandwich Shops, Inc., 351 So. 2d 17, 18-19 (Fla. 1977).

110. The court cited with approval New Deal Cab Co. v. Stubbs, 90 So. 2d 614 (Fla. 1956). In *New Deal Cab*, the plaintiff was injured in substantially the same manner. The *New Deal Cab* court found "that the plaintiff was an innocent sufferer of harm and was entitled to a verdict at all events." *Davis*, 351 So. 2d at 18.

111. 336 So. 2d 80 (Fla. 1976).

West. She died several days later. Her husband brought a products liability action against the manufacturer for design flaws in its tractor.[112] The United States Court of Appeals for the Fifth Circuit certified to the supreme court the question of whether strict liability was applicable to products liability cases in Florida.[113] The court responded by formally adopting the doctrine, noting that the Florida courts had imposed "absolute or strict liability" before.[114] In its analysis, the court concluded that:

> [S]trict liability should be imposed only when a product the manufacturer places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. The user should be protected from unreasonably dangerous products or from a product fraught with unexpected dangers.[115]

By relieving the plaintiff of having to prove negligence on the part of the manufacturer, thus making the prosecution of a products liability

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112. The flaws identified were failure to design a tractor with an audible warning system for use while backing up and failure to provide adequate rearview mirrors to compensate for the blind spots. *Id.* at 82.

113. The question certified was: " 'Under Florida law, may a manufacturer be held liable under the theory of strict liability in tort, as distinct from breach of implied warranty of merchantability, for injury to a user of the product or a bystander?' " *Id.* at 84 (quoting from West v. Caterpillar Tractor Co., 504 F.2d 967 (5th Cir. 1974)).

114. *West*, 336 So. 2d at 86. The court traced the development of products liability law in Florida from the days of privity to the *West* case. The court felt that recognition of the doctrine of strict liability was of "no great departure from present law and, in most instances, accomplishes a mere change of nomenclature." *Id.*

115. *Id.* at 86-87. The court formally adopted RESTATEMENT (SECOND) OF TORTS § 402A (1965), which reads:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
> (a) the seller is engaged in the business of selling such a product, and
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
> (2) The rule stated in Subsection (1) applies although
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

West, 336 So. 2d at 84. *See also* Ford Motor Co. v. Hill, 404 So. 2d 1049 (Fla. 1981) (strict liability applies to enhanced injury cases); Ford Motor Co. v. Evancho, 327 So. 2d 201 (Fla. 1976) (manufacturer liable for defect which causes injury to user when injury occurs as result of collision, even though defect did not cause collision); *but cf.* Bernard v. Kee Mfg. Co., 409 So. 2d 1047 (Fla. 1982) (successor company cannot be held liable for injuries caused by defects in original company's products because safety incentive purpose lost). For a history of the development of strict liability, see generally Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L. J. 1099 (1960); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

case easier, the court gave manufacturers a greater incentive to ensure the safety of their products. The court noted that "[m]any products in the hands of the consumer are sophisticated and even mysterious articles . . . . In today's world it is often only a manufacturer who can fairly be said to know and understand when an article is suitably designed and safely made for its intended purpose."[116]

The same policy consideration led the court to abrogate the "patent danger" doctrine in *Auburn Machine Works Co., Inc. v. Jones*.[117] In that case, the plaintiff lost his balance when the side of a trench caved in and his foot became entangled in an exposed chain of a trench digging machine. The trencher possessed no shield and was obviously dangerous.[118] The court reasoned that "the patent danger doctrine encourages manufacturers to be outrageous in their design, to eliminate safety devices, and to make hazards obvious."[119] By abrogating the "patent danger" doctrine, the court implicitly recognized its policy determination that manufacturers should make their products as safe as possible before putting them on the market.

Insurance Co. of North America v. Pasakarnis[120] presents an interesting variation on the safety incentive theme. In *Pasakarnis*, the supreme court approved the "seat belt defense"[121] as a means of mitigating damages in automobile accident cases. Although not a products liability case, this opinion illustrates how the safety incentive policy runs throughout all of tort law. The court noted that the "common thread running through [its] decisions has been that the law will step in to protect people against risks which they cannot adequately guard against themselves."[122] The law will step in to protect people, however, *only* to the extent that they cannot protect themselves.[123] By making the seat belt defense available to defendants, the court has placed the burden of safety on those who are in the most reasonable position to take effective safety precautions. This is entirely consistent with the policy of imposing liability on manufacturers as an incentive for placing safe products on the market.

The manufacturers of DES were the only parties who could have taken precautions against its defectiveness. Neither the women who

116. *West*, 336 So. 2d at 88.

117. 366 So. 2d 1167 (Fla. 1979).

118. *Id.*

119. *Id.* at 1170.

120. 451 So. 2d 447 (Fla. 1984).

121. The "seat belt defense" gives a defendant the chance of reducing his liability by the extent of the injury that would not have occurred had the plaintiff worn an available seat belt.

122. *Pasakarnis*, 451 So. 2d at 451.

123. The court stated that the law places an emphasis on individual responsibility. *Id.*

took the DES, nor their daughters were in a position to do so. If the court allows manufacturers to escape liability because of the identification problem, it will undercut the entire safety incentive policy. Such a result would encourage manufacturers to market their products in an untraceable generic form to avoid liability in the future, ultimately causing more DES-like situations where injured persons would be without a remedy. By imposing liability, the court will not only give manufacturers more incentive to produce safer products, but will also encourage them to devise methods of assuring that their products are traceable back to themselves. Traceability will help them avoid liability for the defects in some other manufacturer's products.

2. RISK SPREADING

The concept that courts should impose liability on manufacturers for injuries which their defective products cause due to the fact that they are able to spread the cost of the risk to consumers has found expression in Florida opinions. The Supreme Court of Florida held a blood bank liable on a breach of implied warranty theory when a patient contracted hepatitis from the use of its blood product.[124] Justice Roberts, in a concurring opinion, concluded that it was right to hold the blood bank strictly liable for the defects of its product "so that the burden of the losses resulting therefrom may be spread among all who benefit from the operation of the blood bank, rather than require such losses to be borne by the innocent victims alone."[125]

Another breach of implied warranty case was before the supreme court in the form of a certified question from the Fifth Circuit Court of Appeals in *Green v. American Tobacco Co.*[126] The plaintiff developed lung cancer after smoking the defendant's cigarettes for years. The question presented was limited to the status of Florida law on whether the manufacturer could be liable for breach of implied warranty when the manufacturer " 'could not, by reasonable application of human skill and foresight, have known of the danger' "[127] associated with its product that ultimately caused injuries to consumers. The court answered the question in the affirmative, stating that the manufacturer's knowledge was wholly irrelevant to his liability. The court went on to say:

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124. Community Blood Bank, Inc. v. Russell, 196 So. 2d 115 (Fla. 1967) (per curiam).

125. *Id.* at 121 (Roberts, J., concurring). *Cf.* Blanton v. Cudahy Packing Co., 154 Fla. 872, 19 So. 2d 313 (1944) (manufacturer held liable for illness caused by its canned meat).

126. 154 So. 2d 169 (Fla.), *based on response to certified question*, 325 F.2d 673 (5th Cir. 1963), *cert. denied*, 377 U.S. 943 (1964).

127. *Id.* at 170 (quoting from Green v. American Tobacco Co., 304 F.2d 70 (5th Cir. 1962)).

> To hold that prevailing industry standards supplant the ordinary standard of objective truth and proof, and should be conclusive on the issue of a product's reasonable fitness for human use or consumption, would be to shift to the purchaser the risk of whatever latent defectiveness may ultimately be proven by experience and advancement of human knowledge, a risk we are convinced was from the inception of the implied warranty doctrine intended to be attached to the mercantile function.[128]

Implicit in this statement is the understanding that the manufacturer should provide for the risk of defectiveness as part of the cost of doing business. The *West* court expressed similar thoughts:

> The obligation of the manufacturer must become what in justice it ought to be—an enterprise liability . . . . The cost of injuries or damages, either to persons or property, resulting from defective products, should be borne by the makers of the products who put them into the channels of trade, rather than by the injured or damaged persons who are ordinarily powerless to protect themselves.[129]

Theoretically, the DES manufacturers have prepared themselves, through insurance or other means, for the possibility of injuries arising from the use of DES when they placed it on the market.[130] Therefore, if the court does not fashion some sort of recovery scheme for Terri Lynn Conley to take advantage of this preparation, the manufacturers will reap a windfall because they have already passed the cost of this preparation on to the consumers of DES. There can be no justice in denying Terri Lynn Conley and other DES plaintiffs recovery for their injuries when their mothers have already paid prices which included the cost of this insurance.

IV. CONCLUSION

Confrontation with any traditional legal doctrine requires a thorough examination of the public policy considerations which are the

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128. *Id.* at 173.

129. West v. Caterpillar Tractor Co., 336 So. 2d 80, 92 (Fla. 1976).

130. This preparation, of course, is limited to providing for injuries caused by their own products, not by those of other manufacturers. DES manufacturers often argue that if a court allows a plaintiff to recover without requiring her to identify the specific manufacturer or manufacturers of the DES ingested by her mother, then the amount the manufacturer will have to pay will be in excess of that which its insurance was designed to cover. The problem with this argument is that it ignores the fact that the various theories used by the courts were designed to apportion the damages among the various manufacturers as equitably as possible. The effect of these theories is to assign liability to the manufacturers in approximately the proportion that they would have been liable for had there been no manufacturer identification problem. Theoretically, these manufacturers had insured themselves for this level of liability.

substance of the law.[131] The court must recognize the changes that have occurred in society, and if the scope of those changes is great enough, it must rework tort doctrine so that tort law can continue to serve its original purpose—that of making the public policies of society a reality in the everyday lives of individuals. This exercise is one of the essential roles courts play in the society they serve.

The *Conley v. Boyle Drug Co.*[132] case will be a difficult decision for the Supreme Court of Florida. Only if the court relaxes the defendant identification requirement will Terri Lynn Conley have a remedy. Relaxation of the defendant identification requirement is consistent with the court's policy of compensating injured plaintiffs for injuries caused by wrongs committed by others. It is also consistent with the policy of preferring innocent plaintiffs over possibly culpable

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131. The following passage by Professor Keeton puts the relationship between doctrine and policy in its proper perspective:

> [E]very doctrine has its foundations in policy considerations of one kind or another, whether explicit or not. Even stare decisis, one of the most maligned of all doctrines, has firm support in policy considerations concerned with the preservation of the continuity essential both to fair and efficient adjudication and to guidance of private conduct in reliance upon the law. When the issue is whether a well-established doctrine shall be overruled, the confrontation is not one between the doctrine of stare decisis and meritorious policy considerations. Rather, the confrontation is concerned partly with the respective merits that the old and the proposed doctrine would have if the lawmaker were writing on a clean slate, partly with modifications of that appraisal that are incident to the existence of an established doctrine, partly with the preservation of a firm tradition of evenhanded continuity, and partly with the maintenance of a capacity for creative development in law.
>
> Moreover, the full association of doctrine and policy is not represented adequately by the figure of speech that declares doctrine to be founded on policy considerations. The policy considerations are interwoven into the fabric of the doctrine itself. One who undertakes to interpret doctrine and to apply it independently of attention to the policy considerations that are associated with its creative decisional development misunderstands the doctrine itself.
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> . . . It is an everyday occurrence for courts to examine the more specific formulations of a doctrine in light of the broader considerations associated with its development, seeking the sense of the doctrine in relation to a current problem, or even the sense of apparently competing doctrines each of which might be extended by analogy to the current problem. . . . No single policy reason is alone a satisfactory explanation of the pattern of decisions that emerges. Relentless pursuit of the logical implications of a single policy reason is usually a distortion of the legal doctrine expressed and implicit in a succession of related decisions. The doctrine does not foreordain the court's conclusion. The court is exercising a choice—a choice, however, that is to be exercised not blindly or arbitrarily but responsibly, and under the guidance of reason and an accumulation of ideas that are expressed or implied in legal doctrine with varying shades of clarity.

Keeton, *supra* note 16, at 470-71 (footnotes omitted).

132. 477 So. 2d 600 (Fla. 4th DCA 1985) (petition for review filed Sept. 10, 1985) (No. 67,626).

defendants. Because the *Conley* case is a products liability action, the relaxation of the defendant identification requirement promotes the court's policy of giving manufacturers the incentive to produce safe products. It is also consistent with the court's recognition that manufacturers are better able than consumers to spread the risk of loss caused by defects in their products. The court must also recognize that the expanding use of generic drugs will inevitably cause the problem to occur again. The court must take some action that will encourage manufacturers to assure that their products are traceable back to themselves. To do otherwise will leave open a loophole through which manufacturers can escape liability for injuries sustained by their consumers. This result would be inconsistent with the court's declared policy that "the law will step in to protect people against risks which they cannot adequately guard against themselves."[133] By recognizing that Terri Lynn Conley is entitled to a remedy at law, the court will protect Florida citizens from similar incidents in the future.

JOHN J. GRUNDHAUSER*

133. Insurance Co. of North America v. Pasakarnis, 451 So. 2d 447, 451 (Fla. 1984).

* This article is lovingly dedicated to Lois for her love and support, and to my little goddaughter, Rosemary Joan.