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Industry-Wide Joint Liability

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without any such knowledge. To impose liability where the utility is less than the risk of harm and to excuse the manufacturer when the risk is less than the utility of the product is an artificial distinction. Also, under this approach, the injured person is denied recovery where the product is more useful to the public, but he is allowed recovery, and, therefore, the loss supposedly spread to all consumers, where it is found that the risk of harm is greater than the utility of the product to those same consumers.

Although the injured user or consumer of a product should be protected, the mere fact that the manufacturer has the deeper pocket should not be the controlling factor. The injured party need not prove negligence on the part of the defendant, but he should be required to prove that either the defendant could have found and corrected the defect had he utilized all scientific knowledge available to him or he could have given a warning so that the consumer could have taken precautionary measures. The manufacturer of a product which has a scientifically unknowable risk inherent in it should be excused from liability under strict liability in tort.

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INDUSTRY-WIDE JOINT LIABILITY

INTRODUCTION

The issue presented in this article is whether or not an entire industry may be held jointly and severally liable under a theory of strict liability for injuries caused by its products. In its broadest form, this concept of industry-wide joint liability could impose liability upon an entire industry if the plaintiff could show that: 1) there was an injury caused to him by a product of that industry; 2) the product was defective, unreasonably dangerous and it reached the plaintiff without substantial change in its condition;[1] 3) the manufacturers adhered to an industry-wide custom in producing the product.[2] Whether or not the actual manufacturer could be identified would be irrelevant since all of the manufacturers would be liable for the action of one of them.

Industry-wide joint liability should be differentiated from two

1. RESTATEMENT (SECOND) OF TORTS § 402A (1965) [hereinafter cited as RESTATEMENT § 402A].

2. *See* notes 27-28 and accompanying text *infra*.

traditional theories of joint liability that may, at first, appear to impose a form of industry-wide joint liability on an industry. For example, one traditional theory of joint liability would impose liability where each of the defendants caused the plaintiff injury, but the harm was not capable of apportionment among the defendants. In this situation, the burden of proof as to the apportionment of harm caused by each defendant is shifted to the defendants.[3] The plaintiff, therefore, need not prove the specific harm caused by each defendant. The policy reason for this shift in the burden of proof is that tortfeasors should not escape liability merely because the harm done is of such a nature that the plaintiff is unable to prove how much damage was caused by each tortfeasor.[4] The difference between this theory and the theory of industry-wide joint liability is that in the latter, although the damage is capable of apportionment among one or more manufacturers, the entire industry remains jointly and severally liable to compensate the injured plaintiff.

Under another traditional theory of joint liability, a group of manufacturers comprising an entire industry may be held liable if those manufacturers acted in accordance with a common plan of action which resulted in injuries to the plaintiff. This would constitute a joint tort in the historic common law meaning of the phrase.[5] The difference between this theory and the theory of industry-wide joint liability is that in the latter it may not be necessary for the plaintiff to prove an expressed or implied agreement among the defendants to act in concert eliminating a key element of proof required under this traditional theory.[6]

As a general proposition, industry-wide joint liability involves three unique characteristics. First, under certain circumstances a manufacturer of a product may have liability imposed upon him for injuries caused by a similar "product in a defective condition"[7] produced by another manufacturer in that same industry. Second, the elements of proof required to establish a prima facie case may be fewer and easier to prove than in an ordinary negligence case.[8] Third, since the industry as a whole is not within the "chain of

3. RESTATEMENT (SECOND) OF TORTS § 433B (1965).
4. *Id.* comment *c*.
5. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 46 at 291-92 (4th ed. 1971).
6. *See* notes 18-20, 27-28 and accompanying text *infra*.
7. RESTATEMENT § 402A.
8. *See* notes 22-29 and accompanying text *infra*.

distribution"[9] which includes the manufacturer, distributor and seller of the particular object that caused the actual injury, the imposition of industry-wide joint liability means that the liability is spread horizontally and not vertically as is true in the usual products liability case.[10]

This article is divided into three sections. The first section discusses the cases of *Hall v. Du Pone de Nemours & Co.*[11] (hereinafter referred to as *Hall*) and *Chance v. Du Pone de Nemours & Co.*[12] (hereinafter referred to as *Chance*). These were the first cases to raise the possibility of industry-wide joint liability. The second section explores the possible theories and policies which could support the concept of industry-wide joint liability. The third section deals with whether industry-wide joint liability is feasible in products liability cases and whether it is desirable.

I. THE THEORIES OF *Hall* AND *Chance*

The sister cases of *Hall* and *Chance* raise the issue of whether an entire industry may be held liable for injuries caused by its products in unrelated accidents. It will appear that the theory of industry-wide joint liability formulated by the court in *Chance* is applicable only under a limited set of circumstances and it does not impose an extensive form of liability. In *Chance,* the plaintiffs were thirteen minors injured in unrelated accidents by blasting caps. None of the plaintiffs were able to identify which manufacturer produced the blasting caps which injured them. They sued six manufacturers of blasting caps who represented virtually the entire blasting cap industry and their trade association on various theories including negligence and strict liability. The plaintiffs contended that the defendants were negligent in failing to provide adequate warnings about the dangers of their products and failing to produce a blasting cap that would not explode so easily. The court denied the defendants' motion to dismiss the complaint. In the course of its decision, the court formulated a theory of industry-wide joint liability. In doing so, the court combined elements of two existing theories of joint liability with a new concept of what constitutes joint control and integrated the result with the theory of strict liability.

9. Little v. Maxam, Inc., 310 F. Supp. 875, 877 (S.D. Ill. 1970).
10. *Id.*; *see* Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965).
11. 345 F. Supp. 353 (E.D. N.Y. 1972).
12. *Id.*

In *Hall,* the case also concerned minor children injured in separate accidents by blasting caps. A number of manufacturers of blasting caps and their trade association were sued. Through legal maneuvers the number of defendants was reduced to two manfacturers. The plaintiffs were able to identify these two manufacturers as the makers of the blasting caps that caused the injuries. In addition, to the separate cause of action against each of the two manufacturers, the plaintiffs maintained a cause of action against the entire industry with the two manufacturers as representatives of the entire industry. The court dismissed the cause of action against the entire industry. The reasons for the court's dismissal of the cause of action against the entire industry and the effect of that dismissal upon the theory put forth in *Chance* will be discussed later in this section.

The court in *Chance* drew upon two older theories of joint liability. One of those theories was formulated in the case of *Summers v. Tice*[13] (hereinafter referred to as *Summers*). In *Summers* the plaintiff and defendants were members of a hunting party. The two defendants negligently shot in the direction of the plaintiff, and the plaintiff received pellet wounds. Only one of the defendants could have caused the injury, but the plaintiff was unable to identify who was the tortfeasor. The court allowed joinder of both tortfeasors and shifted the burden of proof as to which one caused the injury to the defendants. If they failed to prove which one was causally negligent, both would be jointly and severally liable for the damages.[14] The elements of this theory that are important in relation to *Chance's* theory are:

1. The plaintiff is required to prove that the defendants are negligent,[15] *i.e.,* breached a duty owed to the plaintiff;
2. The burden of proving which tortfeasor caused the injury is shifted to the defendants;[16]
3. The defendants' joint and several liability is contingent upon their failing to carry the burden of proof as to which of them actually caused the injury.[17]

The second theory of joint liability which the court in *Chance* drew upon is represented by *Bierczynski v. Rogers*[18] (hereinafter

13. 33 Cal. 2d 80, 199 P.2d 1 (1948).
14. *See* notes 3-4 and accompanying text *supra.*
15. Bowman v. Redding & Co., 449 F.2d 956, 967 (D.C. Cir. 1971).
16. *Id.*
17. *Id.* at 968.
18. ___ Del. ___, 239 A.2d 218 (1968).

referred to as *Bierczynski*). In this case the two defendants were drag racing when one of them struck the plaintiff's car. The court rejected one defendant's contention that he could not be found liable for the plaintiff's injuries since, although he was drag racing, his car stayed in the proper lane and it never struck the plaintiff's car. This defendant was still found to be a joint tortfeasor. Joint liability may be based on concert of action as evidenced by an express or an implied agreement. The court found that the act of drag racing was sufficient evidence of an implied agreement.[19] This theory of liability requires the plaintiff to prove:

1. All elements of causal negligence, *i.e.* duty, breach, cause and damage.[20]
2. Conduct by the defendants sufficient to show an express or implied agreement to act in concert.

As previously stated, *Chance* combines elements of the above two theories of joint liability along with a new concept of joint control to create a limited form of industry-wide joint liability.

The fact situation in the *Chance* case is similar to that in the *Summers* case since the plaintiffs cannot identify which defendant actually caused the damage, and therefore, the burden of proving causation is shifted to the defendants.[21] *Chance* is also like *Bierczynski* since the court found that the defendants could be jointly and severally liable because of their joint action.[22] However, a number of factors make the theory of joint liability in *Chance* different from the theories in *Summers* or *Bierczynski.* In *Summers,* as a prerequisite to shifting the burden of proof of causation to the defendants, the plaintiff had to prove that the defendants were negligent, *i.e.,* a duty and its breach.[23] A cause of action sounding in strict liability, as it is used in *Chance,* does not require proof that the defendants were negligent.[24] Thus the burden of proving causation is shifted to the defendants without a need for the plaintiff to prove negligence. In addition, if the defendants in *Summers* could prove which one of them actually caused the injury, then only the tortfeasor who was causally negligent was liable for the damages. The *Chance* theory seems to have extended liabil-

19. *See* notes 3-4 and accompanying text *supra.*
20. W. PROSSER, *supra* note 5, at 143.
21. 345 F. Supp. at 380.
22. *Id.* at 373-74.
23. 33 Cal. 2d at ___, 199 P.2d at 3.
24. RESTATEMENT § 402A.

ity to all the defendants even if they could establish which company produced the blasting caps causing the injuries to the plaintiffs.[25] There are two elements of the *Chance* case which tend to support this conclusion. First, if it was merely a question of identifying which manufacturer produced the blasting caps which caused the injuries then there would be no reason to join the trade association in the action. Second, if the court was merely applying the theory of *Summers* there would have been no need to engage in a further discussion of different types of joint liability and the policies underlying them.[26]

Chance also appears to be akin to the fact situation in *Bierczynski* because the defendants in *Chance* may be jointly and severally liable because of their joint action. In *Bierczynski,* however, the plaintiff was required to show an express or implied agreement to act in concert. In *Chance* it is suggested that, in some instances, adherence to an industry-wide custom might be sufficient to impose joint liability on all of the defendants, including the trade association, without showing evidence of an express or implied agreement to act in concert.[27] The court states that adherence to an industry-wide custom in the manufacture of a product may be, in some instances, an alternative to showing either an express or implied agreement.[28]

In summary, it can be seen that the theory set forth in *Chance* does not require the plaintiff to prove negligence, causation, or express or implied agreements between the defendants. It is possible that industry-wide joint liability may be imposed if the plaintiff can prove that he has been injured by a product, that the circumstances of such injury would be sufficient to impose liability upon the manufacturer of such product, that the plaintiff is unable to identify which manufacturer actually produced the product causing him injury, and that there exists adherence to an industry-wide custom as to the manufacture of such product. The theory of industry-wide joint liability proposed in *Chance* appears to lessen the burden of proof of the plaintiff while extending the liability of the defendants. However, it appears that the theory of *Chance* will be limited in its application to those cases with the same facts as are found in *Chance, i.e.,* a product capable of causing serious

25. 345 F. Supp. at 371.
26. *Id.* at 370-78.
27. *Id.* at 374.
28. *Id.*

bodily injury, an industry with a limited number of manufacturers, and the inability of the plaintiff to identify the individual tortfeasor. The court's rejection of joint liability of the industry in *Hall* was based upon the plaintiff's ability to identify the individual manufacturers that produced the product that actually harmed him.[29] If the court in *Chance* was proposing a broad form of industry-wide joint liability, then it should have made no difference in *Hall* whether or not the plaintiff could identify the actual tortfeasors. Therefore, the court in *Chance* seemed to be formulating a remedy to be used only in circumstances where the plaintiff is unable to identify the specific tortfeasor.

II. INDUSTRY-WIDE JOINT LIABILITY—THE THEORIES AND UNDERLYING POLICIES

The theories that have been advanced as reasons for the development of the theory of strict liability are the natural starting point for inquiry into the theoretical basis of industry-wide joint liability. Industry-wide joint liability may be considered to be an extension of one of the basic purposes of strict liability—the reallocation of risks on other than a fault basis.[30] Strict liability is not considered to be a radical departure from past practices of the court in imposing liability. In the past, when manufacturers sold directly to consumers the manufacturer could be held liable for a defective product under certain circumstances. Strict liability, to some extent, reestablishes this direct consumer-manufacturer relationship by cutting through the complex maze of modern distribution systems. The movement from the fault concept in negligence to negligence per se has had a slow but steady development in the case law.[31] Is the movement from strict liability to industry-wide joint liability part of this natural development?

There are two major categories of theories which have been proposed as bases for strict liability. One may be termed the insurer theory and the other may be termed the deterrence theory. Are either of these theories broad enough not only to justify strict liability but industry-wide joint liability? The importance of determining which theory underlies industry-wide joint liability is that

29. *Id.* at 383.

30. *See* 34 OHIO ST. L.J. 216 (1973); Katz, *The Function of Tort Liability in Technology Assessment*, 38 U. CIN. L. REV. 587 (1969).

31. Noel, *The Drift Toward Strict Liability*, 24 TENN. L. REV. 963, 1014-15 (1957). *But see* Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products*, 24 TENN. L. REV. 938 (1957).

the theory, in general, has an effect upon the proof required to impose liability on a defendant. For example, if the industry is considered an insurer, the emphasis will be less upon the element of fault than upon whether or not the plaintiff can prove that his injury is one that the defendants should insure. If, on the other hand, the deterrence theory is used, then the emphasis will be upon whether or not the manufacturer is able to reduce the dangerousness of his product.

The theories under the insurer theory all have a central theme —the manufacturer should pay to varying extents for the injuries caused by his products. This is so even though no actual negligence can be demonstrated on the part of the manufacturer. One theory states that society may burden one of two innocent parties where it would result in a maximization of benefit to society.[32] The Workmen's Compensation rules would be an example of this. While there may not be an argument with the theory itself, there certainly is a question of whether or not the courts are the proper instrument of government to create this type of liability. The Oregon Supreme Court directly faced this issue in *Cochran v. Brooke*.[33] In that case the plaintiff lost his sight from the use of the drug manufactured by the defendant. The court found for the defendant, stating that the plaintiff had an extremely rare reaction to the drug. The plaintiff contended that the drug manufacturer should be required to include in the cost of manufacturing drugs the amount needed to set up a general compensation fund for any injuries caused by his drugs. The court rejected this contention, ruling that while it would be a just result, it is not for the courts but for the legislature to require such a fund.

Another theory under the insurer theory is called enterprise liability. This theory focuses on the fact that an enterprise involves certain distinctive risks. These risks may result in injuries.[34] When this theory is used as a basis for strict liability the proof centers on the court's interpretation of what risks the enterprise should be held liable for. The liability is on a continuum ranging from the injuries caused by the kind of risks the enterprise is likely to cre-

32. German, *Products Liability—Strict Liability?*, 33 INS. COUNSEL. J. 259, 265 (Apr., 1966).

33. 243 Ore. 89, 409 P.2d 904 (1966).

34. James, *General Products—Should Manufacturers be Liable Without Negligence?*, 24 TENN. L. REV. 923 (1957).

ate[35] to liability for injuries caused only by unreasonable risks involving the product.[36] *Green v. American Tobacco Co.*[37] illustrates liability for the kind of risks the enterprise is likely to create. In this case the plaintiff sued for damages from a cigarette manufacturer claiming that he developed cancer as a result of smoking the defendant's cigarettes. The evidence showed that it was not scientifically possible for the defendant to have known of the cancer producing qualities of his product when the plaintiff had started to smoke cigarettes since he had started to smoke at the turn of the century. Nevertheless, the court held the defendant liable upon the theory of implied warranty. The court ruled that the merchantability of a product depends not upon the manufacturer's knowledge of the defect, but upon the question of whether the product is or is not safe. In this case, the court considered the manufacturer to be like an insurer in that it made no difference that the plaintiff could not prove fault on the part of the manufacturer. The manufacturer's responsibility was not dependent upon his skill or knowledge.

On the other end of the continuum lies the case of *Lartigue v. R.J. Reynolds Tobacco Co.*[38] in which the court found for the defendant upon facts similar to those in *Green v. American Tobacco Co.* While the risk created by the enterprise was the same in both cases, in *Lartigue v. R.J. Reynolds Tobacco Co.* the court found the risk not to be unreasonably dangerous to the plaintiff. The court ruled that the defendant was liable only for unreasonably dangerous risks and in order for the risk to be so considered it would have to be foreseeable by the defendant.

Can industry-wide joint liability be justified on the basis of the enterprise theory? All manufacturers engaged in producing the same type of product create the same types of risks. However, is risk creating sufficient cause to impose liability on an entire industry where the products of a single manufacturer in that industry can be identified as having caused the injury in question? Risk creating is the justification for the enterprise theory, but one of the major purposes of the enterprise theory is to provide the injured party with compensation for injuries caused by a manufacturer's

35. *Id.* at 925. *But cf.* Prosser, *The Fall of the Citadel,* 50 MINN. L. REV. 791, 800, n.65 (1966).

36. Comment, *An Extension of Joint Liability in Products Liability Law,* 53 B.U.L. REV. 191, 199 (1973); RESTATEMENT § 402A.

37. ___ Fla. ___, 154 So. 2d 169 (1963).

38. 317 F.2d 19 (5th Cir. 1963).

product.[39] In the aforementioned tobacco cases, while the courts came to opposite conclusions as to the defendants' liability, the courts still did not suggest that the entire industry be subject to liability since the plaintiff could identify the particular manufacturer whose product caused him harm. Where the defendant was liable and solvent the plaintiff was compensated and this would seem to be sufficient to fulfill the purposes of the enterprise theory without going beyond the scope of the single manufacturer. Thus, at best, the enterprise theory would justify the imposition of industry-wide joint liability in the limited situation where the manufacturer who produced an injury-causing product was insolvent.

The theory represented by the Restatement (Second) of Torts[40] is a type of enterprise liability with a slightly different emphasis. The stated reasons for imposing strict liability are:

> 1. The seller has assumed a special responsibility to persons injured by the product by virtue of selling the product;
> 2. The public expects that the seller will stand behind the products it is forced to buy from him;
> 3. The burden of the cost of injuries should be on those who manufacture the product as part of the cost of production, against which insurance may be purchased;
> 4. Someone should protect the public and the manufacturer is in the logical position to do so.[41]

These reasons focus upon the situation created by a complex manufacturing-distribution system which involves the difficulty in tracing the defect in the product back to the manufacturer,[42] the relative helplessness of the consumer,[43] and the superior loss distribution mechanism available to the manufacturer through the ability to raise prices and procure insurance.[44] Although there is a different emphasis, this enterprise theory bears the same relationship to industry-wide joint liability as does the enterprise theory originally discussed.

The second major category of theories proposed as a basis for strict liability is the deterrence theory. Philosophically the deterrence theory is in opposition to the insurer theory. While the goal

39. James, *supra* note 34.

40. RESTATEMENT § 402A.

41. *Id.* comment *c.*

42. Noel, *Strict Products Liability Compared With No-Fault Automobile Accident Reparations*, 38 TENN. L. REV. 297, 304-05 (1971).

43. *Id.* at 311-12.

44. *Id.* at 312-13.

of the insurer theory is to provide compensation to the injured party, the purpose of the deterrence theory is to force the manufacturer to make safer products. Thus the ability of the defendants to reduce the risk is a condition precedent to imposing liability. In *Chance* the court felt that the adherence of the manufacturer to an industry-wide custom might be sufficient to indicate that the defendants jointly controlled the risk and *ipso facto* would have been in a position to reduce that risk.[45]

The deterrence theory may be subdivided into two parts—the general deterrence theory and the specific deterrence theory. The general deterrence theory states that what is produced depends on market choices made by individual consumers whose choices will in turn depend on the price of the product. The closer the price of the product is to its true cost, the more people tend to get what they want. However, when the costs are understated there tends to be overproduction and customers buy more of the product than they want or need and thus certain unnecessary costs are undertaken by society. Accidents caused by products are as much a cost factor of the product to society as the actual cost of manufacture. Society wants the safest products at costs that are not prohibitive. It wants the manufacturer to use means of production which may be more expensive in material costs but which reduce the cost in accidents. The manufacturer is in the best position to balance the material versus the accident costs.[46]

The specific deterrence theory does not focus upon the economic aspects of deterrence, but rather upon the strategic position of the manufacturer in the manufacturing and distribution process. The manufacturer is in the best position to correct any defects in these processes.[47] Although it may be impossible to prove that the manufacturer was negligent in a case where a product has caused injury, there is usually some suspicion that some carelessness was present, either in manufacturing, design, testing or warning.[48] This concept applies particularly to those cases in which the manufacturer uses the defense that he adhered to an industry-wide custom. An entire industry may lag in the adoption of new and available technology that might eliminate some of the risk in its product

45. 345 F. Supp. at 372.

46. Calabresi, *Fault, Accidents, and the Wonderful World of Blum and Kalven*, 75 YALE L.J. 216, 223 (1965). Although this article is on no fault insurance, this theory seems to be equally applicable to industry-wide joint liability and its "no fault" concepts.

47. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, ____, 161 A.2d 69, 81 (1960).

48. Noel, *supra* note 42, at 311.

because it adheres to an industry-wide custom.[49] The imposition of liability acts as an incentive to control the danger.[50]

Is the deterrence theory a sufficient basis for the imposition of industry-wide joint liability? It would appear that this theory can be useful as a basis for imposing industry-wide joint liability only where there is no differentiation between the methods used by members of the industry. Since the deterrence theory is founded on the assumption that the imposition of liability will deter manufacturers from making defective products, it would be the antithesis of the purpose of the deterrence theory to impose liability on an entire industry where some members were manufacturing safer products than others. The deterrence theory requires differentiation between those who manufacture defective products and those who do not.

Even if it were to be postulated that an entire industry was manufacturing a defective product, could industry-wide joint liability be imposed on the basis of the deterrence theory? There would still be a difficulty since the deterrence theory requires as a basis for the imposition of liability that the defendant be able to reduce the risk. While it is logical that a single manufacturer can control the risk of his own production, it does not necessarily follow that an entire industry can do so. First, there would be a question as to whether an industry as an entity could have this kind of control without violating the Sherman Anti-Trust Act.[51] Second, what proof would be required in order to show this kind of control? While traditionally an express or implied agreement among the manufacturers would be required, *Chance* states that adherence to an industry-wide custom may be sufficient.[52] It can be argued that anything less than an agreement among the manufacturers cannot show the kind of control which the deterrence theory requires. If this agreement can be shown, then traditional liability could be imposed without using a new theory of industry-wide joint liability. Finally, the very basis of the deterrence theory may be questioned. The deterrence theory assumes that the imposition of liability will act as an incentive to make manufacturers more careful. This may be a false assumption. When the deterrence theory was proposed as a basis for strict liability, Prosser noted that if the manufacturer

49. Comment, *An Extension of Joint Liability in Products Liability Law*, 53 B.U.L. REV. 191, 200 (1973).

50. Prosser, *Assault on the Citadel*, 69 YALE L.J. 1099 (1960).

51. 15 U.S.C. § 1 (1970).

52. 345 F. Supp. at 374.

was unmoved by negligence liability, res ipsa loquitur, and damage to his reputation, then the additional imposition of strict liability would not deter him.[53] Assuming this, then will the addition of industry-wide joint liability deter a recalcitrant manufacturer?

III. INDUSTRY-WIDE JOINT LIABILITY—IS IT FEASIBLE AND IF SO IS IT DESIRABLE?

There are a number of factors which tend to make industry-wide joint liability procedurally unfeasible in a great number of situations. One problem is that in order to commence suit in federal court under 28 U.S.C. section 1332, there must be a proper diversity of citizenship among the plaintiffs and the defendants.[54] The greater the number of defendants, the more likely it is that one or more manufacturers will be domiciled in the state where the plaintiff is domiciled. Since a state cannot be on both sides of a controversy, the plaintiff would not have proper diversity and thus would not be able to continue suit in federal court. If, in addition, there is more than one plaintiff the likelihood of improper diversity is increased. If the plaintiff would be required to exclude a manufacturer in order to maintain diversity would industry-wide joint liability still apply since not all of the members of the industry would be defendants?

Another problem the plaintiff faces in federal court is what choice of law principles are to be applied in a case where the defendants, plaintiffs and sites of injury are to be found in different states. It should be noted that the court in *Chance* recognized that this was a difficult and complex question but avoided a determination of it by assuming a national body of state tort law.[55] The problem, therefore, remains unsolved in that case.

Finally, the defendants in an industry-wide joint liability case will be subjected to considerable inconvenience and expense in defending a suit. Manufacturers from different parts of the country will have to defend the suits in states other than their state of domicile. The plaintiff may expect motions to sever, as occurred in *Chance* and *Hall*.[56] A new remedy such as industry-wide joint liability will not be entertained by the court when it imposes such

53. Prosser, *supra* note 50, at 1119 & n.142.

54. Strawbridge v. Curtis, 7 U.S. (3 Cranch) 575 (1806).

55. 345 F. Supp. at 360. The question of whether the jury or the court should decide the conflict of laws problem was decided in Chance v. E.I. DuPont de Nemours & Co., 57 F.R.D. 165 (E.D. N.Y. 1972).

56. 345 F. Supp. at 359, 384. *See*28 U.S.C. § 1404(a); F.R.C.P. 20, 21.

heavy burdens upon the defendants unless very compelling reasons to do so are shown to the court.[57] The court apparently would have the authority to refuse industry-wide joint liability under its general procedural power to "secure the just, speedy, and inexpensive determination of every action."[58]

The question of the desirability of the theory of industry-wide joint liability is dependent in a large measure on what ramifications can be predicted should this new theory of liability be allowed. For example, if in the future, only one manufacturer is sued, should he be able to implead the rest of the industry for contribution or indemnification? This may result in almost every manufacturer becoming involved in a continuous series of litigations. Besides the expense and time involved, would the manufacturers be able to procure insurance to protect themselves when there is almost a certainty of litigation? Another question concerns exactly what will be required of an entire industry before the industry as an entity can escape this type of liability. Will each industry be required to set up joint funds for common research and defense? Once again this raises the possibility of antitrust violations.[59]

On the positive side, the existence of industry-wide joint liability may help to prevent the small manufacturer from going bankrupt as a result of paying a large products liability judgment. The large manufacturers would be able to sustain these losses without severe damage and the injured party would be assured of a solvent defendant. However desirable this may be, as has been previously mentioned, it is questionable whether the courts rather than the legislature should be the instrument to bring about this change. Legislatures have, in fact, acted to set up precisely this type of general compensation fund in areas where the public has shown great concern over the compensating of a damaged plaintiff. An example of this would be Wisconsin Statutes Chapter 646 (1971) where the state requires all insurance companies to contribute to a central fund which is used to pay the claims of persons who hold policies in bankrupt insurance firms. There is a similarity between the insurance situation and industry-wide joint liability. In both cases an industry may be required to pay the plaintiffs even though they are not themselves at fault. The state has made a policy decision incorporating the losses to the public as part of the cost of doing business.

57. 345 F. Supp. at 383.
58. F.R.C.P. 1.
59. Sherman Anti-Trust Act, 15 U.S.C. § 1 (1970).

CONCLUSION

At present there does not exist a broad type of joint industry-wide liability in tort law. The cases of *Hall* and *Chance* represent at best a limited form of this type of liability which may only be used in cases where the plaintiff is unable to identify which of a number of negligent defendants caused him injury. There does not appear to be any justification for extending liability from one manufacturer to an entire industry under the theories which underlie the imposition of strict liability upon the single manufacturer. Neither the insurer theory nor the deterrence theory provides a justification for the expansion of a manufacturer's liability to an entire industry. The theory of industry-wide joint liability has a number of inherent practical problems such as diversity of citizenship and conflicts of laws. While it may be desirable to have industry-wide joint liability in certain situations it would appear that the legislature, and not the courts, is the proper branch of government to bring about this type of liability.

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