Alternative Liability Theory: Solving the Mystery of Who Dunnit in Foodborne Illness Cases

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I. INTRODUCTION

On September 8, 2006, the Centers for Disease Control (CDC) was alerted to a small group of *Escherichia Coli* O157:H7 infections in the state of Wisconsin.[1] *E. coli* O157:H7 is a strain of bacteria that can cause severe illness, with symptoms typically including bloody diarrhea and occasionally kidney failure.[2] The bacteria is commonly carried in the intestines of farm animals, and is often contracted by humans through consumption of raw or undercooked foods.[3] The CDC reports that it is among the leading causes of foodborne illness, resulting in approximately 73,000 infections and 63 deaths per year.[4]

On September 13, 2006, epidemiologists in Wisconsin and Oregon confirmed fresh spinach as the source of the *E. coli* infection.[5] Over the next month infections were reported from all across the country, and a total of 26 states were affected, including Pennsylvania.[6] Results of a Food and Drug Administration (FDA) investigation traced the outbreak to Natural Selection Foods, LLC, a California based company.[7] Several of the company's spinach fields were found to have been contaminated by cattle feces containing *E. coli* O157:H7.[8] Ultimately 204 individuals across the nation were infected, including 104 hospitalizations, 31 reported cases of kidney failure, and three deaths.[9]

In 2003, Pennsylvania experienced much more devastating effects of foodborne illness than occurred in the most recent spinach outbreak. State health officials were informed of a potential outbreak of Hepatitis A in late

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1. Centers for Disease Control, *Ongoing Multistate Outbreak of Escherichia coli serotype O157:H7 Infections Associated with Consumption of Fresh Spinach*, 55 MORBIDITY & MORTALITY WKLY. REP. 1, 2 (2006), http://www.cdc.gov/mmwr/preview/mmwrhtml/mm55d926a1.htm.

2. CENTERS FOR DISEASE CONTROL, DIVISION OF BACTERIAL AND MYCOTIC DISEASES, *ESCHERICHIA COLI H157:H7* (2006), http://www.cdc.gov/ncidod/dbmd/diseaseinfo/escherichiacoli_g.htm.

3. *Id.*

4. *Id.*

5. *Ongoing Multistate Outbreak of Escherichia coli serotype O157:H7 Infections Associated with Consumption of Fresh Spinach*, *supra* note 1.

6. U.S. FOOD AND DRUG ADMIN., CENTER FOR FOOD SAFETY AND APPLIED NUTRITION, NATIONWIDE *E. COLI* O157:H7 OUTBREAK: QUESTIONS & ANSWERS (2006), http://www.cfsan.fda.gov/~dms/spinacqa.html.

7. *Id.*

8. *Id.*

9. *Id.*

October originating in Beaver County.[10] Hepatitis A is an illness-causing virus that primarily affects the liver of infected persons, and is most commonly transmitted through contaminated food products.[11] The virus affects 30,000-50,000 individuals per year—100 of these resulting in death.[12]

In conjunction with the CDC and FDA, Pennsylvania officials conducted an investigation and determined that the source of the outbreak was green onions served at a local Chi-Chi's restaurant.[13] As a result of the outbreak, 650 people were infected with Hepatitis A, including restaurant employees and residents of other states.[14] Three individuals also died.[15] Additionally, 9,000 vaccinations were administered to individuals who had either encountered infected persons or eaten at Chi-Chi's during the time period of exposure.[16]

These incidents demonstrate the problem that foodborne illness poses in the United States. For a developed nation which has the benefit of modern technology, the statistics in this area are staggering. The CDC estimates that 76 million cases of foodborne illness occur each year.[17] Of these, approximately 325,000 result in hospitalization and another 5,000 in death.[18] The U.S. Department of Agriculture reports that deaths resulting from contaminated food outnumber those caused by the combined total of all 15,000 products regulated by the U.S. Consumer Protection Safety Commission.[19] This includes such products as: asbestos, lead paint, prescription drug ingredients, and products containing toxic substances.[20] The Department of Agriculture further estimates that the annual economic cost of dealing with only the five leading illness-causing pathogens totals $6.9

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10. MARLER CLARK, HEPATITIS LITIGATION (2005), http://www.hepatitislitigation.com/chichis.htm.
11. MARLER CLARK, ABOUT HEPATITIS A (2005), http://www.about-hepatitis.com/.
12. *Id.*
13. CLARK, *supra* note 10.
14. *Id.*
15. *Id.*
16. *Id.*
17. Paul S. Mead et al., *Food-Related Illness and Death in the United States*, 5 EMERGING INFECTIOUS DISEASES 607 (1999), http://www.cdc.gov/ncidod/eid/vol5no5/mead.htm.
18. *Id.*
19. U.S. DEP'T OF AGRIC., AGRICULTURAL ECONOMIC REPORT NO. 799, PRODUCT LIABILITY AND MICROBIAL FOODBORNE ILLNESS 1 (2001), *available at* http://www.ers.usda.gov.publications/aer799/aer799.pdf.
20. U.S. CONSUMER PRODUCT SAFETY COMMISSION, REGULATED PRODUCTS, http://www.cpsc.gov/businfo/reg.html.

billion.[21] These costs include funds spent on medical care, productivity losses, and premature deaths.[22]

II. CURRENT LEGAL APPROACHES

Currently cases of foodborne illness are decided based on products liability law. In order to succeed on such a claim, the plaintiff must prove that the food product in question contained a defect, and that the plaintiff suffered harm as a result.[23] The *Restatement (Third) of Torts: Products Liability* defines a harm-causing ingredient of a food product defective, "if a reasonable consumer would not expect the food product to contain that ingredient."[24]

There are three major and interconnected problems with the current method of handling foodborne illness claims: low success rates associated with foodborne illness claims, minimal deterrent effect, and costs imposed on society. Regarding low success rates, in 2001 the Department of Agriculture conducted a study concerning the outcome of foodborne illness lawsuits. This study focused 175 jury trials in 32 states for which data was available regarding the verdict and damages awarded.[25] Based on this study the Department of Agriculture concluded that plaintiffs prevailed in only 31.4% of foodborne illness cases.[26]

The report indicated that several factors prevented plaintiffs from prevailing in their claims, of all which contributed to the plaintiffs' ability to establish a causal link between a defective food product and their illness.[27] Among these were identification of the contaminated food product, the illness-causing pathogen, and the appropriate defendant.[28] Where the contaminated product is concerned, most illness-causing pathogens have an incubation period that may last several days before symptoms appear.[29] Often plaintiffs will have consumed numerous products before they realize they are sick and

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21. Stephen R. Crutchfield & Tanya Roberts, *Food Safety Efforts Accelerate in the 1990's*, 23 FOOD REV. 44, 48 (2000), *available at* http://www.ers.usda.gov/Publications/FoodReview/septdec00/FRsept00h.pdf.

22. *Id.*

23. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 7 (1998).

24. *Id.*

25. U.S. DEP'T OF AGRIC., *supra* note 19, at 15 (Table 2—Compensation for Consumer Plaintiffs in Foodborne Illness Lawsuits, note 1).

26. *Id.* at 15.

27. *Id.* at 16.

28. *Id.* at 16-17.

29. *Id.* at 7.

will be unable to identify exactly which product was the cause of their illness.[30] "With such a long period between consuming a food and the onset of symptoms, poor recall by the patient as well as recall error . . . make investigation problematic."[31] This is particularly true of individual cases which are not associated with outbreaks. Inability to identify a particular product further hinders a plaintiff's ability to identify a specific pathogen responsible for causing their illness. Because the product in question was never identified, or has since been disposed of, there is no way to conduct testing to determine what pathogen was present in the food. Despite the ability of medical personnel to identify harm causing pathogens through blood tests, the Department of Agriculture report indicated that plaintiffs were unable to identify a specific pathogen in over half of the cases studied.[32]

The downstream chain of commerce also poses a huge obstacle for plaintiffs to overcome.[33] Almost all food products include ingredients from several sources, or pass through several processors before reaching consumers.[34] This allows multiple opportunities for contamination thus making it difficult for plaintiffs to identify exactly which of these parties is responsible for their illness. Take for example, a situation in which a plaintiff purchases and consumes a chicken Caesar salad at a restaurant. This particular item includes at least three products that may be contaminated: lettuce, chicken, and Caesar dressing. Each of these products may have been contaminated by any number of parties along the chain of commerce. The lettuce fields may have been infected in the same manner as the spinach case described earlier. The chicken may have been infected with *Salmonella* while on the farm, may have been cross-contaminated with other chicken products at the packaging plant, or may have been improperly cooked at the restaurant. The salad dressing may have been made from infected eggs or spoiled anchovies.

The restaurant may also use different brands of product depending on availability. With so many potential sources of contamination, it would be difficult for a plaintiff to pinpoint exactly which of these food handlers is responsible for their illness. Plaintiffs may choose to bring suit against several

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30. *Id.*

31. Neal D. Fortin, *The Hang-Up With HACCP: The Resistance to Translating Science into Food Safety Law*, 58 FOOD & DRUG L.J. 565, 575 (2003).

32. U.S. DEP'T OF AGRIC., *supra* note 19, at 16 (Table 4—Foodborne Pathogens, Toxins, or Illnesses Involved in Foodborne Illness Lawsuits Decided by Jury Verdicts, 1988-97).

33. *Id.* at 4.

34. *Id.*

of these parties, however data suggests that suing multiple defendants may lead juries to doubt the sufficiency of plaintiffs' evidence.[35] Ultimately, "[b]ecause there are steep obstacles to surmount in proving causation, the vast majority of foodborne illnesses do not result in lawsuits,"[36] leaving most victims of foodborne illness no legal recourse.

The second major problem with the current legal scheme is the failure to induce food producing firms to improve their policies and practices.[37] Based on the limited success rates of plaintiffs in foodborne illness cases, the deterrent effect of litigation is minimal.[38] Commentators agree that the direct impact of foodborne illness litigation is small, with greater reform occurring in cases stemming from outbreak situations.[39] "Economic theory indicates that firms will invest fewer resources in safety measures against risks for which they are less likely to pay for consequential injuries."[40] The decision to revamp procedures in the food industry can be likened to an automobile company's decision to recall a defective model of vehicle. Firms will weigh the likelihood and expense of litigation against the cost of implementing new procedures and choose the less expensive of the two. Even in cases where plaintiffs are successful, many firms have sufficient product liability insurance, and they may not feel the full financial impact of a lawsuit.[41]

Additionally, not all failures to adopt new policies and procedures are intentional, cost-based decisions by food producers. As one commentator points out, "[p]ost-hoc remedies through tort liability . . . provide incomplete feedback to the food industry to uniformly effect a change in food safety."[42] This relates back to the factors discussed regarding the first problem associated with foodborne illness litigation. If a plaintiff is unsuccessful in bringing a products liability claim, that does not necessarily mean that a particular food product was not defective. As previously mentioned, most foodborne illness claims are unsuccessful due to the plaintiff's inability to establish a causal link between a food producing firm, the product consumer, and the resulting illness. Revisiting the earlier example of the chicken Caesar salad, it is likely that one ingredient of the salad was contaminated. However, due to chain of commerce effects and inability to identify the illness causing

35. *Id.* at 17.
36. Fortin, *supra* note 31, at 575.
37. U.S. DEP'T OF AGRIC., *supra* note 19, at 27.
38. *Id.*
39. *Id.* at 26.
40. Fortin, *supra* note 31, at 575.
41. U.S. DEP'T OF AGRIC., *supra* note 19, at 26.
42. Fortin, *supra* note 31, at 575.

product, the culpable firm is never identified. Firms may naturally conclude that either no contamination existed and the plaintiff's illness was caused by something else, or that contamination was caused by one of the other potential defendants. Either conclusion lends itself to the same end result, namely that improved procedures are unnecessary.

Finally, there are also significant economic impacts associated with the failure to hold firms accountable for contaminated products.[43] Because food producing firms are not held financially liable for the effects of contamination "society bears nearly all of the cost of foodborne illness."[44] Generally, costs are borne by the ill consumers or family members, or "shifted to other parties such as employers, private health insurers, and governments (and in turn, taxpayers), or handled by some combination of these parties."[45] This phenomenon contributes to the problem of minimal incentive for firms to improve their food handling procedures.

These problems indicate that the current approach to dealing with foodborne illness lawsuits leaves much to be desired. Since food cases will likely remain within the realm of products liability law, addressing these problems must occur through improvements in the current system.

III. ALTERNATIVE LIABILITY AS A POTENTIAL REMEDY TO THE PROBLEMS ASSOCIATED WITH LITIGATION OF FOODBORNE ILLNESS CASES

In May of 2006, the United States District Court for the Eastern District of Pennsylvania took a novel approach when considering a case involving an outbreak of *Listeria*.[46] In *Drayton v. Pilgrim's Pride Corp.*[47] several plaintiffs sued two defendant poultry companies for producing contaminated turkey products, the consumption of which ultimately resulted in instances of illness, death, and premature birth. An investigation was conducted which traced the outbreak to ready-to-eat turkey products produced by either Pilgrim's Pride

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43. *Id.*

44. *Id.*

45. U.S. DEP'T OF AGRIC., *supra* note 19, at 26.

46. *Listeria monocytogenes* is a bacteria that causes severe illness, with symptoms of fever, muscle aches, and gastrointestinal problems. An extreme case of Listeriosis may cause infection to the nervous system resulting in headaches, confusion, loss of balance, or convulsion. Listeria poses a significant risk to pregnant women, who may experience premature birth, stillbirth, miscarriage, or may pass the infection to their child. The CDC estimates that approximately 2,500 persons become infected with Listeria each year, and of those approximately 500 die. CENTERS FOR DISEASE CONTROL, DIVISION OF BACTERIAL AND MYCOTIC DISEASES, *LISTERIOSIS* (2006), http://www.cdc.gov/ncidod/dbmd/diseaseinfo/listeriosis_g.htm.

47. Drayton v. Pilgrim's Pride Corp., 472 F. Supp. 2d 638 (W.D. Pa. 2006).

Corporation, Jack Lambersky Poultry Company, or both.[48] Investigation further revealed two significant factors. First, that all of the plaintiffs involved in the case had consumed turkey products processed by both defendants.[49] Second, that contamination caused by the illness causing pathogen was found at both defendants' processing plants, causing both plants to recall over 32.1 million pounds of product.[50] Because plaintiffs were unable to pinpoint exactly which product caused their illness they were subsequently unable to prove which of the two defendants was liable. In granting plaintiffs' motion for summary judgment the court chose to apply the alternative liability standard set forth in *Restatement (Second) of Torts* § 433B(3).[51]

Alternative liability theory was developed to alleviate problems of identification and causation. The *Restatement* provides, in pertinent part:

> Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm.[52]

In comment (f), the Restatement further explains the process of applying alternative liability under § 433B(3).[53] The plaintiff has the burden showing that (1) of two or more actors, each has acted tortiously, and (2) that the plaintiff has sustained harm resulting from the conduct of some one of them.[54] The burden of proof then shifts to the defendants, giving each the opportunity to prove that they are not responsible for the harm.[55] Those defendants who are unable to exculpate themselves will remain jointly or severally liable.[56] Cases involving the application of § 433B(3) generally involve situations where all potential tortfeasors are joined as defendants, and each defendants' tortious conduct is simultaneous and identical.[57]

The leading case on the doctrine of alternative liability is *Summers v. Tice*,[58] which was decided by the California Supreme Court in 1948. The

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48. *Id.* at 639.
49. *Id.* at 641.
50. *Id.* at 640.
51. *Id.* at 646-48.
52. RESTATEMENT (SECOND) OF TORTS § 433B(3) (1965).
53. *Id.* at § 433B(3) cmt. f.
54. *Id.*
55. *Id.*
56. Ferrigno v. Eli Lilly & Co., 420 A.2d 1305, 1315 (N.J. Super. Ct. Law Div. 1980).
57. RESTATEMENT (SECOND) OF TORTS, *supra* note 52, at § 433B(3) cmt. h.
58. Summers v. Tice, 199 P.2d 1 (Cal. 1948).

plaintiff in *Summers* was shot while on a hunting trip with the defendants, and as a result suffered injury to his right eye and face.[59] At trial however, the plaintiff was unable to prove which of the defendants was responsible for each of his injuries because they had both fired at him simultaneously.[60] In support of alternative liability theory the court focused on the unfairness that would result if the defendants were exonerated in a situation where both had acted negligently, leaving the plaintiff remediless.[61] The court also asserted that in general, defendants are in a better position to show which of them caused the injury.[62]

Since *Summers*, "[c]ourts have been willing to dispense with traditional causation tests to allow victims of asbestos and DES-related[63] injuries to recover without having to prove who manufactured the product that caused the injury."[64] These types of cases pose causation problems similar to those faced by plaintiffs in foodborne illness cases.[65]

In *Ferrigno v. Eli Lilly & Co.*,[66] several women brought actions against defendant drug companies to recover for injuries they sustained because their mothers consumed prescription DES while pregnant.[67] Due to the large number of pharmaceutical companies who manufactured and distributed DES, plaintiffs were unable to identify which specific defendant was responsible for their injuries.[68] The specific question considered by the New Jersey Superior Court was whether "the cause of action of a plaintiff who cannot identify the drug company whose product harmed her [can] withstand a motion for summary judgment?"[69] Holding for the plaintiffs, the court based its analysis on alternative liability grounds consistent with New Jersey precedent. The court even went so far as to reject the California Supreme Court's earlier interpretation of § 433B(3) in favor of a more lenient standard favoring

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59. *Id.* at 1-2.
60. *Id.* at 2.
61. *Id.* at 3.
62. *Id.* at 4.
63. DES is the common abbreviation for diethylstilbestrol, "a synthetic female sex hormone which was prescribed for pregnant women between 1947 and 1971 to prevent pregnancy problems such as miscarriages and spontaneous abortions." *See* Cynthia Alice Feigin, Note, *Statutes of Limitations: The Special Problem of DES Suits*, 7 AM. J.L. & MED. 91 (1981).
64. *See* Myra Mulcahy, *Proving Causation in Toxic Torts*, 11 HOFSTRA L. REV. 1299, 1335 (1983).
65. *Id.* at 1301.
66. Ferrigno v. Eli Lilly & Co., 420 A.2d 1305 (N.J. Super. Ct. Law Div. 1980).
67. *Id.* at 1308.
68. *Id.* at 1310.
69. *Id.* at 1312.

plaintiffs.[70] Similarly, in *Eileen v. Erlich*,[71] the Philadelphia County Court of Common Pleas allowed plaintiffs in a DES case to maintain an action on § 433B(3) grounds.

Additionally, § 433B(3) has been expanded and modified to accommodate plaintiffs when called for. In the landmark case of *Sindell v. Abbott Laboratories*,[72] the California Supreme Court extended the application of § 433B(3) to create market-share liability. Similar to the previous two cases, *Sindell* also involved claims brought by victims of DES-related injuries.[73] Unable to identify which of several drug companies was responsible for their injuries, plaintiffs argued that they should be allowed to proceed on § 433B(3) grounds.[74] Unfortunately the court declined to apply the doctrine, because plaintiffs failed to join all potential tortfeasors as defendants.[75] The court feared that failure to join all potential tortfeasors would allow the responsible party to go free while an innocent named defendant was found liable.[76]

However, finding that the purpose and policy reason behind § 433B(3) were sound, the court formulated market-share liability to accommodate the plaintiffs.[77] Similar to alternative liability, market-share liability involves a shifting in the burden of proof to defendants once plaintiffs have made the required preliminary showings.[78] Defendants must then prove that they are not culpable, or else remain liable for the plaintiff's injuries. The only major difference between alternative and market-share liability is the way in which damages are apportioned.[79] Rather than being held jointly or severally liable, defendants under market-share theory are instead held "liable for the proportion of the judgment represented by its share of th[e] market."[80] Application of market-share liability therefore requires submission of evidence establishing the relevant market, and each defendant's proportionate

70. *Id.* at 1315.
71. Erlich v. Abbott Labs., 5 Phila. Co. Rptr. 249 (Pa. Com. Pl. 1981).
72. Sindell v. Abbott Labs., 607 P.2d 924 (Cal. 1980).
73. *Id.* at 925.
74. *Id.*
75. *Id.* at 931.
76. *Id.*
77. *Id.* at 937.
78. *Id.*
79. *Id.*
80. *Id.*

share in that market.[81] Post-*Sindell*, market-share liability has also been applied in asbestos-related litigation.[82]

IV. ARGUMENTS SUPPORTING APPLICATION OF ALTERNATIVE LIABILITY IN FOODBORNE ILLNESS CASES

A. Public Policy Arguments

As mentioned previously, the main problem facing plaintiffs when bringing a foodborne illness case is the inability to identify the contaminated food product, the illness causing pathogen, or the appropriate defendant.[83] Identifying these elements is imperative because "without proof of the precise cause of the injury, the plaintiff may not be able to meet the two traditional tests of causation: the "but for" and "substantial factor" tests."[84]

There are two dominant theories which purport to explain the purpose and goals of tort law: law and economic theory and corrective justice theory.[85] Of these, law and economic theory is concerned with the efficient allocation of resources.[86] The corrective justice theory, as proffered by Aristotle, suggests that the purpose of tort is "to restore to a person what has been wrongly taken from him."[87] In shifting the burden of proof to the defendant, alternative liability doctrine advances both goals of tort law.

The authors of the *Second Restatement* recognized the corrective justice theory of tort law when drafting the provision governing alternative liability. Comment f to § 433B(3) provides that:

> [T]he reason for the exception is the injustice of permitting proved wrongdoers, who among them have inflicted an injury upon the entirely innocent plaintiff, to escape liability merely because the nature of their conduct and the resulting harm has made it difficult or impossible to prove which of them has caused the harm.[88]

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81. *Id.* at 938.

82. *See* Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353 (E.D. Tex. 1981).

83. U.S. DEP'T OF AGRIC., *supra* note 19, at 16-17.

84. Mulcahy, *supra* note 64, at 1302.

85. Jeffery Johnson, *Explanation, Human Nature and Tort Theory*, 4 GEO. J.L. & PUB. POL'Y 333 (2006).

86. *Id.* at 337 (*quoting* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 14 (1987)).

87. *Id.* at 336 (*quoting* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 14 (1987)).

88. RESTATEMENT (SECOND) OF TORTS, *supra* note 52, at § 433B(3) cmt. f.

As evidenced by this comment, alternative liability is concerned with providing a remedy to those plaintiffs who, due to causation problems, would otherwise have none. Additionally, in *Sindell*, the California Supreme Court acknowledged the role of alternative liability in making an injured plaintiff whole, holding 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."[89]

The *Sindell* court also supports the application of alternative liability based on the law and economics theory of tort law by recognizing that "[f]rom a broader policy standpoint, defendants are better able to bear the cost of injury resulting from the manufacture of a defective product."[90] The court advances an additional public policy argument by suggesting that "[t]he 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."[91]

B. Deterrent Effect

Another goal of tort law that stems from the law and economic theory is deterrence.[92] As mentioned previously, economic theory suggests that "firms will invest less in reducing risks if they are unlikely to pay for the consequences of those risks."[93] Based on the low recovery rates associated with litigating a foodborne illness case, incentives for firms to produce safer foods are limited.[94]

For example, those who suffer illness as a result of Hepatitis A or *Listeria* are rarely able to identify the pathogen that caused their sickness.[95] "Thus, the food industry has a perverse economic incentive to continue risky food handling practices relative to Hepatitis A and *Listeria* . . . . Firms with risky food handling save the expense of prevention; and could find themselves at a

89. *Sindell*, 607 P.2d 924, 936 (Cal. 1980).
90. *Id.* at 936.
91. *Id.*
92. Gary Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801 (1997).
93. Fortin, *supra* note 31, at 577.
94. U.S. DEP'T OF AGRIC., *supra* note 19, at 27.
95. Fortin, *supra* note 31, at 577.

competitive advantage over those firms that implement preventative practices."[96]

By allowing alternative liability doctrine in foodborne illness cases, plaintiffs will be more likely to prove causation and in turn, more likely to recover damages in products liability claims. Increased success rates in litigation will result in higher financial obligations by negligent firms. Application of alternative liability will therefore increase deterrence because "firms will invest more resources in safety controls on risks for which they *are* likely to pay for consequential injuries."[97]

C. Traditional Reservations About Alternative Liability Not Present in Foodborne Illness Cases

As mentioned previously, the low success rates associated with the application of alternative liability doctrine has not been for lack of trying. Many courts have been willing to consider alternative liability, but have refused to apply the doctrine because plaintiffs have been unable to prove all of the necessary elements under § 433B(3).[98] In particular, "there is some question as to whether application of the alternative liability theory requires that (1) the defendants are in a better position to determine which of them caused the plaintiff's injury and (2) all of the potential defendants are joined."[99]

The Appellate Division of the Supreme Court of New York addressed the first of these issues in *New York Telephone Co. v. AAER Sprayed Insulations, Inc.*[100] The case involved a claim for damages arising from the presence of asbestos in several of the plaintiff's buildings.[101] Due to the vast number of asbestos products involved, the plaintiff was unable to identify particular defendants and therefore based several claims on alternative liability theory.[102] The trial court denied defendant's motion to dismiss, holding that the plaintiff's allegations were sufficient to establish the elements required to apply alternative liability doctrine.[103] On appeal the Appellate Division

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96. *Id.*

97. *Id.* at 576.

98. RESTATEMENT (SECOND) OF TORTS, *supra* note 52, at § 433B(3) cmt. h.

99. Christina Bohannan, Note, *Product Liability: A Public Policy Approach to Contaminated Factor VII Blood Products*, 48 FLA. L. REV. 263, 290 (1996).

100. New York Tel. Co. v. AAER Sprayed Insulation, Inc., 250 A.D.2d 49 (N.Y. App. Div. 1998).

101. *Id.* at 50.

102. *Id.*

103. *Id.* at 51.

reversed, rejecting the application of alternative liability on several grounds.[104] Among these was the plaintiff's failure to prove that defendants were in better a position to determine which of them manufactured the products in question.[105] The court held, "[h]ere, plaintiff is in no worse position to identify the correct manufacturer; indeed, it was arguably in a better position . . . ."[106]

As the California Supreme Court recognized in *Sindell*, alternative liability doctrine does not require the defendant to be in a better position to identify the correct manufacturer.[107] Furthermore, where foodborne illness is concerned, defendants will almost always be in a better position to determine which of them is responsible for causing a plaintiff's illness. In general, plaintiffs are unsuspecting consumers who come in contact with contaminated food products they have purchased themselves or consumed at a dining establishment.[108] As mentioned previously, plaintiffs are often unable to identify the contaminated product that caused their illness.[109] They are therefore also unable to identify the food producing firm responsible for their illness.[110] Even where plaintiffs can narrow the scope of possible contaminated foods they consumed, they may still be unable to identify the responsible manufacturer due to chain of commerce.[111]

Alternatively, defendant food processors have the resources available to prove that they are not the culpable party. Defendant firms have access to the areas used to prepare food. They can therefore conduct testing to determine whether or not contamination consistent with plaintiff's illness exists in their facilities. If a defendant firm can show that no contamination exists then it will be relieved of liability. This approach was utilized in *Drayton*, where both firms had the opportunity to exculpate themselves through inspections conducted in conjunction with the U.S. Department of Agriculture.[112] Because testing revealed contamination in both defendants' manufacturing plants, the court held that the burden was on the defendants to prove that the other's

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104. *Id.* at 52.

105. *Id.* at 56-57.

106. *Id.*

107. Sindell v. Abbott Labs, 607 P.2d 924, 929-30 (Cal. 1980).

108. U.S. DEP'T OF AGRIC., *supra* note 19, at 16 (Table 6—Food Items Involved in Foodborne Illness Lawsuits Decided by Jury Verdicts, 1988-1997).

109. *Id.* at 16.

110. *Id.* at 16-17.

111. *Id.* at 4.

112. Drayton v. Pilgrim's Pride Corp., 472 F. Supp. 2d 638 (W.D. Pa. 2006).

product caused the illness.[113] Defendants also have the added advantage of knowing who they regularly conduct business with. They are therefore in a better position to address contamination through chain of commerce.

In *Vigiolto v. Johns-Manville Corporation*,[114] the United States District Court for the District of Pennsylvania upheld the requirement that all potential defendants be joined in order to apply alternative liability doctrine. In *Vigiolto*, plaintiff brought an action to recover damages for the death of her husband which allegedly resulted from exposure to asbestos.[115] Following discovery plaintiff was unable to identify the manufacturer of the asbestos to which her husband was exposed.[116] Plaintiff attempted to go forward on § 433B(3) grounds, claiming that she had joined "all, or substantially all" of the potentially liable manufacturers.[117]

The court denied application of alternative liability holding that "in order to invoke § 433B(3) the plaintiff must name as defendants all who could have caused the complained of injury."[118] The court reasoned that "if plaintiff cannot prove who caused his injuries and does not name as defendants *all* who *possibly could have*, plaintiff has not proved that *at least one* of the named defendants caused the harm."[119] Therefore, failure to name all potential tortfeasors allows for the possibility that the responsible party will remain unnamed while a suit goes forward against innocent defendants.

Although joinder of all defendants may present a problem in other settings, it is unlikely to become an issue in foodborne illness cases. Based on the business nature of the food industry, firms are likely to keep accurate accountings of their transactions. Sellers know who they are selling to, and purchasers know who they are buying from. Plaintiffs will therefore be able to identify all potential tortfeasors involved in the chain of commerce through discovery proceedings. Additionally, failure to join the culpable party will not necessarily result in a verdict against an innocent defendant. If such a case goes forward, those defendants who were joined will still have the opportunity to exculpate themselves by proving that they did not cause any contamination.

Finally, in *Eileen v. Erlich*,[120] the defendant made similar arguments to those asserted in *New York Telephone* and *Vigiolto*. The defendant argued

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113. *Id.* at 641.
114. Vigiolto v. Johns-Manville Corp., 643 F. Supp. 1454 (W.D. Pa. 1986).
115. *Id.* at 1455.
116. *Id.* at 1455-56.
117. *Id.* at 1456.
118. *Id.* at 1457.
119. *Id.*
120. Erlich v. Abbott Labs., 5 Phila. Co. Rptr. 249 (Pa. Com. Pl. 1981).

that § 433B(3) required that all potential defendants be joined, and proof that defendants are in a better position than the plaintiff to identify which of them caused the injury.[121] The court rejected the defendant's argument, holding that "[n]either the comments to Section 433B(3) not the cases involving alternative liability support the Defendant's absolute position that these elements must always be present."[122]

D. Doctrine of Alternative Liability is Flexible in Nature and Adaptable to New Situations

There remains some question as to whether application of alternative liability requires that the defendants' tortious conduct be both simultaneous and identical. Section 433B(3) comment (h) notes that those cases in which § 433B(3) was applied involved situations where the defendants' tortious conduct was "simultaneous in time, or substantially so, and all of them have involved conduct of substantially the same character, creating substantially the same risk of harm, on the part of each actor."[123] Similar to the two issues discussed above, nothing in the language of § 433B(3) mandates that either simultaneous or identical conduct be present in order to apply alternative liability. Comment (h) only describes how the doctrine had thus far been applied by the courts. More important, comment (h) goes on to state:

> It is possible that cases may arise in which some modification of the rule stated may be necessary because of complications arising from the fact that one of the actors involved is not or cannot be joined as a defendant, or because of the effect of lapse of time, or because of substantial differences in the character of the conduct of the actors or the risks which they have created. . . . The rule stated in Subsection (3) is not intended to preclude possible modification if such situations call for it.[124]

This language makes clear that the drafters of the Restatement recognized that § 433B(3) was designed to be adaptable to new situations as they arose in order to protect the plaintiff consistent with the purpose of the provision. In *Sindell*, the California Supreme Court further recognized the need for adaptability of the doctrine, holding:

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121. *Id.* at 258.
122. *Id.*
123. RESTATEMENT (SECOND) OF TORTS, *supra* note 52, at § 433B(3) cmt. h.
124. *Id.*

> 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.[125]

There have already been major modifications of the alternative liability doctrine, the most significant of these being market-share liability. As discussed previously, market-share liability was first applied in *Sindell* as a way to accommodate DES victims who were unable to identify the manufacturer of the drug that injured them.[126] After rejecting both traditional alternative liability doctrine and industry-wide liability theory, the court crafted a market-share approach to compensation, holding "we acknowledge that some adaptation of the rules of causation and liability may be appropriate in these recurring circumstances. The *Restatement* comments that modification of the *Summers* rule may be necessary in a situation like that before us."[127] Under a market-share approach, once plaintiff has joined a "substantial share" of defendant manufacturers, the burden will then shift to the defendants to exculpate themselves.[128] Damages will then be apportioned according to each defendants' share in the market.[129]

Not only is modification of alternative liability permissible, but foodborne illness cases are particularly well-suited to its application. In *Ferrigno v. Eli Lilly and Co.*,[130] the New Jersey Superior Court identified several factors indicating that the burden of proof should shift to defendants in the litigation of DES related claims. The first of these factors was that "defendants are members of a group, all of whom are potentially at fault."[131] Similar to the DES setting, this is also true of foodborne illness cases. Because food-handling errors occur during one of the processing stages,[132] all food handling firms may have contributed to the injury. In fact, "[m]any illnesses are attributable to sequential errors by [both] firms and consumers."[133]

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125. Sindell v. Abbott Labs., 607 P.2d 924, 936 (Cal. 1980).
126. *Id.* at 924.
127. *Id.* at 936.
128. *Id.* at 937.
129. *Id.*
130. Ferrigno v. Eli Lilly & Co., 420 A.2d 1305, 1313-14 (N.J. Super. Ct. Law Div. 1980).
131. *Id.* at 1313.
132. U.S. DEP'T OF AGRIC., *supra* note 19, at 4.
133. *Id.*

The second factor identified by the *Ferrigno* court was that "defendants owed a special responsibility to plaintiff."[134] Similarly, food producing firms also have a responsibility to ensure that their products are safe and free from illness causing pathogens. Otherwise, products liability suits against food manufacturers would not be permissible. The third factor identified is that "plaintiffs are totally innocent."[135] This element is met where contamination occurs as a result of food-handling errors by firms. There is some question as to whether this element is met where consumers own actions contribute to or cause foodborne illness; however it remains likely that errors by firms may still be involved.[136] Additionally, comparative negligence rules may be applied to take into account the plaintiff's own conduct.

"Fourth, the mishap that has befallen the plaintiffs was not reasonably foreseeable by them and was unrelated to the purpose for which the [food product] was ingested . . . ."[137] Clearly, no one expects to fall seriously ill when they consume food products, particularly when they are dining out. Finally, the fifth factor recognized by the *Ferrigno* court is that "while defendants . . . may not have knowledge superior to that of plaintiffs as to identification, the frustration which plaintiffs have continuously experience has been caused to some degree by the defendants themselves, albeit inadvertently."[138] As discussed earlier, chain of commerce often makes it difficult for a plaintiff to identify a single culpable defendant from among many. Though defendants may not be purposely frustrating plaintiffs' efforts, the frequency of business transactions satisfies this element.

V. CONCLUSION

Foodborne illness is a growing problem that affects millions of Americans each year. In 2006 alone, the contamination of fresh spinach affected over half of the states and made national headlines. Those who become ill as a result of consuming contaminated food often incur significant medical bills and experience varying degrees of pain and suffering. The financial effects of foodborne illness are felt in many sectors of the economy.[139] Even the general population may be affected by increased

134. *Ferrigno*, 420 A.2d at 1313.
135. *Id.*
136. U.S. DEP'T OF AGRIC., *supra* note 19, at 4.
137. *Ferrigno*, 420 A.2d at 1313-14.
138. *Id*. at 1314.
139. U.S. DEP'T OF AGRIC., *supra* note 19, at 26.

insurance premiums or taxes designed to recoup losses expended on providing treatment to victims.

In rare cases where victims do attempt to recover from food manufacturers under products liability law, they regularly face the insurmountable obstacle of proving causation. Failure to identify the culpable defendant, contaminated food product, or illness-causing pathogen can leave a plaintiff dead in the water. Even in cases where the illness-causing food product and pathogen are identified, a plaintiff is often left with the dilemma of choosing one culpable defendant from among many potential tortfeasors. As a result of these difficulties, less than a third of plaintiffs who bring an action to recover from food producers are successful.[140]

Application of alternative liability doctrine relaxes the causation requirement by shifting the burden of proof to the defendant,[141] thereby allowing the plaintiff's case to go forward where it otherwise would not. The plaintiff is still required to make preliminary showings that he has sustained harm, and that the defendants have acted tortiously, however the problem of proving which tortfeasor is liable now falls to the defendant.[142]

The arguments in favor of applying alternative liability to foodborne illness cases are numerous. One of the basic tenets of tort law is to provide compensation to an injured victim, and alternative liability helps to achieve this. Another hallmark of tort law is deterrence. Application of alternative liability increases the likelihood that food producers will be held liable for their actions, and in turn will implement improved safety policies and procedures.[143]

Applying alternative liability does not impose an unfair hardship on the defendants. The law of products liability recognizes that one who places products into the stream of commerce has a duty to the consumer to ensure that those products are safe.[144] As between an innocent victim and a negligent defendant, it is fitting that the wrongdoer bear the burden of proving that he is not responsible for the plaintiff's harm.[145] Defendants are often in a better position than plaintiffs to prove causation, and through their behavior have contributed to the plaintiff's inability to identify a single culpable party.[146]

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140. *Id.* at 15.
141. RESTATEMENT (SECOND) OF TORTS, *supra* note 52, at § 433B(3).
142. *Id.*
143. *See* Fortin, *supra* note 31, at 576.
144. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, *supra* note 23, at § 1.
145. *See* Summers v. Tice, 199 P.2d 1, 4 (Cal. 1948).
146. *See* Ferrigno v. Eli Lilly & Co., 420 A.2d 1305,1314 (N.J. Super. Ct. Law Div. 1980).

Finally, under alternative liability theory each defendant is given the opportunity to exculpate himself. By proving that he could not have caused the plaintiff's injury, the defendant is thereby relieved of liability.[147]

Application of alternative liability doctrine will help alleviate many of the problems associated with the current system of handling foodborne illness claims. Relaxed causation requirements will increase compensation to injured plaintiffs, and increased jury awards will bolster deterrence efforts and lessen the burden on society as a whole.[148] Alternative liability doctrine provides a feasible solution to an area of the law that is wrought with difficulties and obstacles.

147. *See* Sindell v. Abbott Labs., 607 P.2d 924, 937 (Cal. 1980).
148. *See* Fortin, *supra* note 31, at 576.