

PROBABILITY AND THE LAW

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READING GUIDE – WEEK #6

Sindell (1980). Focus on the majority opinion (pp. 7–19) and read the dissenting opinion (pp. 19-24) if you've got time.

(pp. 7-10) Background. No need to understand the details, but make sure you understand what the disputed fact is.

(section I: pp. 10–13) Discussion of plaintiff's first claim based on *Summers* theory. Why does the court think that the *Summers* theory cannot be applied to the instant case?

(section II: pp. 13–15) Discussion of "concert of action" theory. You may skip this part.

(section III: pp. 15–17) Discussion of industry-wide or enterprise liability theory. Why does the court think that this theory cannot be applied to the instant case (pp. 16,17)?

(section IV: pp. 17-19) Presentation of the *Sindell* market share liability theory. Read carefully!

(dissenting opinion: pp. 19–24) Read at least the top two paragraphs on page 22.

Schmalbeck (1986). This is a response to Thomson's article. It might be of interest to know that while Thomson is a moral philosopher, Schmalbeck is a legal scholar.

(section I pp. 221-223) Recapitulation of Thomson's hypotheticals.

(section II: pp. 223–225) Here the author urges us to think beyond the epistemological question of whether the defendant caused the harm. How would a court ruling in favour of the defendant affect the plaintiff? And how would it affect future civil proceedings?

(section III: pp. 225–231) Three reasons to be careful with statistical evidence (confidence; parts/whole; mistrust).

(section IV: pp. 231-235) Criticism of Thomson's causality account. The key criticism is on page 232. Interesting IRS example on pp. 234,235.

(section V: pp. 235-end) You may skip this part.

Response paper. In the response paper for this week, you are required to do *two* things.

First. The *Sindell* Court distinguishes four (actually five) theories of civil liability: (1) standard causality requirement; (2) *Summers* theory; (3) enterprise liability, (4) extension of *Summers*. The Court examines these theories and concludes that (4) should be applied in *Sindell*. Give a brief description of each theory (a few lines for each theory should suffice). Further, summarize the Court's reasoning for using theory (4). Why didn't the Court apply *Summers* theory?

Second. You have two options here. *Option 1.* What is Schmalbeck's criticism of Thomson's definition of individualized evidence (p. 232, in particular)? *Option 2.* Why does Schmalbeck think that Thomson's hypotheticals are only "superficially troubling"? What does the IRS example (p. 234) tell us?