

EVIDENCE, UNFAIRNESS, AND MARKET-SHARE LIABILITY:
A COMMENT ON GEISTFELD

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In response to Mark A. Geistfeld, *The Doctrinal Unity of Alternative Liability and Market-Share Liability*, 155 U. PA. L. REV. 447 (2006).

In his provocative and insightful article, *The Doctrinal Unity of Alternative Liability and Market-Share Liability*,¹ Professor Mark Geistfeld offers several interesting theses about market-share liability, causation, and evidence. Three of the more moderate theses are:

- (1) Cases like *Sindell v. Abbott Laboratories*² need not be understood as supplanting causation-based liability with risk-creation liability.
- (2) Evidentiary considerations in fact played a leading role in *Sindell*, and, if properly interpreted, could explain both *Sindell* and certain forms of market-share liability in a manner that fully retains traditional causation notion rules, and does not depend on any novel risk-creation principles.
- (3) The rationale underlying *Sindell* and certain forms of market-share liability shares a great deal with the principles underlying *Summers v. Tice*,³ which is regarded as quite uncontroversial.

I agree with all three of these theses. Indeed, I, along with Professor Arthur Ripstein, defended these claims about *Sindell*, *Summers*, market-share liability, and alternative liability several years ago, in an article from which Professor Geistfeld quotes approvingly.⁴ Professor Geistfeld goes well beyond the claims in that article, however, advancing a proposal that is far reaching in its implications for law revision, and profound in its theoretical import.

Geistfeld's project, in broad form, is to bring together a variety of different bases for joint and several liability that operate by means of

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¹ 155 U. PA. L. REV. 447 (2006).

² 607 P.2d 924, 938 (Cal. 1980) (constructing and imposing market-share liability on manufacturers of the drug DES).

³ 199 P.2d 1, 5 (Cal. 1948) (holding that defendants, who had each negligently fired shotguns in the plaintiff's direction and injured him, were each presumed to have caused injury, and therefore held to be jointly liable).

⁴ See Geistfeld, *supra* note 1, at 461 & n.38, 467 n.54, 484 n.102 (citing Arthur Ripstein & Benjamin C. Zipursky, *Corrective Justice in an Age of Mass Torts*, in PHILOSOPHY AND THE LAW OF TORTS 214 (Gerald J. Postema ed., 2001)).

what he calls “evidential grouping,”⁵ without indulging a joint agency theory or a risk-contribution theory. These include, in the first instance: the alternative liability of *Summers v. Tice* and the market-share liability of cases such as *Sindell v. Abbott Laboratories*, as well as the special concurrent causation rules both in the classic two-fire case of *Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Railway*,⁶ and contemporary cases involving multiple contributing toxic tortfeasors;⁷ and only somewhat less directly, in group *res ipsa* cases such as *Ybarra v. Spangard*.⁸ The principle most clearly expressed in the alternative liability case of *Summers v. Tice*, according to Geistfeld, is the principle of evidential grouping—in basic form it explains the rationale underlying all of these cases:

Once the plaintiff has proven by a preponderance of the evidence that (1) each defendant may have tortiously caused the harm, (2) one or more of the defendants did actually cause the harm, and (3) each defendant would be subject to liability for having actually caused or contributed to the harm, then no defendant can avoid liability by relying upon the tortious conduct of the other defendants, when that form of exculpatory causal proof would enable all of the defendants to avoid liability.

To invoke this principle, the plaintiff must satisfy the ordinary burden of proving that each defendant is responsible for a tortious risk that may have actually caused or contributed to the harm. In order for this proof to establish the plaintiff’s *prima facie* case, each defendant must also be subject to liability in the event that her tortious conduct actually caused or contributed to the harm. With respect to the element of causation, the plaintiff must satisfy the ordinary burden of proof against the group of defendants.⁹

Geistfeld seems not to appreciate just how broad this principle is. Consider the following hypothetical:

⁵ *Id.* at 453.

⁶ 179 N.W. 45, 48-49 (Minn. 1920) (holding that a defendant who starts a fire that combines with other fires is liable for any destruction of property caused by the combined fire if plaintiff can show that defendant’s fire was a material element in the property’s destruction).

⁷ *See, e.g., Eagle-Picher Indus. v. Balbos*, 604 A.2d 445, 459 (Md. 1992) (“[T]he failure to warn on the part of any one supplier of an asbestos product to which a decedent was exposed can operate as a concurrent proximate cause with the failures to warn on the part of other such suppliers.”).

⁸ 154 P.2d 687 (Cal. 1945) (applying an extended form of *res ipsa loquitur* to justify imposition of joint and several liability upon all members of a group of medical personnel present at and involved in plaintiff-patient’s surgery when plaintiff-patient in their care sustains an injury while unconscious).

⁹ Geistfeld, *supra* note 1, at 469 (footnote omitted).

Between 11:00 and 11:15 p.m. on Sunday, July 22, Robert Lupin was working at a construction site on the highway, quite near the entrance to a bridge crossing. Prominently posted signs indicated a reduced speed limit (25 mph, from 55 mph) and additional prominent signs warned that the fines for speeding in this work zone were doubled. However, virtually all of the cars on the road were traveling between 50-60 mph. Lupin needed to cross a lane in the construction zone and waited until another worker signaled for the traffic to stop, but a dark sedan nevertheless almost hit him (apparently not noticing him). Lupin jumped out of the way, landing on an oil slick. He fell on his face, breaking several teeth and his arm. The traffic did not stop for a few minutes.

Using video cameras around the toll-booth area, Lupin's personal injury lawyer can identify forty dark sedans that were speeding significantly during the window of time that Lupin was injured, consistent with where he was injured. He can therefore prove that each of these drivers "is responsible for a tortious risk that may have actually caused or contributed to the harm."

This is also a scenario in which "(1) each defendant may have tortiously caused the harm, (2) one or more of the defendants did actually cause the harm, and (3) each defendant would be subject to liability for having actually caused or contributed to the harm."¹⁰ None of these defendants would be able to exculpate himself by saying, "it was not me, it was one of the other dark sedans." According to Geistfeld's principle, there should be rebuttable joint and several liability for each of the forty drivers. Each should be liable to Lupin unless the driver can prove that she was not involved.

Three points should be made about this hypothetical. First, this is not a fanciful or unrealistic case. In cases involving automobile accidents, defective products, or even in excessive force cases against police officers, it is the personal injury lawyer's mundane reality that tortfeasor identification can be very difficult. And this is true even where it is possible to produce evidence of widespread tortious risk creation or tortious conduct, and even where it is possible for the plaintiff to circumscribe the potential causative agent to some degree.

Second, under current law there would not be not liability in this case or cases like it; therefore, Geistfeld's account from a descriptive or interpretive point of view is not plausible. In both this hypothetical and the throngs of cases like it, there is no liability in our system.¹¹

¹⁰ *Id.*

¹¹ "A fundamental principle of traditional products liability law is that the plaintiff must prove that the defendants supplied the product which caused the injury." *Gaulding v. Celotex Corp.*, 772 S.W.2d 66, 68 (Tex. 1989); *see also* *Fillmore v. Page*, 358 F.3d 496, 506-08 (7th Cir. 2004) (rejecting civil rights claim in which State actor who committed wrongful conduct against plaintiff was not identified); *Rodrigues v. Gen. Elec. Corp.*, 204 F. Supp. 2d 975, 976 (E.D. Tex. 2001) (holding that failure to establish the fan causing plaintiff's injury was made by defendant—and failure to rebut evidence to

Summers, *Sindell*, and *Ybarra* are exceptional: “zebras,” as medical residents call them, not “horses.”¹² Overwhelmingly, cases factually similar to the Lupin hypothetical are not brought. A plaintiff’s lawyer who has no more information than that which I gave in the Lupin hypothetical will abandon the case or choose to sue the Bridge and Tunnel Authority (perhaps preferring to attempt to prove duty or fault) and avoid an unbridgeable gap in causation. And so it is that civil rights lawyers sue police departments and cities for what is really an individual’s act, products liability lawyers caught in such a bind sue industries rather than just manufacturers, and personal injury lawyers sue landowners, not perpetrators.

Third—and here is the core of this Response—the arguments made from a normative point of view for the principle of evidential grouping are unsound. Geistfeld offers three: (a) a defendant may not shelter herself from liability by claiming a right to a procedural rule that favors her, if that rule is unfair; (b) defendants who reject evidence-based liability are taking mutually inconsistent positions; and (c) defendants who reject evidence-based liability are relying upon naked statistics in an unacceptable way.¹³

(a) *Unfair Procedural Rules*: It is of course true at some level that a defendant may not avail herself of the benefits of an unfair procedural rule. But what counts as unfair, and why? Geistfeld himself argues persuasively against the most popular, hornbook-style move in this scenario, which is to argue that it is only fair that the wrongful actor should bear the risk of evidentiary uncertainty. That principle is un-

the contrary—undercut plaintiff’s claim); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 115-17 (Mo. 2007) (rejecting lead paint action in which plaintiffs could not identify particular defendants causing particular damage). The lure of *Summers*’s reasoning—and the version of the reasoning that Geistfeld depicts—is undoubtedly powerful. Indeed, the courts that routinely reject cases on the ground of inadequate tortfeasor identification frequently make a point of distinguishing *Summers*. See, e.g., *Hessel v. O’Hearn*, 977 F.2d 299, 304-05 (7th Cir. 1992) (Posner, J.) (rejecting plaintiffs’ civil rights claim against fourteen officers where there was no way to identify which officer stole plaintiffs’ items from the search scene, and reasoning that there was no evidence that each of them acted wrongfully, only that one of them did). More generally, Dobbs’s treatise sets out a broad array of limitations on *Summers*. See DAN B. DOBBS, *THE LAW OF TORTS* § 175, at 428-29 (2000). To see *Summers* as the rule—doctrinally—and everything else as exceptions is to miss the forest for the trees. Geistfeld’s article does not make this error; its point is that the law should move to realize the principle of evidential grouping, not that it has done so.

¹² “When you hear hoofbeats, think horses, not zebras,” goes the medical residents’ maxim (meaning, roughly, that it is prudent to attribute symptoms to ordinary causes rather than exceptional ones).

¹³ See Geistfeld, *supra* note 1, at 461, 466-68.

tenably broad, Geistfeld argues, because it would swamp all cases in which the proof of fault was strong but the proof of causation was weak.¹⁴

Geistfeld needs to move beyond the word “unfair” and provide either: (i) a normative account of what makes certain attributes of a procedural and evidentiary system fair and others unfair; or (ii) a basis for cabining the fairness intuition that is so powerfully felt in *Summers* and *Sindell* so that it can drive intuitively satisfactory outcomes in some settings, without entirely overtaking the principle that a defendant who caused no harm cannot be held liable for harm; or (iii) an account of why particular features of *Summers*, *Sindell*, and other cases where courts have shifted the burden of proof on tortfeasor identification, render it particularly justifiable from a normative point of view to alter the evidentiary and procedural framework, and why these features are present in a wider array of settings than has generally been recognized. Because Geistfeld provides none of the above, the “unfairness” argument is more rhetoric than substance.¹⁵

(b) *Inconsistency*: Geistfeld does not rest on “unfairness” alone; instead, he offers an interesting argument that defendants in “evidential grouping” cases cannot consistently maintain their view. Here is his argument:

The plaintiff’s evidence shows that she was injured by the group of defendant tortfeasors, and that each defendant is a member of that group. Unless a defendant rebuts this evidence, she cannot reasonably deny that the plaintiff was harmed by one of the defendants, including herself. *The defendant, therefore, cannot avoid liability merely by arguing that the other defendants, more likely than not, caused the harm, if that same argument would enable every other defendant to avoid liability. In these circumstances, the defendant’s argument effectively denies that the plaintiff was harmed by any of the defendants, including herself, even though the defendant’s failure to rebut the plaintiff’s proof disables the defendant from denying liability*

¹⁴ See *id.* at 456-58.

¹⁵ To be sure, fact patterns like *Summers* and *Sindell* move judges and scholars to ask the larger question of whether the causation requirement of negligence law (and, to a great extent, tort law more generally) is itself fair. This is a question I will not address here, both because it is part of Geistfeld’s own project to justify evidential grouping and a broader form of market-share liability without jettisoning the causation requirement and because I have addressed the defensibility and fairness of requiring causation in several other articles. See Ripstein & Zipursky, *supra* note 4, at 221-22, 229-31; see also John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 93 CORNELL L. REV. (forthcoming 2007) (replying to criticism that tort law’s causation requirement unfairly permits luck to carry too much weight in determining liability); John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1636-60 (2002) (arguing that tort does not permit recovery absent injury, and providing justification for this requirement).

on this basis. To avoid this inconsistency, the defendant can only rely upon proof rebutting the plaintiff's evidence.¹⁶

The argument is unsound because it depends upon an ambiguity in the modifier "effectively" in the clause, "the defendant's argument effectively denies that the plaintiff was harmed by any of the defendants." "Effectively" can be used to suggest a practical equivalence or to suggest an equivalence in semantic content, and Geistfeld's short argument that there is an inconsistency in the defendant's position relies upon an equivocation between these two. If the clause is intended to convey that the defendant's argument "has the same practical consequences" as denying that the plaintiff was harmed by any of the defendants, then it is true to say that the argument "effectively denies" it. But there is no actual inconsistency in making a statement that leads to the same practical consequences as an outright denial would. There is no contradiction. Of course, if "effectively" in the phrase "effectively denies" is intended to connote "in essence denies" or "really denies" or "in meaning denies" or "not in so many words denies," then we are in a different situation. If it is accurate that the defendant is really denying that the plaintiff was harmed by one of the defendants, then (given the earlier part of Geistfeld's paragraph), the defendant is in fact contradicting himself. But the problem with Geistfeld's argument is that the defendant *is not really denying* that the plaintiff was harmed by one of the defendants. The defendant is denying that plaintiff can identify which particular defendant harmed her, and is asserting that proof of injurer identity is a *sine qua non* of recovery. There is no inconsistency here.

(c) *Naked Statistics*: Geistfeld's most intriguing argument is the following:

[W]hen every defendant attempts to avoid liability by relying upon the negligence of other defendants, they are resorting to "naked statistics" rather than particularistic proof, but "[j]udges generally have refused to accept naked statistics or *ex ante* causal probabilities as evidence of what actually happened on a particular occasion." The fact that the remaining group of defendants probably caused the injury does not explain what happened in this particular case, as it implies that no defendant caused the harm, and yet the plaintiff has provided uncontested proof to the contrary.¹⁷

¹⁶ Geistfeld, *supra* note 1, at 466 (emphasis added).

¹⁷ *Id.* at 467-68 (footnote omitted) (quoting Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001, 1050-51 (1988)).

Four concerns emerge here, however. First, Geistfeld's language in this paragraph is mostly descriptive and doctrinal, rather than normative or explanatory. However, on a descriptive front, as I have argued, it is quite clear that judges do not generally accept such "evidential grouping" claims.

Second, naked statistics are deemed unacceptable if they are used to support one of the allegations that establish liability. However, discussion of naked statistics being used to establish the plaintiff's case is misplaced. Rather, the real inquiry is determining what evidence would undermine the plaintiff's case. Perhaps more importantly, we are discussing whether the burden on a plaintiff to put forward a prima facie case should include a requirement of identifying a defendant tortfeasor. If anything, the ban on naked statistics to uphold what looks like a flimsy case on causation would seem to cut in favor of defendants, not against them. Geistfeld seems to have forgotten that he is offering the naked statistics argument as an effort to justify the principle of evidential grouping, not as an argument over what would rebut a plaintiff's claim, were the principle so accepted.

Third, even if we assume that a plaintiff has a prima facie case, it is not obvious why a court's disinclination to permit naked statistics on the liability-establishing front is a reason to reject naked statistics on the defendants' side. The literature on naked statistics is notoriously elusive and undertheorized, and it is simply not clear why limits on exculpation should parallel limits on inculpation.

Finally, and perhaps most simply, is this really use of naked statistics? The case has not seriously been made that a defendant's efforts to exculpate herself by pointing out that many others were similarly situated (and that plaintiff has not linked her tortiousness to the plaintiff's injury) actually constitutes an effort to establish a fact by use of naked statistics. It seems, rather, to be merely a means of emphasizing the underspecified nature of the evidence that the plaintiff has offered against her.

The basic shortcoming of Geistfeld's "principle of evidential grouping" is that he mistakes the question his analysis yields for the answer to that question. The categories that he so suggestively brings together are indeed illustrations of a basic phenomenon: Due to the frequent difficulties plaintiffs encounter in identifying any individual tortious agent who can be shown to have been a but-for cause of the injury, a plaintiff's lawyer will often take aim at a category of parties who may have tortiously caused the injury. Moreover, in all of these cases, good lawyers, judges, and ordinary jurors are drawn to the idea of finessing the problem by shifting the burden of proof to the whole

group of defendants. Yet Geistfeld (like Ripstein, myself, and the overwhelming majority of courts) takes as basic, both interpretively and normatively, that a defendant cannot be held liable for a plaintiff's injury merely for creating the risk of injury; rather, the defendant must have actually caused the injury. Moreover, Geistfeld does not believe that courts can simply assert an Orwellian redefinition of words: he believes that the set of procedural and evidentiary standards that courts set up to adjudicate causation must, while displaying a sense of pragmatism and fairness, nevertheless take seriously the idea that a defendant should not be liable to a plaintiff unless that defendant caused plaintiff's injury.¹⁸ Finally, in all of these cases, although it would circumvent the tortfeasor identification problem if one could plausibly depict factual or legal connections among the parties that would justify treating the group as a single, unified agent, for purposes of attributing responsibility, the facts are just not there to justify unified agency conceptualization.

The question that Geistfeld's synthesis invites is, therefore: *Given that the conditions he sets forth for evidential grouping are themselves insufficient to justify the creation of rebuttable joint and several liability*, what makes evidential grouping permissible in these different doctrinal areas? Some of the answers are quite clear at this stage. Concurrent causation cases challenge—correctly, in my view (and that of most tort scholars)—the underlying assumption that but-for causation is truly a conceptual requirement of actual causation with regard to a narrow band of cases.¹⁹ Group *res ipsa* cases, such as *Ybarra*, remain controversial with regard to their acceptability, but there is less mystery about what drives them normatively: a combination of policy motivations intended to break a code of silence among interconnected defendants who close out access to evidence, and lingering doubts about whether some type of group agency theory really should apply. This cluster of judicial motivations was palpably at work in a more contemporary case from Indiana. *Shepard ex rel. Shepard v. Porter* involved a group of four friends walking behind the plaintiff, one of whom lit the plaintiff's pants on fire, causing serious injury.²⁰ The plaintiff was unable to identify which one did it, and none of the boys volunteered this information pre-trial; the court understandably preferred to force the

¹⁸ See *id.* at 469.

¹⁹ See Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735, 1792-93 (1985) (arguing that courts' deviation from but-for causation standard in concurrent causation case is best interpreted as hinging on analysis of causation).

²⁰ 679 N.E.2d 1383, 1386 (Ind. Ct. App. 1997).

information out at trial, rather than rewarding their evident pact of silence.²¹

Geistfeld is right to pick market-share liability as a subdomain in which theorizing remains highly contested, and right to pick alternative liability as its closest cousin. Moreover, the conditions for the applicability of market-share liability is a particularly timely topic, given the Wisconsin Supreme Court's recent decision to permit market-share liability (which it calls "risk-contribution theory") in the domain of liability for lead-based paint.²² And, of course, the plaintiffs in *Sindell* advocated the adoption of alternative liability from *Summers*.²³ Nevertheless, the California Supreme Court in *Sindell* expressly rejected alternative liability,²⁴ and Geistfeld never takes seriously its reasons for doing so.

By contrast, Arthur Ripstein and I offered an explanation that accommodates both the similarities and the differences of the two.²⁵ *Summers* works because the defendant's right is a right to be free of liability where he did not cause the plaintiff's injury, and respecting that right is inconsistent with imposing liability where it is more likely than not that the defendant caused no injury to the plaintiff. But that leaves open the question, we argued, of what should happen in equipoise, where the probability is exactly fifty percent. It is therefore permissible for the court to adopt rebuttable joint and several liability in the two-person *Summers* (the real *Summers*), but not in any more extended version.²⁶

²¹ See *id.* at 1389.

²² *Thomas ex rel. Gramling v. Mallet*, 701 N.W.2d 523, 562 (Wis. 2005) (holding that "risk-contribution theory" developed in DES context is applicable to products liability actions based on lead-based paint, notwithstanding substantial differences in product and context). As the *Thomas* court recognized, the overwhelming majority of courts facing this question have rejected market-share liability for lead-based paint. See, e.g., *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 115-17 (Mo. 2007).

²³ *Sindell v. Abbott Labs.*, 607 P.2d 924, 928 (Cal. 1980).

²⁴ See *id.* at 930-31.

²⁵ See Ripstein & Zipursky, *supra* note 4, at 243-44.

²⁶ One might object to our analysis—that we too readily adopt the artifice of the court in *Summers*, that the chance is exactly fifty percent as to each defendant that he committed a "completed" tort of negligence (rather than an inchoate, or unrealized tort). After all, one might add, the evidence behind each of the other elements of the claim—especially breach—establishes the element by a preponderance, but perhaps somewhat less than one hundred percent. However, if one were really to abstract away from the artificial framing of the problem in *Summers*, one might then reject the stipulation of the parties that both pellets came from the same shotgun. If one pellet came from each, then there would have been a completed tort by each defendant, and the dispute would only be about damages—a much easier case. Indeed, in a case remarkably similar to *Summers*, but plainly involving only one hit (a single bullet) coming

Sindell does not work under the *Summers* rationale, nor does market-share liability more generally, we argued.²⁷ However, so long as the court has before it as parties a domain of plaintiffs and defendants large enough to ensure that each defendant has in fact tortiously injured a share of the plaintiffs before the court, then liability is really being imposed for injuries tortiously caused, not simply for tortious risk creation. The form of market-share liability created and applied by the California Supreme Court in *Sindell* fits that analysis perfectly, but is peculiar to the constraints of that analysis.

Geistfeld's article pushes harder than anyone has done thus far on questions about evidential grouping. For the reasons articulated, I do not think he has made out the case that all or even most factual scenarios falling under the conditions he enumerates qualify for such grouping, and I do not think that case can be made. However, there may indeed be more types of evidential grouping that are permissible, there may be interconnections among those so far developed, and there may be as yet unearthed reasons underlying the superficially discrete categories. Those questions remain to be answered, but Geistfeld is to be credited with forcing us to ask them.

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from one of two hunters, a Minnesota appellate court rejected liability. See *Leuer v. Johnson*, 450 N.W.2d 363, 364-67 (Minn. Ct. App. 1990).

²⁷ See Ripstein & Zipursky, *supra* note 4, at 243-44.