

great. The evidence showed that the Gonzales parents did not supervise the children, their son engaged in horse play that lead to the drowning, and the son failed to call for help. Second, the jury vote as to liability demonstrated that the instruction affected their conclusion. On the issue of breach of duty, the jury substantially agreed that the Gonzaleses breached their duty. By similar majorities, the jury decided that there was no causation. Thus, the instruction affected the result of the suit. Third, the court noted the Gonzales' attorney had directed the jury to the causation issue and Damechie's inability to swim in closing arguments. This argument highlighted the potential effect of the jury instruction on the result. Finally, the court noted that none of the other instruction given to the jury mitigated the effect of the erroneous instruction.

Hawaii Adopts Market Share Theory

Smith v. Cutter Biological, Inc., 823 P.2d 717 (Haw. 1991).

In a detailed discussion of the various theories for proving who caused an injury in a negligence case, the Hawaii Supreme Court approved the use of market share liability. Smith, the plaintiff in the case, sued several manufacturers of Antihemophilic Factor Concentrate (AFT) after he became infected with acquired immune deficiency syndrome (AIDS). Smith was a hemophilic and received AIDS-infected AFT to enable his blood to coagulate properly in 1983 or 1984. The manufacturers made the AFT from donated blood. Because Smith could not identify the manufacturer of the tainted AFT, the trial court granted judgment for the manufacturers. Smith appealed, and the federal court of appeals certified the issue of causation to the Hawaii Supreme Court for a determination of whether state recognized market share liability. The supreme court concluded that Smith could use a theory of market share liability to pursue his claim for negligence.

Although a state statute prevented the application of strict product liability to Smith's claims, it did not preclude actions for one's own negligence or willful misconduct. The manufacturers argued that the exception required proof of individual causation. The court rejected this argument on two grounds. First, the argument would have left no room for cases in which there were several tortfeasors. Second, the legislative history of the law did not support the manufacturer's argument.

Having found the statute did not preclude the claim, the court next addressed whether state tort law recognized a negligence claim without an identification of a specific tortfeasor. The manufacturers argued that cases based on tainted blood were different from other cases recognizing some form of market share liability. First, the number of companies was small. Second, the product was not inherently defective as was diethylstilbestrol (DES), the source of many market share cases. The court rejected both arguments, but only after finding other theories of joint liability should not be available.

First, the court rejected the theory of alternative liability. In an alternative liability case, all the defendants act negligently simultaneously and the harm results from one of them. All responsible parties must be joined, and then it is up to each defendant to show that it did not cause a harm. If it fails to do so, it is jointly and severally liable for all the damage. The alternative liability theory was not applicable since the manufacturers did not act simultaneously and Smith may not joined all the potential defendants.

Second, the court rejected liability based on concerted action. The concerted action theory is premised on the planned action of several parties and is similar to aiding and abetting in criminal law. It also results in joint and several liability. The court stated that it did not want to apply this theory since one of the defendants could be held liable for all the damages.

Third, the court rejected the application of enterprise liability. To establish enterprise liability, the plaintiff must show that the defendants jointly controlled the level of risk of the product by adopting standards, delegating safety planning to a joint group, and cooperating in the design and manufacture of the product. The theory was not applicable since the industry was regulated externally by the government. Moreover, the court again raised the problem of joint and several liability.

After rejecting the alternatives, the court concluded that market share liability would be available. The court stated several policy reasons for its conclusion. First, negligent parties should be responsible for their actions. Second, the plaintiff could not trace the AFT to its source. Third, the manufacturers could absorb the costs. Fourth, they were in a better position to prevent the injury. Fifth, they could pass on the costs. Finally, the court felt that the result was fair.

Moreover, the court noted that the traditional rules of negligence did not apply in this case. First, the manufacturers widely distributed AFT. Second, the drug could cause massive injury. Third, the drug was fungible. These attributes called for new rules; otherwise, Smith did not have any remedy for the wrong.

The court then concluded with a discussion of the application of market share liability. First, the court adopted a national market. A definition of the market is necessary since the percentage of liability for each defendant is based on its share of sales. (The percentage of sales approximates the probability that a manufacturer caused injury.) While some courts defined the market narrowly to a city or region, others have used a national market to correspond to the manufacturer's overall culpability. The court adopted a national market based on the second argument.

Second, the court refused to apply joint liability to all manufacturers. Each manufacturer was liable only to the extent of its percentage of the market, but the court established a presumption that the manufacturers had equivalent shares. It placed the burden of establishing a smaller share on the manufacturer.

Finally, the manufacturer could avoid liability if it could show that it had no product in the market at the time of the injury.

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