

HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA

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Joint and Several Liability

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House Judiciary Committee

Room 140 (Majority Caucus Room)
Main Capitol Building
Harrisburg, Pennsylvania

Tuesday, May 14, 2002 - 10:10 a.m.

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BEFORE:

Honorable Thomas Gannon, Majority Chairperson
Honorable Brooks Wallis
Honorable Patrick Browne
Honorable Craig Dally
Honorable Robert Flick
Honorable Kate Harper
Honorable Timothy Hennessey
Honorable Stephen Maitland
Honorable Mike Turzai
Honorable Kevin Blaum, Minority Chairperson
Honorable Frank Dermody
Honorable Harold James
Honorable John Pallone
Honorable Joseph Petrarca
Honorable James Roebuck
Honorable Edward Staback

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ORIGINAL

ALSO PRESENT:

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Majority Counsel

Michael Schwoyer
Majority Counsel

Judy Sedesse
Majority Administrative Assistant

Jason Klipa
Majority Intern

Mike Rish
Minority Executive Director

Beryl Kuhr
Minority Counsel

Jane Mendlow
Minority Research Analyst

Cathy Hudson
Minority Administrative Assistant

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Robert Carnathan
Smith Staple & Supply Co., Inc.

1 CHAIRPERSON GANNON: The House Judiciary
2 Committee will come to order for public hearings concerning
3 the issue of joint and several liability. I can't tell you
4 how disappointed I am that our friends in the Medical
5 Society declined to testify at this hearing and failed to
6 testify at the hearing yesterday before the Senate
7 Judiciary Committee.

8 In addition to that, they failed to testify at
9 our hearings with respect to frivolous lawsuits that were
10 held by this committee some time ago. They have seen fit
11 to spend millions of dollars on a public relations campaign
12 to influence the Legislature on these critical issues, but
13 they declined the opportunity to come before a committee of
14 the Legislature to advance their position and subject
15 themselves to examination by members of the Legislature.

16 One of our witnesses today has written a book
17 on medical malpractice, A Comprehensive Analysis. Had the
18 physicians in Pennsylvania read that book, they would have
19 been picketing their insurance company rather than the
20 State Capitol.

21 With that said, I would like to ask our first
22 witnesses, which will be a panel of distinguished
23 professors. And I would like them to appear as a panel.
24 And that would be Professor Bhat -- if you could come up to
25 the -- Professor Bublick, and Professor Vandall.

1 These professors are here at my invitation,
2 and they're here on their own time to give this committee
3 and the Legislature an objective analysis and an academic
4 analysis of this issue of joint and several liability. And
5 with that, I would invite whichever one among the 3 of you
6 agreed to testify first.

7 And I guess it would be Professor Ellen
8 Bublick of the University of Arizona, James Rogers College
9 of Law, since we go by ladies first here. Professor
10 Bublick, you may proceed when you are ready.

11 PROFESSOR BUBLICK: Thank you very much. Did
12 I win the coin toss or lose it? The first thing I'd like
13 to do is to thank the Judiciary Committee for inviting me
14 here today. Over the last year, I've studied comparative
15 apportionment questions that arise in state courts, often
16 after comparative apportionment legislation has been
17 enacted.

18 So it's a real pleasure today to be able to
19 talk with you in a proactive way about that legislation.
20 It's a particular pleasure for me to talk about the subject
21 here in the State of Pennsylvania because I think that some
22 of the best decisions I have seen in some of my areas of
23 research interest come from this state.

24 There's been a lot of media attention given
25 recently to a Cardinal's defense that a 6-year-old child

1 who was sexually assaulted by a priest was himself, the
2 6-year-old, guilty of comparative negligence. In my
3 published work, I've argued against such defenses.

4 And one of the only court decisions that I've
5 seen that rejects that defense and holds that a sexual
6 assault victim has no duty to prevent his own assault comes
7 from here in the Superior Court of Pennsylvania just last
8 year. I think that decision is important. And I hope it
9 will be just the beginning of more victim supportive law,
10 particularly in state civil actions.

11 It's on that theme of victim supportive law
12 that I would like to address my deep concerns about
13 proposals to abolish joint and several liability. A
14 colleague of mine likes to say, "Before you can discuss any
15 proposed solution, you need to define the problem to be
16 addressed."

17 For the legislation being discussed today,
18 I've heard the problem defined as how to reduce tort
19 liability to help business. If you will indulge me, I
20 would like to redefine the problem in this way: How does a
21 state ensure adequate compensation to injury victims -- and
22 my particular interest is victims of violent crimes -- in a
23 way that holds appropriate parties responsible for a fair
24 amount of the damages caused by their fault and no more in
25 the hope of deterring other injuries and acts of violence

1 while avoiding wasteful expenditures?

2 It's from this vantage point, a concern for
3 fairness, deterrence, fair compensation for injury victims,
4 that I'm deeply troubled by the legislation that
5 Pennsylvania is considering. Let me start first by
6 identifying my concerns in the context of the 2 questions
7 that you've asked me in advance to address.

8 The first -- and I'm going to paraphrase
9 here -- is when does having joint and several liability, as
10 Pennsylvania now does, result in injustice? And I want to
11 reword this question slightly to ask it in a way that I see
12 it presented in the state supreme court cases that I study.

13 Doesn't fairness require several rather than
14 joint and several liability so that each party pays for
15 only that portion of the harm that he caused or for only
16 his portion of the total fault? Among the state supreme
17 courts that have chosen to adopt comparative apportionment
18 systems, this argument is the single most frequently cited
19 judicial rationale for adopting comparative apportionment.

20 If there's only one thing that I can do this
21 morning, I'd like to help you understand why this fairness
22 argument is really a red herring. The basic problem with
23 the fairness argument is that it misunderstands the meaning
24 of the percentages assigned through the apportionment
25 process.

1 Those percentage shares do not reflect true
2 shares of either causation or a fault. In the typical
3 joint and several liability cases that I see, 2 defendants
4 cause a single indivisible injury. So, for example, in the
5 Colorado Supreme Court's recent decision in the Slack case,
6 a woman was hit by a driver who ran a red light.

7 She filed a claim for medical payments with
8 her auto insurer. The auto insurer required her to see its
9 doctor for an independent medical examination. During that
10 examination, the insurance company's doctor sexually
11 assaulted the plaintiff.

12 She promptly reported the conduct to the
13 authorities, and she learned that the insurance company had
14 notice of previous sexual assaults by that doctor on other
15 insureds. She sued the doctor and the insurance company
16 for negligence, arguing that had the company taken
17 appropriate action to previous complaints, investigated
18 those complaints, had some sort of a system where there
19 would be a nurse or some other person in the room during
20 the examination, that she would not have been assaulted.

21 Now, in this case, both the doctor and the
22 insurance company are necessary but not sufficient causes
23 of the full injury. So but for the insurer's failure to
24 investigate the previous assaults and take action, the
25 plaintiff wouldn't have been assaulted by the doctor.

1 In addition, but for the doctor's intentional
2 assault, the plaintiff wouldn't have been assaulted by the
3 doctor. So in cases like this, in the large number of
4 cases like this that would be subject to joint and several
5 liability, both defendants are the actual cause of all of
6 plaintiff's harm.

7 So the rhetoric that you'll likely hear about
8 each party being liable only for what he actually caused is
9 really a red herring. The question isn't about causation.
10 It's about policy. So what's wrong with a policy then that
11 says we divide responsibility based on a comparison of the
12 parties' fault?

13 The single biggest logical problem with
14 comparative apportionment is to see defendants' fault
15 shares as a zero sum gain. When one person has more fault,
16 another must have less. This is an assumption that's
17 forced by the idea that all parties' fault have to equal
18 100 percent.

19 And let me give you an example that I give to
20 my students. The plaintiff comes into a hospital with a
21 gunshot wound. The doctor commits malpractice. From the
22 combination of the 2, the victim dies. The victim would
23 have lived had either one of these events, the gunshot or
24 the malpractice, not happened.

25 And for simplicity, the damages amount is

1 \$100,000. In the first hypothetical -- professors love
2 hypotheticals. I apologize. I hope you'll indulge
3 me -- the patient is shot by accident. There's no
4 negligence by anyone else. With several liability, the
5 doctor then is potentially liable for 100 percent, for all
6 \$100,000.

7 In the second hypothetical, the plaintiff is
8 shot by another defendant who was negligent. It's a
9 hunting accident. There's negligence by another defendant.
10 And the doctor can now compare, in a several liability
11 system, his fault with the fault of the shooter. So maybe
12 you say each is 50 percent liable, 60/40, you know. The
13 defendants are both negligent and both liable for some
14 percentage. So say the doctor here is liable for \$50,000
15 in damages.

16 In the third hypothetical, the plaintiff is
17 shot at point-blank range by her boyfriend who is
18 intentionally trying to kill her. Now we have an
19 intentional tort-feasor that the doctor is comparing his
20 negligence against.

21 And if fault matters for apportioning
22 responsibility, as it generally does in states that have
23 comparative apportionment systems, the doctor is
24 potentially liable for very little of this injury. Say 90
25 percent, 95 percent is the fault of someone who shot the

1 victim at point-blank range trying to kill her; and 5, 10
2 percent is the doctor's malpractice. Now the doctor is
3 liable for \$5,000, \$10,000.

4 So even though the doctor committed the same
5 exact negligence in all 3 cases, caused the identical harm
6 to the plaintiff in all 3 cases, he is liable for a
7 different percentage fault share in each scenario and a
8 different amount of damages in each scenario.

9 So with several liability, our doctor's fair
10 share of liability isn't based on the nature and
11 culpability of his own acts, which are the same in every
12 case, but on an inverse relationship with the nature and
13 culpability of an unrelated defendant's actions.

14 But why is it fair that the negligent doctor
15 pays less when he is fortuitous enough to have a
16 codefendant who's an intentional rather than a negligent
17 tort-feasor or to have a codefendant at all? Here is the
18 place where the law begins to say that 2 wrongs do make a
19 right or at least if you are the only one who commits a
20 wrong, you may be responsible.

21 But if someone else commits a wrong against a
22 plaintiff as well, you may be less responsible. In some
23 cases, the result is even more anomalous. The greater the
24 risk to which the negligent tort-feasor exposes the
25 plaintiff, the greater the benefit that negligent

1 tort-feasor derives by comparison.

2 So to take my insurance example, the insurer
3 is better off sending its clients to doctors known to
4 commit intentional torts rather than negligent ones because
5 by comparison, the insurer's liability with respect to the
6 intentional tort-feasor doctor will look smaller than its
7 liability with respect to the negligent tort-feasor doctor.

8 The irony is not lost on plaintiffs who may
9 recover more if they are injured just by negligence than if
10 they're the victim of 2 injuries of more wrongful conduct
11 directed against them, intentional and negligent in fault.
12 In all of these cases, fairness problems are created by the
13 central assumption that, the central assumption of several
14 liability, which is that fault is a zero sum gain.

15 The fallacy here is if I have more fault, you
16 have less. And that doesn't have to be the case. The
17 wrongfulness of one person's act may increase, may
18 decrease, or may leave unchanged the other party's fault.
19 So if you think about conspiracies, if 2 people are at
20 fault, that can be more problematic than only having one
21 individual at fault.

22 The fact that one negligently markets guns as
23 escaping fingerprinting is made worse and not better by the
24 fact that others will intentionally use those guns for
25 murder. So once you require all fault shares to add to 100

1 percent, I think there's a huge logic flaw in the middle of
2 your tort system. And I can tell you from the courts that
3 I studied that have adopted this kind of system that there
4 are a number of rules that you can adopt to minimize the
5 fairness problems that this zero sum assumption will
6 create.

7 And if the Pennsylvania Legislature should
8 choose to adopt comparative apportionment, I will be happy
9 to tell you all those different rules, ways to minimize
10 fairness problems. But none of these rules are really
11 going to address the central and fundamental problem, which
12 is a flawed assumption at the core of the system that this
13 is a zero sum gain.

14 I apologize. I'm used to speaking in hour
15 increments. So I think I've maybe taken a little more of
16 my time. Let me just quickly make a couple of other points
17 and then let you hear from the other professors on this
18 panel.

19 Once you say that this is not an essential,
20 that having a comparative apportionment system where fault
21 equals 100 percent is not an essential attribute of
22 fairness of causation, it's a question of policy, then the
23 issue relates to the second question that you've asked.

24 Provide examples in which having no joint and
25 several liability results in an injustice. The issue is a

1 question of what are the effects of abolishing joint and
2 several liability. It's an extremely easy question in my
3 area of research to find a number of cases that are
4 problematic where joint and several liability has been
5 reduced or eliminated.

6 And let me just give one example that's not
7 actually intentional torts. Think about the case of
8 dram-shop liability. If you believe -- as many
9 legislatures and states do and I do as well -- that
10 dram-shop liability may actually encourage parties to take
11 care, promote safety, minimize number of accidents, if you
12 believe that dram-shop liability has positive effects, you
13 then take, in a comparative apportionment system, you say,
14 Okay, we're now going to say that the tavern owner is
15 liable if they negligently serve alcohol to someone who's
16 visibly intoxicated and gets on the road and causes harm to
17 others; except now we're going to compare the fault of that
18 tavern owner with the fault of the drunk who got in the car
19 and caused an accident and killed someone.

20 Well, just there you've minimized the
21 liability to some fraction of its original strength. And I
22 think that there are a number of cases in which comparison,
23 elimination of joint and several liability and the
24 comparisons that result from it are going to minimize
25 defendants' liability in places where defendants' liability

1 makes sense, in places where you've adopted defendant
2 liability, either by legislature or courts, because you
3 think it makes sense for reasons of accountability, of
4 deterrence, and of compensation.

5 And I think actually I've probably taken more
6 than my fair share of time. I'd be happy to revisit this
7 issue and talk about some of the particularly egregious
8 problems that can result in comparative fault systems. But
9 first, I'm going to let you hear from the other professors
10 on this panel.

11 CHAIRPERSON GANNON: Professor Vandall.

12 PROFESSOR VANDALL: Vandall.

13 CHAIRPERSON GANNON: Vandall. Thank you.
14 Emory University School of Law.

15 PROFESSOR VANDALL: I'm extremely pleased to
16 be in Harrisburg, the Capitol of Pennsylvania, and in this
17 absolutely beautiful building. But I know that many of you
18 are concerned as to what are the qualifications of a person
19 from the south, from Georgia, coming to Harrisburg to speak
20 about the laws of Pennsylvania.

21 So that I may appear to be a reversed
22 carpetbagger to you, let me just try to soften the impact
23 of that by saying that I was born and raised in Pittsburgh.
24 I graduated from Washington and Jefferson College, and I
25 first visited Harrisburg in the mid-1950s.

1 I wrote an article that was published by the
2 Emory Law Journal, 49 Emory Law Journal 565, published in
3 the year of 2000 where I used Pennsylvania law as the
4 foundation for a comparison with the suggested changes that
5 were put forward by the American Law Institute.

6 The American Law Institute is an enormously
7 prestigious group that is made up of judges, law
8 professors, and attorneys. And they had, they felt that
9 apportionment should be reconsidered. And so I responded
10 to that. My theme will be an embrace of the common law and
11 will be that why the Pennsylvania Legislature should leave
12 joint and several liability intact.

13 We cannot today discuss joint and several
14 liability without considering several other interrelated
15 concepts, as Ellen has suggested, comparative fault and
16 apportionment. Joint and several liability is over 300
17 years old. It was first developed in Sir John Heydon's
18 case, an English case.

19 It was well, has been well-established in
20 Pennsylvania for over 100 years, first established nearby,
21 I gather, in the Borough, Borough of Carlisle against
22 Brisbane case. The purpose of joint and several liability,
23 or the main purpose is to ensure that the victim has a
24 source of recovery.

25 There are 2 well-accepted bases for joint and

1 several liability. One is a concertive action where 2
2 parties agree to attack someone and they do attack them.
3 One stabs them; the other shoots them. They have acted in
4 a concertive action. And so they are the most common
5 example of joint and several tort-feasors.

6 The other example that developed later was a
7 single indivisible result where 2 parties are negligent and
8 cause an injury to someone that cannot be separated.
9 There's no practical basis for dividing up that injury.
10 The classic example is 2 negligent drivers run into another
11 car and someone in that car is injured in the crash.

12 Well, let's say that person has a broken arm.
13 There's no way to say which of the 2 negligent drivers
14 caused in fact that broken arm. Joint means then that the
15 plaintiff can sue both or each and recover the whole amount
16 from either one of the defendants.

17 Several means that the plaintiff must sue each
18 one of the defendants separately. When you're talking
19 about several liability, there are 2 risks on the
20 plaintiff, placed on the plaintiff. The one is that each
21 of the defendants can argue that the other was the cause in
22 fact of the injury.

23 And secondly, the plaintiff, as a several
24 plaintiff or a party in a several-based lawsuit, recovers
25 in proportion to the defendants' fault. Let me just take a

1 minute to explain how the problem that several liability
2 caused in the environmental area.

3 It was true up until 1970 that if you had a
4 convergence of 2 streams and the plaintiff at that
5 convergence wanted to sue, he had to sue each defendant
6 separately. Let's say there were 2 upstream defendants
7 that were causing pollution, odor pollution to the water so
8 that the plaintiff's land was not usable.

9 He had to sue each one of those defendants
10 separately. And they could argue that you've sued the
11 wrong person. You need to sue the other defendant. So the
12 plaintiff would say, Oh, I misunderstood. I'll go sue the
13 other plaintiff, or the other defendant.

14 And the other defendant would say, No, no,
15 no. You should have stayed over there. You made a
16 mistake. It wasn't me. It was the other one. And that
17 was what the law was essentially up till 1970. It was such
18 a serious problem that we had to adopt the Environmental
19 Policy Act and the Clean Water Act to resolve that. But
20 the common law didn't respond to it. And that's just by
21 way of showing how several liability can lead to a very
22 serious problem.

23 Well, let's talk just a minute then about
24 comparative fault. The history was that negligence on the
25 part of the plaintiff that we call contributory negligence

1 was a complete defense against the plaintiff. In many
2 states, if the plaintiff was a scintilla at fault, he was
3 out. He or she couldn't recover anything.

4 Today, only 5 states retain contributory
5 negligence as a complete defense. And so that all the
6 others have adopted what we call comparative fault.
7 Comparative fault means that the plaintiff recovers in
8 proportion to his fault.

9 The purpose of comparative fault is to
10 eliminate contributory negligence as an absolute defense.
11 And the plaintiff then recovers proportionately. An
12 example would be that if the plaintiff is 40 percent at
13 fault, he could recover 60 percent of his damages.

14 There are 2 types of comparative fault, the
15 pure and the modified. The pure I've just mentioned with
16 the 60/40 example. Pennsylvania, by statute, follows the
17 modified approach, I understand. The plaintiff recovers as
18 long as his fault is not greater than that of the
19 defendants'.

20 Now, there's a little problem created there.
21 What if the plaintiff is one-third at fault and each of the
22 2 defendants are one-third at fault? This was litigated in
23 Pennsylvania. And so Pennsylvania adopted what is called
24 the aggregate approach.

25 What that means is the plaintiff's fault of

1 one-third is not compared to each one of the defendants'
2 fault of one-third but is rather compared to the aggregate
3 of the 2 defendants so that the plaintiff is still able to
4 sue and recover under comparative fault because the fault
5 of each one of the defendants is totalled to reach 66
6 percent.

7 And then apportionment. Apportionment covers
8 everything that we're talking about but more specifically
9 what happens under joint and several liability after one
10 defendant pays the plaintiff his damages. In other words,
11 suppose the plaintiff does elect to recover his, the whole
12 amount of the damages from one defendant. What happens
13 then?

14 There are 2 accepted approaches there. One,
15 the first defendant who has paid the whole amount recovers
16 half of what he paid from the second defendant. The other
17 common approach often used when fault of either one of the
18 defendants cannot be well determined is that the first
19 defendant recovers in proportion to the fault of the second
20 defendant.

21 Well, what's the importance of joint and
22 several liability to the state of Pennsylvania? Joint and
23 several is important because it helps to ensure that the
24 victim has a source of recovery. And there are many
25 reasons why one of the defendants -- and I'm assuming

1 perhaps the most basic case where there are only 2
2 defendants. But obviously, there may be many, many
3 defendants.

4 But let's look at some of the situations where
5 a plaintiff may go home with, with nothing from a
6 particular defendant or only a proportion of his damages,
7 situations where the defendant may be immune. First of
8 all, we have family immunity.

9 The common example would be a car crash
10 situation where a husband can't sue the wife and vice
11 versa. Another common example is outside the jurisdiction.
12 For some reason, a defendant cannot be brought within the
13 jurisdiction, or perhaps the defendant cannot be
14 identified.

15 A common problem is where a car pulls out in
16 front of a driver and the driver swerves into oncoming
17 traffic. Well, the driver didn't think quickly enough to
18 write down the license tag number of the person that pulled
19 out in front of him. So that person is not identified,
20 isn't sued, not before the court.

21 Bankruptcy, unfortunately, is a very common
22 example. Sovereign immunity. The state, a state official
23 may be immune from suit in many, many jurisdictions.
24 Immunity under workers' compensation. The employer is
25 immune from suit by his employee. And then finally,

1 unfortunately, a very, very common example is that the
2 defendant, one of the defendants is judgment proof, just
3 has no assets or insufficient assets to be worth suing.

4 All of these are examples of situations where,
5 without joint and several liability, the plaintiff is going
6 to go home with insufficient funds to cover his or her
7 loss. And so let's reflect for a moment on the question of
8 why eliminating joint and several liability would be
9 detrimental.

10 As I've suggested, in more suits, the victims
11 would not have a full recovery. And how much less they
12 would have would depend on the alternative that is adopted.
13 Or they would recover less. Not that they would recover
14 nothing, but they would recover less. And fewer suits
15 would likely be brought. Although Professor Bhat, I think,
16 is going to suggest that the opposite is true. So we'll
17 have a little tension here this morning.

18 I think it might lead to an increase in
19 vengeance. We don't talk about that very much. But if
20 the -- one of the purposes of tort law is to prevent people
21 from taking baseball bats -- that's an old example. I'm
22 sorry -- taking guns and shooting their neighbors.

23 If they think they're not going to recover
24 sufficiently in the court system, they might return to
25 taking out the guns and going across the yard and taking

1 vengeance into their own hands. It would lead to less
2 deterrence. If the defendants, who are often
3 manufacturers, are not held liable, they might produce more
4 dangerous products.

5 We saw this last year with the pirouetting
6 Ford Explorers and the Bridgestone tires. I don't think we
7 want to do anything that would increase the number of
8 problems where totally innocent drivers and their children
9 are dying in vehicle crashes.

10 Of utmost importance, I think, is that in
11 Pennsylvania, the cases have held several times that the
12 policy is that the victim is preferred, the innocent victim
13 is preferred over the tort-feasor who is both a cause of
14 the injury and is negligent to some extent.

15 Also, you need to understand that this is
16 reducing the plaintiff's recovery a second time. Any
17 alternative that is adopted, any reduction in joint and
18 several liability is saying to the victim, We've reduced
19 your recovery once under comparative fault, now we're going
20 to reduce it again.

21 It would force -- all of tort law is
22 interrelated, and any changes that are adopted in joint and
23 several liability will overlap other doctrines. For
24 example, it would force an artificial discrimination
25 between economic loss and pain and suffering.

1 The case law in Pennsylvania is that an
2 injured victim is entitled to recover for his or her
3 injuries. But under some of the alternatives that are
4 being suggested to you, you would have to draw a
5 distinction between damages that have a market base for
6 valuation, such as cost of medical assistance,
7 pharmaceuticals, prosthetic devices, those kind of economic
8 losses, and pain and suffering. They draw the line between
9 those 2.

10 But in Pennsylvania today, pain and suffering
11 is seen as an important injury. And all of us know that,
12 that often we get over our broken arms or broken fingers
13 very quickly. But what lingers is the disturbing fact that
14 brought that about, the pain and suffering.

15 Some of the suggestions that are being brought
16 before you involve the word persons, persons. You have to
17 be very careful when you see the word person. What the
18 word person means is someone that is not before the court.
19 At present, the law in Pennsylvania is that in order to
20 consider the fault of an individual, that individual must
21 be a party, must be before the court.

22 You can't talk about someone from California
23 who may have driven in front of the car. But some of the
24 alternatives are suggesting that that is just what should
25 be done. And so you're going to have to talk, develop an

1 entire new lexicon about persons, those people who are not
2 in the courtroom, have not been sued.

3 And then finally to show, I think, the
4 contemporary problem that getting rid of joint and several
5 liability might bring forward; that is, that in the ongoing
6 suits against terrorism, there is obviously no hope of
7 recovering against the terrorists.

8 They are, in many cases, dead. They piloted
9 the plane into the towers, or they're in prison and will
10 never see the light of day again. The hope in many of the
11 civil-based antiterrorism suits is to recover from the
12 entities the charities that provided money to the
13 terrorists. And if you get rid of joint and several
14 liability, you may well affect the impact of those
15 anti-terrorism suits.

16 I can tell you from my own experiences in the
17 south that the civil suits were very, very successful in
18 putting the Ku Klux Klan out of business, not by suing the
19 Klanners but by taking their meeting halls, taking their
20 farms, taking their homes and selling them to execute the
21 judgment under joint and several liability.

22 One question asked is, What are the
23 alternatives to joint and several liability? And I've
24 canvassed those in my article. And I think many of you
25 have received a copy of the article. That's a very

1 technical piece, something that I think should be reserved
2 for later. But I would be happy to discuss those
3 alternatives with you if you desire.

4 Each one of the alternatives to joint and
5 several liability favors the corporate defendant or the
6 insurance company and hurts the victim. The goal of
7 alternatives to joint and several liability are to prevent
8 a corporate defendant who is slightly at fault from being
9 held liable for a large amount.

10 So I think I've taken quite a bit of time.
11 I'd be happy to entertain questions now or later. And I'll
12 turn the platform over to Professor Bhat if that's
13 acceptable to the Chairman.

14 CHAIRPERSON GANNON: Thank you, Professor
15 Vandall. Professor Bhat.

16 PROFESSOR BHAT: My name is Vasanthakumar
17 Bhat. I'm a professor at Lubin School of Business, Pace
18 University in New York. Mr. Chairman, members of the
19 committee, and counsel, I very much appreciate the
20 opportunity to be here to discuss joint and several
21 liability reforms.

22 Even though I use the term reforms, it does
23 not mean that changes to tort rules result in any
24 improvements in the system from the point of view of the
25 injured. However, most of these changes are extremely

1 favorable to the wrongdoers. My primary purpose today is
2 to provide an overview of empirical research on the impact
3 of joint and several liability reforms.

4 With a view to compensate the injured fully,
5 the states have traditionally held that the wrongdoers are
6 liable for damages jointly and severally irrespective of
7 their degree of culpability. Under the joint and several
8 liability, an injured can sue all responsible parties and
9 recover from each payment in proportion to their faults; or
10 the injured can sue anyone and recover the total payments
11 even if the wrongdoer is partially responsible for injury.

12 Even though one of the wrongdoers may pay the
13 full amount, he or she can sue other wrongdoers for their
14 share of payments. The doctrine of joint and several
15 liability effectively transfers the burden of underpayments
16 away from the injured onto the wrongdoers.

17 As of October 1999, 35 states have amended the
18 traditional joint and several liability doctrine. Five
19 states have abolished the joint liability. Others have
20 restricted its application depending on the degree of fault
21 by the injured or wrongdoer.

22 The scarcity of data makes it difficult to
23 provide any definitive conclusions about the impact of
24 joint and several liability doctrine on product liability
25 and medical malpractice. However, available data on

1 insurance premiums indicates that there is absolutely no
2 reason to change this doctrine in the Commonwealth of
3 Pennsylvania.

4 Changes in direct written premiums for auto
5 liability, auto collision, and comprehensive, product
6 liability, and other liability between 1995 and 1999 for
7 Pennsylvania have been much lower than for the nation as a
8 whole.

9 In fact, direct premiums written for auto
10 liability, product, and other liability decreased during
11 '95-'99 even though liability-related costs during the
12 same period increased. Medical malpractice payments by
13 physicians in Pennsylvania during 1996-2000 rose by just
14 27.5 percent, while they grew by 39 for the nation as a
15 whole.

16 Scholarly research indicates that under
17 certain circumstances, the joint and several liability rule
18 is economically more efficient than other types of
19 allocations of payments by wrongdoers. The EPA
20 Administrator and the Assistant Attorney General during the
21 Reagan Administration strongly urged Congress to retain the
22 joint and several liability rule for environmental damages
23 because this doctrine encouraged settlement.

24 This has proven to be true by subsequent
25 empirical and theoretical research. Scholarly research is

1 divided, however, about which rule will force the defendant
2 to work harder to reduce injuries. Empirical studies do
3 not provide any definitive conclusions about the impact of
4 joint and several liability rule on tort filings and
5 insurance premiums.

6 I suggest that you look at table 1 on page 12
7 of my report. What we are trying to conclude here is that
8 reforms to joint and several liability rules do not achieve
9 what they are supposed to achieve and, as a result, provide
10 no significant economic benefits to defendants.

11 State court cases involving joint and several
12 liability in lawsuits were found to be a mere 4.1 for every
13 1,000 cases in 1988. Unfortunately, this is the latest
14 statistics we have. And the researcher found that it's
15 only 4.1 for every 1,000 cases.

16 I also want to point out one point here. Most
17 liability insurance policies bought by businesses and
18 physicians only have limits on payments to the injured and
19 pay for unlimited legal defense. Insurance companies spend
20 a major portion of their premiums for defense-related
21 costs.

22 In medical malpractice, insurance companies
23 spend more on legal and related costs than on payments to
24 the injured. On the other hand, an injured person does not
25 get compensated for legal expenses. Therefore, there is no

1 question that a joint and several liability reform will be
2 devastating to the injured. They will have to not only
3 suffer injuries but bear the burden of insolvencies of
4 wrongdoers as well.

5 In short, modification to the joint and
6 several liability rule amounts to telling the injured to
7 use his or her compensation for legal costs rather than for
8 the much needed health and living expenses.

9 I also want to point out, if you look at your
10 auto policy, you'll find that you pay for uninsured
11 motorist coverage. The reason for that is you want to be
12 compensated for wrongdoers with no or uninsured coverage.
13 And also, another thing you also have to look at is the
14 product liability costs in Pennsylvania is only about 11
15 cents for every \$100 of retail sales in Pennsylvania.

16 This is a more efficient coverage for a person
17 living in Pennsylvania than coverage obtained by every
18 individual buying his own accident insurance policy. In
19 addition, studies show that tort pays for only a small
20 fraction of costs of injuries.

21 New restrictions on tort rules in favor of
22 wrongdoers will only further nationalize tort costs, a
23 policy that is grossly inconsistent with our cherished
24 values. Governments would bear the financial costs through
25 additional SSI and welfare benefits.

1 If you have any questions, I'll be happy to
2 answer.

3 CHAIRPERSON GANNON: Thank you, Professor
4 Bhat. Professor Vandall, just a clarification. You had
5 indicated at the very end of your testimony about the
6 corporate defendant who was minimally negligent and being
7 required to pay a substantial amount under current joint
8 and several.

9 And my understanding is that irrespective of
10 the degree of negligence, the negligence, it doesn't stop
11 there but you also must find that the conduct was a
12 substantial factor in causing the injury. So it just goes
13 beyond the pure -- and I think you were saying that earlier
14 in your testimony -- and correct me if I'm wrong -- that
15 the pure percentage, looking at pure percentages is really
16 a fallacy because you can have any degree of percentage but
17 that negligent conduct may not have been a substantial
18 cause of the injury; and therefore, that particular
19 defendant would not be obligated to pay anything. Is that
20 a fair statement?

21 PROFESSOR VANDALL: That's absolutely right.
22 We often hear about the corporate defendant or the
23 manufacturer who is one percent at fault who is obligated
24 to pay for the entire amount of damages. That's very much
25 a fallacy because before any defendant can be held liable,

1 2 things must occur:

2 One, they must be at fault; that is, there
3 must be a failure to show care on their part. Secondly,
4 you must show cause in fact. There are 2 tests for cause
5 in fact: The "but for" test and the substantial factor
6 test. The "but for" test is the more difficult to prove,
7 and we're not talking about that.

8 But rather, we're talking about the idea of
9 substantial factor. Before you can hold any defendant
10 liable, they must at least be a substantial factor; that
11 is, that the injury would not have occurred unless the
12 conduct of the corporate defendant was a substantial factor
13 in bringing about the injury.

14 I don't know what percent that would equate
15 to, but it's got to be much more than one percent.
16 Certainly, maybe 10 percent would come to mind, 15 percent,
17 something like that. So that many of us believe that these
18 cases where there is a suggestion that the defendant is one
19 percent at fault and held liable are mistaken and, under
20 close analysis, will reveal that they are substantially
21 more at fault than one percent.

22 CHAIRPERSON GANNON: Thank you.
23 Representative Blaum, questions?

24 REPRESENTATIVE BLAUM: No.

25 CHAIRPERSON GANNON: Representative Roebuck?

1 REPRESENTATIVE ROEBUCK: No.

2 CHAIRPERSON GANNON: Professor Bublick, you
3 had talked about the drunk driver scenario. And what I
4 heard you say was -- and correct me if I'm wrong -- that
5 you have a, an individual goes into a bar and stays there
6 all day and gets pretty well drunk and they continue to
7 serve him.

8 He has no insurance. He's got no assets,
9 totally devoid of any ability to pay for any harm that he
10 would cause. Under the, under the proposals that we're
11 seeing in Pennsylvania, how would that, how would that work
12 if we abolished joint and several?

13 PROFESSOR BUBLICK: I think there's a question
14 here that's not sufficiently answered for me from the
15 drafts of the legislation; and that is, when you change the
16 language from comparative negligence or comparative fault
17 to comparative responsibility, is the Legislature intending
18 to compare the fault of negligent parties with the fault of
19 reckless tort-feasors, which would be the drunk driver,
20 intentional tort-feasors like murderers?

21 I don't think that -- I think that that's
22 something that the legislation is silent on and would be
23 open to court interpretation. So I'm not certain how this
24 bill would affect it. But I can say that a number of
25 courts have taken small changes, changes like that wording

1 to say, well, what the Legislature meant to do then was
2 create a system where we compare all fault, including
3 reckless fault, including intentional fault.

4 And if that were the case, then I think what
5 you would see is a substantial reduction in the ability of
6 injured victims to be able to recover from dram-shop and
7 other negligent defendants where there's, where there's
8 negligence, risk, harm of a reckless or intentional tort
9 like this.

10 CHAIRPERSON GANNON: Let me just give you
11 another scenario that came to mind when you talked about
12 the intentional tort. You have a hotel, and the hotel has
13 very lax security. They have no security.

14 PROFESSOR BUBLICK: There are hundreds of
15 cases just like that.

16 CHAIRPERSON GANNON: And a guy breaks into the
17 hotel during the night. And he goes into the room, and he
18 rapes and murders a woman who is on business staying at the
19 hotel. Now, you have the intentional tort-feasor who
20 committed this horrendous act; and then you have the hotel
21 who had no security.

22 How would that work under the, when you've
23 abolished this idea of joint and several?

24 PROFESSOR BUBLICK: Poorly. I think the
25 states where you see those kinds of cases, if you have

1 comparison of intentional and negligent acts, you have 5
2 possibilities. The switch to abandon joint and several
3 liability creates 5 possibilities.

4 The first is you can minimize the liability of
5 the intentional tort-feasor to the plaintiff based on the
6 plaintiff's fault. So if all we're going to do is add up
7 the percentages of fault, we say the hotel was 30 percent
8 at fault and the rapist was 60 percent at fault and the
9 victim was 10 percent at fault. And then -- and we get all
10 kinds of crazy numbers.

11 In my own jurisdiction, what got me interested
12 in researching this issue, we had a murderer held 25
13 percent at fault for his intentional murder of his
14 ex-girlfriend. The court upheld that. So we start adding
15 all those numbers together. And then we say, Okay, well,
16 then the rapist only has 60 percent of the fault and he
17 only has to pay his fair share.

18 So even if he were as rich as OJ Simpson, he
19 doesn't have to pay more than that share with respect to
20 the plaintiff. And now he can say, you know, the victim
21 left her door unlocked, that's her 10 percent of fault, and
22 take advantage of that kind of defense.

23 I've seen several jurisdictions that have a
24 number of cases that look like that. And then the
25 legislature comes back and says, Oh, we didn't mean that

1 effect of comparing intentional and negligent torts, and
2 then writes some sort of legislation to get rid of that.

3 You can also minimize the intentional
4 tort-feasor's liability of the plaintiff based on the
5 defendant's fault. So the rapist says not only am I not
6 liable for your 10 percent fault, based on your comparative
7 fault, I'm not liable for the 30 percent fault of the hotel
8 which I would otherwise be jointly and severally liable
9 for.

10 It seems to me that would be a possibility
11 under the pending legislation because only fraud feasers
12 maintain joint and several liability. Well, this isn't a
13 fraud feasor. It's a rapist. So he doesn't have joint and
14 several liability.

15 I don't think that that's an effect that most
16 courts or legislatures want, but it's certainly one of the
17 possibilities with comparison. You can help the
18 intentional tort-feasers vis-a-vis the other negligent
19 defendants.

20 So in many jurisdictions now, ultimately the
21 rapist would, if he had money, would have to indemnify the
22 hotel. Basically, the active tort-feasor would have to pay
23 the full amount of damages. But here, the hotel can't say,
24 you know, jeez, if you have money, hand it over because he
25 says, nope, that was my share.

1 I think the real effect that courts and
2 legislatures want when they're looking at this kind of
3 legislation is to reduce the negligent tort-feasor's, the
4 hotel's liability. And my feeling is if that's what you
5 want, it should be done directly instead of creating all
6 these distortions that have to be taken out.

7 But I actually believe that one of the reasons
8 that people want these kinds of reduction is there's a
9 perception that joint and several liability provides, yes,
10 a source of recovery for the plaintiffs but that it's not
11 really a fair source, that it's just a deep pocket.

12 And one of the things that I've been really
13 surprised about and interested as I look at a number of
14 cases involving crime victims against third party is what a
15 strong moral basis, accountability basis there is for
16 negligent tort-feasors to have liability in these kinds of
17 cases.

18 I first ran across a case in the 7th circuit
19 where a small motel was being accused of negligence for not
20 taking adequate security precautions, having phones in
21 their rooms, alarms, something, security guard. And I
22 thought, you know, these little motels, they can't afford
23 all these big security measures.

24 And what I found is, in that case, they had
25 alarms on the TVs. And in case after case where I look at

1 enterprises where I think, Well, could they really afford
2 to take security measures for plaintiffs, they're taking a
3 whole heck of a lot of security measures for their
4 property.

5 When I go into Target at night where I live
6 back in Tucson, they've got somebody in the dressing room
7 making sure that you don't take their clothes. They don't
8 have someone in the parking lot making sure that you're not
9 injured when you get into your car.

10 But they're taking care for property that
11 they're not taking care for customers in some cases, and I
12 think that has a strong accountability basis. I think a
13 kind of case like the Slack case from Colorado that I
14 mentioned where the insurer knows about sexual assault by
15 one of its physicians and keeps sending clients to that
16 doctor, I say to myself, if I knew of that doctor's
17 history, would I tell my mom go see the doctor without
18 saying anything more about, you know, be a little careful,
19 make sure there's someone in the room?

20 Or I mean, would I pick a different doctor? I
21 wouldn't, I wouldn't go to that doctor myself, especially
22 after I had just been through an injury, a car accident
23 like the plaintiff in that case. And I think, you know,
24 golden rule, take the care for your, for other people that
25 you would want taken for yourself.

1 And I think that's a case in which liability
2 makes moral sense. You look at a lot of these cases with
3 gas stations, and there's an employee working late at
4 night. The company wants to have the stores open 24 hours
5 a day, 7 days a week despite the fact that there have been
6 a number of robberies, criminal incidents at the store.

7 Well, you know, there's a worker, often the
8 workers who are working night shifts, who are poor, who are
9 disproportionately likely to be young. And companies want
10 to make the money from keeping those enterprises open at
11 night because they don't necessarily want to provide the
12 security to those employees.

13 And so they turn around and say, Well, you got
14 murdered while you were working for us. It's the murderer.
15 But, you know, sometimes there are protections that they
16 could take that they haven't taken. And if you look at the
17 Centers for Disease Control now says that murder is the
18 second leading cause of death for workers.

19 And so companies should be thinking about how
20 do I protect my employees, particularly if you have prior
21 experience with crimes on your premises, should be thinking
22 about how do I protect my employees from crime. If they're
23 going to be there making money for me, how do I take care
24 of them?

25 So I guess my worry whenever I hear people

1 talk about this, Well, you're, you know, joint and several
2 liability, you're getting money from this negligent party
3 when you should get it from the intentional party, I think,
4 you know, there's no question that intentional tort-feasors
5 have a lot of fault. And that's why we have criminal laws,
6 and there are some things we can do.

7 But the fault that's assigned to negligent
8 tort-feasors isn't just because they happen to have money.
9 It's a negligent standard. There has to be some failure to
10 take reasonable care. And in the cases that I see, you
11 know, as a court watcher, there's always some cases where
12 you say, you know, is that really fault or, you know, is
13 this really right or not?

14 One way or the other, you know, you disagree
15 with fringe cases. But on the whole, I think that the
16 cases are being decided fairly well and fairly consistent,
17 not only with ideas about compensating victims but ideas
18 about fairness in accountability for the parties involved
19 in the cases.

20 CHAIRPERSON GANNON: Thank you. Professor
21 Bhat.

22 PROFESSOR BHAT: Can I just expand on this, on
23 her point? The other purpose of the tort law is to, is the
24 purpose of literis. Now, if you want to have an optimal
25 literis, you have to internalize all the social costs of

1 the hotel owner. Let me give an example. How does hotel
2 owner make a decision?

3 Suppose he has 4 alternatives. Suppose he can
4 go for security guard, he can go for some alarm system.
5 Suppose he has 4 different alternatives. You'll also look
6 at the cost of those, and you'll also look at the cost of
7 damages under each alternative. And then you'll take the
8 sum total of the primitive cost and the cost of damage, and
9 he will choose that alternative which minimizes his total
10 cost.

11 Now, the problem with the, if you do not have
12 joint and several, we are not forcing or making him pay for
13 the, all the costs. He only pays for a part of that cost.
14 So what happens is, as a result, there is no free literis
15 at all. There is only partial literis.

16 So it may be -- from the society's point of
17 view, it may be better to have a security guard. But since
18 his costs are lower, he will go for alarm system. So as a
19 result, society as a whole loses much more. So if you are
20 looking for an efficient system, the best way is to go for
21 joint and several liability. That way, you are
22 internalizing 100 percent of the total cost.

23 CHAIRPERSON GANNON: Professor, very quickly,
24 you had stated in your testimony that in terms of
25 malpractice insurance, that the defense costs and other

1 costs were actually the biggest number --

2 PROFESSOR BHAT: Yes.

3 CHAIRPERSON GANNON: -- with respect to the
4 cost of malpractice.

5 PROFESSOR BHAT: Yeah.

6 CHAIRPERSON GANNON: And I just want a
7 clarification. Were you speaking in terms of nationwide?
8 Because we certainly can have anecdotal stories about
9 million-dollar verdicts and judgments and settlements.

10 PROFESSOR BHAT: Yeah.

11 CHAIRPERSON GANNON: But we don't hear about
12 the small ones or where there's a defense, a zero payment
13 but the defense costs, as you said, are unlimited.

14 PROFESSOR BHAT: Yeah.

15 CHAIRPERSON GANNON: And I just wanted to make
16 sure in context when you were making that statement, it was
17 relative to the total costs across the board; that you
18 found that the actual amount of payout for defense costs
19 was actually higher than the payout to victims who had been
20 harmed --

21 PROFESSOR BHAT: Yes.

22 CHAIRPERSON GANNON: -- or allegedly harmed.

23 PROFESSOR BHAT: Yeah.

24 CHAIRPERSON GANNON: Okay. I just wanted a
25 clarification. And with that, I recognize Representative

1 Dally who has a question.

2 REPRESENTATIVE DALLY: Thank you, Mr.
3 Chairman. I have a question for Professor Vandall. In
4 your article, you cited the Disney World case. And in your
5 testimony, you talked about the jury required to find that
6 a tort-feasor's action has to be a significant cause of the
7 injuries.

8 I was wondering, since they were found to be 1
9 percent at fault, does Florida have that rule that they
10 have to find the tort-feasor, that their actions are a
11 significant cause?

12 PROFESSOR VANDALL: That's an excellent
13 question. And Disney World is probably one of the most
14 cited cases in this area. So I think it's very worthwhile
15 to talk about it. The facts in Disney World are that a
16 young woman and her fiance' went to Disney World and either
17 rode bumper cars or Grand Prix cars. I can't find out
18 which one. And the fiance' drove into his girlfriend and
19 caused her injury.

20 She brought suit against Disney World. Disney
21 World joined her fiance'. The young woman and the young
22 man got married. The jury found that the plaintiff was 14
23 percent at fault; the fiance', now husband, was 85 percent
24 at fault; and Disney World was 1 percent at fault.

25 The holding was that because of spousal

1 immunity; that is, that Disney World could not cross-claim
2 and recover against the wife because he couldn't sue her
3 and she couldn't sue him, because of spousal immunity,
4 Disney was held liable for 86 percent of the damages; that
5 is, \$75,000, when only 1 percent at fault. So those are
6 the facts.

7 But let's back up a minute. Okay? Let's,
8 let's pretend we live in the real world. And let's pretend
9 we've been to Disney World. What are your thoughts when
10 you go to Disney World? It's fantasy. It's fantasy.
11 You're going to go down there, pay a truck load of money,
12 have a wonderful time, and drive back home.

13 You do not think that by using whatever they
14 have available to you that you're going to suffer injury
15 and spend several days or a week in the hospital. So my
16 take on the case is that the 1 percent is completely
17 fantasy; that Disney World designed the park; they designed
18 the ride.

19 The last time I was in Harrisburg in 1955, I
20 was here to raise outboard hydroplane. So maybe I am
21 different than most of you in that I'm a risk taker. But I
22 will tell you, when I get on a bumper car, my goal is to
23 bump into someone. And when I drive a Grand Prix car, I'm
24 going to do some pretty wild things at these tracks.

25 Disney World has got to have been much, much

1 more at fault, 40, 50, 60 percent at fault. Just to show
2 my Pittsburgh-developed cynicism, I think the case was
3 developed to take the headlines. It was developed to lead
4 to these numbers.

5 And so I don't feel sorry for Disney World. I
6 would like to say to them they should have designed a safe
7 ride. They knew what people were going to do when they got
8 in these bumper cars or Grand Prix cars. Oh, let me just
9 add that following the case, because of the case, because
10 of the publicity -- and this is part of the terrible issue
11 that faces you, is what are we going to do with everybody
12 talking about how horrible it is out there?

13 Well, following this, the Florida Legislature,
14 I believe, adopted a 50 percent rule; that is, in order for
15 a plaintiff to recover against the defendant, in joint and
16 several liability, that defendant must be 50 percent or
17 more at fault. So that Disney World would not be liable
18 for the \$75,000 damage. They would only be liable
19 severally. So they would be liable for 1 percent of the
20 fault.

21 Facially, that sounds fine until you begin to
22 peel back the onion and realize that, at least in my
23 opinion, Disney World was much, much more at fault; and
24 under any definition of substantial factor, they were more
25 than 1 percent.

1 REPRESENTATIVE DALLY: Thank you.

2 CHAIRPERSON GANNON: Representative Turzai.

3 REPRESENTATIVE TURZAI: Yes. Thank you, Mr.
4 Chairman. To Professor Bublick -- am I saying it
5 correctly?

6 PROFESSOR BUBLICK: Bublick.

7 REPRESENTATIVE TURZAI: Bublick. I'm sorry.
8 On your point of perspective intentional acts versus
9 negligent acts, did you review the status of Pennsylvania
10 cases and the case law with respect to the Pennsylvania
11 comparative negligent statute as it presently exists?

12 PROFESSOR BUBLICK: Yes. You know, I actually
13 spend very little time studying Pennsylvania; and I think
14 that's because I think you're doing a lot of things right.
15 I tend to study the states that have a doctrine on
16 comparative apportionment and then are having the crazy
17 problems that my home state is having now with that system.

18 So I have looked at the Pennsylvania cases;
19 but I haven't looked at them in the kind of depth as I have
20 the states where, in the last 5 or 10 years, there are 25,
21 26 states that have started reconsidering whether to
22 compare intentional and negligent torts.

23 And those courts are very split on whether
24 they allow comparisons or not. But I have been looking at
25 the courts that have recently reexamined the issue. And

1 your courts, I think, seem to see the issue as very well
2 decided and established by the Legislature and haven't seen
3 fit to revisit those issues.

4 REPRESENTATIVE TURZAI: You know, just to
5 provide some edification, despite the comparative
6 negligence statute that had been enacted in '76, knowing
7 intentional torts prevent a defendant from raising
8 comparative negligence as a defense in this state as a
9 result of an intentional or a reckless act, would an
10 extension of the existing statute, an extension of the
11 existing comparative negligence statute whereby just
12 eliminating the language that kept joint and several
13 liability in effect, you eliminated that whereby you
14 extended the existing statute and said that now when we go
15 and we're going to allow recovery, we're only still going
16 to allow recovery with respect to the percentages involving
17 that party's negligent you were found, is the intentional
18 behavior under those set of circumstances going to have an
19 effect despite the elimination of joint and several?

20 PROFESSOR BUBLICK: You don't have to. And
21 several states have actually -- Connecticut I think is a
22 good example. Connecticut Supreme Court said we're going
23 to compare intentional and negligent fault. We think that
24 the legislature would want that in the purpose of
25 comparative fault statutes to include intentional fault.

1 And within a short time after, the legislature
2 put in specific language saying no, this is comparative
3 fault, this is not comparative responsibility apportionment
4 and intentional torts are not a part of this system. So
5 states can and have in both directions written in that
6 intentional torts are part of the comparative apportionment
7 system or not. So there really -- there are 2 decisions
8 that are related, but they don't have to be joined.

9 REPRESENTATIVE TURZAI: That's certainly my
10 understanding. I think the courts would continue to hold
11 as they've held despite the enactment of the comparative
12 negligence law, certainly under one version but I believe
13 actually perhaps under both versions. If I might,
14 Professor Vandall.

15 PROFESSOR VANDALL: Vandall.

16 REPRESENTATIVE TURZAI: Vandall. Excuse me.
17 Professor, I just wanted to make sure that I caught you
18 right. Were you implying, if not directly, or not
19 implying, were you stating that it's a result of a tort
20 system that we ended the efficacy of the (inaudible) and
21 that the tort system is somehow going to abrogate terrorism
22 in much the same way, that we should be relying on lawsuits
23 to end those sort of activities?

24 PROFESSOR VANDALL: Yeah, precisely. The
25 South battled the Klan for years trying to lock up judgment

1 proof people, put them in jail and to no effect. The Klan
2 continued. And so one of the great successes for civil
3 litigation was that the suit was brought against the Klan
4 and their activities. And the facts involved a hanging as
5 though they were any other tort-feasor, much like the OJ
6 Simpson case.

7 Instead of thinking of the Klan as the
8 horrendous group that it is, just view them as organized
9 tort-feasors who have meetings in strange outfits and let's
10 sue them. And that's exactly what happened. And we don't
11 hear anything much from the Klan anymore since this suit
12 was brought and judgment was executed and every asset they
13 could find, including their meeting halls, were sold.

14 And in regard to terrorism, the suits are
15 going to be civil suits. And what is going to happen is
16 that they will likely be able to show that many charities
17 with wonderful names were actually fronts for terrorism,
18 and the assets will be taken.

19 I studied the criminal justice system. I was
20 going to teach criminal procedure. That's what I went to
21 graduate school in. I am not a believer in our criminal
22 justice system. I don't think it works very well. I am a
23 believer in our civil justice system. I think it works
24 wonderfully well.

25 And I think in regard to the terrorism

1 situation, what is going to happen is that the charities
2 are going to pay and the deterrence that Professor Bhat was
3 referring to is going to be very broad and that charities
4 will cease being front organizations for terrorism. All
5 this because of the civil justice system and -- not to put
6 too fine a point on it -- but the positive impact of joint
7 and several liability.

8 REPRESENTATIVE TURZAI: Well, that's saying a
9 lot. Would you concede that how you view the purposes of
10 the tort system certainly affects your perspective on joint
11 and several liability?

12 PROFESSOR VANDALL: Sure. The beauty of our
13 civil justice system and why we enjoy teaching it is
14 because it brings together all of life's experiences. For
15 those of you who are attorneys, probably one of your
16 favorite courses in law school was, was torts.

17 And the reason for that is it has to do with
18 things that you're familiar with, car crashes, medical
19 malpractice, vehicles that malfunction, other products that
20 malfunction. Everybody can talk about that and can
21 understand that.

22 So the reason I've been teaching tort for 32
23 years and products liability probably for 20 years is
24 because I feel that many of society's serious problems,
25 most serious problems can be dealt with through an

1 appropriate application of our civil justice system.

2 REPRESENTATIVE TURZAI: So you take a
3 (inaudible).

4 PROFESSOR VANDALL: In the teaching of
5 personal injury law, there have been waves of attempts by
6 other disciplines to enter into the law or to critique the
7 law as though the law was somehow insufficient to stand on
8 its own 2 feet.

9 And so I have tried to address those
10 intrusions by lecturing on the material, handing out
11 readings. The most recent, of course, is the law on
12 economics movement. So -- and have failed. And I think
13 the reason I failed and that those intrusions are not
14 successful, those intrusions into the law, is because
15 they're simplistic.

16 What I mean by that is that civil liability
17 represents all the interests of society. And to talk
18 merely about economics or to talk merely about insurance or
19 to talk merely about deep pockets is a criticism of the
20 size, importance, and flexibility of the civil justice
21 system.

22 And so what I mean by that is that your task
23 is to do the right thing. Let me, if you would, just take
24 a minute and ask you to think of that wonderful movie that
25 we saw, that we all saw, Titanic, and to reflect upon one

1 of the most defensive aspects of the movie. And this is
2 important to the people of Pennsylvania because so many
3 people with an Irish background settled and still remain in
4 Pennsylvania.

5 But as you remember, in the Titanic, there
6 were gates put up below. And the gates throughout the ship
7 were intended to keep the poor Irish immigrants in their
8 place. And so I say to you, would you like to be
9 remembered as people who tried to do the right thing; or
10 would you like to be remembered as the captain of the
11 Titanic who put the gates up to keep the poor Irish
12 immigrants in their place?

13 And that's how I see joint and several
14 liability. Do you want to provide an opportunity where
15 injured victims can receive justice; or do you want to be
16 remembered like the captain of the Titanic who erected
17 gates so that the poor, often innocent victims are unable
18 to obtain their just compensation?

19 REPRESENTATIVE TURZAI: Mr. Chairman, just one
20 last question. I don't remember if it was Professor
21 Vandall or Professor Bublick, but one had indicated that
22 economic loss would be treated differently from pain and
23 suffering given an enactment of a joint and several
24 liability elimination statute.

25 To whoever made that comment, are you aware

1 that presently, given the comparative negligence statute,
2 that economic loss is not subject to the comparative
3 negligence statute but that injuries, personal pain and
4 suffering with respect to personal or property damage is in
5 fact subject to the comparative negligence statute so that
6 the present case law, as it exists, makes some distinction
7 as it arises under 42 Section 7102?

8 PROFESSOR VANDALL: Yes, I was the one that
9 made that comment. And the comment was in reference to one
10 of the tracks introduced by the authors of the Restatement
11 Third of Apportionment. And my point was that that track,
12 that alternative to joint and several liability draws a
13 distinction between economic loss, economic damages, and
14 pain and suffering.

15 As I understand Pennsylvania law, that
16 distinction is not drawn under joint and several liability
17 as it presently exists. And I may be mistaken. But my
18 understanding is that whatever damages you suffer are
19 reduced under comparative fault but that you can recover
20 those damages, be they economic or pain and suffering,
21 against the defendant who is jointly and severally
22 liability, jointly and severally liable.

23 If I'm wrong, I'd be happy to review the
24 statute and try to respond more accurately to that.

25 REPRESENTATIVE TURZAI: I have nothing

1 further. I would just call attention to the West case
2 which holds opposite of what you're contending here today.

3 CHAIRPERSON GANNON: Thank you, Representative
4 Turzai. However, we have here the current comparative
5 negligence and apportionment of joint tort-feasors standard
6 jury instruction for Pennsylvania. Apparently, as of
7 today, that hasn't caught up with the case referred to by
8 the Representative.

9 So it speaks in terms of all damages, both
10 economic and noneconomic. And I would, I'd like to see
11 that citation that he refers to which says that only
12 noneconomic damage is subject to comparative negligence.
13 That's not my understanding of the law nor is it the
14 understanding under our current, as of today, standard jury
15 instructions with respect to damages.

16 And with that, I'll recognize Representative
17 Roebuck.

18 REPRESENTATIVE ROEBUCK: Thank you, Mr.
19 Chairman. I want to go back to Disney World. I'm
20 confused. And I'm not a lawyer. Perhaps that's good. But
21 the case that was cited talked about 2 people who were not
22 related involved in an accident in which there was
23 liability.

24 And subsequently, they changed their status.
25 Is it true then in law, that if you change your status, you

1 also change your responsibility for what you do? If they
2 weren't married when the accident occurred, why does the
3 fact that they become married thereafter change the
4 liability? And that's to Professor Vandall. I'm sorry.

5 PROFESSOR VANDALL: I'm just speculating. But
6 apparently in Florida, they were able to do that. And they
7 did bring about the result that you're concerned about,
8 that after the injury, they were able to change their
9 status and therefore change the result. Perhaps Ellen
10 would like to respond to that in some --

11 PROFESSOR BUBLICK: Well, I mean, I think
12 that's a state-by-state decision. And I can certainly
13 imagine that a court, particularly if it smelled foul play,
14 if these were people who, you know, weren't already engaged
15 expecting to be married, felt that people were taking
16 advantage of changing their status at that time to get some
17 type of litigation benefit.

18 But a court could easily say that the immunity
19 is based not on your status at the time of the litigation
20 but at the time of the accident. So I don't know why that
21 particular state chose to go with their status at the time
22 of the litigation instead of the injury.

23 I think you could -- a court could easily make
24 that decision either way. It may depend on the language of
25 the statute in that state.

1 REPRESENTATIVE ROEBUCK: So the issue would be
2 resolved at the state level. The state would make a
3 determination. The state court would determine that. That
4 would vary across all 50 states.

5 PROFESSOR BUBLICK: Yeah.

6 REPRESENTATIVE ROEBUCK: Okay. Thank you.

7 CHAIRPERSON GANNON: I want to thank Professor
8 Bhat, Professor Bublick, and Professor Vandall for
9 appearing before the committee today. We went a little
10 over time. But I thought your insight was so helpful that
11 I extended, by about 25 minutes, the testimony.

12 I really appreciate your coming here today and
13 sharing your research and insight and understanding of this
14 very important issue. And if you don't have to leave right
15 away, if you hang around, maybe some of the committee
16 members might have other questions of you.

17 And I invite them to, if it's okay with you,
18 to ask the questions privately. You can help them
19 understand this issue better. I really appreciate your
20 being here. Thank you very much. And so that -- I'm going
21 to state the obvious.

22 And it's apparent from the testimony of these
23 3 professors that they do not favor repeal of joint and
24 several. These professors are here at my invitation. And
25 I extend this invitation to those folks who are proponents

1 of the repeal of joint and several, that if they can find
2 academic folks with at least the same or better credentials
3 than the panelists we have here, I would be all more than
4 willing to, at a subsequent hearing, invite those academics
5 to testify before the committee and perhaps have a
6 different analysis.

7 But our search for folks that have come from
8 the academic community produced these 3 distinguished
9 scholars. And they were very kind to come here and present
10 their point of view on their own time. Thank you very
11 much.

12 With that, our next witness is Mr. James
13 Redmond, Senior Vice President, Legislative Services, the
14 Hospital and Healthsystem Association of Pennsylvania.
15 Thank you for being here, Mr. Redmond. And I believe he's
16 also with Mr. James Robinson, Senior Vice President, Thomas
17 Jefferson Hospitals and Chief Administrative Officer for
18 the Methodist Hospital Division.

19 I'm very pleased that you accepted our
20 invitation to testify before the committee, unlike our
21 friends in the Medical Society who declined the invitation
22 and have consistently declined invitations to testify on
23 tort reform before any committee of the Legislature. With
24 that, Mr. Redmond, you may proceed when you're ready.

25 MR. REDMOND: Thank you, Mr. Chairman and

1 members of the committee. It's a pleasure to be with you
2 this morning. And as the Chairman mentioned, I am Jim
3 Redmond, Senior Vice President of Legislative Services for
4 the Hospital and Healthsystem Association of Pennsylvania.

5 And I'm pleased to have with me today Jim
6 Robinson, Senior Vice President, Thomas Jefferson
7 University Hospitals and the Chief Administrative Officer
8 of Methodist Hospital Division in Philadelphia.

9 In our written statement, there are a couple
10 points that we're trying to make. And given the time frame
11 that we're operating under and the courtesy of others who
12 follow us, let me just summarize a couple of key points.
13 As you well know, the rising cost of medical liability
14 coverage in Pennsylvania has been a problem over the past
15 several years.

16 And in our testimony, we have included some of
17 the recent data showing that the cost of primary coverage;
18 that is, the amount of coverage that is mandated under law
19 in Pennsylvania, has risen approximately 70 percent over
20 the past 12 months but the cost of excess insurance, which
21 most hospitals have in the Commonwealth; that is, insurance
22 above what's mandated by law, has risen even greater to 150
23 percent.

24 The recently passed and enacted Medical
25 Liability Reform Law Act 13 of 2002 was a good first step

1 and addressed primarily our concerns in the primary layer
2 but did not address some of the concerns that we have in
3 the excess insurance layer.

4 And as you well know, the House of
5 Representatives did agree with us that there should be some
6 modification of the joint and several liability law when
7 1802, House Bill 1802 was considered back in February and
8 March of this year.

9 Before I talk about some of the issues
10 relative to joint and several liability, I'd like to turn
11 it over to Mr. Robinson to talk about his particular
12 situation and the impact rising medical liability costs has
13 on his community.

14 MR. ROBINSON: Thank you, Jim. Good morning.
15 I want to thank the members of the House Judiciary
16 Committee for giving me the opportunity to speak to you
17 this morning. As Mr. Redmond stated, my name is James E.
18 Robinson. And I serve as Senior Vice President for Thomas
19 Jefferson University Hospitals and Chief Administrative
20 Officer for Methodist Hospital Division.

21 For approximately 110 years, Methodist has
22 provided a full array of primary care, primary health care
23 services, including maternity services, to the community of
24 South Philadelphia. Since 1984, Methodist has been the
25 only hospital in the South Philadelphia area delivering

1 babies.

2 Due to the dramatic increase in the cost of
3 medical malpractice insurance premiums in the region, the
4 Methodist Hospital Division will discontinue delivering
5 babies effective June 30th, 2002. Based on our commitment
6 to the community, the hospital will continue to provide
7 outpatient prenatal care; but the actual deliveries will
8 take place at Thomas Jefferson University Hospital, Center
9 City Campus.

10 The decision to consolidate maternity services
11 will reduce a portion of the high malpractice insurance
12 premium for the coming fiscal year. Currently, the
13 hospital is facing a near doubling of its malpractice
14 premiums. In real terms, this means an increase of nearly
15 \$3 million.

16 The consolidation of services will result in
17 an estimated \$700,000 reduction in premiums. Since the
18 hospital employs obstetricians, or employs the
19 obstetricians, we bear the entire malpractice cost of
20 insurance. Obstetricians region-wide are faced with
21 unusually high premium increases.

22 At Methodist, the cost of insuring an
23 obstetrician is averaging about \$125,000 per physician. In
24 addition, of the 6 obstetricians the hospital employs, all
25 but one have been requested to be released from their

1 contracts to pursue opportunities out of the area and, in
2 some cases, out of the state.

3 The diminution of obstetrical services in our
4 community is also resulting in the elimination of 91 full
5 and part-time positions at Methodist. While we have
6 committed to making every effort to reassign affected
7 employees, this has not been possible for everyone.

8 To summarize, this is what the exorbitant rise
9 in malpractice insurance costs looks like in human terms
10 from the perspective of those who provide health care and
11 on the residents of the community we serve.

12 Again, I thank the members of the committee
13 for providing me this opportunity to speak. And I now will
14 turn it back over to Mr. Redmond.

15 MR. REDMOND: There is no doubt that you're
16 dealing with an issue that has 2 conflicting objectives.
17 On one hand, should liability correspond in any way to the
18 degree of fault? On the other hand, should there be
19 maximum compensation to the claimant? Pursuit of one
20 impacts the other.

21 I mean, there is no doubt about that. I think
22 you all recognize that. What we've tried to demonstrate is
23 that there is a cost to all of us in terms of trying to
24 maximize the benefit to any one of us. And indeed, that's
25 why we believe that there needs to be some balance, some

1 fairness into our civil justice system.

2 On page 5 and 6 of our testimony are 5
3 examples that we've provided. The Chairman had requested
4 that we provide some examples of some actual cases, both in
5 terms of jury verdicts and also settlements. There's a
6 common theme; and that is, in medical malpractice cases,
7 usually there is a physician, oftentimes more than one
8 physician, and certainly a hospital involved.

9 In each of these cases, the hospital was
10 brought into these cases not because there was equipment
11 failure or the failure of, of the hospital itself but
12 simply because the physician practiced there. And in a
13 couple of cases, there were, the physician was found to be
14 at fault for failure to diagnose.

15 The hospital's participation in the suit was
16 brought under vicarious liability or ostensible agency
17 theory. And in all cases, the hospital ended up paying
18 most of the amount. And even in those settlement
19 situations -- and as you well know, I think that most
20 medical malpractice cases are settled. They do not reach a
21 jury.

22 But for fear that a case might go to a jury
23 and a runaway jury and award be awarded, the hospital would
24 agree to pay more than what would be its fair share under
25 current, current law.

1 Jim and I would be happy to take any of your
2 questions. And again, thank you very much for inviting us
3 to participate.

4 CHAIRPERSON GANNON: Representative Hennessey.

5 REPRESENTATIVE HENNESSEY: Thank you, Mr.
6 Chairman. Thank you, Jim. Thank you, Mr. Robinson, for
7 being here. In many cases involving medical malpractice,
8 it would seem to me that we can all agree that awards
9 exceed the amount of insurance that we require individual
10 physicians to carry in Pennsylvania.

11 And so it would seem to me that to the extent
12 that you don't have multiple doctors involved lumping \$1.2
13 million worth of insurance, if you have 2 doctors that got
14 2 1/2, \$2.4 million of insurance coverage for the
15 physicians and you have a \$6 million verdict, it's my
16 understanding that the hospital generally will cover the
17 \$3.6 million balance but will not seek contribution from
18 the doctors from their individual assets. And I'm
19 wondering why.

20 I understand there's an employment
21 relationship there. But it seems to me the converse of
22 that position would be to tell the plaintiff they should
23 then turn around and sue the, if they couldn't collect from
24 the hospital, the deep pocket, so to speak, then they'd
25 have to go out after the doctors themselves.

1 And would you -- is it your position that
2 you'd rather see the plaintiffs chase those individual
3 doctors as separate assets that are beyond their insurance
4 coverage rather than to have the hospital do it?

5 MR. REDMOND: It's a good question. And it's
6 highly unlikely that any hospital would turn around and try
7 to get payment from one of its physicians, whether or not
8 they were employed or simply on the staff there as an
9 independent contractor or even turn around and try to gain
10 compensation from an individual nurse or technician or a
11 technologist. Now --

12 REPRESENTATIVE HENNESSEY: Jim, can I just
13 interrupt for a minute? Is that the same whether or not
14 the hospital is self-insured or whether it's privately, or
15 insured through the private marketplace because it would
16 seem to me the insurance --

17 MR. REDMOND: Generally yes. Generally yes,
18 from my experience. I think, I think that in the reality,
19 though, of -- if you're to repeal joint and several, what
20 would happen is that you would reach settlement at a lower
21 amount faster.

22 At the moment an individual physician or their
23 insurance company representing them, if they're going to,
24 if they've tendered their limits, they recognize that
25 they're going to pay out 500,000 and the CAT Fund is going

1 to pay its additional 700,000, there's no incentive to
2 settle the case if there is a so-called deep pocket.
3 There's no risk.

4 If we repealed it, I would believe that we
5 would have a different kind of recognition of the economic
6 realities of each of the defendants. Yes, I think the
7 amount would be less to that individual. But it isn't that
8 the claimant is going without compensation because we do
9 have mandatory insurances, as you've pointed out.

10 One other aspect to your question. In the
11 beginning, there's a legitimate argument as to whether or
12 not we need any sort of mandated limit. And certainly,
13 during the debate, we had some discussion about that. It
14 was pointed out that in those states where there is no
15 mandated limit, actually physicians carry much more
16 insurance than what is mandated by law here in
17 Pennsylvania.

18 CHAIRPERSON GANNON: Representative Dermody.

19 REPRESENTATIVE DERMODY: Thank you, Mr.
20 Chairman. Mr. Redmond, a question. I just had an
21 opportunity to read a few of your examples here. And I
22 guess the situation is, there was settlement agreements.
23 You have a situation where a plaintiff's been injured by a
24 negligent defendant. Now, in either of these cases,
25 neither one went to trial, correct?

1 MR. REDMOND: Some of the cases went to trial;
2 some did not.

3 REPRESENTATIVE DERMODY: The first 2 examples
4 I was able to read, they didn't go to trial; is that right?

5 MR. REDMOND: Yeah. Actually, in the first
6 one, it did go to trial. The jury awarded \$13 million.
7 But the hospital and the plaintiff attorney agreed to work
8 out an adjustment of that amount.

9 REPRESENTATIVE DERMODY: So the hospital was
10 found negligent by the jury, correct?

11 MR. REDMOND: Yes.

12 REPRESENTATIVE DERMODY: And the plaintiff
13 received an amount that the jury felt made them whole; is
14 that right?

15 MR. REDMOND: That's correct.

16 REPRESENTATIVE DERMODY: Is that a bad result?

17 MR. REDMOND: I think, I think the amount that
18 was awarded was, was incredible, \$13 million. \$10 1/2
19 million for pain and suffering.

20 REPRESENTATIVE DERMODY: I don't know the
21 facts of the case, and those always have a lot to do with
22 what happens. Usually when there's -- I've also been
23 experienced when juries have come back with large amounts,
24 for all kinds of various reasons. Most of them are very
25 horrible cases. There's been an adjustment made out in the

1 case where the parties agree.

2 But if you're found negligent, who should pay
3 them? I guess my question is, If the plaintiff is here
4 injured through no fault of his own and you're found to be
5 negligent, who should pay? I mean, what does the plaintiff
6 do in those situations?

7 MR. REDMOND: Each of the defendants who were
8 found at fault should pay their fair share.

9 REPRESENTATIVE DERMODY: Thank you. Thank
10 you, Mr. Chairman.

11 CHAIRPERSON GANNON: Representative Pallone.

12 REPRESENTATIVE PALLONE: Thank you, Mr.
13 Chairman. Just to piggyback on Representative Dermody's
14 query. And that may apply in the medical community or even
15 in the other professional environments where there may be
16 multiple defendants, a hospital, an anesthesiologist, the
17 physician, the treating physician, the surgeon, et cetera,
18 et cetera. There would be levels or layers of insurance.

19 And I don't know if you have the answer or
20 not. But how do you suppose or propose that would happen
21 in the nonprofessional arena where you have multiple
22 tort-feasors, whether they be 3 or 4 hunters out in the
23 field or 3 or 4 automobiles involved in an accident or
24 something to that effect?

25 So when you look at the joint and several tort

1 issue, it's not limited to the medical community.

2 MR. REDMOND: That's correct. And I can only
3 give you a personal response of that, not a professional
4 one, given that I'm not an expert. But just as an
5 individual, I try to carry insurance on me and my family to
6 help cover those particular situations.

7 REPRESENTATIVE PALLONE: Thank you.

8 CHAIRPERSON GANNON: What percentage of the
9 cases that you -- if you know this -- that you have where
10 the hospital is involved, other than where it's an employee
11 and the doctor respondeat or the superior comes into
12 play -- that's not joint and several -- what are the number
13 of cases where joint and several comes into play with
14 respect to the hospital's liability of the total number of
15 cases filed against the hospital?

16 MR. REDMOND: I do not have a percentage
17 number to give you and have never seen such information or
18 even know where to go and get that information.

19 CHAIRPERSON GANNON: You had said earlier in
20 the beginning of your testimony we had just recently passed
21 legislation that deals with the issue with respect to
22 health care providers on joint and several; we've modified
23 that to some extent.

24 We've also modified it to the extent of the,
25 the ability to recover medical expenses that are paid by

1 other insurance so that under that law as it currently is
2 now, a victim of medical negligence would be precluded from
3 recovering any medical expenses that have already been
4 paid. So that's, you know, off the table.

5 And with respect to joint and several
6 liability, that would only come into play, I believe, if
7 the case has a value of in excess of a million dollars?

8 MR. REDMOND: No. That's what the, that's
9 what the House adopted back in February. But it was taken
10 out of the final package.

11 CHAIRPERSON GANNON: That's right. Okay. I'm
12 sorry.

13 MR. REDMOND: Right.

14 CHAIRPERSON GANNON: But we did address the
15 issue of economic/non-economic damages. And I would imagine
16 there hasn't, we haven't seen the impact of that as of yet
17 in cases that, since it's so new.

18 MR. REDMOND: That's correct. Usually -- I
19 mean, our best guess from the actuaries is it's going to
20 take at least 3 to 5 years before some of the tort reform
21 elements of Act 13 have any sort of effect.

22 CHAIRPERSON GANNON: And I stand corrected.
23 That provision was taken out. Well, thank you very much --

24 MR. REDMOND: Thank you.

25 CHAIRPERSON GANNON: -- Mr. Redmond and Mr.

1 Robinson, for appearing before the committee to present
2 information and testimony on the issue of joint and several
3 liability. Our next witness is Carol Steinour, Esquire,
4 the Pennsylvania Chamber of Business and Industry.
5 Welcome, Ms. Steinour. And you may proceed when you're
6 ready.

7 MS. STEINOUR: Thank you, Representative
8 Gannon. My name is Carol Steinour. Good morning to
9 everybody here. I guess it might be afternoon at this
10 point. Seated to my right is Mr. Barry Stern, who's also
11 here on behalf of the Pennsylvania Chamber.

12 Mr. Stern does not have any prepared remarks,
13 but he does have information on what the other states have
14 done with regard to the abolition of joint and several
15 liability or the modification of that doctrine. And he is
16 here to answer any questions that you might have.

17 I'm very happy to be with you this morning. I
18 am a practicing lawyer. I describe myself as a trial
19 lawyer. I'm a partner in the Law Firm of McNees, Wallace,
20 and Nurick here in Harrisburg. And I have spent my entire
21 professional career as a litigator defending people and
22 companies who are involved in lawsuits and also suing
23 companies and people who have been injured in accidents.

24 And it's because of my experiences as a trial
25 lawyer that I'm very happy to be here with you this morning

1 to offer my testimony with regard to the abolition of joint
2 and several liability. In my practice and in my
3 experiences as a lawyer, I have come to the belief that our
4 system is out of balance because we now have a system that
5 requires a defendant to pay more than its share of
6 liability that has been assessed against it by a jury.

7 Abolishing joint and several liability, in my
8 belief, will make a defendant pay his share of the verdict
9 and not somebody else's share. I heard a lot of testimony
10 this morning from various law school professors, and I
11 respect that position. I don't know how many cases any of
12 those, any of those law school professors have tried. And
13 I'm here today to tell you about how this plays out in the
14 real world.

15 Now, part of my prepared remarks specifically
16 mention the history of joint and several liability in this
17 Commonwealth. I don't think it does any of us any good
18 this morning for me to rehash that because that's already
19 been discussed by the law school professors. But I want to
20 give you the real-world examples of how this plays out
21 against what I see as innocent defendants.

22 You've heard a lot this morning about victims,
23 innocent victims, full compensation, and that sort of
24 thing. But let's talk about how joint and several
25 liability hurts innocent defendants, companies here in

1 Pennsylvania. We're not talking about just big companies.
2 We're talking about the local grosser. We're talking about
3 the local hardware store. We're talking about your
4 hairdresser.

5 So when we hear these theories about shifting
6 social costs, let's be very clear about what social costs
7 we're talking about. We all pay. Businesses in
8 Pennsylvania pay when you're talking about their shifting
9 costs. This is not some theory. This is not something
10 that none of us feel the effect of. We do feel the effect
11 of it. And Mr. Redmond and Mr. Robinson just told you
12 about the effect on hospitals.

13 Let me tell you about the effect on business.
14 There's been a lot of discussion today about substantial
15 cause, substantial factor, and 1 percent. And I think one
16 of the law school professors said that that's a fallacy.
17 Let me tell you it's not a fallacy. It's what happens.

18 I talked with one of my partners yesterday.
19 And he tried a case before a judge here in the Commonwealth
20 of Pennsylvania. Our client was ultimately found by that
21 judge, the fact finder in the case, to be 2 percent liable.
22 Obviously, the first step that the judge had to take was to
23 find whether or not that defendant's actions were a
24 substantial factor in causing the harm. That's the very
25 first step. Then after you figure that out, then you

1 apportion the liability.

2 So does 2 percent mean substantial? Yes, it
3 does. Was that judge in that case wrong? No, that judge
4 in the case wasn't wrong. Now, you can talk about 1
5 percent, 2 percent, 5 percent. And those are the actual
6 apportionments that juries make when they are presented
7 with these questions.

8 But the real problem with joint and several
9 liability is what happens before a case gets into the jury
10 room. And that's in settlements. What happens is a
11 defendant -- let's just take a real-world example.
12 Plaintiff is injured through no fault of his own,
13 completely innocent.

14 There was a single actor causing the harm. It
15 might even have been a crime that this person committed. I
16 think the professor, one of the professors talked about
17 that. That person committing the crime or involved in the
18 act has no assets, no insurance, nothing to collect from.

19 It's a terrible situation. You have the
20 victim who's injured. What do you do? Well, what happens
21 in the real world is that the plaintiff's attorney casts a
22 very wide net and drags in whoever might be responsible.
23 Okay? If it happened in a parking lot, was there adequate
24 lighting? Were there other incidents? Could the company
25 who owned the property that was not involved in the

1 criminal act at all, could they have done something?
2 Perhaps yes; perhaps no. But they are dragged into the
3 lawsuit.

4 So a businessman is sitting there saying, Do I
5 risk going to trial and being held 1 percent, 5 percent, 10
6 percent liable knowing that the other defendant has no
7 assets to pay and I'm going to be on the hook for 100
8 percent of the damages? Do I take that risk, or do I
9 settle the case and try to cut my losses?

10 Every single day in Pennsylvania, businesses
11 take those risks. So they settle lawsuits where they might
12 have only a tangential involvement because they don't want
13 to risk paying more at trial. That's the real-world
14 example. So when the professor talks about looking at
15 cases and how those cases play out, that's one thing.

16 That's a very small percentage of -- those are
17 court decisions. They're not actual -- they're a very
18 small percentage of cases that are actually filed and
19 litigated just prior to a case going to a verdict. So
20 let's look at that wide majority of cases where defendants
21 are brought to their knees essentially and large
22 settlements are extracted from those defendants because of
23 this threat looming above them. And that threat is called
24 joint and several liability.

25 Yesterday, I had the privilege of testifying

1 before the Senate with 2 business people. One was Mike
2 Cortez, vice president and general counsel from Sheetz,
3 which is a very important --

4 CHAIRPERSON GANNON: I usually do not
5 interrupt a witness. But during his testimony, mister, the
6 representative for Mr. Sheetz, or the Sheetz company raised
7 the issue of confidentiality when he was asked specific
8 questions about the case.

9 I don't want to hear anything about the Sheetz
10 case because the defendant, in most of my experience, the
11 defendant is the one who insists on confidentiality for a
12 whole bunch of reasons. Mister, the representative from
13 Sheetz could have waived that confidentiality yesterday and
14 told that committee the facts. So skip over your testimony
15 as far as the Sheetz case is concerned.

16 MS. STEINOUR: I was not going to testify
17 about the Sheetz case.

18 CHAIRPERSON GANNON: Okay. I just -- I didn't
19 mean -- this is not directed to you. Please --

20 MS. STEINOUR: I was not going to testify
21 about the Sheetz case.

22 CHAIRPERSON GANNON: Okay. Fine.

23 MS. STEINOUR: But Sheetz is a very important
24 employer here in the Commonwealth of Pennsylvania. And I
25 think what they had to say is important. Without talking

1 about the case, Mr. Sheetz testified about the impact that
2 joint and several liability has on his company every single
3 day. And it was not just that single case.

4 He emphasized the commitment that his company
5 has to this Commonwealth. And he also urged us to reform
6 the tort system because of the decisions he has to make
7 every day. As he said, when a business has to make a
8 decision whether or not they're going to expand into
9 Pennsylvania, expand their business here in Pennsylvania,
10 move to Pennsylvania or move somewhere else, they have
11 different factors to consider.

12 One of those factors is, Will they be held
13 liable for somebody else's negligence or intentional acts?
14 If they can move to a state or expand into a state where
15 they don't have to be responsible for somebody else's acts,
16 what decisions do you think that business is going to make?

17 We also heard from Mr. Liddell, Kirk Liddell
18 from the Irex Corporation. And he talked about how his
19 company was put out of business because of the asbestos
20 litigation. Now, I understand asbestos is a whole
21 different creature.

22 But what has happened here in asbestos can
23 happen in other areas. And that is, once you get through
24 with all of the manufacturers, that first line of people
25 who have made a product and they go bankrupt, the Johns

1 Manvilles of the world, once they go bankrupt, then you
2 have to go to the next layer and bankrupt those companies
3 and then you get to the next layer and bankrupt those
4 companies.

5 Now, where does it stop? Okay. We already
6 have businesses here in Pennsylvania who are going out of
7 business. My testimony today is focused on those
8 defendants who can't take the chance of going to trial
9 because of what might happen at trial. So again, large
10 settlements are extracted from them.

11 We believe that the system is out of balance
12 and it needs to be fixed. Thank you.

13 CHAIRPERSON GANNON: Representative Hennessey.

14 REPRESENTATIVE HENNESSEY: Thank you, Mr.
15 Chairman. With all that noise outside, I was tempted to
16 say your testimony is music to my ears. I couldn't help a
17 corny joke. I'm sorry.

18 MS. STEINOUR: I'll accept that,
19 Representative.

20 REPRESENTATIVE HENNESSEY: Carol, you had
21 talked about innocent defendants. And to put this in some
22 perspective, once a defendant has been found guilty of
23 substantial negligence by a jury, it probably differs
24 substantially materially from a plaintiff who is considered
25 to be innocent and a victim of an injury.

1 MS. STEINOUR: Right. When I talk about an
2 innocent defendant, I'm not talking about somebody who's
3 actually gone to trial and some negligence has been found
4 against them. I'm talking about those, those, the great
5 majority of cases that never reach a verdict because
6 companies don't want to take the chance of being found 5
7 percent or 10 percent liable.

8 REPRESENTATIVE HENNESSEY: I understand.
9 With regard to a particular set of circumstances,
10 forgetting -- we're going back to an earlier part of your
11 testimony but not the Sheetz case. If there had been a
12 situation where there had never been any kind of problem on
13 a particular parcel of property, there would not be, it
14 would seem to me, the fear in the part, on the part of the
15 defendant who simply owned a safe and secure property of
16 going to trial.

17 Ownership of property I don't think has been
18 ever held by a jury to be found to be, you know, a
19 substantial negligent act. Okay?

20 MS. STEINOUR: Yes, yes.

21 REPRESENTATIVE HENNESSEY: But it would seem
22 to me that if there had been a history of prior, prior
23 problems on a property, then you can take a look at the
24 joint, at the potential for a joint liability verdict
25 exceeding a fair share as being some impetus toward

1 improving the security of that property.

2 And in converse, you can say that anybody's
3 going to say, Look, you know, if a drug transaction has
4 taken place, there were bad people out there and they're
5 not going to find us more than 2 or 3 percent liable. So
6 why should we have to secure our place? Why should we
7 light it up? Why should we improve it at all?

8 It would seem to me that in that sense, moving
9 from joint liability to a strict several liability concept
10 in Pennsylvania would have the unwanted effect of simply
11 telling property owners you don't need to upgrade your
12 property. There's no downside to not upgrading it. Just
13 let it deteriorate. Let it stay at its current level.

14 MS. STEINOUR: I understand. And I think what
15 you're getting at is the incentive that joint and several
16 liability brings to businesses to make improvements. Is
17 that what you're getting at?

18 REPRESENTATIVE HENNESSEY: Essentially, yes.

19 MS. STEINOUR: Now, let's think about another
20 factor here. How about those millions of dollars that go
21 to one person that are not available to the rest of us for
22 improvements to that business? If there is a, a verdict,
23 in essence, that a jury has said, Gee, there's a little
24 bit, you were involved a little bit, we think that we
25 should hold you responsible, what the jury doesn't know is

1 that them holding them responsible for just a minor amount
2 means that they have to pay the entire verdict.

3 The problem here and the problem with your
4 example is that money is spent given to one plaintiff in
5 one case. That's money that is out of pocket that's not
6 available for other things. It's not available for new
7 products. It's not available for improvements to property.
8 It's not available for innovations. It's not available for
9 employee benefits.

10 REPRESENTATIVE HENNESSEY: It may not be
11 available --

12 MS. STEINOUR: There's only so much money
13 available.

14 REPRESENTATIVE HENNESSEY: It may not be
15 available to anybody but the plaintiff, but the plaintiff
16 has been awarded that amount in compensation for injury.
17 So to some extent, the plaintiff is made whole by receipt
18 of the verdict.

19 MS. STEINOUR: Well, that's another
20 interesting --

21 REPRESENTATIVE HENNESSEY: But are you telling
22 me that if the million dollars or \$100,000 is not paid out,
23 that there's any way to guarantee that it's going to
24 instead flow into improvements on the property? It's not.
25 It's going to sit in the pocketbook of somebody, either the

1 insurance company or the defendant. All right.

2 And, you know, I think I could be more swayed
3 by argument if we could find some way to show that the
4 money, that it wasn't spent on compensating an injured
5 plaintiff; it was actually going to be put into some sort
6 of upgrading of the property or, you know, benefiting
7 society. I don't see it.

8 I mean, what I see is somebody says, Okay, we
9 dodged the bullet on that one. We don't have to put a
10 fence around our property. We don't have to improve the
11 lighting. We don't have to do anything because nobody's
12 going to hold us really liable much more than 1 or 2
13 percent.

14 MS. STEINOUR: Well, I think that that's, you
15 know, businesses in Pennsylvania, businesses across the
16 United States want to stay in business. And one of the
17 ways they can do that is to offer better services. And so
18 money has to be available for other services.

19 Now, let's talk about another situation with
20 Mr. Liddell talking about his company having to go out of
21 business because the judgments against his company were
22 more than what that company made in its entire history. So
23 there are 1,500 people out of jobs. Benefits are lost;
24 taxes are lost; jobs are lost.

25 Now, are you telling me if we didn't have

1 joint and several liability that they would have pocketed
2 all that money and fired the employees anyway? That
3 wouldn't happen. That wouldn't happen. So we have to
4 remember that there is a cost, there is a cost to all of
5 us; there is a cost to the tax base; there's cost to the
6 businesses in Pennsylvania.

7 REPRESENTATIVE HENNESSEY: I think that if the
8 system works the way it's supposed to work generally, you
9 have defendants, either they're insured or they're solvent.
10 If a verdict is arrived at by a jury, if the plaintiff was
11 somehow contributorily negligent or negligent in some
12 respect, the verdict amount is reduced to reflect that.

13 And as long as there are solvent defendants,
14 there's really not a problem with our system because the
15 joint liability aspect never kicks in. It's only when one
16 of those defendants who has been called upon to answer for
17 some of the harm that they've caused says I don't have any
18 money, it seems to me that at that point, the system is
19 going to arrive at an unfair result.

20 And we have the choice of saying to the other
21 defendants who have been found by a jury to be negligent,
22 You've got to cover the loss. Or we can turn to a
23 plaintiff who is the victim, if she or he was in any way
24 negligent, the jury's already punished them by reducing the
25 amount of the verdict.

1 We can turn to the plaintiff then and say,
2 There's got to be an, there's going to be an unfair result
3 here. You might as well, as an innocent plaintiff, suffer
4 or shoulder that burden of the unfairness because we don't
5 want to put it on a defendant or other defendants who have
6 already been found negligent by this jury.

7 And it would seem to me that if we're going to
8 put that unfair burden on somebody's shoulders, it
9 shouldn't be on the plaintiff but rather on somebody else
10 who has already been found liable by the jury to be
11 negligent.

12 MS. STEINOUR: What you're talking about there
13 is the small percentage of cases where there is actually a
14 verdict. Now, Mr. Redmond already said to you that there
15 is a conflict here. You're going to be saying to the
16 innocent victim, You're not going to get full compensation.

17 And to me, there's a huge difference between
18 full compensation and being made whole. Okay. Let's leave
19 that for a moment. Huge.

20 REPRESENTATIVE HENNESSEY: That's probably a
21 discussion for another day.

22 MS. STEINOUR: Huge difference. Okay. And
23 then you're saying to the defendant who has only marginal
24 involvement in the case, You have to shoulder all of the
25 costs. All right. Is that fair? In our view, no, it's

1 not fair because we see businesses being hurt by that
2 system.

3 REPRESENTATIVE HENNESSEY: Okay. But whether
4 it's fair and whether businesses get hurt are 2 different
5 issues.

6 MS. STEINOUR: Businesses get hurt by that.

7 REPRESENTATIVE HENNESSEY: Okay. But is it
8 fair to turn that situation around and say that a plaintiff
9 is going to have to suffer the loss because we don't want a
10 negligent business to contribute more than its share, so an
11 innocent plaintiff should essentially cover that share,
12 that lost share?

13 MS. STEINOUR: But I think what's getting
14 lost, in fact, is that the plaintiff -- if there is a
15 finding of 10 percent negligence, that defendant has to pay
16 10 percent of the verdict. So the plaintiff is getting
17 some compensation.

18 REPRESENTATIVE HENNESSEY: Yeah. Oh, sure. I
19 mean, to the extent that compensation follows the
20 percentages that are allocated, I don't think anybody would
21 think that there's a problem. It's when somebody, some
22 defendant who is bankrupt, insolvent, judgment proof in
23 some respect can't pay its share that either the plaintiff
24 is going to suffer that 40 percent or 30 percent loss or
25 the other defendants who have been found to be negligent by

1 a jury are going to cover it.

2 And it just seems to me that if we're talking
3 fairness, it makes more sense to put it on, on the
4 collective negligent defendants than it does on the
5 innocent plaintiff.

6 MS. STEINOUR: But again, I think we're
7 missing the point here. Let's take an example. Let's take
8 concrete numbers. If you have 4 defendants, one is 10
9 percent, Defendant A is 10 percent negligent; Defendant B
10 is 10 percent negligent; Defendant C is 10 percent
11 negligent; Defendant D is 70 percent negligent.

12 And it is that Defendant D who is bankrupt.
13 Then you've got the other 3 defendants who cumulatively are
14 30 percent liable. So they will pay 30 percent of the
15 verdict. Okay. So plaintiff is not walking out without
16 any money.

17 REPRESENTATIVE HENNESSEY: No. The plaintiff
18 loses 70 percent.

19 MS. STEINOUR: Yes.

20 REPRESENTATIVE HENNESSEY: And your defendants
21 who have been found negligent lose nothing.

22 MS. STEINOUR: Yes.

23 REPRESENTATIVE HENNESSEY: Well, they answer
24 for their own, for their own negligence as has been set up
25 by the jury, right?

1 MS. STEINOUR: Yes.

2 REPRESENTATIVE HENNESSEY: So in a sense, they
3 pay what they've been required to pay.

4 MS. STEINOUR: Right.

5 REPRESENTATIVE HENNESSEY: Somebody has to
6 absorb the 70 percent loss. It's either going to be the
7 plaintiff or collectively the defendants.

8 MS. STEINOUR: Correct.

9 REPRESENTATIVE HENNESSEY: And if we assume
10 that the plaintiff is the innocent victim here, I guess
11 I'm, I'm still trying to figure out why you think it's
12 fairer to put that burden on the shoulders of an innocent
13 party rather than collectively on people who have been
14 found to be negligent.

15 I realize it's going to be an unfair result.
16 But can't we at least mitigate the result and keep it away
17 from the innocent party and make the negligent parties bear
18 it?

19 MS. STEINOUR: Well, if you say it's an unfair
20 result, I guess I'm confused as to why you're asking me why
21 it's fair because --

22 REPRESENTATIVE HENNESSEY: Well, what's
23 more --

24 MS. STEINOUR: You said it's unfair.

25 REPRESENTATIVE HENNESSEY: Sure. It's unfair

1 because one defendant is judgment proof or beyond the reach
2 of the court. So we have a verdict which is not -- the
3 plaintiff -- the amount of the judgment is not going to
4 come from the various defendants as the jury allocated it.
5 Okay.

6 So either the plaintiff bears the 70 percent
7 loss or collectively the negligent defendants bear a 70
8 percent loss. And I hear you saying that it's really we're
9 searching for fairness here to find the competitive, you
10 know, the reason to keep people in Pennsylvania. So let's
11 let the negligent defendants off the hook, so to speak.

12 The flip side to that is that the plaintiff
13 loses 70 percent. I guess I'm wondering why you think
14 that's a fairer result than having the negligent people
15 lose the 70 percent.

16 MS. STEINOUR: You know, I heard that Judge
17 Kistler made some comments at the Pennsylvania Bar
18 Association.

19 REPRESENTATIVE HENNESSEY: I don't know. I
20 wasn't there. I don't know what -- I don't know Judge
21 Kistler.

22 MS. STEINOUR: Let me retract that. I don't
23 think it's fair for me to repeat certain things that were
24 said. But let me just say this: We bring juries in, and
25 we tell them that they have a very serious job and that

1 they are a very important part of our judicial system.

2 And they take their job seriously. And they
3 go back -- they hear all the evidence. They're very
4 attentive. They go back into that jury room, and they make
5 very careful decisions. And they come out, and they report
6 those decisions.

7 And then essentially what joint and several
8 liability says is we're going to throw all that hard work
9 out because no matter how negligent you find the defendant,
10 we're going to say they're 100 percent liable. A jury
11 never knows that.

12 MR. STERN: If I may, let me give you an
13 example of a real case that happened in 1986, the Elder
14 Orluck case. It happened to a municipality as opposed to a
15 business. But to show where this theory and this practice
16 really is unfair and how this can happen in any case, I
17 just want to read this.

18 The plaintiff was involved in an automobile
19 accident. The plaintiff's car slowed down for a municipal
20 Memorial Day parade but was hit from behind by an
21 automobile driven by the defendant, Orluck. Orluck joined
22 the municipality as an additional defendant claiming that
23 it was negligent, negligent in failing to warn oncoming
24 traffic of the parade.

25 The jury found the plaintiff 25 percent

1 contributorily negligent, the other driver 60 percent
2 negligent, and the municipality 15 percent negligent. We
3 don't know why the 15 percent. But you can see it was a
4 small amount, not a major factor but a substantial
5 contributor.

6 The supreme court held that despite the
7 plaintiff being more to blame for the accident than the
8 municipality, he was, nevertheless, entitled to recover his
9 entire judgment from the municipality under the doctrine of
10 joint and several liability.

11 In so doing, the court adopted a construction
12 of Pennsylvania's Comparative Negligence Act that was
13 really at odds with what the legislature had intended. The
14 court did so because of its paramount policy goal that was
15 compensation to the plaintiffs, which is what I think we
16 are talking about now.

17 And coming from the decision, it says,
18 Comparison of the plaintiff's negligence to that of the
19 combined negligence of all defendants is consistent with
20 and furthers the intent of the act. It ensures that an
21 injured plaintiff who is otherwise entitled to recovery
22 will not go uncompensated because of the number of
23 defendants who contributed to the injuries.

24 The court thus held that the abolition of the
25 harsh doctrine of contributory negligence under which the

1 plaintiff who was found to be 1 percent causally negligent
2 could not recover from a defendant who was 99 percent at
3 fault meant that the defendant who was 1 percent at fault
4 could be required to pay 100 percent of the judgment.

5 It's just a little bit longer. Why was one
6 result harsh while the other was not? The court did not
7 say, except through the broad generality, that, quote, the
8 modern notions of fault and liability, end quote, required
9 the plaintiff to be compensated when he or she was less
10 negligent than several defendants combined regardless of
11 how little at fault any one of those defendants might have
12 been. A majority of the court rejected this reasoning.
13 But because of concurrences in the, concurrences in the
14 result, the result remains the law of Pennsylvania to this
15 date. As Elder recognized, this construction encourages
16 plaintiffs to sue as many defendants as possible rather
17 than those primarily at fault. Pennsylvania's plaintiffs
18 routinely file complaints naming scores of defendants in
19 cases when the ability of the primary liable defendant to
20 pay is questionable.

21 Now, this goes back a little bit to the
22 history. Up until '39 through '70s, Pennsylvania made its
23 change from contributory to comparative negligence. And
24 what the courts were saying prior to that was that it's
25 really unfair and harsh to the plaintiff who is 1

1 percent -- and this is their words -- who is 1 percent
2 responsible to be restricted from receiving any type of
3 compensation to their injury even though others were much
4 more at fault.

5 So the pendulum went from here to now where
6 it's over on the other side. And what this case is saying
7 is -- and what we're saying is we just want the fairness
8 thing to bring it back to the middle, not back to the other
9 side, just to bring it to the middle.

10 If it was unfair for the plaintiff not to
11 recover when they were 1 percent contributorily negligent,
12 why is it fair for a defendant who was 10 percent liable, 5
13 percent liable, or 20 percent liable to pay 100 percent of
14 the damages?

15 Now, that gets into the social policy and so
16 forth. But this was an actual case. It happened to be a
17 municipality. It could have been a business.

18 REPRESENTATIVE HENNESSEY: The case you were
19 referring -- you weren't reading from the case. You were
20 reading from some commentary?

21 MR. STERN: I was reading from a paper that
22 was submitted to the Pennsylvania Institute for Tort Reform
23 written by Pepper Hamilton. But it's a 1986 case, 515
24 Atlantic 2d.

25 REPRESENTATIVE HENNESSEY: But it was

1 advocating for a change in the system, for a change in the
2 case law?

3 MR. STERN: Well, the case showed, would show
4 the unfairness of where the municipality, in spite of the
5 fact that the plaintiff was more responsible for the, more
6 negligent than the municipality was, the municipality had
7 to pay even for the plaintiff's comparative responsibility.

8 REPRESENTATIVE HENNESSEY: And I have a couple
9 follow-up questions. When you talk about the entire
10 judgment, hasn't the entire judgment, hasn't that judgment
11 been reduced by the jury to reflect the plaintiff's
12 negligence already?

13 MS. STEINOUR: Yes.

14 REPRESENTATIVE HENNESSEY: So that we're
15 talking about the entire balance of the judgment --

16 MS. STEINOUR: Yes.

17 REPRESENTATIVE HENNESSEY: -- which the jury
18 says was caused by defendants, not by the plaintiff?

19 MS. STEINOUR: Well, by defendants altogether,
20 not by one particular defendant.

21 REPRESENTATIVE HENNESSEY: I'm sorry. I said
22 defendants. You know, it seems to me that when we have
23 somebody who doesn't have the ability to pay, to answer for
24 the problem that's caused, we're going to have an unfair
25 result. What we'll just have to figure out, I guess, is

1 how we can best apportion that result between innocent
2 plaintiffs and negligent defendants and do we protect one
3 at the expense of the other because it is a 2-sided coin.

4 MS. STEINOUR: Can I just talk, or say one
5 thing about compensation because I think that what we're
6 losing sight of here is what does it mean for somebody to
7 be fully compensated? Does that mean for them to have
8 their medical bills paid, for their wage loss paid?

9 Or does it mean for them to essentially get
10 tens of millions of dollars for pain and suffering? Is
11 that full compensation? Our system --

12 REPRESENTATIVE HENNESSEY: If you're asking
13 me, when you get your medical bills paid and you get your
14 wage loss paid, you've been reimbursed; but you've not been
15 compensated. And I think it really skews the argument to
16 talk about tens of millions of dollars because we're not
17 talking about that in the vast, vast majority of cases out
18 there.

19 In auto accident cases, you might be talking
20 \$70,000 or 100,000 or \$200,000. And I would think that
21 anybody who's been through the pain of an auto accident
22 might say that that's not an exorbitant amount. I will
23 agree with you that 10 or 15 or if we had a \$100 million
24 verdict in a medical malpractice action, it would seem to
25 me that's exorbitant.

1 We have the procedures in place, if the courts
2 would use them, to reduce that to a reasonable amount. The
3 courts chose not to do that. The case, I think, is on
4 appeal. And maybe our appellate courts will reduce it.

5 MS. STEINOUR: But we also --

6 REPRESENTATIVE HENNESSEY: The system can work
7 to that.

8 MS. STEINOUR: But we also have a system where
9 if I'm a defense lawyer and I have, I'm defending a case
10 brought by an injured victim and the plaintiff's lawyer
11 will bring in the same old experts every single time to
12 talk about the wage loss and, you know, you have somebody
13 who's working minimum wage or a little bit more and they've
14 got an economist who will come in and say that person at
15 the end of their life would have earned \$1.2 million and
16 that's the number that's before the jury.

17 Okay. So we also have problems with
18 evidentiary rules in Pennsylvania and the way damages are
19 allowed to be calculated. So what I'm saying to you is
20 that joint and several liability is part of the problem but
21 there are all kinds of other problems involved with numbers
22 that are put before a jury.

23 REPRESENTATIVE HENNESSEY: Thank you.

24 CHAIRPERSON GANNON: Thank you, Representative
25 Hennessey. Representative Dally.

1 REPRESENTATIVE DALLY: Thank you, Mr.
2 Chairman. Attorney Steinour, I'm just having a little
3 problem, I guess, reconciling in my own mind the
4 substantial factor test and then this apportionment of
5 liability after the fact.

6 And am I correct in saying that if, if a
7 defendant's found to be a substantial factor in the
8 injuries to the plaintiff, that means that without them
9 involved, there would have been no injury? Is that what
10 that means?

11 MS. STEINOUR: No. I saw Jessie Smith over
12 here a little bit earlier. Jessie is with the Tort Section
13 of the Attorney General's Office. And Jessie has provided
14 me with a copy of the, the jury instructions. These are
15 suggested standard jury instructions that will be accepted
16 by any court in the Commonwealth of Pennsylvania.

17 I believe that -- Jessie, did you make these
18 available? Yes. Okay. So they are available for you to
19 review. And it's important to remember that this committee
20 that adopted these rules was composed of plaintiffs'
21 lawyers as well as defense lawyers and I think maybe a
22 judge or 2. All right.

23 So these are the accepted standard jury
24 instructions. When you talk about -- I don't know any
25 other way to do this except read it. 3.25, when you talk

1 about legal cause, that's substantial factor. "In order
2 for the plaintiff to recover in this case, the defendant's
3 negligent, reckless, or intentional conduct must have been
4 a substantial factor in bringing about the accident. This
5 is what the law recognizes as legal cause. A substantial
6 factor is an actual real factor, although the result may be
7 unusual or unexpected, but it is not an imaginary or
8 fanciful factor or a factor having no connection or only an
9 insignificant connection with the accident."

10 So essentially what you ask a jury to do in
11 these cases, it's really a 2-step process. You ask a jury,
12 first of all, to determine was the defendant negligent.
13 Yes, no? Was the defendant's negligence a substantial
14 factor in causing the harm? Yes, no? And that is where
15 this definition comes in. Was it a legal cause? Was it a
16 factor?

17 Then if you have a case where there are
18 multiple defendants, then apportion the liability among
19 them. Okay. So you can have a 1 percent, 2 percent, 5
20 percent, 10 percent defendant who has already been found,
21 their actions have already been found to have a
22 significant, to have been a significant factor in causing
23 the injury. And then that liability is apportioned.

24 REPRESENTATIVE DALLY: Okay. But I guess the
25 problem I'm having to reconcile is how can you find a

1 defendant that is, that their actions are a substantial
2 factor in the injury and then they turn out to be only 1
3 percent liable? I mean, how can you reconcile those 2
4 things?

5 MS. STEINOUR: Because that's, that's what the
6 law says. What you're asking is what, did you have an
7 involvement in causing the harm? Was it substantial? And
8 substantial, again, is defined as legal cause. Is it an
9 actual or real factor?

10 REPRESENTATIVE DALLY: It just seems to me
11 that -- I just have a problem in my own mind just
12 reconciling how someone can be 1 percent liable but the
13 jury, by the same token, finds that they're a substantial
14 factor in the injuries.

15 Unless it's compared to the egregiousness of
16 the other conduct, conduct of the other defendants for some
17 reason. I don't know.

18 MS. STEINOUR: Absolutely. That's when you
19 get the percentages. You compare it to the other
20 defendants.

21 REPRESENTATIVE DALLY: The other question or
22 I guess comment I had is that you mentioned about
23 businesses fearing a large verdict in the case. But
24 isn't it true -- and at least in the case of small
25 businesses -- that they really don't have a lot of control

1 over these cases and how they're handled?

2 I mean, aren't the insurance companies the
3 ones that are settling these cases and the defendants, in
4 many instances, don't have the say as to whether they go to
5 trial or they don't go to trial? So isn't that -- I mean,
6 it's really out of the hands of these.

7 And here again, most of the small businesses
8 that I'm familiar with, they don't have control of these
9 cases.

10 MS. STEINOUR: Do they have control of the
11 case? In a lot of these insurance policies, you have a
12 consent to settle clause. So to that extent, yes. But I
13 think one thing you have to remember is that if the
14 insurance, if the liability limits do not completely cover
15 the loss, then their assets are at risk, you know.

16 And one of the professors mentioned a
17 dram-shop case where you had somebody who was drinking all
18 day -- I think, Representative Gannon, you talked about
19 that -- and the bar was serving them all day and they were
20 visibly intoxicated.

21 Let me give you the flip side of that. I
22 represent a small business who serves alcohol. It's a very
23 popular local bar. They have music Friday, Saturday
24 nights. Great place for people to go. One Friday night, a
25 group of people walked in, sat down. Nobody was visibly

1 intoxicated. They started serving beers.

2 After one of the patrons had consumed about
3 half a beer, she became loud and boisterous. And we
4 realized that there was a problem. So we took the beer
5 from her. She became incensed, ran out. The boyfriend ran
6 out. Boyfriend had the keys to the car.

7 Apparently, out in the parking lot, she
8 punched him, took the keys, got in the car, drove down the
9 road and was involved in an accident. My client is now
10 being sued, drinking half a beer, for serving half a beer.
11 Now, because of joint and several liability, they have to
12 be very, very careful about how they defend this case.

13 You would say, My God, half a beer. You would
14 think that you have a pretty good defense. But because of
15 joint and several liability, they might have to think about
16 paying out a large amount for settlement because they can't
17 take the risk.

18 Were there serious injuries by the people
19 involved? Yes, there were serious injuries. And that's a
20 terrible, terrible thing to happen. But should my client
21 be responsible for all of that?

22 REPRESENTATIVE DALLY: Well, and that's a good
23 example. But you also have cases, say it's the
24 run-of-the-mill traffic accident where a property owner
25 gets sued for failure to maintain the weeds on their

1 property or something. Now, that may be a small case. And
2 there, the insurance company will probably settle without
3 the consent of that defendant to get out of the case. And
4 there's no, there's very little exposure in that instance.

5 So I'm saying doesn't that also cause the
6 drive-up of insurance rates by not giving the defendant the
7 opportunity to, to object to that? I mean --

8 MS. STEINOUR: You know what? I'm not a good
9 person to answer anything about insurance rates because I
10 just don't understand that business. That's not my
11 business. My business is in the legal world. But I think
12 one thing I have to impress upon the panel today is when
13 you sit down with these small businessmen and you look in
14 their eyes and you see the hard work that they have put
15 into developing their businesses over years and years and
16 years and they say to me, Help me. What can I do here?
17 This is unfair. What am I supposed to do?

18 And I have to say to them, That's the law.
19 That's the law. It stinks. It's not fair. And I don't
20 want to see you have to lose your business, everything that
21 you've put hard work into. That's the message that we need
22 to be sending to you today.

23 REPRESENTATIVE DALLY: Thank you.

24 CHAIRPERSON GANNON: Representative Dermody.

25 REPRESENTATIVE DERMODY: Thank you, Mr.

1 Chairman. Just a couple of brief questions. I'd like just
2 one little follow-up to Representative Hennessey's
3 question. I'm just concerned. You have a person who's
4 injured, a wage earner for the family, can't go back to
5 work.

6 Surely it's not wrong for the attorneys to be
7 able to present evidence of his earning capacity over the
8 estimated life-span so that he'd be able to provide, or if
9 they're found, negligence is found, he can provide for his
10 family. Is that right?

11 MS. STEINOUR: Well, I think it's the way the
12 damages are calculated because they're not reduced to
13 present value. It's this large award over X number of
14 years. And I think you realize that question or the
15 difficulty with that question in the medical malpractice
16 situation, and you dealt with it fairly.

17 REPRESENTATIVE DERMODY: Well, I
18 think -- well, we need to deal with it fairly. But I think
19 that what we're saying also is that if you have a person in
20 that situation who's the wage earner who was injured and
21 there's a defendant who's judgment proof and there's 2 or 3
22 others that are a certain percentage of negligence, you
23 know, I think what Representative Hennessey is getting at,
24 should the plaintiff then be saddled with having to go on
25 welfare or whatever it takes to provide for his family? Or

1 should negligent defendants have to pay? Is it --

2 MS. STEINOUR: And what we're saying is
3 negligent defendants will pay their fair share.

4 REPRESENTATIVE DERMODY: Well, no. I'm
5 saying --

6 MS. STEINOUR: Are you asking me for my
7 opinion?

8 REPRESENTATIVE DERMODY: I'm suggesting that
9 that plaintiff should be made whole and that whatever that
10 judgment is based on, what his earning capacity should be,
11 should be made by the negligent defendants as opposed to
12 the taxpayers having to pick up the tab because if there's
13 not enough there for the percentage of negligence, of the
14 percentages that are allotted to the negligent defendants,
15 then the plaintiff certainly isn't made whole, correct?

16 MS. STEINOUR: Well, I'm glad you mentioned
17 the taxpayers because Jessie Smith is here on behalf of the
18 Attorney General's Office. And she's going to be
19 testifying today, and she's going to tell you how taxpayers
20 are hurt by joint and several liability.

21 REPRESENTATIVE DERMODY: Good. I'll be
22 waiting to hear that. But I'm just saying is who should
23 pay I guess is the issue. Should a negligent defendant or
24 an innocent plaintiff? Another point I'd like to make. I
25 live in Pittsburgh. I haven't practiced in a long time but

1 follow it pretty closely. And we keep saying, mentioning
2 these huge million-dollar verdicts.

3 The truth is, they don't happen very often.
4 Most plaintiffs don't get millions. And I think it's a
5 mistake and it's misrepresentation to keep saying, you
6 know, million-dollar verdicts, million-dollar verdicts,
7 million-dollar verdicts. It just isn't happening. It
8 certainly isn't happening in Western Pennsylvania.

9 I don't know if it's happening here, but it's
10 not happening out there. I think most juries are very
11 responsible and are doing a good job and not just throwing
12 around judgments frivolously.

13 MS. STEINOUR: Well, again, I think when you
14 talk about verdicts, it's a very small percentage of cases
15 that are actually filed in this Commonwealth. You have
16 most of the cases being settled. And in my experience,
17 joint and several liability results in higher settlements,
18 extracting unfair settlements from marginally responsible
19 defendants.

20 REPRESENTATIVE DERMODY: Maybe you should try
21 more cases.

22 MS. STEINOUR: Defendants, defendants can't
23 take that risk. That's the message that I'm bringing you
24 today. They can't take the risk because of joint and
25 several liability.

1 REPRESENTATIVE DERMODY: Thank you, Mr.
2 Chairman.

3 CHAIRPERSON GANNON: Representative Blaum.

4 REPRESENTATIVE BLAUM: Thank you, Mr.
5 Chairman. The testimony today, when we talk about your
6 hypothetical in the parking lot, there is no doubt in my
7 mind that if anybody in this room's child was tragically
8 injured, deformed in that parking lot and the main
9 perpetrator was only, was 90, 80 or 90 percent responsible,
10 did not have the means to make that person whole, although
11 that person probably could never be made whole, there's no
12 doubt in my mind that everybody in this room would cast
13 that broad net to provide for their child as best they
14 could for the needs of that child long after they were
15 gone.

16 So to sit there and tell me that we as
17 policymakers should be satisfied and produce legislation
18 and produce law in Pennsylvania which tells the parents in
19 our districts that the likelihood is that child is only
20 going to be made 20 percent whole or 40 percent whole if
21 there were 2, that's unacceptable.

22 So that's not helpful to me. That testimony
23 is not helpful to me. That is not going to happen. This
24 is a complicated issue that this chamber and this committee
25 is willing to deal with. And we call experts to help us

1 wrestle with this problem. But we need better testimony.

2 We need something that recognizes the fact
3 that you at that table and me at this table and everybody
4 else here present today would hire the best attorneys they
5 could and cast the broadest nets possible to protect that
6 child. That's the reality that we have to wrestle with as
7 policymakers, everybody up here, in making these final
8 decisions.

9 And what I'm interested in, my one question
10 is, the case that you mentioned that where a person was, a
11 defendant was listed as 2 percent negligible or liable, if
12 you could, is that something that we could be provided
13 with, the docket number on that case?

14 MS. STEINOUR: I could certainly -- it was
15 probably a dead file in our office. I'll certainly do what
16 I can to find that. Certainly.

17 REPRESENTATIVE BLAUM: Thank you very much.
18 Thank you, Mr. Chairman.

19 MS. STEINOUR: I would like to respond,
20 though, because you have the converse of that. Well, let
21 me say I have a 9-month-old at home. I will do anything to
22 protect her --

23 REPRESENTATIVE BLAUM: I know.

24 MS. STEINOUR: -- anything to protect her. I
25 also have people in my family, I have doctors, I have small

1 businessmen. And I would -- and --

2 REPRESENTATIVE BLAUM: So do all of we.

3 MS. STEINOUR: Okay. But I just want to make
4 the point, a small businessman who is working so hard to
5 put his kids through college, would you say to that small
6 businessman, I'm sorry, you have to go out of business, you
7 can't send your kids to college? How do you deal with that
8 situation?

9 REPRESENTATIVE BLAUM: Hence, the wrestling
10 match in dealing with this issue. What I said -- which is
11 why we're here today -- what I said is it's not helpful to
12 us, to tell us that the answer is that that injured child,
13 that injured 9-month-old, who may live to be 99 long after
14 you and I are gone, has to be, has to settle for, instead
15 of X amount that is going to take care of them in their new
16 condition for the rest of their lives, instead of X amount,
17 they're going to have to put up with, they're going to have
18 to make due with X amount minus 80 percent.

19 That is not going to become law. That
20 is -- to bring that to me is not helpful in helping me,
21 only as one member, make my decision. That's all I'm
22 saying.

23 MS. STEINOUR: Is it helpful for us to say, as
24 we are saying today, to a small businessman, you have to go
25 out of business and you can't provide for your children?

1 REPRESENTATIVE BLAUM: If I have to weigh
2 those 2, the law stays the way it is.

3 CHAIRPERSON GANNON: Representative Pallone.

4 REPRESENTATIVE PALLONE: Thank you, Mr.
5 Chairman. My question is more factual than it is
6 philosophical. In the number of cases -- I'm not only
7 talking about trials because I'm not worried about
8 judgments. I'm talking about cases that settle.

9 Who keeps the statistic, or who would have the
10 statistic as to how many cases settle where there are
11 multiple defendants where the highest or most liable
12 defendant pays the least or nothing and the least liable
13 defendant pays the most of that settlement?

14 MS. STEINOUR: I don't think there is such a
15 statistic. I don't think there are any studies or we keep
16 track of those things.

17 REPRESENTATIVE PALLONE: Because it seems that
18 everyone seems to continue to testify that -- I mean, they
19 always pick the extreme case, the company that was 2
20 percent liable and paid 98 percent of the judgment.

21 MS. STEINOUR: No, I'm not saying that that
22 happened. I'm saying that that -- I offered that example
23 to say that somebody can be found substantially, in
24 substantial, their negligence can be a substantial factor
25 and yet be held 2 percent liable. It didn't have anything

1 to do with them paying more than their fair share.

2 REPRESENTATIVE PALLONE: Well, the issue that
3 continues to rise, though, is we have the defendant,
4 multiple defendants that has a de minimis impact in the
5 case but yet pays a significant amount of the settlement
6 and/or the judgment in the case of verdict.

7 But yet as a practicing lawyer for 15 years
8 now, in most cases, that doesn't happen. I mean, I can
9 only look at my own practice. And I can tell you that in
10 15 years, multiple defendant cases are few and far between
11 with the exception of multiple traffic accidents.

12 If you're talking about some of these class
13 action suits, it's a little different. But when you look
14 at the average case, it's 1 or 2 defendants; and they share
15 somehow in the allocation of the loss, whether it's
16 settlement or judgment or verdict.

17 I'm just sitting here like Representative
18 Blaum saying, How do I go back to my community, which
19 includes large businesses, includes small businesses,
20 includes rich people and poor people and middle-class
21 people, how do I go back to them and say in the situation
22 with a business, how do I tell the small businessman today,
23 Well, you are only a little bit liable; because you have
24 good insurance or because you have a deeper pocket, you got
25 to pay them most of the money? That's not fair, and I'm

1 willing to accept that argument.

2 But how do I go back to the same injured
3 plaintiff and say, Well, unfortunately for you, your
4 defendant is poor also; therefore, you enjoy no recovery?
5 We're in a situation where we have to represent those who
6 can't represent themselves.

7 And I don't care if it's the poor schlep who
8 gets run over by the car or the wealthiest man in my
9 community. I represent them all equally. And that's,
10 that's what we're wrestling with. The statistic like I'm
11 asking for would be very helpful, and I don't know where I
12 would go to find that.

13 MS. STEINOUR: I don't think you're going to
14 find a statistic. But I can tell you what has happened in
15 my practice with the people that I represent. And there
16 are situations, too many situations where large settlements
17 are extracted because of minimal involvement.

18 MR. STERN: And I think you go back to what
19 the legislature said and the courts said in '39 and through
20 1970s when we went from contributory to comparative
21 negligence where they said it was too harsh, the public
22 doctrine was too harsh before on plaintiffs.

23 Now, what we're saying is it may be too harsh
24 on some defendants who are paying far beyond what their
25 comparative responsibility is. Neither side is perfect,

1 and there's not going to be a perfect situation where
2 everybody in all cases at all times are either going to pay
3 their fair share or be compensated for their fair share.

4 But it's something that needs to be dealt with
5 because from the business community, it's become a
6 competitiveness issue with other states. Thirty-nine
7 states in this country have either eliminated, altered, or
8 restricted joint and several liability. Pennsylvania was
9 one of the few that has yet to address that issue.

10 It's something that businesses do look at now
11 under site selection when they -- you heard this mentioned
12 before -- when they decide to either expand or move into
13 Pennsylvania and because it becomes a cost factor. And I
14 don't think there's really any businessmen that I've been
15 involved with -- and I'm counsel to a company in Montgomery
16 County who has plants in Pennsylvania, North Carolina, and
17 elsewhere -- who doesn't want to pay if they've actually
18 caused harm or caused damages. It doesn't want to pay for
19 it.

20 The fairness issue and the harshness issue
21 comes to the point where they have to, they have a
22 tangential negligence, which can be a substantial factor to
23 a de minimis amount, but where they end up because they're
24 the deep pocket and they have to pay something. That's not
25 fair.

1 REPRESENTATIVE PALLONE: Of the 39 states who
2 have adopted some modified form, is there a common thread
3 that runs between all of them?

4 MR. STERN: I wish I could say yes. But every
5 state has really -- I mean, some of them have eliminated
6 joint and several for noneconomic damages. Many have done
7 it that way. Economic damages are still included in joint
8 and several. Some have put a cap of 50 percent.

9 If the defendant is greater than 50 percent or
10 60 -- New Jersey just went to 60 percent. New Jersey said
11 if a defendant is greater than 60 percent liable or
12 culpable, then joint and several will not be eliminated.
13 Below that, it is eliminated. Ohio is doing the same
14 thing. New York has a 50 percent threshold.

15 There's a whole hodgepodge of judgments -- and
16 probably as a result of some of these type of
17 discussions -- that really deal with unique factors.
18 Florida has done, as we heard earlier, has done a menagerie
19 of changes.

20 REPRESENTATIVE PALLONE: From the Chamber of
21 Business and Industry's point of view, because you're
22 suggesting that perhaps we're losing business in
23 Pennsylvania because we haven't adopted one of these many
24 different formats, is there: A, a preferred solution?

25 It's one thing to identify the problem because

1 we can all sit in a room and identify the problem. But can
2 we identify the solution is really the question. A, is
3 there a preferred solution to the problem; and B, can you
4 show me statistically that any one of these states that
5 have adopted some modified form, that their business and
6 economic community has grown or prospered better because of
7 it?

8 MR. STERN: Well, again, it's not any one
9 factor that makes a business decide to come to or not come
10 to a jurisdiction. It's very hard to do. And I was up
11 here in economic development in Harrisburg. We used to sit
12 with businesses all the time and get the Commerce
13 Department, Labor and Industry Department, Education
14 Department together to try to put together a fabric of
15 receptive, receptiveness from the state in order to address
16 the concerns of a business, quality of life issues, those
17 type of things.

18 So it's hard to say any one thing. Taxes are
19 always the number one issue that they look at. But this
20 has become, is becoming such a large factor in businesses'
21 decision because of the cost of and the possibilities of
22 verdicts being harshly, to use the courts' words in the
23 past, or unfairly falling upon them.

24 And they'll look at a state -- and I think we
25 heard it yesterday where, you know, a business is in 3 or 4

1 different states. They're going to weigh that. If they
2 have a choice to put a new business in state A which has,
3 has eliminated joint and several liability or state B that
4 hasn't and everything else is equal, they're going to make
5 the decision to go where it's more beneficial to them to
6 go, more fairer for them to go.

7 REPRESENTATIVE PALLONE: I don't want to speak
8 for you. But correct me if I'm wrong. In other words, no,
9 you don't have the statistics available; or no, you don't
10 have the solution?

11 MR. STERN: Well, the best solution is the
12 elimination of joint and several liability. Anything less
13 than that --

14 REPRESENTATIVE PALLONE: And replace it with
15 what?

16 MS. STEINOUR: With liability to let the jury
17 decide. If the jury decides you're 10 percent liable, then
18 you're 10 percent liable. You pay 10 percent of the
19 verdict.

20 REPRESENTATIVE PALLONE: But when I'm 100
21 percent injured and I can only recover 10 percent, I'm not
22 made whole. How do we solve that problem? I still have 90
23 percent of my pie that isn't filled. What do we do about
24 that?

25 MR. STERN: And that's where these

1 compromises, I believe, have come in in all these other
2 states, which is why -- of the 39 states that have done
3 something, you have everything from elimination to, you
4 know, a 25 percent threshold. And that's how, that's how
5 that gets -- because neither side can be made perfect.

6 REPRESENTATIVE PALLONE: Well, thank you
7 folks. Thank you, Mr. Chairman.

8 CHAIRPERSON GANNON: Thank you, Mr. Pallone.
9 Thank you very much, Ms. Steinour and Mr. Stern, for coming
10 before the committee and sharing your views and information
11 with respect to the issue of joint and several liability.
12 Thank you very much. Appreciate it.

13 We may as well realize we're behind here. But
14 our court reporter, I think, needs a break. So we're going
15 to take a 5-minute break and be back sharply at 1:10. I
16 know some of the people that are scheduled to testify have
17 some commitments. And I might shuffle this around a little
18 bit to accommodate them so they can get out of here. We'll
19 reconvene at 1:10.

20 (A brief recess was taken.)

21 CHAIRPERSON GANNON: We're going to convene
22 the hearing in the interest of time. Some of our members
23 will drift in as we proceed. Our next witness is Jay
24 Silberblatt, the immediate past chair of the Civil
25 Litigation Section of the Pennsylvania Bar Association.

1 Mr. Silberblatt, you may proceed when you're ready.

2 MR. SILBERBLATT: Thank you very much,
3 Chairman Gannon. Good afternoon. My name is Jay
4 Silberblatt. I'm the immediate past chair of the Civil
5 Litigation Section of the Pennsylvania Bar Association and
6 am a practicing attorney for 22 years in Pittsburgh.

7 I'm pleased and honored to provide testimony
8 to this committee on this very difficult and complicated
9 issue. And I commend you for bringing the law professors
10 here, who were clearly very articulate and far brighter
11 than I'll ever be, which is why I think they're teaching
12 law and I'm just practicing law.

13 Pursuant to the authorities set forth in Title
14 42 of Purdon's, the Pennsylvania Supreme Court has
15 recognized that the Pennsylvania Bar Association is the
16 association that is most broadly representative of the
17 members of the bar of this Commonwealth. And so I'm very
18 proud to be here on behalf of the 28,000 members of the
19 Pennsylvania Bar Association.

20 Those members are plaintiff lawyers, they're
21 defense lawyers, they're tax lawyers, they're government
22 lawyers, they're divorce lawyers, they're criminal defense
23 lawyers. But they've done one very important thing; and
24 that is, lawyers from across the Commonwealth have refused
25 to equate moral, a moral judgment with economic interests,

1 which is precisely what I contend Ms. Steinour was
2 requesting that you do. The policy of this Commonwealth is
3 a moral judgment. And that moral judgment is best
4 embodied, I believe, in the principle of joint and several
5 liability.

6 As you may well know, the Pennsylvania Bar
7 Association has reviewed the principle of joint and several
8 liability many, many times. And each time, the lawyers of
9 the Pennsylvania Bar Association have resolved the issue
10 the precise same way.

11 They've made the proper moral judgment that
12 any civilized society makes; and that is, they recognize
13 that our tort system is designed to provide compensation to
14 an injured innocent victim and to require the defendants,
15 the wrongdoers, to compensate that injured innocent victim.

16 Last month, most recently, the Civil
17 Litigation Section of the Pennsylvania Bar Association
18 reviewed the proposed Senate Bill 1376. The language in
19 Bill 1376 is almost identical to Senate Bill 5 of previous
20 years. The precise same conclusion was reached last month
21 as was reached in 1999, as was reached in 1996, as was
22 reached in 1986 by the Pennsylvania Bar Association; and
23 that is, the law of this Commonwealth, the policy of this
24 Commonwealth has made the proper and correct moral
25 judgment.

1 If we were to close our eyes to all of the
2 flag-waving and all the political posturing and turn a deaf
3 ear to all the anecdotal evidence of 1 percent defendants
4 that are required to pay 99 percent of the harm -- a
5 case, by the way, which does not exist and never has
6 existed -- the issue of joint and several liability boils
7 down to a very simple question that involves fundamental
8 fairness.

9 The answer to this question has been clear to
10 the lawyers of the Pennsylvania Bar Association, again,
11 whether they're plaintiff lawyers, defense lawyers, tax
12 lawyers, government lawyers, any kind of lawyer, corporate
13 lawyer, transactional lawyer.

14 The question is, In a situation where several
15 defendants have combined to cause harm to a plaintiff, who
16 should bear the risk that one of the defendants is unable
17 to pay the compensation to the plaintiff that a jury has
18 determined the plaintiff is entitled to receive?

19 Should the risk be borne by the defendant
20 wrongdoers, or should the risk be borne by the victim?
21 It's a very simple question. Representative Blaum, I
22 believe, answered the question with his own moral judgment.
23 The doctrine of joint and several liability has centuries
24 of sound tradition and legal precedent at its roots.

25 The doctrine recognizes that the defendant

1 wrongdoer is in a better position to bear the risk than the
2 injured plaintiff. Tort law in this Commonwealth is
3 designed to make the innocent injured victim whole, to the
4 extent possible. But the doctrine of joint and several
5 liability has to be understood in light of the Uniform
6 Contribution Among Joint Tort-Feasors Act.

7 It's simply inaccurate and just plain wrong to
8 argue that the doctrine of joint and several liability
9 forces some wrongdoers to pay more to a victim than a jury
10 has obligated them to pay. That is simply not the law in
11 Pennsylvania. To make such an argument is to ignore the
12 concept of contribution and indemnity.

13 At common law, all persons who acted in
14 concert to cause harm to someone else were held liable for
15 the entire result. Therefore, a victim who was awarded
16 \$100 by a jury against 2 defendants could collect the whole
17 \$100 from one of the defendants.

18 And if only one of the defendants paid the
19 entire \$100, the plaintiff was made whole; but one of the
20 defendants walked away scot-free. And that didn't seem to
21 be fair to the defendants. So gradually, the common law
22 recognized the unfairness of this result. And Pennsylvania
23 happened to be one of the states that was the first to
24 recognize it.

25 Pennsylvania was one of the first states to

1 judicially permit the defendants to make claims against
2 each other in the event one paid more than its
3 proportionate share. Soon, Pennsylvania enacted, in 1974,
4 the Uniform Contribution Among Joint Tort-Feasors Act.

5 Under our present statutory scheme, if a jury
6 awards a plaintiff \$100 and determines that defendant
7 number 1 is 30 percent responsible and defendant number 2
8 is 70 percent responsible, the plaintiff can recover and
9 will recover \$30 from defendant number 1 and \$70 from
10 defendant number 2.

11 But what if defendant number 2 is simply
12 unable or simply refuses to pay the \$70 that the jury has
13 found it to be liable to pay? Since the courts can't force
14 defendant 2 to pay up, the law has created a backup plan.
15 That's joint and several liability.

16 Under this backup plan, the plaintiff can
17 still recover the entire \$100 that a jury has found the
18 plaintiff is entitled to receive from either defendant or
19 any combination of the 2 without regard to the jury's
20 actual apportionment of responsibility for percentages.

21 But under the Uniform Contribution Among Joint
22 Tort-Feasors Act, if defendant 1 happens to pay the entire
23 \$100 when it should have had to pay only \$30, defendant 1
24 can recover the other \$70 from defendant 2. That's the
25 law. There's nothing unfair about that.

1 This scheme assures the victim the full
2 measure of compensation that the jury has determined the
3 victim is entitled to receive while at the same time
4 allowing the defendants to make any adjustments that need
5 to be made between them.

6 And the victim isn't forced to chase
7 defendants all over the state or all over the country or
8 all over the world in an effort to collect that to which
9 the jury has found the plaintiff entitled. If there's
10 going to be any such chasing, the defendants chase each
11 other, the defendants who have wronged the victim.

12 The Pennsylvania Bar Association believes that
13 the elimination of joint and several liability would
14 unfairly shift this burden from the victim, or from the
15 defendants, from the wrongdoers to the victim.

16 Now, while the doctrine of joint and several
17 liability may, on occasion, result in some unfairness to
18 a defendant wrongdoer, it's the Pennsylvania Bar
19 Association's position that such a burden is most
20 appropriately placed on the wrongdoers and never on the
21 victim.

22 I'd like to give you a real-life example from
23 my file drawers. Several years ago, I had the opportunity
24 to represent the mother of a young man who was admitted to
25 a hospital for a round of chemotherapy. The doctor

1 intended to prescribe 5 milligrams of a particular
2 medication, a particular chemotherapeutic medication. But
3 for whatever reason, he wrote on the prescription 500
4 milligrams.

5 The pharmacy that filled that prescription
6 knew that 500 milligrams could not possibly have been what
7 the doctor intended, but the pharmacy filled the
8 prescription anyway and sent the bottle of medicine to the
9 patient's floor in the hospital.

10 The nurse who hung the bottle and began the IV
11 drip looked at the bottle and saw that it said 500
12 milligrams. And she knew, after having done this same
13 regimen so many times, that the 500 milligrams had to be
14 wrong; but she did it anyway. And shortly thereafter, the
15 young man died, burned from the inside out.

16 Now, when suit was filed, suit was filed
17 against the doctor, the nurse, and the pharmacist. And we
18 can all agree all of them were tort-feasors, all of them
19 had made a mistake. We can agree that the provable damages
20 in the case were exorbitant.

21 The young man died leaving 2 very small
22 children for someone to care for. Let's just assume they
23 were a million dollars. Had the case gone to trial,
24 certainly the jury would have found liability on the part
25 of all 3 defendants. Maybe the jury would have determined

1 the doctor to have been 33 percent at fault, the nurse to
2 have been 33 percent at fault, and the pharmacy to have
3 been 33 percent at fault and award a million dollars.

4 Now, typically what would happen is the
5 nurse's insurance company would pay one-third of the
6 verdict and the doctor's insurance company would pay
7 one-third of the verdict and the hospital's insurance
8 company would pay one-third of the verdict and we would all
9 go home. The plaintiff will have been made whole, and each
10 defendant will have paid their proportional share.

11 Let's assume, though, that the case had been
12 tried only against the doctor. There's only one defendant
13 in the courtroom. Do you think the jury would have
14 returned a verdict of 333,000? Of course not because that
15 would not have made the plaintiff whole. The jury would
16 have returned a verdict of a million dollars and the doctor
17 would have paid it all and the victim would have been made
18 whole.

19 That's the concept of joint and several
20 liability. In that case, the doctor's conduct was a
21 substantial factor in causing the patient's death. In that
22 case, the nurse's conduct was a substantial factor in
23 causing the patient's death. And in that case, the
24 pharmacy's conduct was a substantial factor in causing the
25 plaintiff's death.

1 Eliminate any one of them and you eliminate
2 all of them. If the pharmacy had said, You know what,
3 there's a mistake here, the patient would be alive. If the
4 doctor had written the script correctly, the patient would
5 be alive. If the nurse had written, had recognized the 500
6 and known that was a mistake, the patient would be alive.

7 All of them are jointly responsible. All of
8 them have been found by a jury to have not only been
9 negligent but that their negligence has been a substantial
10 factor, not a fanciful factor, not something some lawyer
11 dreams up by casting some wide net. A jury has found them
12 to be a substantial factor.

13 Someone asked Ms. Steinour, Why don't you try
14 more cases. That's the question that was on my mind, too.
15 I've been practicing 22 years. I have yet to find any
16 defendants or any insurance companies come rushing to me
17 with offers of settlement when they're not responsible.

18 If they're not responsible, then place your
19 trust in a jury to find them not responsible. I think it's
20 disingenuous to come to you as policymakers of this
21 Commonwealth and to effectively say to you, We don't trust
22 juries. Even though we demand a jury trial every time we
23 get sued, we don't trust juries. We want you to change the
24 law to tip the scales in our favor.

25 I find that to be personally offensive. And I

1 find that to be advocating the wrong kind of moral judgment
2 that the lawyers of the Pennsylvania Bar Association have
3 advocated for. For all of these reasons, the Civil
4 Litigation Section of the Pennsylvania Bar Association
5 recommended to the Board of Governors of the Pennsylvania
6 Bar Association that they oppose Senate Bill 1376.

7 The House of Delegates of the Pennsylvania Bar
8 Association, after a full and fair opportunity to review
9 that legislation, has taken the same position,
10 overwhelmingly making the moral judgment that a civilized
11 society makes.

12 And so I advocate on behalf of the lawyers of
13 the Commonwealth of Pennsylvania that you not make changes
14 to joint and several liability. And I'd be pleased to
15 answer any questions that you might have.

16 CHAIRPERSON GANNON: Thank you, Mr.
17 Silberblatt. Representative Dally.

18 REPRESENTATIVE DALLY: This isn't a question
19 on substance but more or less procedure. It seems from the
20 testimony today and also from attorneys I've heard from on
21 both sides of this issue, it seems that the bar is pretty
22 divided. And I just wondered, the House Delegates voted.
23 Do you know what the number of votes were in favor of --

24 MR. SILBERBLATT: It was a voice vote. And I
25 will tell you I was there and it was an overwhelming vote.

1 There were negative votes. There were those people who
2 said no. If I were to venture a percentage, I would say 90
3 to 95 percent of those present and voting at the House of
4 Delegates approved the recommendation of the Civil
5 Litigation Section.

6 REPRESENTATIVE DALLY: Thank you.

7 CHAIRPERSON GANNON: Representative Harper.

8 REPRESENTATIVE HARPER: Hi. I happen to be a
9 member of the bar. And I think that sometimes people who
10 are not members of the bar confuse the Pennsylvania Bar
11 Association with the Pennsylvania Trial Lawyers. Could you
12 address the different compositions of those bodies or at
13 least describe your own?

14 MR. SILBERBLATT: Sure. The Pennsylvania Bar
15 Association is comprised of approximately 28,000 members of
16 the bar of the Commonwealth of Pennsylvania. And those
17 members of the bar practice not only plaintiffs' trial work
18 but defense work as well.

19 Members of the Pennsylvania Bar represent
20 insurance companies every day. Members of the Pennsylvania
21 Bar are employed by insurance companies. Members of the
22 Pennsylvania Bar are government lawyers. Members of the
23 Pennsylvania Bar are divorce lawyers, criminal defense
24 lawyers, transactional lawyers, municipal lawyers, bond
25 counsel.

1 The Pennsylvania Bar is representative of
2 every possible discipline within the Commonwealth of
3 Pennsylvania.

4 REPRESENTATIVE HARPER: Thank you.

5 CHAIRPERSON GANNON: It impressed me that I
6 thought perhaps the most interesting point that you made in
7 your testimony was the fact that -- and you pointed
8 something out that I think should be obvious but is glossed
9 over or ignored by many of the proponents, and that is that
10 the conduct of the defendant was responsible for the entire
11 harm.

12 You talked about under the old common law
13 where the plaintiff can collect his full damages from any
14 defendant because whatever the degree of conduct was, it
15 caused the entire harm. And I guess that gets back to the
16 legal cause or the "but for." You know, had the nurse
17 said, Wait a minute, I'm not going to give this guy 500
18 milligrams or the pharmacist said, Wait a minute, I'm not
19 going to fill a prescription for 500 milligrams, I'm going
20 to pick up the phone and call the doctor, even though their
21 negligence may have been ascribed a lesser percentage than
22 the physician, it still caused the entire injury.

23 MR. SILBERBLATT: Right.

24 CHAIRPERSON GANNON: So it seems to me that
25 that was a very important point. And it seems from what

1 your testimony was is that as this evolved, it was really a
2 process that evolved to make it more equitable for the
3 defendants to resolve their, their dispute, their
4 differences about who was more or less responsible. It
5 wasn't apportioning the jury.

6 It seems to me what I'm sensing is that this
7 is an effort really to apportion injury as opposed to
8 apportion responsibility.

9 MR. SILBERBLATT: That's exactly right. And
10 it's really impossible to apportion an injury. A death is
11 a death is a death. And the young man's death was caused
12 by the doctor; the young man's death was caused by the
13 nurse; and the young man's death was caused by the
14 pharmacist.

15 CHAIRPERSON GANNON: But that -- I thought
16 that was an important concept to bring back because it's
17 not something new. You were just pointing out an existing
18 concept about what's going on here. And it seems that with
19 respect to the defendants, each one having caused the
20 entire harm to the plaintiff, even though their negligent
21 conduct may have been less or more among them, that they're
22 now complaining, Well, the guy who was more negligent than
23 I is bankrupt. I can't get my money from that individual.
24 I can't get reimbursed. I can't get contribution, which
25 was not permitted under common law but we now permit under

1 statute in Pennsylvania.

2 And what they're now saying is rather than me
3 have to go after that person who also caused the entire
4 harm, who also caused the death of this individual, it's
5 going to be the responsibility of the plaintiff to get
6 that --

7 MR. SILBERBLATT: That's exactly right.

8 CHAIRPERSON GANNON: -- to get that
9 compensation. Let them go after the bankrupt person. Why
10 should I have to do it? And that's what I'm seeing.

11 MR. SILBERBLATT: This principle of
12 liability -- and I'm going to plagiarize Jim Mundy, who
13 testified before the Senate Judiciary Committee yesterday.
14 But this moral judgment that is being made is something
15 that our mothers all taught us as youngsters.

16 Imagine a group of friends, 5 boys throwing
17 rocks. And they finish their frivolity and go home. And
18 the phone rings at my mother's, at my home. And my mother
19 finds out that I was throwing rocks along with 4 other boys
20 and our neighbor's window is broken and there's a rock in
21 her living room, a single rock. But 5 boys all throwing
22 rocks.

23 What do you think my mother is going to say to
24 me? Well, I bet my mother is going to say the exact same
25 thing that all of your mothers will say. You were there.

1 You were throwing rocks. You pay for that window. And if
2 I say to her, But Mom, all the other boys were throwing
3 rocks, too, she'll say to me, Then you talk to those 4
4 other boys; but you get your rear end down to that hardware
5 store and you buy another window.

6 That's my mother's moral judgment. And I'm
7 sure it's your mother's moral judgment as well. That's
8 joint and several liability. I'm responsible because I was
9 there. I did it. We don't know whose rock it was. But I
10 was there, and I was throwing rocks along with everyone
11 else. It's for me to work out with the other 4 boys.

12 CHAIRPERSON GANNON: Thank you very much, Mr.
13 Silberblatt, for appearing before the committee --

14 MR. SILBERBLATT: Thank you.

15 CHAIRPERSON GANNON: -- and sharing your views
16 and additional information with the issue of joint and
17 several liability. Thank you very much.

18 MR. SILBERBLATT: Thank you for allowing me to
19 be here.

20 CHAIRPERSON GANNON: Our next witness is Mr.
21 Sam Marshall, President of the Pennsylvania Insurance
22 Federation. Welcome, Mr. Marshall. You may proceed when
23 you're ready.

24 MR. MARSHALL: Good afternoon. Thanks for the
25 chance to be here. I'm Sam Marshall, President of the

1 Insurance Federation. We're a nonprofit trade association
2 representing the insurance industry here in Pennsylvania.
3 Companies do business here not just in insuring people and
4 companies. We also invest in this Commonwealth. We employ
5 people here. And for many of our members, we're
6 headquartered here.

7 I'm here today to recommend your support for
8 the reform of Pennsylvania's joint and several liability
9 law. We were part of the debate in the Senate yesterday,
10 and I'd like to amplify on our comments there. This issue
11 is often debated in terms of fairness. Proponents of the
12 joint and several liability claim that it's fair, that it's
13 the responsibility of wrongdoing defendants, not the
14 victim, to apportion their own shares and fault among
15 themselves.

16 Proponents of reform claim the current law is
17 unfair but every defendant should be responsible for his
18 share, not for the conduct of somebody else. Both sides
19 draw up scenarios where a genuinely sympathetic party would
20 suffer under the other side's system.

21 I don't envy your task of deciding what's fair
22 and not fair. For what it's worth, I think fairness
23 considerations argue in favor of reforming the current
24 standard. In the first place, the reform measure doesn't
25 let anybody pay less than his fair share of

1 responsibility.

2 Second, our laws are pretty strong in not
3 allowing anybody to escape discovery or jurisdiction.

4 Third, intentionally or not, our joint and several
5 liability standard has started to result in 2 classes of
6 victims. The amount of liability is all too often
7 calculated not by the amount of damage to the victim but by
8 the amount of resources of the richest defendant.

9 But this issue is about more than fairness to
10 an individual plaintiff or a defendant in a particular
11 case. It's also an issue of economic development. And
12 that's what I'd like to talk about today. We see it as
13 insurers and we see it as investors and employers. A
14 state's liability law plays an increasingly major role in
15 an employer's decision on whether to grow or invest in that
16 state.

17 You hear a lot about even small businesses
18 being national or international in scope, and that's true.
19 But the liability exposure for all businesses remains
20 largely set on a state-by-state basis. So when businesses
21 decide where to go and grow, they look at the liability
22 laws in those states because that liability exposure is a
23 large part of their operating costs.

24 The truth is, Pennsylvania's liability laws,
25 or at least our liability exposure, are out of whack with

1 those of most other states. The truth is, among
2 plaintiff and defense lawyers across the country -- and I
3 think the Bar Association inadvertently led to this
4 point -- Pennsylvania has a pretty good reputation as a
5 place to sue. It's a pretty bad reputation as a place to
6 be sued. It's not a particularly helpful reputation or
7 slogan if your goal is to promote economic growth in
8 anything, I guess, but the legal field.

9 Some of this is a regional phenomenon within
10 the Commonwealth. Even with one liability standard
11 throughout the Commonwealth, there's dramatically higher
12 liability exposure -- meaning a likelihood of being sued
13 and the amount of any verdict -- in Southeastern
14 Pennsylvania than elsewhere in the Commonwealth.

15 It's really a venue problem, and that's a
16 topic for another day. But much of this is our joint and
17 several standard. That standard is far harsher on
18 defendants than in most other states. You can cast this in
19 a variety of terms.

20 Opponents of any reform would say other states
21 are too tough on plaintiffs and too easy on defendants.
22 I'd say other states have enacted laws that promote
23 stability and predictability in assessing liability among
24 partners while Pennsylvania continues to work under an
25 antiquated statute that promotes the search for the deep

1 pocket rather than a fair and equitable determination of
2 liability and apportionment of that liability among
3 parties.

4 But however you want to look at it, our
5 liability laws -- and specifically our joint and several
6 standard -- are significant drawbacks to bringing business
7 and investment here and in making businesses grow here.
8 These are tough economic times with employers and investors
9 facing considerable uncertainty.

10 Reforming Pennsylvania's joint and several
11 liability standards sends a clear message to employers and
12 investors that this Commonwealth is doing what it can to
13 reduce the uncertainty by providing stability and
14 predictability in its liability laws. That message is
15 essential if this Commonwealth's economy is to be one of
16 growth, competition, and opportunity.

17 Sometimes when this measure gets debated, it
18 gets framed as an insurance issue, generally by its
19 opponents. I understand that. It's hard to oppose a
20 measure that promotes responsible economic growth. It's
21 easy to bash the insurance industry.

22 The truth is this isn't an insurance issue.
23 And I hope you don't let industry bashing obscure the
24 economic development that's a real goal of joint and
25 several reform. For many lines of insurance, this reform

1 will have no immediate impact. For some lines or some
2 insureds, it could even mean higher than fair premiums.

3 But we do have a stake in this measure.
4 Insurers are like any other business. We invest and do
5 business in states that have good education systems,
6 qualified work force, a sound infrastructure, fair tax
7 laws, sound regulatory policies, and stable and predictable
8 liability laws.

9 Those are all cornerstones for creating a
10 strong marketplace for insurance as much as for any other
11 business. I can't say this measure is going to mean lower
12 rates across the board or bring good insurers into every
13 segment of the insurance marketplace.

14 But I can say, based on years of experience
15 here and based on results in other states, that good
16 markets attract good insurers; bad markets attract nobody
17 or, even worse, bad insurers. Reform of our joint and
18 several liability standard is one way of making
19 Pennsylvania a better insurance marketplace.

20 Pennsylvania's done a lot of good things on
21 the tax and regulatory sides over the past few years. And
22 consumers, including our policyholders and employees, have
23 benefitted. But more needs to be done. Our liability laws
24 need to be made more stable and predictable or at least
25 brought in line with those of most other states.

1 To reform Pennsylvania's joint and several
2 liability law is an important part of that and a reform we
3 support. I stayed away from the specifics of any reform.
4 There are options ranging from a complete abolition to some
5 sort of middle ground.

6 My experience is that hearings before
7 legislative committees are bad places in which to negotiate
8 a compromise. And I think it's too soon for that in any
9 event. For now, we think the first question is whether
10 this committee is committed to reforming our joint and
11 several liability standard to remain competitive with other
12 states in encouraging economic growth while still ensuring
13 fair access and relief for plaintiffs.

14 As tough as it may be to draft the details of
15 any bill, it won't be that tough if you have a commitment
16 to some level of reform. I'd like to offer an observation
17 from yesterday's Senate hearing and following up on some of
18 the comments I've heard today.

19 Trial Lawyers did a good job. They claimed
20 the reform efforts would overturn a moral equation -- that
21 was a phrase used yesterday -- a moral equation 300 years
22 in the making, claimed that countless innocent victims
23 would suffer. I guess they also claimed that all of you
24 moms would agree that joint and several ought to remain in
25 place, and I guess my mom as well. I'm not sure if that's

1 true.

2 It all sounds good, but it really doesn't
3 stand up to the facts. Most of the other states have
4 enacted at least some level of joint and several liability
5 reform, and they've done so without throwing their own
6 scales of justice into some terrible moral quandary.
7 They've done it without a huge outcry from innocent
8 victims.

9 I was greatly entertained by the 3 professors
10 who spoke at the outset of the hearing. I did note that
11 all 3 of those professors came from states that themselves
12 have some decent joint and several liability reforms. Of
13 all the hypotheticals and anecdotes that we heard from them
14 today, not once did I hear any one of them mention cases in
15 their own jurisdictions, places where they teach, where
16 they practice, where they do business, of innocent parties
17 in real-life terms being grieved.

18 So I'd recommend that you do look at other
19 states. You know, this is not Pennsylvania going off on a
20 plank into another realm that nobody else has been. What
21 we're talking about is trying to keep Pennsylvania in line
22 with a lot of major states. One of the people talked about
23 39 states having done it. That includes places like New
24 York and New Jersey, the places with which we are in
25 immediate competition for economic growth.

1 I do hope you keep an open mind on it. And I
2 think there are things that can be done that continue to
3 provide fair access and fair relief for plaintiffs while
4 keeping Pennsylvania competitive as a place for economic
5 growth. Thanks for the chance to be here. Happy to answer
6 any questions.

7 CHAIRPERSON GANNON: Thank you, Mr. Marshall.
8 Representative Harper.

9 REPRESENTATIVE HARPER: Thanks for coming in.
10 My question is the same as the one that's been posed to
11 other witnesses this morning, none of whom had empirical
12 evidence that business executives are deciding not to come
13 to Pennsylvania because of this issue.

14 I was wondering whether you have any empirical
15 evidence that that is in fact true?

16 MR. MARSHALL: No. I don't think proponents
17 of joint and several reform can claim that it's going to be
18 an economic nirvana, you know, it's not going to be 2
19 chickens in every pot. I can tell you that we see it just
20 based on surveys with policyholders, our corporate
21 policyholders, they do look at liability laws as a factor.

22 I've listed a number of the factors that
23 everybody looks at: Good education system, qualified work
24 force, a good infrastructure. It doesn't just mean the
25 transportation system. It's criminal justice system,

1 things of that nature.

2 But to say that liability laws aren't a part
3 of any business's consideration as to where to locate or
4 invest would be naive. You know, I think -- and hearings
5 like this are bad places to do it. But I think you have to
6 go into your own jurisdictions and ask employers in your
7 own areas.

8 I think it's appropriate, you know, to ask the
9 particular larger businesses. You might want to bring in
10 people like the Business Roundtable to ask some of their
11 CEOs, Do you really consider the liability laws? I don't
12 think anybody can say if you do, if you go to the New
13 Jersey approach, you will see our, you know, Pennsylvania's
14 gross national product or gross state product expand by 5
15 percent, 10 percent, anything like that. It's not that
16 easy to put on a scale any more than you can say the tax
17 cut of X percent automatically brings in this many new
18 businesses.

19 It is something, though -- I do think that it
20 is widely acknowledged within the business community. And
21 I think it would be very naive on the part of the General
22 Assembly to disregard this. It is true that the business
23 communities and businesses make decisions as to where to go
24 in part based on the liability system.

25 And I think you need to look at our

1 surrounding states, at their liability systems if you want
2 to remain competitive with them. I also think you want to
3 look at those other states because if you do, you can see
4 whether the, the immorality that's been suggested if you do
5 any reform of the joint and several standard actually
6 happens. I don't think that it does.

7 REPRESENTATIVE HARPER: The reason I asked the
8 question is I have seen studies of business executives
9 asking them why they choose to locate or relocate. Taxes
10 are among the top reason. And of course, Pennsylvania has
11 taken a leadership role in trying to reduce its corporate
12 taxes and make the state more business friendly.

13 But the second reason I asked is that
14 interestingly enough, 2 states you didn't mention have the
15 exact same joint and several law that we do: Delaware,
16 which business executives rate as the most friendly court
17 system in the nation, has the same law we do right now; and
18 Maryland, another state with whom we do beat economically.

19 So I guess what I'm trying to say is we heard
20 a lot of anecdotal evidence this morning. And I'm trying
21 to pin down whether there is any factual basis for the
22 assertions that you're making. I'm not disputing the fact
23 that it runs through an executive's head when he's trying
24 to decide where to locate a business.

25 I am disputing the fact that Pennsylvania's

1 present law is so seriously out of whack that we are
2 challenging our own economic survival here. And that is
3 what I was trying to address.

4 MR. MARSHALL: One -- when you point out
5 Delaware, you know, it actually sort of heightens where it
6 is all of a, it is all a balance. There are a number of
7 things Delaware does to attract corporations into its
8 state. You know, there are, you know, there are things
9 beyond joint and several liability reform that Pennsylvania
10 could do.

11 It is all a balance, I mean, something in one
12 area, something in another area. You know, right now, our
13 budget is not in the -- sadly, we're not in the position to
14 offer tax incentives to businesses to come to Pennsylvania.
15 There aren't a whole lot of things that we can do.

16 The liability laws are one area where we can.
17 Does it come at a price? Yes, it comes at a price. Any
18 decision that you make in all of this comes with a price.
19 And again, I don't represent the business community. I
20 represent the insurance community.

21 And one of the troublesome things, you have so
22 many people in all of this make reference to insurance
23 companies. Do understand we're not the defendants in the
24 joint and several liability suits. We're the people who
25 insure the defendants.

1 Yes, we have an important stake in the matter.
2 You know, one thing that we can tell you -- and it is
3 anecdotal. You know, I'd defer to the business groups to
4 come up with more empirical surveys on it. But I can tell
5 you businesses that we insure do make decisions in part
6 based on the liability laws of any given state as to where
7 to invest and where to grow.

8 I'd be happy to put you in touch with some of
9 those businesses, but I think that's probably more
10 incumbent on the part of the business community itself
11 rather than our community.

12 REPRESENTATIVE HARPER: Thank you, Mr.
13 Chairman.

14 CHAIRPERSON GANNON: Thank you. I can tell
15 you, Mr. Marshall, this committee reported legislation last
16 session reforming Pennsylvania's corporate laws and I
17 believe making them much more competitive with Delaware's
18 corporation laws and in fact requiring us to review those
19 laws on a more regular basis than we have in the past.

20 That's just one element to make us more
21 competitive with the state of Delaware, particularly with
22 respect to corporations. Representative Dally.

23 REPRESENTATIVE DALLY: Thank you. Thank you,
24 Mr. Chairman. I think that one of the reasons so many
25 people are wrestling with this issue is the anecdotal

1 stories we hear on both sides. But I just have to disagree
2 with part of your testimony saying that the insurance
3 industry isn't part of the mix here because I would think
4 that with the sophisticated computer models -- I mean, this
5 is a system upon risk -- that those companies couldn't plug
6 into those models.

7 Without joint and several liability, what
8 happens to rates? Because you're saying today that you
9 can't guarantee the rates are lower with the repeal of
10 joint and several liability; isn't that correct?

11 MR. MARSHALL: Let me amplify on that. I
12 apologize. There was the same question in my testimony
13 yesterday. What I meant by that was that in many lines of
14 insurance, joint and several liability, one way or the
15 other, has no impact. Do understand, for instance, with
16 life insurance, it's not really an issue in the realm of --

17 REPRESENTATIVE DALLY: Right. And I'm talking
18 about primarily liability insurance. That's what we're
19 talking about, not life insurance.

20 MR. MARSHALL: Okay. And yes. My point in
21 saying that for many lines there would be no immediate
22 impact is because we represent all lines. It's a little
23 bit like people talked about medical malpractice. Medical
24 malpractice is about 1 percent of the overall insurance
25 pie. You know, as important as it is, it is, in the world

1 of insurance, a relatively small market niche.

2 If you did joint and several liability
3 reform -- of course, it depends on exactly what the reform
4 is -- yes, in certain lines of coverage, there will be
5 winners and there will be losers. We would be able to
6 price that.

7 I can't say, though, all commercial
8 policyholders will receive right now some 5 percent, 10
9 percent. You can pick whatever number you want because
10 it's going to depend on the individual business that you're
11 insuring where it stands in sort of the mix of codefendants
12 where there's exposure in any case.

13 It will be much more -- in terms of the impact
14 in the world of insurance rates, in the immediate sense,
15 it's much more individually focused as far as a particular
16 policyholder. Where you would in theory -- and this gets a
17 bit attenuated -- but in theory, where you may see some
18 overall savings, there is a belief that if you enact some
19 level of reform, the overall amounts of claims, not just
20 the number of claims filed, but the amounts awarded in
21 those claims goes down.

22 There is a tendency to award more if there are
23 rich defendants at the table than if there aren't rich
24 defendants at the table. Those awards themselves determine
25 the settlement amounts that are used on a much broader

1 scale.

2 So if you do joint and several reform, there
3 is a, there is a theory that it will, down the line, reduce
4 the amounts actually awarded in certain damages because you
5 don't always have a rich codefendant to pick up the whole
6 tab at the table and that that in turn will produce savings
7 throughout the system.

8 REPRESENTATIVE DALLY: Well, it just seems to
9 me that if we can't -- I won't say guarantee -- but with
10 all likelihood expect lower premiums or at least stable
11 premiums, how does the small businessman benefit by the
12 repeal of joint and several liability?

13 MR. MARSHALL: I actually thought I was clear
14 in my testimony that I thought that it did bring stability
15 into the marketplace. That is, that is its virtue. It
16 brings a certain level of predictability and stability into
17 the marketplace because when you look at a particular
18 business, you realize here that business is responsible for
19 its conduct, not for the conduct of somebody wholly
20 unrelated.

21 There's always a lot of talk about somebody
22 acting in concert. That, frankly, to me is a bit different
23 than somebody wholly related that somehow is also dragged
24 in. So yes, it -- and will it produce savings? Yeah. Can
25 I give you a precise percentage? No, because I don't even

1 know what type of reform we're talking about here.

2 REPRESENTATIVE DALLY: Okay. Thank you.

3 CHAIRPERSON GANNON: Thank you very much, Mr.
4 Marshall, for appearing before the committee and providing
5 your insights and information with respect to the issue of
6 joint and several liability.

7 Our next witnesses are Brian Landon and Kevin
8 Shivers, State Director of the National Federation of
9 Independent Business.

10 MR. SHIVERS: Mr. Chairman, thank you for
11 giving us the opportunity to testify today. Brian very
12 much wanted to be here. Unfortunately, when you're a small
13 business owner and a business with only 2 people, you can't
14 often get away on repeated opportunities. So business
15 called him away today.

16 I do appreciate the opportunity for you to
17 allow us to submit his testimony as well as the testimony
18 of another small business owner, Bob Carnathan, from
19 Harrisburg. They very much wanted to be here. In fact,
20 they were here all day yesterday testifying.

21 And unfortunately, when you have 1 or 2 people
22 in a business, you can't take too many days off in a row;
23 otherwise, they have a hard time paying the bills and
24 meeting the needs of their customers. So with that, I do
25 appreciate you giving us the opportunity to share our

1 comments with you on this important issue.

2 CHAIRPERSON GANNON: That's fine. We'll
3 accept their written testimony and make it part of the
4 record.

5 MR. SHIVERS: Thank you.

6 CHAIRPERSON GANNON: And Mr. Shivers, you may
7 proceed when you're ready.

8 MR. SHIVERS: Chairman Gannon, members of the
9 Judiciary Committee, thank you very much for giving us the
10 opportunity to present testimony today. My name is Kevin
11 Shivers, and I'm the State Director for the National
12 Federation of Independent Business.

13 NFIB was formed nearly 60 years ago to provide
14 a voice for America's small and independent businesses. We
15 represent a broad range of small employers and independent
16 businesses in every sector of Pennsylvania's economy. We
17 truly are the mom and pop shops that you see along every
18 street and throughout every town in Pennsylvania.

19 And with 29,000 small business members in
20 Pennsylvania and more than 600,000 nationally, NFIB is by
21 far the largest small business advocacy group here in
22 Harrisburg or in Washington. Our typical member employs
23 less than 5 workers and generates gross revenues of about
24 300,000 annually.

25 A typical owner earns less than \$40,000 a

1 year. One of the things that I've heard throughout our
2 discussion and our debate is talking about competitiveness.
3 And, you know, that's an important factor. But with many
4 of our members, they're just worried about paying the
5 bills. You know, they're worried about staying in
6 business.

7 Faced with these facts, it should come as no
8 surprise the tremendous negative and financial and
9 emotional impact on our members by the shotgun effect of
10 joint and several liability lawsuits. Each year, NFIB
11 polls all of its 29,000 members on a variety of issues.
12 And we use the results of this statewide ballot to set our
13 legislative agenda.

14 This democratic method of setting policy
15 ensures that the positions advocated by NFIB reflect the
16 consensus views of our members. Clearly, the number one
17 priority on the minds of small business owners is lawsuit
18 abuse. Relief from lawsuit abuse has been a long-standing
19 legislative priority for small business.

20 All too often, small business owners are the
21 targets of shotgun lawsuits that seek to elicit big money
22 awards and settlements. Take the retailer who's brought
23 into a lawsuit simply because a product was purchased at
24 his or her store or the manufacturer who was sued for
25 negligence even though the safety guard was removed by the

1 injured plaintiff.

2 For small business owners who already are
3 struggling to survive, the time and money needed to defend
4 these frivolous actions can put them out of business. In
5 Pennsylvania, these frivolous actions result in higher
6 prices for goods and services and lead to lower wages and
7 benefits for workers; and they can also result in reduced
8 access to critical professional services and fewer product
9 innovations.

10 I appreciate the opportunity to submit
11 testimony from 2 Pennsylvania small business owners, Bob
12 Carnathan of Harrisburg and Brian Landon of Canton,
13 Pennsylvania, who very much wanted to be here and appear
14 before you today; but their responsibilities to their
15 respective small businesses would not permit it. Their
16 written testimony, however, offers a glimpse of how the
17 disastrous effects of joint and several liability can
18 impact small family businesses.

19 Bob Carnathan has been in business for over 21
20 years operating a small nail and staple fastening business
21 located just outside of the City of Harrisburg. Bob's
22 legal nightmare began in 1996. One of the tenants in the
23 complex was walking across the parking lot from his car to
24 the building.

25 It was so cold that day in early 1996 that an

1 icy film had covered the parking lot, covered the blacktop.
2 Clearly, the wintry conditions required caution and common
3 sense. The tenant slipped and fell flat on his back and
4 bumped his head, and he required medical attention. As I
5 understand it, the medical bills were about \$3,300.

6 About 4 months later, Bob was served with
7 legal papers. The man who slipped and fell in the parking
8 lot was suing him and every other tenant in the complex, as
9 well as the landlord and developer, for \$1.7 million.
10 Bob's first reaction was, Why am I being sued? I had
11 nothing to do with this fall.

12 The lawyer for the insurance company told him
13 that because the plaintiff said he fell in front of Bob's
14 window, his lawyers were trying to include him in the
15 lawsuit even though he was not responsible for the
16 maintenance of the parking lot or the facility grounds.

17 The lawyers told Bob that it had nothing to do
18 with fault. In fact, they said the goal of these types of
19 shotgun lawsuits is to involve as many different insurance
20 companies as possible in the suit. That way, you could
21 work out individual settlements with each, increasing the
22 overall cost of the settlement, or the overall award of the
23 settlement.

24 After more than 2 years filled with meetings,
25 teleconference calls, paper hunting expeditions, and other

1 nonproductive events that took valuable time away from his
2 business, Bob's insurance attorney called him with the news
3 that it was determined that his company had nothing to do
4 with his neighbor's fall and his business was released from
5 the lawsuit.

6 And after our testimony yesterday, one of the
7 things that Bob had asked me was, Who's going to compensate
8 me for the time that I took away from my business? Three
9 years after the release from his suit, this case was
10 settled out of court.

11 Eliminating joint and several liability and
12 replacing it with proportionate liability, for example, as
13 proposed in Senator Piccola and Senator Mowery's Senate
14 Bill 1376, Bob's business likely would not have been
15 included in that lawsuit.

16 Proportionate liability requires defendants to
17 pay damages that are proportionate to their fault in an
18 accident. Reducing the search for the deep pocket, a
19 reasonable plaintiff's attorney likely would have
20 recognized that Bob's involvement only was the fact that
21 his business was located in the office complex.

22 Bob Carnathan is not the only small business
23 owner to suffer from the results of litigation. A Gallup
24 survey in 2000 found that 24 percent of small business
25 owners had either been sued or threatened with court action

1 within the last 5 years.

2 In a lot of ways, this argument, it reminds me
3 of the old economic axiom. It's a recession when your
4 neighbor's out of work. It's a depression when you're out
5 of work. Small business, small business owner Brian
6 Landon, who also had submitted testimony, is one of the
7 lucky small business owners, for he has not been sued and
8 he's not been threatened with court action.

9 Brian owns a car wash and laundry that bears
10 his name, a true typical small business owner. His
11 business also includes the remanufacturing, installation,
12 and the service of equipment used in the car wash industry.
13 But that does not mean that he is not a victim of lawsuit
14 abuse just because he hasn't been sued, for lawsuit abuse
15 imposes many other costs or taxes on Brian and his small
16 business.

17 Some of these taxes are obvious, such as the
18 cost of the liability insurance premiums that he has to
19 pay. In Brian's case, it's an average of 2 1/2 cents for
20 every dollar spent at his car wash and laundry that goes
21 towards liability insurance.

22 Most of the taxes associated with lawsuit
23 abuse are a little less obvious but no less real. The
24 hidden lawsuit tax is part of everything Brian purchases
25 for his business, whether it's the chemicals and equipment

1 used to clean cars, the cleaning supplies, washers and
2 dryers at his laundry, or the tools, including that
3 notorious stepladder, that he uses for the remanufacturing
4 and installation of car wash equipment. That lawsuit tax
5 already has been added in.

6 Then there is the nonmonetary tax which comes
7 in the form of the constant fear of being named in some
8 shotgun lawsuit, which claims are far exceeding any
9 insurance company coverage that he carries such as the
10 lawsuit that Mr. Carnathan was involved with, a fear which
11 inhibits innovation and growth in Brian's small business
12 and other small businesses like it.

13 As a consumer, hidden lawsuit taxes increase
14 the prices on all fronts from higher insurance rates to the
15 increased cost of consumer goods to inflated health care
16 costs due to the practice of defensive medicine and
17 skyrocketing malpractice rates.

18 All totalled, these lawsuit taxes cost every
19 Pennsylvania man, woman, and child about \$1,200 every year.
20 As taxpayers, all of us pay for lawsuits filed against our
21 schools, our police departments, our fire departments, our
22 public transportation systems, state government, and
23 municipalities. And these all result in higher taxes and
24 reduced services at the local, at our governmental levels.

25 Lawsuit abuse also affects our communities.

1 The fear of personal liability due to lawsuit abuse has
2 discouraged many citizens from serving as community
3 volunteers. And the threat of lawsuits has deterred the
4 activities of some charities and other nonprofit
5 organizations.

6 Small business owners want a legal system
7 that's based on fairness, common sense, and personal
8 responsibility. The outdated legal doctrine of joint and
9 several liability, which can require someone who is found 1
10 percent at fault in a negligence lawsuit to pay 100 percent
11 of the damages awarded, that needs to be eliminated.

12 Replacing that doctrine of joint and several
13 liability with proportionate liability, which requires
14 defendants to pay their fair share for damages for which
15 they were negligent, would go a long way to bring fairness
16 and common sense to our legal system and help bring
17 Pennsylvania in line with virtually all other states.

18 I thank you for the opportunity to speak to
19 you today, and I look forward to your questions.

20 CHAIRPERSON GANNON: Thank you, Mr. Shivers.
21 I don't believe anyone has any questions. But a comment.
22 The lawsuit you were talking about, Bob --

23 MR. SHIVERS: Carnathan.

24 CHAIRPERSON GANNON: Yeah. That must have
25 happened in another state because in Pennsylvania, you

1 cannot sue for \$1.75 million. When you file a complaint in
2 Pennsylvania, it has to be for either less than \$50,000 or
3 more than \$50,000. It's the only number that you can state
4 in your complaint. You can't even ask the jury for how
5 much you want. So I don't know --

6 MR. SHIVERS: Yeah. I mean, I can certainly
7 get that information.

8 CHAIRPERSON GANNON: You talk a little bit
9 about lawsuit abuse. I have a lawsuit here in front of me.
10 And this is an automobile accident -- it's not my case, but
11 it was given to me -- where a person was very seriously
12 injured. They were stopped, stopped. And the plaintiff
13 came along and crashed into the back of the car, seriously
14 injured the defendant -- excuse me -- the plaintiff.

15 The defendant seriously injured the plaintiff
16 to the point that he probably may not work again for the
17 rest of his life. The accident happened in February, and
18 the plaintiff filed a suit in April. We have a 2-year
19 statute of limitations in Pennsylvania.

20 That means from the date of the accident, you
21 have 2 years to file your lawsuit. This was filed within 2
22 months. Yet when the defendant filed his complaint, or
23 filed the answer to the complaint, he filed some additional
24 pleadings. And in his pleadings, he says the plaintiff's
25 claims are barred by the statute of limitations.

1 Do you think that's lawsuit abuse to make that
2 kind of a statement in a pleading when you know it's false?

3 MR. SHIVERS: Quite frankly, I'm not a lawyer.
4 I couldn't offer you a --

5 CHAIRPERSON GANNON: Well, based on the facts
6 that I just gave you. Now, we know the guy was stopped and
7 the guy sailed into him. And he says the plaintiff's claim
8 is barred by his own contributory negligence. Do you think
9 that's lawsuit abuse to make those kind of statements in a
10 complaint when you know it's not true?

11 MR. SHIVERS: Again, I mean --

12 CHAIRPERSON GANNON: I'm being rhetorical.
13 I'm being rhetorical. But -- and this is specifics. We've
14 heard a lot of stuff about anecdotal stories. That's a
15 specific case. And I've got the court term and number
16 here, and I can tell you who the insurance company is and
17 the attorneys.

18 But I think it's kind of interesting when we
19 hear this term of lawsuit abuse. But it seems to only
20 apply on one side. And here we have an actual -- and this
21 is one of many, by the way, where the defendants are
22 abusing the process by making statements that they know
23 that are false, dragging out litigation, burdening the
24 system, and raising your insurance premiums because the guy
25 that filed that was working for an insurance company as an

1 attorney.

2 And I'm sure he wasn't doing it for free. And
3 that money goes right back to the insurance company, which
4 means those premiums go right back to those policyholders.
5 And I think what we should do is start taking a look at
6 this kind of abuse that burdens the system as well as any
7 other abuses that we would see.

8 MR. SHIVERS: Yeah. I think when you hear
9 testimony from the representative from the State Attorney
10 General's Office, they're going to offer, I think, some
11 pretty interesting facts, at least such as the testimony
12 yesterday.

13 I mean, I would like to leave you with a
14 couple of comments from our members. We had asked them, I
15 mean, Why are you so afraid of lawsuits? And, you know,
16 the overwhelming answer was that even if you win, you'll
17 lose, you know, that the consequences of a lawsuit can
18 destroy a business.

19 And, you know, our members, the small business
20 owners, they operate on a margin that's so small that,
21 unfortunately, they just don't have the financial resources
22 to fight and win on principle. I mean, they're, you know,
23 they would love to be able to carry out a case to fruition
24 and be able to win and stand up and say, Ah.

25 But unfortunately, their financial resources

1 are such that they just don't have the time or the
2 financial resources to carry it out to that conclusion.
3 And that's what's unfortunate. I mean, for our members,
4 that's the real problem with these kinds of shotgun
5 lawsuits. And if you eliminate that deep pocket or if you
6 eliminate that search, then oftentimes, you know, you
7 eliminate that small business owner who, in many instances,
8 is not going to be the 70 or the 80 or the 90 percent
9 responsible in an action.

10 And our members also, too, they recognize that
11 if they are at fault in an action, they are, they recognize
12 that it's their responsibility to pay. I mean, most small
13 business owners, I mean, they're the breadth of our
14 communities. They are the, they are the people in our
15 communities who saw a problem, came up with a few thousand
16 dollars to be able to fix that problem, and they started a
17 nice little business.

18 These are people that are within our, our
19 communities that we know that are involved with all of our
20 community groups. And they're very responsible stand-up
21 citizens of that particular community. So it's not -- you
22 know, our members recognize that if they're at fault, they
23 want, you know, they should be held accountable and they
24 should be, they should be responsible for their fair share
25 to help support, you know, whatever, whatever the damages

1 are of an individual. Thank you.

2 CHAIRPERSON GANNON: Representative Blaum.

3 REPRESENTATIVE BLAUM: Thank you very much,
4 Mr. Chairman. And I appreciate your testimony and coming
5 before us. And I understand that small businesses operate
6 on a small profit margin. And you're right to be here
7 advocating for that position. We, on the other hand, have
8 a button to push to make a law in Pennsylvania or not.

9 And there's no doubt in my mind that each and
10 every one of your members who operate on a small profit
11 margin, if, God forbid, something happened to them, a
12 member of their family, their child, tragically injured and
13 deformed for obviously the rest of their life, could not in
14 any way provide for that child yet the perpetrator, the
15 main perpetrator of the incident might be 90 percent
16 responsible but have no financial means to make that child
17 whole, impossible as that may be, I know for a fact that
18 every member of your organization, if confronted with that
19 reality, that there was no money available for their child
20 because back in 2002 they asked members of the House of
21 Representatives to change Pennsylvania law, they would
22 regret that.

23 And that's what we have to take into
24 consideration as we have to vote on this particular issue.
25 Be careful what you wish for. People come before us. And

1 it amazes me the way they posture themselves as if this
2 could never happen in their neighborhood, to their
3 neighbor, to themselves, to their families, to their
4 children. We have to consider that stuff. Thank you very
5 much.

6 CHAIRPERSON GANNON: Thank you, Mr. Shivers,
7 for coming before the committee. We appreciate your taking
8 the time to offer your testimony and insights concerning
9 joint and several liability.

10 Our next witness is Mr. Jessie Smith, Chief
11 of -- I'm sorry -- Ms. Jessie Smith, Chief of the Torts
12 Litigation Section of the Office of the Attorney General.
13 Welcome, Ms. Smith. And you may proceed when you are
14 ready.

15 MS. SMITH: Thank you. Good afternoon,
16 Chairman Gannon, who I see has stepped out for the moment,
17 and members of the Judiciary Committee. My name is Jessie
18 L. Smith, and I am Chief of the Office of Attorney General
19 Torts Litigation Section.

20 Two of your esteemed colleagues,
21 Representative Joseph Petrarca and former Representative,
22 now Senator Jane Orié actually worked in our section. So
23 they can give you some personal observations on what I'm
24 about to talk about today.

25 I note that I'm also an active member of the

1 Pennsylvania Bar Association, was a member of the Civil
2 Litigation Section for many years, and am a member of the
3 PBA House of Delegates. But I'm here to speak in favor of
4 the modification of joint and several liability.

5 I believe there was a question by
6 Representative Dally about the vote at the House of
7 Delegates meeting. It was a voice vote. Definitely, the
8 resolution against the Senate Bill passed. I don't know
9 that I would say it was overwhelming. There were a lot of
10 people there. There were a lot of no votes. But it
11 certainly did pass the House of Delegates.

12 Our section defends Commonwealth agencies in
13 negligence cases. About 80 percent of the cases we defend
14 are filed against PennDOT alleging highway design,
15 maintenance, or traffic control deficiencies. You've heard
16 a broad range of testimony. So I'll focus on an area that
17 has not yet been addressed, which is the impact of joint
18 and several liability on the Commonwealth and its
19 taxpayers, I think perhaps in a bit different context than
20 Representative Dermody had referred to.

21 And I'm going to vary from my written
22 testimony just to attempt to answer some of the questions
23 that you've asked through the course of the day. And I'm
24 sure you'll still have some questions. The doctrine of
25 joint and several liability did not contemplate the

1 Commonwealth being a joint and severally liable party, as
2 at that time the Commonwealth was immune from suit under
3 the common law.

4 That doctrine also did not contemplate
5 comparative negligence as we have it in Pennsylvania
6 because that doctrine of joint and several liability went
7 hand in hand with the common law doctrine of contributory
8 negligence where if a plaintiff were even 1 percent at
9 fault, they could recover nothing.

10 And Representative Harper, you had asked about
11 Delaware and Maryland. I know that that's the system that
12 Maryland still has. They do have joint and several
13 liability. But it's my understanding that they are still
14 one of the handful of states that has contributory
15 negligence. Where in Maryland, if you as a plaintiff are 1
16 percent responsible, then you do not recover.

17 Sovereign immunity was abrogated by the
18 Pennsylvania Supreme Court in 1978, and the Sovereign
19 Immunity Act became effective in 1980. So we've had about
20 25 years of experience with joint and several liability as
21 applied to the Commonwealth and Commonwealth agencies.

22 As I'm sure you know, recoverable damages
23 against the Commonwealth are limited to 250,000 per
24 plaintiff and a million per occurrence. And the
25 Commonwealth is self-insured with tort payments coming from

1 the Motor License Fund for PennDOT and from the General
2 Fund in other cases.

3 On average, 11 tort suits are filed against
4 the Commonwealth each week. And we are currently defending
5 over 3,300 active cases. A typical case against PennDOT
6 involves an uninsured or minimally insured driver. And
7 minimum liability insurance policy limits in Pennsylvania
8 are 15,000 for plaintiff and 30,000 for accident.

9 This uninsured or minimally insured driver
10 causes an accident through some combination of alcohol or
11 drug impairment, speed, or reckless driving, such as
12 running a stop sign, passing or turning without a
13 clearance, leaving the road and hitting a fixed object.

14 At least a handful of our cases each year
15 involve a driver who has never even had a driver's license.
16 The driver is sued by passengers, by occupants of other
17 vehicles who may have been catastrophically injured or
18 killed in the accident.

19 PennDOT is then sued as the deep pocket since
20 the driver at fault cannot begin to pay for the damages
21 that have been caused. An expert report is procured
22 identifying some imperfect feature of the roadway. The
23 case then goes to a county court jury whose members may not
24 think the world of PennDOT.

25 The fact that PennDOT has met its own

1 standards does not mean that it cannot be found negligent
2 by that jury. The jury is not told about joint and several
3 liability. One of the most common post-trial questions we
4 get when we interview jurors is, Why didn't you attack the
5 driver at fault?

6 They don't realize what a risky strategy this
7 is because a big verdict against the driver is just a big
8 verdict that PennDOT will have to pay under the doctrine of
9 joint and several liability if PennDOT is found even 1
10 percent negligent.

11 The Motor License Fund is used for both tort
12 payouts and road repairs and improvements. More payouts
13 mean less repairs, and the average annual tort payout by
14 PennDOT is about \$17 million.

15 Representative Hennessey, you had asked a
16 question about that trade-off. This is one example where
17 there really is a direct trade-off. If PennDOT is paying
18 out more in tort payments, there is less money in the Motor
19 License Fund to work on the roadways.

20 Jurors take their role seriously, often
21 deliberating for days to assign precise percentages of
22 negligence to each party, not realizing that their work
23 will then be ignored.

24 Carol Steinour had briefly mentioned Judge
25 Kistler from Centre County. That's because he got up at

1 the Pennsylvania House of Delegates meeting for the
2 Pennsylvania Bar Association. He has been a judge since
3 1997. He had a practice where he represented both
4 plaintiffs and defendants in a rural county. And he has
5 come to the view that joint and several liability is a bad
6 idea because it disrespects the jurors' time and service
7 and contradicts what they are told about the importance of
8 their role. So he spoke against joint and several
9 liability at that House meeting.

10 Several years ago, a jury in Susquehanna
11 County in a case that we were involved in assigned
12 fractional percentages of negligence to each party. They
13 assigned 49.5 percent negligence to a deceased 12-year-old
14 motorcyclist who passed a vehicle on a curve and hit an
15 oncoming car.

16 They assigned 26.25 percent negligence to his
17 mother for letting him or having him drive the motorcycle.
18 And they assigned 24.25 percent negligence to PennDOT for
19 trees that allegedly impaired his view as he was coming
20 around the curve.

21 The jury had been told that the estate of the
22 12-year-old would not recover if more than 50 percent
23 negligent. So they sat down and calculated the dollar
24 amount in such a way that they wanted the mother to pay
25 more money than she received because of the lawsuit being

1 brought, having no idea that PennDOT was going to pay any
2 part of the verdict that wasn't assigned to the driver.

3 Informing the jury of the effect of joint and
4 several liability would probably lead to a more fair result
5 even if the doctrine is retained. I think one point that
6 we certainly agree with the Bar Association's Civil
7 Litigation Section and the Pennsylvania Trial Lawyers is
8 that we do trust juries, but we feel that they are
9 operating under the system of joint and several liability
10 yet they have no idea that that's true.

11 Another feature of joint and several liability
12 in Pennsylvania is that the plaintiff can collect 100
13 percent of the verdict from any defendant regardless of
14 other defendants' ability to pay. Then it's up to that
15 defendant to go and try to collect from the others. If 5
16 defendants are found 20 percent negligent, the plaintiff
17 can demand 100 percent from one of them. That defendant
18 then has the burden of collecting.

19 The Commonwealth was involved in a Lebanon
20 County trial in which the jury found the plaintiff 20
21 percent negligent, another driver 40 percent negligent, and
22 PennDOT 40 percent negligent based on lack of sight
23 distance due to a hill crest on the road.

24 The plaintiff post-trial agreed with the
25 defendant driver, who had business assets and whose carrier

1 was a large self-insurance fund, that plaintiff would seek
2 all the delay damages from the Commonwealth if that
3 defendant dropped his meritorious appeal, enabling the
4 plaintiff to hold onto their large verdict.

5 This attempt to shift liability from a solvent
6 defendant, an insurer, to the Commonwealth is but one
7 example of why joint and several liability is unfair as
8 applied to the Commonwealth. Some say there's no such
9 thing as a 1 percent case, that it's an urban legend, that
10 it's hyperbole.

11 Let me give you an example of such a case. In
12 February 1994, there was a snow whiteout on Cresson
13 Mountain in Cambria County. There were 25 drivers at the
14 summit of the mountain in this whiteout who couldn't see
15 beyond their windshields. Some were involved in minor
16 fender bender accidents. Others were just sitting on the
17 road because they couldn't see.

18 Into this scene came a tractor trailer who hit
19 the rear of a van, killing its 4 occupants, hit another
20 vehicle, seriously injuring the driver, and caused injury
21 to another man who hurt his back when he just dove to get
22 out of the way.

23 These 25 drivers, including the estate of the
24 van driver who was killed, were brought into the case as
25 defendants. They filed pleadings. They were deposed.

1 Their testimony was that they couldn't see anything. The
2 court then ordered them to pay for and attend a mandatory
3 mediation to encourage them to settle the case.

4 Were they negligent? In a way because they
5 were sitting stopped on the road. Was this a substantial
6 factor? In a way because if they hadn't been there, the
7 fatal accident wouldn't have happened. Rather than expend
8 the time and money to proceed through a lengthy trial, with
9 the court encouraging them to settle, they settled.

10 These defendants could not take the 1 percent
11 risk of a case of this magnitude. And you say, Why would
12 somebody who's very slightly liable settle? And I think
13 this answers that question. Neither these people nor their
14 insurance carriers were about to say let's have the time
15 and expense of a 2-week trial and prove our principle
16 point. They couldn't afford to do that.

17 I have submitted with my written testimony a
18 chart of the 50 states and where they stand on the joint
19 and several issue. Most states have either eliminated or
20 modified joint and several liability. Both Hawaii and West
21 Virginia have modified joint and several liabilities for
22 government defendants.

23 The various statutory schemes developed by
24 other states -- and I would agree with Barry Stern from the
25 Chamber of Business and Industry. They are almost all

1 different. There's really about 30 anyway variations among
2 the 50 states.

3 These states demonstrate that change is
4 possible while still maintaining an adequate level of
5 compensation for injured parties. Also, it's an area of
6 rapid change. So you really have to look at each state and
7 make sure they still have what they had last year.

8 I brought with me the instructions that the
9 jury is given on substantial factor, and I did that because
10 there were questions both yesterday and today about
11 substantial factor. I would strongly disagree with the
12 testimony of the professors that -- I believe it was
13 Professors Vandall -- that you're really looking at 10 or
14 15 percent or the idea that this has to be an important
15 factor.

16 I believe Carol Steinour had read to you the
17 main instructions. So I certainly won't do that again.
18 But there are 2 accompanying instructions on substantial
19 factor, one of which relates to the situation that we're
20 talking about, multiple defendants, which says there may be
21 more than one substantial factor in bringing about the harm
22 suffered by the plaintiff. When negligent conduct of 2 or
23 more persons contributes concurrently to an incident, each
24 of those persons is fully responsible for the harm suffered
25 by the plaintiff regardless of the relative extent to which

1 each contributed to the harm.

2 And there's another accompanying instruction
3 that says when the negligent conduct of a defendant
4 combines with other circumstances and other forces to cause
5 the harm suffered by the plaintiff, the defendant is
6 responsible for the harm if his negligent conduct was a
7 substantial contributing factor in bringing about the harm,
8 even if the harm would have occurred without it. So this
9 is not as high of a standard as you may think.

10 I heard the example by Jay Silberblatt of the
11 Civil Litigation Section of the rock. That's the kind of
12 situation that does not apply in these cases where the
13 Commonwealth is a defendant because the Commonwealth has
14 never done the same thing as the other defendants.

15 The Commonwealth is being faulted for some
16 sort of problem with the road that's said to contribute to
17 an accident. The Commonwealth is never a driver among many
18 drivers in that situation. We have our own cases where
19 people are driving Commonwealth vehicles and cause
20 accidents, and those are certainly handled in a different
21 manner.

22 That's not a joint and several liability type
23 of situation. But these cases where PennDOT is sued
24 because of road conditions, we're not dealing with that
25 kind of rock situation.

1 In summary, joint and several liability
2 impacts the Commonwealth in an especially negative way in
3 that the taxpayers rather than a private entity are left
4 paying the verdict share that others typically, un- or
5 underinsured drivers, cannot or the share that the
6 plaintiffs choose not to collect from them. Thank you for
7 your time and your courtesy. And I'd be happy to answer
8 any questions you have.

9 CHAIRPERSON GANNON: Representative Hennessey.

10 REPRESENTATIVE HENNESSEY: Thank you, Mr.
11 Chairman. Thank you, Ms. Smith. I was intrigued by your
12 comment at the bottom of the first page of your testimony
13 about informing the jury of the effect of joint and several
14 liability would probably lead to a more fair result even if
15 the doctrine is retained. Let me go back some.

16 This is the, this is the case that was brought
17 by the estate of the son against PennDOT and the mother, or
18 perhaps against PennDOT and then PennDOT joined the mother
19 as an additional defendant?

20 MS. SMITH: I think that PennDOT probably did
21 join the mother, but I'm not sure about that.

22 REPRESENTATIVE HENNESSEY: Well, I'm not so
23 sure that he'd be allowed, the son would be allowed to sue
24 the mother. Maybe I'm -- I'm not a plaintiff's attorney.

25 MS. SMITH: Well, it would depend on who the

1 administrator of the estate is. And I don't really know
2 that sitting here today.

3 REPRESENTATIVE HENNESSEY: Okay. In that
4 situation, did PennDOT pay its share and the mother's share
5 of the liability?

6 MS. SMITH: What ultimately happened in that
7 case, because we had appealed the case, is that the
8 Commonwealth Court found that -- and this was under a prior
9 interpretation of the law that does not exist today. You
10 may have heard of the Crawl case that said the Commonwealth
11 basically can't be jointly and severally liable, which was
12 out there for a couple of years and then it was reversed by
13 the supreme court in another case.

14 Eventually, this case went to the Commonwealth
15 Court. And they found that there couldn't be joint and
16 several liability, and they dismissed PennDOT. So PennDOT
17 in this particular case didn't pay both shares. That,
18 however, is only because there was a doctrine for a couple
19 of years that said the Commonwealth can't be joint and
20 severally liable.

21 And the supreme court disagreed with that, and
22 the Commonwealth is again jointly and severally liable.

23 REPRESENTATIVE HENNESSEY: It's a rather
24 unusual case. But had PennDOT been required to pay 49 1/2
25 percent rather than 24 percent to pick up its own share and

1 also the mother's, wouldn't PennDOT have been entitled to
2 the same right of contribution against the mother in the
3 sense of cross-claim or whatever the proper terminology is
4 to make her pay it back?

5 MS. SMITH: Well, PennDOT would have been
6 entitled to that. But in this case, as in many cases, the
7 mother didn't have any applicable insurance.

8 REPRESENTATIVE HENNESSEY: Okay. So the money
9 would have gone to the estate and not to the mother.
10 Okay. Should we -- if we're going to tell the jury about
11 the rules of joint liability, should we also tell them
12 about the available assets of the defendants?

13 We've had this discussion at sidebar, you
14 know, among other people. But it would seem to me that
15 we've heard a lot of discussion about what's a fair share.
16 If you have 5 defendants and they're all equally liable and
17 they're all assessed at 20 percent liability, that they
18 should never, under any circumstances, have to pay more
19 than 20 percent.

20 It would seem to me that my limited knowledge
21 of this area of the law was that common law said everybody
22 who has a substantial cause is responsible for the entire
23 amount. And it's only because we passed either the
24 comparative negligence statute or some other statute that
25 required the jury to then turn around and assess liability

1 among defendants.

2 If I understand it correctly, before we had
3 the juries doing that task, we had those defendants going
4 off to some sort of intercompany arbitration or some other
5 process by which jointly, defendants held jointly
6 responsible sort of sorted out their differences and
7 figured out what kind of percentages they should each pay
8 in order to make the plaintiff whole.

9 It just seems to me that if -- to say that
10 that becomes the fair share, if we say the jury has to make
11 a decision and says 20 percent for each of the 5 defendants
12 equally, if we were to turn around and say to them but
13 understand, ladies and gentlemen of the jury, that one of
14 these defendants is totally judgment proof, then I would
15 think that the jury would turn around and may very well
16 come back and say, Well, in that case, defendants 1 through
17 4 are 25 percent liable because we want the plaintiff to
18 receive 100 percent.

19 And I guess I'm concerned about this, this
20 tacking onto the fair share concept and not telling, you
21 know, and saying that's all the jury ever wanted me to pay
22 as defendant 1. I think that's probably true if defendants
23 2 through 5 all pay.

24 But if, you know -- I think it breaks down
25 that analysis and it's not necessarily a static fair share

1 percentage when you tell the jury that, Well, 2 of those
2 defendants or 3 of them don't have any money because I'm
3 not so sure under those circumstances the jury would say,
4 Well, in that case, defendant 1, we still only want you to
5 pay 20 percent and we'll let the plaintiff lose 40 or 60
6 percent of the verdict that we're about to hand over, or
7 the award.

8 So if we should tell the jury about the
9 doctrine of joint liability and how it relates to, among
10 the various defendants, shouldn't we also realize that we
11 should tell them that some of the defendants are simply not
12 going to be able to pay and find out what they would say in
13 that situation as to whether or not they still think that
14 this 20 percent figure is a fair share under those
15 circumstances?

16 MS. SMITH: I think you asked 2 questions. So
17 let me see if I can answer both of them. There are
18 situations like where a plaintiff is seeking punitive
19 damages where the jury does in fact find out about the
20 assets of the defendant in order to assess punitive
21 damages.

22 Also, the comparative negligence doctrine that
23 you have been hearing about where the plaintiff is not
24 going to recover if the plaintiff is more than 50 percent
25 negligent, the jurors hear that. That's part of their jury

1 instruction.

2 I don't know that the jurors, in a case that
3 doesn't involve punitive damages, should get the financial
4 aspects of all of the parties. I think that in itself
5 might be a reason why parties would choose to settle rather
6 than disclose their financial situation or lack of it to a
7 jury.

8 But because the doctrine of joint and several
9 liability impacts what the jurors are doing in terms of
10 percentages, I think that's one route to take. I think it
11 would be more fair if the jurors knew what they were doing
12 as they do with the plaintiff in comparative negligence
13 than the system today.

14 Among the many states' approaches to this,
15 there is the Uniform Comparative Fault Act which has been
16 adopted in some states, although not necessarily word for
17 word what the Uniform Law Commissioners have proposed.
18 What they do is they take the verdict.

19 And if everybody can pay their share of the
20 verdict, that's the end of it. But if there is someone who
21 cannot pay, then they take the share of the defendant who
22 can't pay; and they allocate it among everybody else who's
23 negligent, including the plaintiff.

24 So if you had someone who was 20 percent
25 negligent and they couldn't pay, that 20 percent would be

1 paid by the remaining defendants and subtracted from the
2 plaintiff's recovery in proportion to what everybody's
3 negligence was. One of the worst features of --

4 REPRESENTATIVE HENNESSEY: I'm sorry. So that
5 not only the plaintiff -- assuming that there were 4
6 defendants and 1 plaintiff and all were 20 percent liable,
7 the verdict has already been reduced by 20 percent when
8 it's entered --

9 MS. SMITH: Yes.

10 REPRESENTATIVE HENNESSEY: -- because of the
11 plaintiff's 20 percent contribution to this accident,
12 right?

13 MS. SMITH: That's correct.

14 REPRESENTATIVE HENNESSEY: Are you saying that
15 among the -- if there's one other defendant that is
16 insolvent, that the 3 defendants and the plaintiff all
17 share that 20 percent equally?

18 MS. SMITH: That's true.

19 REPRESENTATIVE HENNESSEY: So instead of 20
20 percent negligence, the plaintiff, in a sense, shoulders 25
21 percent?

22 MS. SMITH: That would be correct, yes. For
23 the defendant who does not pay, yes.

24 REPRESENTATIVE HENNESSEY: Which is
25 essentially rather closely again to joint liability because

1 we assure that the plaintiff is being wholly compensated.

2 MS. SMITH: Well, and I think it addresses the
3 fact that joint and several liability was intended to go
4 hand in hand with the situation where the plaintiff
5 couldn't recover if they were negligent at all. Where we
6 have joint and several liability, but plaintiffs can
7 recover unless they're more than 50 percent negligent.

8 One of the worst features of joint and several
9 liability in Pennsylvania, though, is you as the plaintiff
10 don't have to look at the solvency of the parties and their
11 ability to pay. If you're 20 percent negligent and there's
12 4 other solvent defendants who are 20 percent negligent, as
13 the plaintiff, I can come to you and say I want 100 percent
14 of my money from you. You go figure it out.

15 And you do have the ability to go figure it
16 out through the Uniform Contribution Among Joint
17 Tort-Feasors Act. I don't think Pennsylvania has the act.
18 But they have the concept where I, as the 20 percent
19 defendant, can then go after everybody else. But that is a
20 difficulty.

21 And I've seen it happen with the Commonwealth
22 where the taxpayers were actually being asked to pay monies
23 that were owed by another defendant who had assets and
24 money.

25 REPRESENTATIVE HENNESSEY: The state you were

1 just talking about that had the comparative fault analysis,
2 plaintiff's 20 percent got ballooned to 25 percent because
3 she had to share in the insolvency of one of the
4 defendants, what state is that? Is that reflected in your
5 chart here?

6 MS. SMITH: It is reflected in my chart. I'm
7 pretty certain that Connecticut is one of the states that
8 has it. There are a few states that have that. And in the
9 chart, it's detailed by saying if the verdict is
10 uncollectible, then you apportion it among the other
11 defendants or among the -- the Uniform Comparative Fault
12 Act says among the plaintiff and the other defendants.

13 REPRESENTATIVE HENNESSEY: But it says there,
14 what I have underlined, you reallocate among the defendants
15 according to their percentages of fault, not among the
16 plaintiff and the defendants.

17 MS. SMITH: It depends upon the state. The
18 Comparative Fault Act allocates it among the plaintiff and
19 the defendants.

20 REPRESENTATIVE HENNESSEY: But Connecticut is
21 varied from that?

22 MS. SMITH: Some states have that per se.
23 Connecticut may not. And it looks like in Connecticut,
24 they only allocate the economic damages, which means the
25 noneconomic damages for pain and suffering there would not

1 be joint and several liability for.

2 But every state is different. You really need
3 to look at the statutes of them. But that's one scheme
4 that's out there.

5 REPRESENTATIVE HENNESSEY: Okay. Thank you
6 very much. Thank you, Mr. Chairman.

7 MS. SMITH: Certainly.

8 CHAIRPERSON GANNON: Thank you, Representative
9 Hennessey. Representative Turzai.

10 REPRESENTATIVE TURZAI: Ms. Smith, you had
11 indicated in your testimony that there are 11 tort suits
12 each week levied against the Commonwealth?

13 MS. SMITH: Filed, yes.

14 REPRESENTATIVE TURZAI: Filed. And over 3,300
15 cases presently on the docket?

16 MS. SMITH: Yes.

17 REPRESENTATIVE TURZAI: Do you find that the,
18 in your experience, that the existence of the doctrine of
19 joint and several liability encourages plaintiffs and
20 plaintiffs' counsels to bring the Commonwealth into suit?

21 MS. SMITH: I believe that it does because the
22 Commonwealth does have the 250,000/1,000,000 self-insurance
23 coverage. And if you're looking at a driver that has
24 15,000/30,000, then you're certainly looking for someone
25 else to pay for the damages.

1 And I believe that it does encourage PennDOT
2 to be sued in cases where you have an un- or underinsured
3 driver, yes.

4 REPRESENTATIVE TURZAI: Do you find
5 historically in your experience that some of the bases for
6 those suits are tenuous, bringing the Commonwealth into the
7 lawsuit?

8 MS. SMITH: I do. And one of the luxuries, I
9 guess, that the Commonwealth has is we don't have all the
10 expenses of private counsel. Our expenses of going to
11 trial -- although, we certainly have to hire experts -- are
12 less. So we will often try the case that someone else will
13 settle based on the cost of trial.

14 I think the best example is if there's a
15 tenuous liability case and the person has broken their arm,
16 we might go to trial in that case because that risk is
17 within our limits and we feel that there was no negligence
18 on the part of PennDOT or that it wasn't a substantial
19 factor.

20 But if we have someone who's catastrophically
21 injured, then we're looking at it like everyone else is,
22 that even though our negligence, we believe that we'll be
23 able to go in and say we weren't negligent or it wasn't a
24 substantial factor, the jury may look at that
25 catastrophically injured person and say we don't care.

1 We're going to award some money to this person.

2 REPRESENTATIVE TURZAI: Do you find that in
3 your experience with jurors, that if they find you, you the
4 Commonwealth, as a defendant in a particular case, that
5 they're going to almost invariably ascribe some percentage
6 of negligence to the Commonwealth by its very presence in
7 that suit?

8 MS. SMITH: I wouldn't say that because we win
9 a good number of our cases. But I do think that juries are
10 willing to ascribe some negligence to PennDOT in situations
11 where it's pretty tenuous. An example that I can think
12 of -- and it's actually a case that we've settled recently
13 and paid a lot of money -- was a case where PennDOT was
14 doing some construction in Washington County.

15 And they had a 4-inch drop-off between the
16 road and the shoulder because they had to because they had
17 to take out the dirt shoulder and they had to put in the
18 paved shoulder, and they couldn't do that simultaneously.
19 And there was a truck driver who was killed in an accident
20 where he went off into that drop-off and wasn't able to
21 recover and was killed.

22 And PennDOT did not have every sign in that
23 location that their manual specifies that they should have.
24 But it happened in the day. The driver had been in that
25 construction zone for at least a couple of miles. He had

1 seen signs obviously that were there. He had seen flagmen.

2 And so our thought in that case was, Well, can
3 you say PennDOT was negligent because it didn't have each
4 and every sign there that the manual specifies? Sure. Was
5 that a substantial factor in the accident? No, because
6 this truck driver certainly knew that there was a drop-off
7 along the edge of the road at the point he had the
8 accident.

9 But he was killed in the accident. It was a
10 very tragic accident. And our thought was that it wasn't a
11 case that we could go to trial on because of the risk.

12 REPRESENTATIVE TURZAI: Just one last question
13 on the case that you brought up where a solvent defendant,
14 a solvent defendant, by not following through an appeal,
15 would be able to shift some of that award to PennDOT. How
16 did that work?

17 MS. SMITH: Well, it didn't work ultimately
18 because the supreme court said that the Commonwealth
19 couldn't be responsible for someone else's share of delay
20 damage, which is like a prejudgment interest. That's
21 figured at a rate that's a point above prime. So a very
22 high interest rate from a year after trial.

23 But there had been a written agreement entered
24 into between the defendant and the plaintiff that if the
25 plaintiff paid their self-insurance policy limit, which was

1 considerable, and if they dropped their appeal, that the
2 plaintiff would never seek these delay damages from them
3 and would seek them all from the Commonwealth.

4 REPRESENTATIVE TURZAI: Thank you very much,
5 Mr. Chairman.

6 CHAIRPERSON GANNON: Representative Dermody.

7 REPRESENTATIVE DERMODY: Thank you, Mr.
8 Chairman. I just have 2 brief questions. I just want to
9 make sure I heard you right, correctly. You said that in
10 the case where you mentioned somebody had broken an arm and
11 you didn't think that PennDOT was liable, that you would
12 take that to trial.

13 As a matter of fact, you take a lot of cases
14 to trial because of the situation of the Commonwealth; is
15 that right?

16 MS. SMITH: That is true. We are able to try
17 a lot more cases, I believe, than the private sector
18 because we don't have the same costs because we're
19 Commonwealth employees. However, there are many, many
20 cases that we don't take to trial because of these same
21 considerations.

22 REPRESENTATIVE DERMODY: Now, but you also
23 mentioned that you win quite a few of those cases, correct?

24 MS. SMITH: That's correct.

25 REPRESENTATIVE DERMODY: All right. And the

1 case you just talked about with Representative Turzai was
2 one that you settled, you chose not to bring to trial;
3 correct?

4 MS. SMITH: That's correct.

5 REPRESENTATIVE DERMODY: And did you mention
6 in your testimony the liability limits that you have?

7 MS. SMITH: Yes. Our limits are 250,000 per
8 plaintiff and a million in the aggregate, and
9 municipalities are 500,000 single limit. Those are the --

10 REPRESENTATIVE DERMODY: So the truck driver
11 who was killed in that accident, you were liable for
12 \$250,000 as a result of that accident?

13 MS. SMITH: Well, actually, we would have been
14 liable for 500,000 because his wife had a wrongful death
15 claim. So the one claim was a survivor claim, which was
16 his pain and suffering, loss of earnings. He was 25 years
17 old. The other claim would have been his wife's claim for
18 loss of consortium and loss of his income.

19 REPRESENTATIVE DERMODY: So that whole
20 occurrence, the Commonwealth paid \$500,000?

21 MS. SMITH: That's correct.

22 REPRESENTATIVE DERMODY: He was 25 years old?

23 MS. SMITH: And there was also an amount paid
24 in consideration of the delay damages that I mentioned
25 before, which is a prejudgment interest.

1 REPRESENTATIVE DERMODY: Okay. Thank you, Mr.
2 Chairman.

3 CHAIRPERSON GANNON: Thank you. How
4 many -- of the cases that you have where joint and several
5 comes into play, how many of those instances, if you know,
6 where you are not sued initially by the plaintiff but are
7 brought in by the original defendant either in an action or
8 by joinder?

9 MS. SMITH: In answer to the first
10 question -- and I know that you've been hearing this all
11 day. And I apologize -- we don't keep statistics that
12 specifically relate to joint and several liability. If I
13 were to give you a ballpark estimate just from looking at
14 settlements -- because if it's a case where the damages are
15 very small, then joint and several liability isn't much of
16 a factor.

17 And if it's a case where the other parties
18 have lots of insurance, then that's not a factor. If you
19 look at the cases where joint and several liability comes
20 into play, I would say you're probably talking about maybe
21 20 percent of our cases.

22 And if you're looking at cases where we're
23 brought in, that is typically where you have a defendant
24 who is at fault and may have significant insurance or
25 resources but is hoping that they're not going to be paying

1 100 percent of the verdict and that someone else may
2 contribute.

3 And I have not even a ballpark on how many
4 times it's defendants bringing us in rather than
5 plaintiffs. Although, typically, we're being sued by the
6 plaintiff, not being brought in by the defendant.

7 CHAIRPERSON GANNON: How about instances
8 where, for example, you might -- let's take that scenario
9 where you have that fellow that was killed. If you had a
10 contractor working on that job instead of your people
11 directly but you got sued, maybe the defendant, the
12 plaintiff was not aware that whoever was doing the work was
13 a contractor, would you bring that contractor in as an
14 additional defendant and seek contribution or indemnity?

15 MS. SMITH: That depends because the way those
16 insurance agreements typically work, Representative Gannon,
17 is that the contractor defends PennDOT in that situation.
18 So we wouldn't be bringing them in because they would be
19 representing us.

20 Now, often, the contractor is also sued by the
21 plaintiff. And there are times when we would bring a
22 contractor in; but that's, that's not the typical
23 situation.

24 CHAIRPERSON GANNON: So if you have a hold
25 harmless and indemnity agreement with that contractor,

1 which I guess you do as a matter of routine, and he has a
2 certificate of insurance which names PennDOT as an
3 additional insured under the contract, then PennDOT still,
4 the limitation of liability still applies to \$250,000. But
5 PennDOT actually doesn't make any payment. It's the
6 carrier for the contractor that was negligent. Would that
7 be a fair statement?

8 MS. SMITH: No. What the contractor has is
9 the duty to defend. Because of the additional insured
10 certificate, as you mentioned, they have a duty to defend.
11 The contractor does not have a duty to indemnify PennDOT
12 for its own negligence. So that would not be true in terms
13 of payment.

14 CHAIRPERSON GANNON: Well, if PennDOT has a
15 hold harmless and indemnity agreement with the contractor.

16 MS. SMITH: PennDOT does not have an agreement
17 with contractors.

18 CHAIRPERSON GANNON: So you don't do that?
19 That's what I'm I guess -- you don't necessarily do that.

20 MS. SMITH: That's right.

21 CHAIRPERSON GANNON: So you would assume your
22 own liability for your own negligence; the contractor would
23 be liable for his own negligence?

24 MS. SMITH: That's correct.

25 CHAIRPERSON GANNON: And he may defend you,

1 but he won't indemnify you or his insurer won't indemnify
2 or pay on your behalf?

3 MS. SMITH: That's absolutely correct.

4 CHAIRPERSON GANNON: So they're just picking
5 up the cost of your defense?

6 MS. SMITH: Right.

7 CHAIRPERSON GANNON: Thank you.

8 MS. SMITH: May I say one more thing?

9 CHAIRPERSON GANNON: Sure you can.

10 MS. SMITH: There's been so many questions
11 about the victim who has no source of recovery. One of the
12 things that is out there for victims is un- and
13 underinsured coverage, which you or anyone can purchase
14 where if you get into an auto accident -- and I don't think
15 this applies in the medical or the product liability
16 sphere. So I wanted to mention it because I'm mainly
17 dealing with the auto accident context -- you can buy
18 un- and underinsured coverage to take care of that
19 situation through your own policy.

20 CHAIRPERSON GANNON: I believe Dr. Bhat
21 referred to that a little bit in his testimony, the
22 uninsured and underinsured, uninsured particularly.

23 MS. SMITH: Thank you.

24 CHAIRPERSON GANNON: Thank you very much for
25 coming before the committee and providing testimony

1 concerning the issue of joint and several liability. Our
2 next witness is Mr. Cliff Rieders, Esquire and David Lutz,
3 Esquire with the Pennsylvania Trial Lawyers Association.

4 MR. RIEDERS: May it please the panel, my name
5 is Cliff Rieders.

6 CHAIRPERSON GANNON: Mr. Rieders, you may
7 proceed when you're ready.

8 MR. RIEDERS: President of the Pennsylvania
9 Trial Lawyers. This is a great honor to be here today. In
10 fact, Representative Gannon, I consider this the height of
11 my presidency being here today. And I want to thank you
12 for your time.

13 You know, we all try to think about instances
14 of joint and several liability. And something just came up
15 a week ago Sunday where I took my kids to visit a relative.
16 My son was playing baseball with some kid he met in a
17 crowded alley. And there were windows on both sides of the
18 alley.

19 And a guy came out. I was right there when he
20 came out. He came out. He screamed at them. And he said,
21 If you's break a window, whoever I catch is going to pay
22 for it. And I thought to myself, Now, that's joint and
23 several liability. That was his first lesson in joint and
24 several liability.

25 I practice in Lycoming County, which is a

1 rural county in the state. But I'm admitted in New York
2 and the District of Columbia as well. So I do have some
3 experience with joint and several liability in Pennsylvania
4 and with the system, the 50 percent system in New York.

5 I also was fortunate to serve on a consultant,
6 consulting group of the American Law Institute when they
7 prepared the Restatement (Third), Apportionment of
8 Liability. And of course, they considered whether to
9 abolish, or whether joint and several liability should be
10 abolished or not.

11 The restatements are adopted by most of the 50
12 states. And many of the restatements are, some are not.
13 Pennsylvania, for example, has, as you all know I'm sure,
14 has adopted 402(a), which is the product liability
15 restatement.

16 The question on the apportionment project;
17 that is, what to do with joint and several liability, no
18 consensus could be reached. There was no empirical data
19 supporting the abolishment of it or any of the particular
20 alternatives that were recommended.

21 As a result -- and it's the only restatement
22 I'm aware of where they did this -- there are 5
23 alternatives, one of which is basically Pennsylvania law
24 and then of course 4 others, varying forms of joint and
25 several liability because there was no consensus and there

1 could be no consensus in the American Law Institute.

2 And I think they are probably the best minds
3 that have looked at this. I think that it's important to
4 appreciate that joint and several liability is about a very
5 simple concept. And that is that all parties to a
6 transaction are responsible not only for themselves but
7 also for one another.

8 I think that it bears repeating that joint and
9 several liability occurs when you have what is called joint
10 tort-feasors. And as one of the law professors said this
11 morning -- and I think it needs to be repeated -- the
12 fundamental theory is that an injury in a joint tort-feasor
13 situation is indivisible.

14 You can't really break it down and say, Well,
15 this part of the injury was caused by this and this part of
16 the injury was caused by that in the joint tort-feasor
17 situation. So that, so that when juries are asked to
18 apportion percentages, they are apportioning percentage of
19 responsibility obviously, not percentages of injury.

20 I thought it might be worth just taking a
21 moment and write down on the board here on the flip chart
22 how it works to really try one of these cases because
23 I have tried many of these cases. Juries in
24 Pennsylvania -- when I started practicing law, everybody
25 got a general verdict. That's what it was. It was a

1 general verdict.

2 And the question was, How much do you award,
3 and fill in a blank. Judges do not do that today. They
4 don't do it in any of the counties I practice, and I don't
5 know if they do it anywhere else. What they do is they
6 give jurors special verdict questions.

7 And the first question in a typical negligence
8 case where there's 2 or more parties, number 1 is, Is there
9 negligence? Okay. That's the first question. And they
10 ask that question with regard to each party. And the
11 instruction says if you do not find negligence, return to
12 court. That's a very important point.

13 You do not even get to answer the next
14 question until they have found some form of misconduct such
15 as negligence. The number 2 question, of course, is
16 substantial factor, whether the negligence which has been
17 found is a substantial factor.

18 You only go on to the next question if you
19 found, if the jury has found substantial factor, which in
20 Pennsylvania, by the way, is one of the most difficult
21 hurdles to cross of all principles of law of any state in
22 the Union.

23 One of the things that I think needs to be
24 mentioned, by the way, is that every legal change that we
25 talk about affects every other law. For example, in New

1 York State where I practice, there is automatic liability
2 for the owner of a vehicle. That is not true in
3 Pennsylvania. If I give my vehicle to somebody in
4 Pennsylvania and they're in a wreck, I am not automatically
5 responsible unless I was negligent to give him my car. We
6 call that negligent entrustment.

7 In New York State, for example, where they
8 have the 50 percent rule that we heard about, that is not
9 the law. There is vicarious liability, there is automatic
10 liability, just because I'm the owner of the car and I gave
11 him my car to use.

12 So when you talk about a principle of law like
13 joint and several and you say, Well, this state has done
14 this and this state has done that, you've got to remember
15 that the laws of all these states are different and affect
16 one another in very substantial ways.

17 I can spend an hour right now telling you the
18 laws in New York State that make recovery easier than in
19 Pennsylvania in a number of areas, cases I have had and I
20 have litigated. I don't want to fill you too much with
21 anecdotes.

22 But when you're considering whether you want
23 to tweak one particular point in Pennsylvania law, I think
24 it's important for everybody to realize how it affects
25 every other principle of law and that other states which

1 may have tinkered with joint and several may have
2 substantially different laws in other areas.

3 Okay. So on to what the jury does in a
4 typical case. Number 3 is that they will apportion
5 responsibility between the parties. And they will -- but
6 they will only do this, of course, if they have found 2 or
7 more parties were negligent and there was a substantial
8 factor in producing harm. And only then do they fill in
9 the money, okay, the money amount.

10 But even that's not the end of the case
11 because the truth is that joint and several liability
12 really does not come in as an issue unless somebody is
13 unable or does not or cannot pay what they are supposed to
14 pay. And that's really, that's really the important point
15 because that's something that happens later on.

16 Up to this point, the system operates exactly
17 the way the people want it to operate who say we should
18 abolish joint and several liability. It's only when
19 somebody's unable to fulfill their responsibility that you
20 get into the issue of joint and several responsibility.

21 And the reason why it is so important is you
22 want to make sure that people do business with and act
23 responsibly and make sure that they do business with
24 responsible people.

25 Now, I got to tell you that I was not born a

1 trial lawyer. You'd be surprised some of you. It would
2 probably surprise my mother. But I was not. And I served
3 from 1982 to 1987 as Financial Vice President of Metro Lab,
4 Inc., one of the nation's leading, at that time, largest
5 quality control engineering firms, a company not located in
6 Pennsylvania.

7 After the death of one of the founders, I
8 wanted the company to move to Pennsylvania strictly for
9 personal convenience. I live in Williamsport, and it was
10 just a lot of traveling for me. And so they undertook an
11 examination to see what state they should relocate to.

12 The reason why they did not come to
13 Pennsylvania was because of poor air service in the smaller
14 cities, in Altoona, in Williamsport, in Harrisburg. Nobody
15 even looked at the indigenous laws in the different states.
16 It wasn't even an issue for the professional planners and
17 movers that they hired to look at where they should
18 relocate.

19 So when people come in here and talk about how
20 it affects business decisions, I was part of a business
21 decision; and I can tell you that that is not a real
22 factor. What is a real factor are taxes. What is a real
23 factor is air service. What is a real factor is how
24 trained is your work force, what sort of educational
25 opportunities are there.

1 And the people who were running this company
2 felt that Pennsylvania was lacking in that regard. And
3 that's why they didn't move this high tech company here.
4 It was not because of joint and several, not because of
5 workers' comp, not for labor reasons or any of these things
6 that we sometimes spuriously hear as the reasons why we're
7 not getting high tech businesses. And I really hope that
8 the Legislature gets that message and looks at those other
9 factors that would make a difference.

10 Another thing that I have done in my career is
11 I have and I do represent a bank, one of the finest, in
12 fact, local banks in the country with one of the highest
13 ratings, repeatedly rated as the second or third finest
14 community bank in the country.

15 We are much more frequently plaintiffs than we
16 are defendants because we collect money from people, some
17 of whom are deadbeats. And I can tell you that without
18 joint and several liability, there's an awful lot of money
19 that our bank would not be able to collect because many of
20 these actions are, in essence, negligence actions.

21 And I can think of one particular case we had
22 where a bookkeeper allegedly stole some money and there
23 were questions of neglect on the part of people who were
24 supposed to be supervising her. The bank never would have
25 collected that money without the concept of joint and

1 several responsibility, joint and several liability.

2 So the, the perception or the complaint that
3 this is somehow used by, by, you know, ambulance-chasing
4 plaintiff lawyers is one that really distresses me because
5 I do other kinds of work. I have done other kinds of work
6 in my time, in my career. I've represented scrap metal
7 dealers. All of these people have been plaintiffs.

8 I can think of cases -- actually, I've had
9 more experience outside the negligence, outside the
10 personal injury area using joint and several liability
11 representing businesses than as a personal injury lawyer.
12 And I'd have to really sit down and make a list because I
13 would want to give you only accurate information. But off
14 the top of my head, I think I could probably give you that
15 information and be correct about it.

16 One of the other odious things about some of
17 the proposals around is what I like to call phantom
18 liability. What some of the proposals would do is create
19 liability on somebody who's not in the case, who cannot be
20 brought into the case. And essentially, the plaintiff gets
21 less because of the naming of that person who was not a
22 party to the case.

23 So the defendant, for example -- and every
24 lawyer who's ever sued a drunk driver that ran a stop sign
25 knows the defense is the brakes failed, the car was no

1 good, the inspection station didn't do their job. So now
2 he can defend that -- under the proposals I've seen, they
3 would be able to defend that case by saying, Well, you
4 should put 5 percent on the inspection station and 5
5 percent here and 5 percent there and that will come off the
6 plaintiff's recovery. I call that phantom blame. What the
7 plaintiff, therefore, will have to do in future cases is
8 bring in every one of those possible parties, which they do
9 not do now.

10 And the allegation that there is some sort of
11 broad net in which people are sued who shouldn't be sued is
12 absolutely not the truth in my experience in my 27 years of
13 practice. The reason for that is it's extremely
14 uneconomical to do it.

15 And nobody wants to be faced with 4 or 5 fine
16 McNees, Wallace attorneys who are going to come in here and
17 say I'm going to try that case and I'm going to send you
18 into oblivion. So we try not to sue people unnecessarily.
19 But under much of the legislation that I have seen
20 considered and talked about, you would actually force the
21 injured party to look for other parties to bring in so that
22 a defendant who's culpable will not have an absent party to
23 blame their misconduct on. And I think that's also a very
24 important factor.

25 I want to talk a little bit about other

1 consequences, real consequences. Enron - Arthur Andersen,
2 for example, is a common one. There will be negligence
3 cases as a result of that. The teachers' pensions in
4 Pennsylvania lost approximately -- maybe I'll be corrected
5 by somebody else -- but I believe I've heard \$89 million.

6 The pension plans in Pennsylvania are defined
7 contribution plans. That means, that means if there is a
8 shortfall because of that fiasco, what is going to happen
9 is that the school districts read that the taxpayers are
10 going to pick up the tab.

11 Now, if you eliminate joint and several
12 liability in that situation and if indeed Enron is bankrupt
13 or insolvent, Arthur Andersen, which created an indivisible
14 injury, which is certainly responsible, whose executives
15 admitted shredding documents, knowingly violated the law,
16 are going to be, may very well not have to pay a percentage
17 attributed to Enron. That would be an example of what
18 would happen if you eliminate joint and several liability.
19 And who's going to pick up the tab for that? The
20 taxpayers.

21 I think another example is Ford Firestone.
22 That was alluded to this morning. Since the hour is late,
23 I won't go through that again.

24 But I will tell you about a public opinion
25 poll that I can make available to you that I saw. People

1 were asked a very interesting question about Ford
2 Firestone. They were asked, If Firestone went out
3 of business, in the scenario where they both are
4 culpable -- Ford, after all, helped design those tires for
5 their Ford Explorer -- but if Firestone went out of
6 business, should Ford be completely and totally 100 percent
7 responsible for negligence caused?

8 And the answer overwhelmingly was yes. The
9 citizens of the Commonwealth of Pennsylvania understand
10 joint and several liability. And I think the answer to
11 that polling demonstrates they understand it.

12 I want to tell you about an environmental case
13 where I represented a scrap metal dealer who sold and
14 processed batteries. Because of the concept of joint and
15 several liability, they did not go out of business. They
16 almost certainly would have.

17 They faced a lawsuit by the government to
18 clean up a particular site. And because they were able to
19 bring in companies that were able to pay a share of
20 responsibility, including a share for companies that had
21 gone out of business, my client was able to absorb their
22 percentage of the loss and not go out of business.

23 In other words, there were other companies who
24 had dumped at that site that were solvent. And together,
25 those solvent companies were able to pick up the full tab

1 for those companies that had also gone bankrupt. The
2 people were properly served because the dump got cleaned
3 up. My client got properly served because thanks to the
4 doctrine of joint and several liability which is in the
5 Superfund Act, they were able to get contribution and
6 indemnity from the parties that were in existence to pay
7 it. So another example where a small business was saved by
8 the, by the concept of joint and several liability.

9 I'll tell you another example of a case that
10 was just completed in federal court which involved a
11 negligent driver who hit my clients head-on. The driver
12 was driving much too fast, lost control of his vehicle. My
13 clients were driving at about 15 miles an hour and were hit
14 head-on, and the seat belts failed in the car.

15 Fortunately, for the sake of joint and several
16 liability, my clients were able to recover. Now, for those
17 who feel that you would be eliminated, apparently believe
18 that my client should have borne the loss by virtue of the
19 fact that the driver that hit them head-on was
20 insufficiently insured. And I'm sorry, but
21 underinsured/uninsured motorist coverage is frequently not
22 sufficient in a catastrophic case.

23 The other case I want to talk about and the
24 last one I want to talk about, also a reported case -- and
25 I'd be happy to give you the citation if you'd like to read

1 it -- is a case of Thurston v. Quigley tried in the Middle
2 District of Pennsylvania in federal court in 1999.

3 Mrs. Thurston went into the hospital to have a
4 small tumor removed from her left lung. The doctor put a
5 hole in her diaphragm by mistake. During the 10 days that
6 ensued, she had evidence of a diaphragmatic injury. The
7 evidence consisted of coffee ground-like material coming
8 out of her chest tube.

9 The nurses saw this and wrote it down in the
10 record, and they were terribly alarmed by what they were
11 seeing. The evidence was clear and uncontested, by the
12 way, that the residents read those records but never gave
13 the information to the, to the attending physician.

14 The attending physician, who realized this
15 patient was not getting better, never communicated with the
16 residents or the nurses but instead went on vacation. This
17 woman, as a result of this, had her stomach herniated
18 through her diaphragm.

19 The gastric contents poured out into her
20 abdomen, creating a permanent open hole in her back for
21 which she has to have dressing changes twice a day. She
22 had to have her lung removed, and she has a stump of a lung
23 on the left side that will never be healed.

24 Her specials; that is, her medical bills,
25 alone were \$330,000. And she will probably have several

1 hundred thousand dollars of future expenses if they ever
2 come up with a way to seal this hole in her back, something
3 which is very uncertain. And she had about a \$2 1/2
4 million loss in earnings. She was an executive at
5 Wal-Mart.

6 The jury found 55 percent negligence against
7 the doctor; 30 percent negligence against the chief
8 resident, who was certainly negligent; and 15 percent
9 against the hospital for systemic failure. And the system
10 absolutely did fail.

11 Again, I want to remind everybody here that
12 this is a case where negligence was found, where it was a
13 substantial factor and it caused horrendous injuries.
14 Thanks to the doctrine of joint and several liability, she
15 was able to be compensated. And she was compensated as a
16 result of that verdict. And hopefully some day, she will
17 be able to have that surgery to sew up that stump and close
18 that hole in her back.

19 So joint and several liability serves an
20 important purpose, and that is to make us indeed our
21 brother's keeper. And that is certainly one of the most
22 important aspects of it. It worked in the Thurston case.
23 It worked in the other cases I've talked to you about. And
24 it's a viable doctrine which you don't want to throw out.
25 As I said earlier, it's what we teach our kids. We should

1 expect no less of our businesses.

2 I also want to touch on a few points raised by
3 other witnesses. You would think to hear the other
4 witnesses -- we hear about lawsuit abuse -- that there was
5 this avalanche of lawsuits. I hear about it all the time.
6 So I went to the Uniform Court System in Pennsylvania. And
7 you can go on the Internet, and you can get the figures.

8 And you will see that in the last 8 years,
9 there has been a drop in the number of filed cases of
10 between 25 and 30 percent. In fact, I've seen some
11 numbers, depending upon how you count the cases, that would
12 say it's as high as a third but no less than a 25 percent
13 drop in 8 years.

14 Maybe that's because we do have joint and
15 several liability and we've preserved the common law. The
16 common law is called the common law because it is, after
17 all, common sense. And I urge you to keep common sense in
18 this debate.

19 Another point that I think is important to
20 make is we hear a lot of, we hear a lot of stories what I
21 like to call apocryphal stories, apocryphal stories. So I
22 at one time joined a truth squad that was made up of the
23 American Trial Lawyers.

24 We would go around and check out these stories
25 that we heard at hearings like this. I want to tell you I

1 never found one that was as described in a hearing to bring
2 tort reform. I never heard a story which, when checked
3 out, was actually borne out by the facts we found.

4 And one of them was a national story that was
5 in Time Magazine and all over the place. And it talked
6 about a guy who cut his hedges with a lawn mower and had
7 the audacity to sue for cutting his hedges with a lawn
8 mower. Now, that would be pretty gross, wouldn't it?

9 So we checked out that case. And we found
10 out -- we finally got the representatives, and we got one
11 of the representatives of a PR firm that told the story on
12 TV. It turned out it was a case in the Middle District of
13 Pennsylvania.

14 I thought, Wow, I should know about that.
15 That's, you know, I know all those cases. Well, it turned
16 out it was my case. And the man never used the lawn mower
17 to trim his hedges. He was nowhere near the hedges. It
18 was absolutely made up.

19 There was another very famous case. I've got
20 to attribute this to my friend Terry Light for bringing
21 this to my attention. This was a case where a professor
22 told a story somewhere about a ladder somewhere in
23 Pennsylvania that was put on a manure pile in the winter.
24 When the springtime came and there was a thaw, the ladder
25 allegedly fell over and there was a lawsuit against the

1 ladder manufacturer.

2 And this story was reprinted to Practical
3 Lawyer. It was in Readers' Digest, and I believe it was
4 either in News Week or Time. So Terry Light wrote the
5 professor and said, you know, I'd like to know more about
6 this case. It's a terrible thing for that manufacturer to
7 have to face a frivolous lawsuit like that.

8 And the professor wrote him back -- and we
9 have the letter -- said, Well, I just made up that story.
10 I was an after-dinner speaker at a dinner. I think it
11 was -- I could be wrong about the city -- I think it was in
12 New Orleans. And he said, I was telling funny stories
13 about things that could happen in the law. He said, But
14 that never happened.

15 So we wrote to Time and the Practical Lawyer.
16 And the Practical Lawyer, on page 37, reprinted a
17 retraction. None of the national publications did that.
18 So I think that a lot of what you hear is driven by
19 apocryphal stories that, when you check them out, simply
20 are not the truth.

21 Now, with regard to the Commonwealth itself,
22 of course the Commonwealth liability is \$250,000. And it's
23 pretty rare that the Commonwealth is ever a deep pocket,
24 quote/unquote. And the reason for that is that jurors do
25 not want to make awards against the Commonwealth or a local

1 agency because they also happen to be taxpayers.

2 Those are indeed among the most difficult
3 cases to bring in Pennsylvania. And certainly, I'm not
4 aware of any case where the Commonwealth paid, where they
5 paid for someone else's, quote/unquote, share of liability.
6 So I think that pretty much wraps up the specifics.

7 I have more extensive remarks that you can
8 read. I ask you simply not to throw out the baby with the
9 wash water.

10 MR. LUTZ: Good afternoon. My name is David
11 Lutz. I'm the President Elect of Trial Lawyers. And I
12 realize the hour is late. So I'll be very, very brief. I
13 practice 4 blocks from here right down here at Dauphin
14 County. And I like to think that I'm in the trenches.

15 I try a lot of cases. Most of the cases I try
16 are auto cases. So I come at this from a different
17 perspective. I come at it from a real practical
18 perspective. I'd like to tell you about one case -- and
19 I'll be very quick -- of a client going west on Route 22.

20 He's going home from work. And the next thing
21 he knows is a car hits him head-on. Now, what happened?
22 Well, a car going east on Route 22 had a tractor trailer
23 turn left in front of that car. Now, the young lady
24 driving the car was inattentive and she was speeding.

25 .But the tractor trailer driver turned left

1 right in front of her. By the way, there's no
2 confidentiality agreement. So I'll give you anything you
3 want. But what happened was State Farm insured the young
4 girl. And they had limited limits, which means \$15,000.
5 And they tendered.

6 Guess what? The tractor trailer insurer,
7 Reliance, said to me, Forget it. Go pound sand. So I had
8 to file suit. And guess what? After 2 years of
9 litigation, the defense lawyer finally convinced the
10 insurance carrier, because of joint and several liability,
11 we better make an offer and settle this case. So joint and
12 several liability promotes settlements.

13 I think if you ask any trial judge is that a
14 good thing, they're going to say yeah. But here's what
15 else happened in this particular case: There was an
16 adequate settlement for this gentleman. But you see, he
17 had auto insurance, \$10,000 of medical bills.

18 To be honest with you, when you're in a coma
19 in Hershey for 3 weeks, that goes in a split second. He
20 also was a worker at a restaurant that had Aetna Insurance
21 as his health insurance, an okay plan but not a great plan.
22 And that paid what it had to pay.

23 But once that exhausted its benefits, guess
24 what? Department of Public Welfare paid their share. And
25 only because of joint and several liability were we able to

1 repay the DPW lien. And again, that all happened because
2 of joint and several liability.

3 There are some really good testimony coming
4 up. So I'm going to cut my remarks short. Very simple.
5 If it ain't broke, don't fix it. The system is not out of
6 balance. Thank you.

7 CHAIRPERSON GANNON: Thank you. Mr. Rieders,
8 just -- and you can tell me whether or not this is true.
9 But I had heard that you were involved in, from a defense
10 standpoint, in the case involving the crash of the
11 helicopter in Philadelphia.

12 MR. RIEDERS: That is correct. Our law firm
13 represented Lycoming Aviation.

14 CHAIRPERSON GANNON: My question was, Did
15 joint and several come into play in that situation?

16 MR. RIEDERS: Yes, it did.

17 CHAIRPERSON GANNON: That was Senator Heinz,
18 where he was killed.

19 MR. RIEDERS: It certainly did come into play.
20 And it probably is the reason why the company was still in
21 business because Lycoming Aviation had \$5 million in
22 coverage. There was clearly negligence on the part of the
23 pilot of Lycoming Aviation as well as Sun Oil.

24 And there was a claim made as to the assets
25 because Lycoming Aviation did have assets. We own -- our

1 company -- the company that we represented owned a dozen or
2 more airplanes, among other things, and pretty well
3 debt-free. It was because of joint and several liability
4 that our client was able to stay in business, keep those
5 planes flying and keep those employees working.

6 Clearly, without it, the plaintiff would have
7 been forced to go after the assets of our, our client. So
8 that is absolutely true. That's another example -- thank
9 you for reminding me of that -- in which joint and several
10 liability saved a Pennsylvania employer from going out of
11 business.

12 CHAIRPERSON GANNON: Representative Hennessey.

13 REPRESENTATIVE HENNESSEY: Thank you, Mr.
14 Chairman. Cliff, I'm going to repeat a question I had
15 asked earlier today. Of all the -- you know, not of you.
16 But at that point, they had indicated -- nobody had given
17 me an answer. Maybe you could.

18 Of all the states -- or of all the claims that
19 are filed involving multiple defendants, do you have any
20 sense of how many of them actually involved, in the
21 ultimate sense, an insolvent defendant when joint liability
22 will then increase the amount that other defendants have to
23 pay?

24 MR. RIEDERS: I've seen some figures actually
25 from Dr. Bhat, who I think could probably give you more

1 specifics on this.

2 REPRESENTATIVE HENNESSEY: The professor from
3 earlier this morning?

4 MR. RIEDERS: Correct. I think he said he had
5 some numbers on that. And I think he said it was something
6 like 4 tenths of a percent. Now, you know, you may ask if
7 it's so low, who cares about it? Why not just get rid of
8 it? The answer for that -- and this is the point I came
9 back to earlier -- is you want the tort law to affect
10 behaviors. That's what's really the key here.

11 And you want to make sure that people have a
12 reason to be careful and monitor their own behavior as well
13 as someone else's. So maybe it's as low as it is because
14 you have joint and several liability. But I've seen that
15 figure. I've heard that figure from Dr. Bhat. I believe
16 that probably if you follow up with him, he can be more
17 explicit about where that comes from.

18 REPRESENTATIVE HENNESSEY: Actually, the
19 reason I was asking, it seemed to me that it was going to
20 be a very small percentage. And the reason I was asking
21 it, you know, it seems to me that we're in danger of not
22 just throwing the baby out with the bath water but letting
23 the tail wag the dog here.

24 It's, you know, a doctrine which really has
25 application in such a very limited circumstance. But to

1 throw it out basically affects a whole lot of other cases
2 because much more than .4 percent of cases involve multiple
3 defendants. And those multiple defendants do, you know,
4 generally kick in their share as allocated by the jury.

5 MR. RIEDERS: Right. And as a business
6 lawyer, coming from a business background, I've got to tell
7 you that you're very careful that you do business with
8 solvent parties because of joint and several and you enter
9 into indemnity agreements because of it and you require
10 insurance because of it.

11 You take away all of that incentive if you
12 eliminate joint and several liability. And again, I've had
13 those real-world experiences with the companies that I've
14 represented and worked with.

15 MR. LUTZ: The only thing I would like to say
16 is, you know, most of these cases settle. A lot of cases
17 settle before anyone even becomes a defendant. So those
18 statistics are not going to be available. So we don't
19 really know.

20 REPRESENTATIVE HENNESSEY: Well, I guess the
21 problem I have now is it's either .4 percent or some other
22 percentage. But somebody's at least quantified it. Maybe
23 it's Professor Bhat.

24 MR. RIEDERS: I believe it's consistent with
25 what Dave is saying. I believe that's of tried cases, of

1 case where there is a record. I think that's a percentage
2 where you can get at the information; therefore, it's of
3 filed cases, actually cases where there's probably a
4 verdict. I believe that is -- again, you'd have to check
5 with Dr. Bhat. I don't want to misrepresent his numbers.

6 REPRESENTATIVE HENNESSEY: Just another
7 question. What about the suggestion of telling juries of
8 the effect of joint liability, how it plays out, and also
9 informing them of the insolvency or the probable judgment
10 proof nature of some of the defendants? What happens? In
11 terms of your experience, how would juries react to that?

12 MR. RIEDERS: Well, my experience is that if
13 you open up Pandora's box, you know, you've got to let out
14 everything, which I think is a point that you made. If
15 you're going to do that, then you've got to talk about how
16 much insurance does everybody else have.

17 In other words, if you're going to ask the
18 jury to make policy, to legislate in effect, then you're
19 really asking them to do more than the jury system has ever
20 been asked to do. The jurors are finders of fact. That's
21 what a jury's supposed to do.

22 And today, the way trials are run with special
23 verdict questions and very, you know, tightly worded jury
24 charges and summary judgment procedures and all of these
25 procedures to make sure that only serious and legitimate

1 cases ever get to a courtroom, you want to make sure that
2 you preserve the jury's function as the finder of fact, not
3 as a policymaker.

4 And I have found and I have engaged in dozens
5 and dozens of studies where we've talked to jurors
6 afterwards, the famous Dartman studies. And jurors do try
7 to look at the facts. And they try very hard to follow the
8 instructions.

9 And if you're going to now say, In addition to
10 that, we want you to make a broad policy determination,
11 then you're going to make trials longer, more expensive.
12 And you're going to bring in information that may or may
13 not really be relevant that is probative of the facts in
14 that case. So I think it's a poor idea.

15 REPRESENTATIVE HENNESSEY: Okay. But now, you
16 were here when Ms. Smith said that in Connecticut, I
17 believe, once, once the jury renders its first verdict, if
18 they then discover that one of the defendants is insolvent,
19 they bring the jury back and ask them to reallocate.

20 MR. RIEDERS: Yes.

21 REPRESENTATIVE HENNESSEY: Have you ever been
22 involved in any kind of situation? How has it played out?

23 MR. RIEDERS: I had a trial in Connecticut
24 where that occurred. The problem with that is that it's
25 very analogous to eliminating joint and several altogether

1 because then you're allocating to the plaintiff some loss
2 that has nothing to do with his own fault but is rather
3 that somebody else is insolvent. And that's not his fault.
4 It was the other parties' who could have dealt with that
5 insolvency, made sure they dealt with a party that was not
6 insolvent or financially responsible.

7 REPRESENTATIVE HENNESSEY: According to the
8 chart we were shown, it was reallocated among the remaining
9 defendants, not among the plaintiff, not including the
10 plaintiff, unless you consider a negligent plaintiff to be
11 in that sense a defendant when it comes to reallocation.

12 MR. RIEDERS: I'm not aware of that system.
13 The case I was involved in included reallocation to the
14 plaintiff. If it did not include reallocation to the
15 plaintiff, I think it would be worth studying. But I don't
16 have enough information to tell you sitting here today how
17 that would work.

18 REPRESENTATIVE HENNESSEY: It just seemed to
19 me that that was sort of what we were getting, what I was
20 trying to get at earlier. When the jury makes its
21 determination that among the defendants which I think
22 presumably they think are going to be able to answer in
23 damages, that they are solvent, they make a determination,
24 say it's 5 defendants and they say 20 percent a piece.

25 If they then find out that, that 2 of them are

1 insolvent, it wouldn't be surprising for me, to me for a
2 jury to then come back and say, Well, in the reallocation
3 phase of this trial, we're going to find the remaining 3
4 each 33 percent liable.

5 MR. RIEDERS: See, but the problem with that
6 is you're assuming that by the time the trial is over, you
7 know who's insolvent or not.

8 REPRESENTATIVE HENNESSEY: Well, they must do
9 something because that's the law in Connecticut, as we're
10 told.

11 MR. RIEDERS: Yeah, I will study that further.
12 The problem is, in the cases I've been involved with, like
13 the Thurston case, for example, we really didn't find out
14 until later on that one of the parties was either unable or
15 unwilling to pay.

16 So if that could happen by the time of trial
17 and you could reallocate without punishing the plaintiff,
18 there may be some merit to studying that. I'd like, you
19 know, more information on that. And I will take a look at
20 it.

21 REPRESENTATIVE HENNESSEY: Okay. Thank you.
22 Thanks, Mr. Chairman.

23 CHAIRPERSON GANNON: Thank you, Mr. Rieders,
24 for attending the hearing and presenting testimony and also
25 Mr. Lutz for attending the hearing and presenting testimony

1 concerning the issue of joint and several liability.

2 Our next witness is Allan Gordon, Esquire,
3 Chancellor of the Philadelphia Bar Association. Welcome,
4 Mr. Gordon. You may proceed when you are ready.

5 MR. GORDON: Thank you, Mr. Chairman. Good
6 afternoon, members of the Judiciary Committee. Thank you
7 for the opportunity to speak to you today. I'm going to be
8 very brief. Following Cliff Rieders is almost as bad as
9 yesterday following Gerry McHugh. I think that they want
10 to torture me so I won't come back.

11 I am the Chancellor of the Philadelphia Bar
12 Association, which is made up of 13,000 members of the
13 15,000, approximately, lawyers who practice in the City of
14 Philadelphia. We are plaintiffs' lawyers; we are defense
15 lawyers. We run the gamut of every branch of the legal
16 profession in Philadelphia.

17 And we are governed by a Board of Governors.
18 The Board of Governors is representative of the membership.
19 And last Monday, May the 6th, we had a meeting to discuss
20 specifically Senate Bill 1376 but in general the abolition
21 or proposed abolition of joint and several. And I can
22 report to you that the vote was unanimous. Everyone voted
23 to oppose any change in the law of joint and several
24 liability.

25 You have my written materials. And because of

1 the late hour, I'm not going to sit here and read them into
2 the record. But I would like to take advantage, perhaps,
3 of my age and point out, if I may, a couple of things that
4 I heard today that I think need clarification.

5 I heard a number of people come here and talk
6 about the change in the law of Pennsylvania from
7 contributory negligence to comparative negligence as a way
8 of balancing things, of making things more fair to the
9 plaintiff. That is an inaccurate statement.

10 What happened -- because I was around then and
11 practicing law. I've been practicing for 36 years -- what
12 happened was the defendants wanted that law changed because
13 juries are not stupid. And juries, when they were told
14 that if you find that the plaintiff is negligent to any
15 degree, he may or she may not recover, juries were not
16 finding plaintiffs contributorily negligent.

17 And the defendants were saying and they were
18 arguing, Wait a minute. We're losing the opportunity to
19 reduce the amount of verdicts by 20, 30, 40 percent that
20 jurors would find if they knew that that wouldn't
21 completely bar the plaintiff.

22 Also, we heard and I heard yesterday about how
23 hospitals are hurt by verdicts as a result of joint and
24 several liability. My practice is almost entirely medical
25 malpractice litigation. The cases that were discussed

1 today had nothing to do with joint and several liability.

2 In those cases, the hospitals were held
3 responsible because of vicarious liability. They were held
4 responsible because the tort-feasors were either employees
5 of the hospital or the hospital held these people out as
6 their employees. And so they were held then because of the
7 theory and the concept of ostensible agency. It had
8 nothing to do with joint and several liability.

9 The only time a hospital could be responsible
10 under a theory of joint and several liability would be for
11 their direct negligence under Thompson v. Mason. And there
12 are very few of those cases. And those people who are in
13 the field know that what I am telling you is correct.

14 The reason that lawyers in the Philadelphia
15 Bar Association, transactional lawyers, criminal lawyers,
16 all fields, voted unanimously to oppose any change in joint
17 and several liability is for a very simple reason. As
18 Cliff just said and as Mr. Lutz just said, the law works as
19 it is. And to shift the burden to a plaintiff as opposed
20 to a negligent tort-feasor is just unfair.

21 You keep hearing about the 1 percent negligent
22 defendant. There is no such thing as a 1 percent negligent
23 defendant. There's no such thing as a 90 percent negligent
24 defendant. A defendant is either negligent or a defendant
25 is not negligent. A jury must determine that.

1 A jury then must determine whether or not that
2 negligent defendant played a substantial factor in causing
3 harm. Only after that is done are these percentages
4 assigned to negligent defendants. And it is only assigned
5 so that they may intersect as amongst themselves, apportion
6 and divide their own responsibility.

7 It was never intended to affect what the
8 plaintiff could do and where the plaintiff could or could
9 not collect his or her judgment from. So that as between a
10 negligent defendant and the plaintiff, it really makes no
11 difference. That jury has determined that that defendant
12 substantially caused the harm to the plaintiff.

13 In response to your request, Mr. Chairman, I
14 do talk about one case that I personally handled in here
15 that I think is representative of what happens as a result
16 of joint and several liability. I represented a young man,
17 a certified public accountant, who went to a resort area
18 very close to where we are today for the 4th of July
19 weekend.

20 He went out to the pool with his 3 children.
21 And while he was sitting there, 3 men came in. They were
22 also guests in the hotel. They had been drinking at the
23 hotel bar. They were drunk. They came in and just started
24 to act rather boisterous. They were harassing people.

25 The lifeguard saw it. I took her deposition.

1 She just decided that she wasn't going to blow the whistle,
2 she wasn't going to do anything. And these 3 men grabbed
3 this young accountant and threw him into the pool. As a
4 result of which, he became a quadriplegic.

5 Now, you could argue that, one, the man who
6 decided to let's start throwing him in is more responsible;
7 2, the men, all 3 together, were more responsible. Was the
8 lifeguard more responsible for not stopping it? Was the
9 motel, the hotel more responsible for serving them when
10 they were drunk?

11 That really should not be the plaintiff
12 quadriplegic's problem. The quadriplegic should not have
13 to chase after the man who threw him in or the one who
14 decided it. That is the purpose of joint and several
15 liability. All of those defendants were found to be
16 culpable and substantial factors.

17 I'd like to leave you just with one question.
18 I want you to assume that -- we all know what happened on
19 September 11th. I want you to assume that we had the
20 capability, if we represented a victim of the September
21 11th tragedy, that we had the ability to sue the 19
22 terrorists individually and a jury decided that they were
23 all responsible and they had to apportion the liability.

24 And so they said, Fine. They're each 5 1/2
25 percent responsible. But only one of them had an estate

1 that could satisfy an award. The proponents of the change
2 in joint and several liability which say that the victims
3 of September 11th should only be able to collect the 5 1/2
4 percent, I don't believe that is the law that the people of
5 the Commonwealth of Pennsylvania want.

6 I don't think it's the law that this
7 Legislature wants, and it's certainly not the law that the
8 members of the Philadelphia Bar Association want. And I
9 thank you very much for giving me the opportunity to talk
10 to you today.

11 CHAIRPERSON GANNON: Thank you very much --

12 MR. GORDON: Thank you, sir.

13 CHAIRPERSON GANNON: -- Mr. Gordon, for coming
14 before the committee and enlightening us with your very
15 interesting testimony. Based on what I'm hearing, I'm not
16 all that certain that the advocates of this -- maybe they
17 have -- have thought this through as to what the draconian
18 consequence would be for people who are injured by
19 defendants.

20 Our next witnesses are Deborah Amoroso; and
21 Richard Golomb, Esquire, attorney for Ms. Amoroso; and
22 Nancy P. Oppedal, State Chair of Mothers Against Drunk
23 Driving, Pennsylvania. Welcome to this hearing. And you
24 may proceed when you are ready. Thank you.

25 MR. GOLOMB: Good afternoon, Mr. Chairman and

1 members of the Judiciary Committee. I want to thank you
2 also for allowing us the opportunity to discuss joint and
3 several liability before you here today. These hearings
4 have been going on for approximately 2 days now, one day in
5 the Senate, one day in the House.

6 And I think it's high time that we lawyers, we
7 experts, and we lobbyists step aside for a moment and allow
8 you to hear from a victim, a real victim, and how joint and
9 several liability helped this family and how abolishing
10 joint and several liability would affect this family. So
11 it's my pleasure to introduce to you Deborah Amoroso.

12 MS. AMOROSO: Thank you for letting me come
13 here. I'm here to tell you my story. I don't know
14 anything about the law. That's why I hired him. Before I
15 begin my story, I'd like to ask you all to picture in your
16 mind a loved one, your wife, your husband, son, a daughter,
17 a friend.

18 And while I tell you my story, I would like
19 you to hold that person in your thoughts and your hearts.
20 My story begins on May 15th, 1998. It was a Friday. A man
21 named John entered a local club around 3:30 in the
22 afternoon, and he began drinking.

23 He consumed over 12 drinks, was helped to the
24 door, left the club at 8:30 that evening. He entered his
25 car, left the parking area, and started driving home. Two

1 miles from that club, he rear-ended a car stopped to make a
2 left turn. The impact was so hard that the imprint of his
3 Cleveland Indians logo plate was imbedded into that rubber
4 bumper. He also smashed out his lights, his headlights.

5 He stopped. He got out. He assumed
6 responsibility for that crash, but he didn't want the
7 police called. That's because he had a previous DUI and he
8 was driving without a license. The driver of the other car
9 insisted the police be called.

10 That's when John made a pretense of having to
11 move his car to the side of the road. Instead, he ran from
12 the scene of that crash. A mile and a half further down
13 the road, traveling at speeds in excess of over 80 miles an
14 hour without headlights and 3 feet into the oncoming lane,
15 John crashed into the car driven by my son Danny.

16 Dan was hit on the driver's side right behind
17 the front wheel. The impact was so violent, it tore the
18 front of the car away. It put the steering column into the
19 passenger side of the car. The car rotated 180 degrees and
20 went 35 feet more down the road where it ended up in a
21 ditch.

22 John's car veered to the right, came to rest
23 against a telephone pole. A man passing by by the name of
24 Don witnessed the crash, and he stopped to help. He went
25 to John's car. He was slumped over the wheel. He had a

1 pulse. He was unconscious, and he wreaked of alcohol.

2 He then went to Dan's car. Dan also had a
3 pulse. He told him to hang in there, that he'd get help.
4 Dan nodded. He went up to the road, flagged down another
5 passerby and called 911. And then he decided to return to
6 Dan. When he got back there, Dan still had a pulse.

7 He told him that help was on the way, to
8 fight, that people loved him and cared about him. Dan
9 nodded. Dan grunted. He took a breath, and he died. The
10 impact fractured his pelvis, lacerated his liver, ruptured
11 his spleen, fractured his ribs, lacerated his lungs, split
12 his heart in 2. He bled internally. He drowned in his own
13 blood.

14 He was 20 years old. He was our only son, our
15 only child. We buried Dan on May 20th. I don't remember
16 very much about those first weeks. But I wake each morning
17 to a knocking sound, the image of a policeman and the cries
18 of Dan's father to, "No, no. Not my son. Not my Danny."
19 And I know I will wake always to those sounds.

20 That first year after Dan was killed, I was
21 filled with such anger and such a rage. We buried our son,
22 but now we had to deal with the criminal and the legal
23 things. And if you don't think that's a trial, you should
24 try and do it.

25 We would have not gotten through that without

1 family; friends; the support of the Lower Providence Police
2 Department; and our attorney, Richard Golomb. Our home was
3 once filled with music and the coming and goings of young
4 people, the dreams and aspirations and challenges of our
5 son's life. It is now profoundly silent.

6 My husband Frank no longer works. He's a
7 carpenter. And Dan would help him during the, during the
8 summers and the holidays. The memories for Frank are too
9 painful and too frail. He says that each day that passes
10 brings him one day closer to seeing his son again.

11 Tomorrow, May 15th, Danny will be dead 4
12 years. And the void in our soul will still widen. We weep
13 silently now, not for all that's been lost, not just for
14 ourselves, but for what Dan has lost. There's no
15 graduation for college from Dan. There's no first job.
16 There's no marriage. There's no holding a child.

17 The lives and times we knew are gone. And
18 there's no one to carry on the memories. All this because
19 choices weren't made. John could have chosen to have one
20 drink and leave. He didn't. He could have chosen to call
21 his wife or a friend or a cab, but he didn't. He could
22 have chosen to stay at that first crash, but he didn't.

23 So he is responsible. But not just John. The
24 club he drank in had choices, too. They could have chosen
25 to flag John, but they didn't. And they could have chosen

1 to call his wife or a cab, and they didn't. And they are
2 as equally responsible for the death of my son.

3 I asked you in the beginning to hold a loved
4 one in your thoughts and hearts. Now I ask you to imagine
5 that tomorrow will start without them because tomorrow
6 starts without our Danny every single day. Thank you.

7 MR. GOLOMB: Members of the committee, if I
8 may, I want to give you some additional facts. And we can
9 talk about the impact of joint and several liability. The
10 fact is, is that when John Force walked out of that bar, he
11 walked out of that bar with a blood alcohol content of .28,
12 almost 3 times the legal limit.

13 During the time period that he was in that
14 bar, he had 13 gin and tonics. We know that because the
15 whole thing was on videotape. We also know that an hour
16 and a half before this accident happened, at 7 o'clock that
17 evening, there was a bartender who left her shift and was
18 so concerned about this man that she sat him down on a
19 couch and then called back an hour later from home to find
20 out what had happened to this man.

21 And what happened to this man was that the
22 hostess that she spoke with grabbed him by the hand, walked
23 him to the door, opened the door and let him drive away.
24 We know that because that's on videotape. Now, there is no
25 more innocent victim than Dan Amoroso.

1 And there are no 2 more negligent parties than
2 John Force, the driver of that car, and that bar that day.
3 What difference does it make if a jury finds that person 20
4 percent or 60 percent liable? The fact of the matter is,
5 without one, without both of those parties acting in
6 concert, Dan Amoroso would be alive today.

7 It is no different than the bar in this case
8 handing the gun and filling the chamber with not 1 but 12
9 bullets, 12 gin and tonics, and giving that gun to John
10 Force to shoot Daniel Amoroso. That's what happened on
11 that day. And that's why the law of joint and several
12 liability should never be changed in this Commonwealth.
13 Thank you.

14 MS. OPPEDAL: Good afternoon, Chairman Gannon
15 and members of the Judiciary Committee. I appreciate the
16 opportunity to express MADD's concern regarding House Bill
17 2315. This legislation will particularly affect victims of
18 alcohol-related motor vehicle crashes who bring a cause of
19 action against the bar/tavern that overserved the drunk
20 driving offender.

21 The Pennsylvania dram-shop law found in
22 Pennsylvania Statutes Annotated Section 47-497 provide
23 civil liability for servers providing alcohol to visibly
24 intoxicated persons. There are no provisions in the
25 statutory language for social hosts or underage patrons.

1 There are also no provisions limiting damages. So both
2 actual and punitive damages are available to the
3 plaintiffs.

4 Pennsylvania does have a common law dram-shop
5 rule which gives liability to social hosts serving minors.
6 There is no provision in the common law, however, for
7 service to able-bodied adults, as common law dictates its
8 service was not the proximate cause of the injury.

9 There are currently 43 states plus the
10 District of Columbia that have a dram-shop law. Some are
11 limited in the amount of damages they allow. Some are
12 limited in the time allowed to bring suit, and others limit
13 who can be sued using a proximate cause of injury defined
14 in their statute.

15 MADD's national position statement on
16 dram-shop is as follows: MADD strongly supports, by means
17 of legislation or case law, the rights of victims of
18 alcohol-related traffic crashes to seek financial recovery
19 from establishments and servers who have irresponsibly
20 provided alcohol to those who are intoxicated or to minors,
21 or to serve past the point of intoxication individuals who
22 then cause fatal or injurious crashes.

23 Studies that have been done to date on
24 dram-shop liability laws' impact indicate that these laws
25 can be an effective way of reducing alcohol-related injury

1 crashes. Stricter liability laws may also encourage
2 alcohol establishments to implement responsible beverage
3 service programs, to establish clear policies, and to train
4 servers to prevent patrons from becoming intoxicated and
5 prevent sales to minors.

6 This goes directly to the safety of
7 Pennsylvania's citizens. Under the Pennsylvania dram-shop
8 statute, a violation is considered negligence per se. And
9 if the violation was the proximate cause of the plaintiff's
10 injury, then the defendant is liable for the injury.

11 House Bill 2315, although dealing with the
12 comparative responsibility law and not the dram-shop law,
13 will affect dram-shop liability that is based in
14 negligence. By proportioning the responsibility among all
15 defendants based on share of blame, servers will not be
16 held responsible to the extent they should.

17 It will abrogate any deterrent effect that
18 dram-shop laws have in promoting responsible serving and,
19 most importantly, will revictimize the victims in limiting
20 recovery for their loss. In order to preserve dram-shop
21 liability in Pennsylvania, MADD recommends that the
22 following language be added to House Bill 2315:

23 "Nothing in this section shall be construed in
24 any way to abolish, modify, or affect a cause of action
25 under Section 47-497 of the state's dram-shop law. A cause

1 of action established under the dram-shop law shall not
2 limit liability to comparative negligence principles."

3 Not included in my written comments, I would
4 just like to say I sat through the Senate hearing yesterday
5 and now all through the House hearing today. I'm glad that
6 Debbie was able to come and speak because finally you're
7 getting to hear from truly the victims in this civil and
8 tort reform issue.

9 I'm afraid that maybe what you've been hearing
10 is a distortion of who the victims truly are. While I can
11 be sympathetic to businesses that are sued in a frivolous
12 lawsuit, I think it's really important, when the
13 legislators are voting on this issue, to keep in mind who
14 truly the victims are and what the changes in this law will
15 do to victims. And thank you very much for your time.

16 CHAIRPERSON GANNON: Representative Turzai,
17 did you have a question?

18 REPRESENTATIVE TURZAI: No. Yeah, just if I
19 might. I do apologize. And I missed your spoken testimony
20 but had reviewed some of the written testimony. But as the
21 comparative negligence statute presently exists, how is
22 dram-shop liability affected in your estimation? How does
23 it impact dram-shop liability?

24 MS. OPPEDAL: Well, first of all, I have to
25 say I'm not an attorney.

1 MR. GOLOMB: If you don't mind,
2 Representative, I'll be glad to answer that.

3 REPRESENTATIVE TURZAI: That would be fine.
4 And I apologize.

5 MR. GOLOMB: And I'll do it by illustration.
6 I'll do it by illustration from what was used this morning
7 by Ms. Steinour when she discussed the case in which she
8 represented a, a bar owner that was only found 10 percent
9 responsible.

10 And you weren't here to hear the testimony of
11 Deborah Amoroso. And there is no written testimony that's
12 been provided. But she is the mother of a 20-year-old who
13 was struck and killed by a drunk driver who came out of a
14 bar with a blood alcohol content of almost 3 times the
15 legal limit.

16 And if we assume for the sake of this
17 discussion that this case went to trial and that there was
18 a \$4 1/2 million verdict --

19 REPRESENTATIVE TURZAI: Did it go to trial?

20 MR. GOLOMB: It did not.

21 REPRESENTATIVE TURZAI: It settled?

22 MR. GOLOMB: It settled.

23 REPRESENTATIVE GOLOMB: Was there any argument
24 in that particular fact matter that the behavior of the
25 defendant and/or the defendant server rose to the level of

1 a reckless or intentional act?

2 MR. GOLOMB: Well, there was certainly a
3 punitive damage claim that was brought against both the bar
4 owner for serving this man 13 drinks over a period of about
5 4 hours as well as the punitive damage claim against the
6 driver of the car. That's correct.

7 REPRESENTATIVE TURZAI: So a punitive damage
8 claim, obviously if you felt -- and I don't mean you
9 particularly. I mean the plaintiff and the plaintiff's
10 counsel -- felt strongly enough that they could bring a
11 punitive damage claim, they certainly, given the standard
12 requirement to prove a punitive claim in Pennsylvania,
13 believed that it was an intentional and/or reckless action
14 on the part of the server; is that correct?

15 MR. GOLOMB: Correct.

16 REPRESENTATIVE TURZAI: Now, under existing
17 Pennsylvania law with respect to the comparative negligence
18 statute, an intentional or reckless defendant does not have
19 the benefit of raising the comparative negligence as a
20 defense; isn't that correct?

21 MR. GOLOMB: No, that's not correct.

22 REPRESENTATIVE TURZAI: What about the case of
23 Kervegansky (Phonetic) at 515 A.2d 933, a PA Superior Court
24 case at 1986, and also the Summit Fasteners (Phonetic)
25 case, 599 A.2d 203, a superior court case, 1991? When

1 wilful or wanton misconduct is involved, comparative
2 negligence should not be applied.

3 That's specifically what the court says in
4 Summit Fasteners. And what -- my understanding is that
5 they basically took precomparative negligence statute, the
6 Casanovich (Phonetic) case, a 1943 supreme court case, and
7 found it to continue to have viability subsequent to the
8 comparative negligence statute.

9 MR. GOLOMB: I thought we were here to talk
10 about joint and several liability.

11 REPRESENTATIVE TURZAI: Well, but it does talk
12 about joint and several liability because you're making
13 examples where the elimination of joint and several
14 liability does not apply, certainly under one of the drafts
15 that you talked about today.

16 MR. GOLOMB: But you had asked me a question
17 of how, in the dram-shop action, how joint and several
18 liability, the abolishment of joint and several liability
19 may affect that.

20 REPRESENTATIVE TURZAI: No. I asked under the
21 present comparative negligence statute. That was the
22 question.

23 MR. GOLOMB: And I'd like to answer how it
24 would affect that under the joint and several liability, if
25 I may. Is that okay?

1 REPRESENTATIVE TURZAI: I mean, there's a
2 variety of versions of joint and several elimination. But
3 do you concede that under the present comparative
4 negligence statute, a defendant who is guilty -- let me use
5 that phrase in a broad sense -- of reckless and/or
6 intentional behavior does not have the benefit of raising
7 comparative negligence as a defense?

8 MR. GOLOMB: You didn't have the benefit of
9 hearing the testimony. I'm not sure that anybody in their
10 right mind in the case that we're talking about here would
11 ever raise the issue of comparative negligence in the case
12 of Daniel Amoroso.

13 And I would like to talk about how joint and
14 several liability, the abolishment of joint and several
15 liability would affect this particular case.

16 REPRESENTATIVE TURZAI: Well, comparative
17 negligence doesn't only speak vis-a-vis a plaintiff. It
18 also speaks vis-a-vis other defendants as well.

19 MR. GOLOMB: That's correct.

20 REPRESENTATIVE TURZAI: It's not limited to
21 just what the plaintiff's conduct is. It's also speaking
22 to what defendants do. So I'm sure in that particular
23 case, somebody would raise comparative negligence as a
24 defense. Although --

25 MR. GOLOMB: In this particular case?

1 REPRESENTATIVE TURZAI: Yes. Although
2 ascribing it to another defendant.

3 MR. GOLOMB: No, I wouldn't think so.

4 REPRESENTATIVE TURZAI: They wouldn't say that
5 the driver and the server of --

6 MR. GOLOMB: Well, in this particular case,
7 the facts were so egregious against both defendants.
8 Certainly maybe at a time of trial, if this case ever did
9 go to trial, maybe they would be pointing fingers at each
10 other somehow. That's correct.

11 But I'm not really sure I understand your
12 point in the context of joint and several liability.

13 REPRESENTATIVE TURZAI: Well, let's just take
14 the one draft, 2315, which is just essentially an extension
15 of the existing comparative negligence statute. In that
16 particular draft, would you tell me that the cases that I
17 outlined, Kervegansky and Casanovich, would not still have
18 liability?

19 MR. GOLOMB: Well, frankly, Representative,
20 I'm not familiar with the 2 cases that you presented here
21 today. So I'm not sure what the facts of those cases are.
22 And without, without the benefit of seeing those facts,
23 those cases and being able to read the facts of those
24 cases, I don't really feel comfortable answering the
25 question.

1 REPRESENTATIVE TURZAI: Okay. No problem.

2 MR. GOLOMB: If you don't mind, I would like
3 to illustrate, however, how the abolishment of joint and
4 several liability, based on the example given by Ms.
5 Steinour this morning, would affect this particular case in
6 terms of its compensation and leave you with a final
7 thought that I know that you've heard during the course of
8 today and also yesterday in the Senate hearings.

9 And that is in terms of how, how joint and
10 several liability, the abolishment of joint and several
11 liability would affect the Commonwealth negatively. But if
12 we take the example that was given here this morning -- and
13 that was from a defense attorney who represented a bar
14 owner that was held 10 percent responsible by a jury and
15 then ultimately had to pay the entire verdict.

16 If we assume for the sake of this discussion
17 that this case went to trial and there was a \$4 1/2 million
18 verdict and we assume further that, in this case, that the
19 negligent driver had a \$15,000 auto insurance policy, then
20 we know under joint and several liability that in this
21 case, the bar, with adequate coverage, would pay \$4,350,000
22 for a total of \$4 1/2 million.

23 On the other hand, with the abolishment of
24 joint and several liability, if there was a, the same
25 \$15,000 policy and again a finding of the jury that the bar

1 was 10 percent responsible, there would be a recovery of
2 \$450,000 for that bar or a total recovery of \$465,000.

3 Now --

4 REPRESENTATIVE TURZAI: I would just disagree
5 with you under the version that's presented in 2315. I
6 can't speak for the other one. But under the version of
7 2315, I don't believe that's accurate.

8 MR. GOLOMB: Well, under 1376, we're talking
9 about the abolishment of joint and several liability in its
10 entirety. So that we're talking about a --

11 REPRESENTATIVE TURZAI: Right. But there are
12 2 bills that --

13 MR. GOLOMB: And that's what's been presented
14 and discussed in front of this committee here today.

15 REPRESENTATIVE TURZAI: I disagree with that.

16 MR. GOLOMB: And if we, if we also assumed for
17 the sake of discussion that rather than Daniel Amoroso
18 being killed, that, like Mr. Gordon's client, Mr. Amoroso
19 ended up paralyzed and in need of millions of dollars of
20 medical care, with the \$465,000 recovery, where do you
21 think that that medical coverage is going to be paid by?

22 That's going to be paid by the Commonwealth of
23 Pennsylvania. And in that circumstance, because that
24 medical care will be paid through the Department of Public
25 Welfare, there will not be a cap of \$250,000 as they have

1 the luxury in other cases.

2 And so I don't know how much that's been
3 discussed in front of the panel. I haven't been here all
4 day. I have been here a great deal of the day. But it
5 certainly, the abolishment of joint and several liability
6 that you did not hear from the Commonwealth, there is also
7 a very real possibility of it having a negative impact on
8 the Commonwealth as well.

9 CHAIRPERSON GANNON: I can tell you this. I
10 meant to comment when Mr. Gordon finished his testimony,
11 since we got into comparative negligence a little bit. I,
12 quite frankly, thought that comparative negligence was
13 vis-a-vis the plaintiff and the defendant and contribution
14 indemnity among the defendants.

15 When I was with the insurance industry and
16 comparative negligence came into being, we were jumping
17 with joy. We hated contributory negligence because 2
18 things happened: The jury would always overlook that
19 factor that there would be no, no, there would be no
20 recovery where the plaintiff was found to be in any way
21 contributory negligent. And invariably, they gave a full
22 verdict.

23 We felt very strongly that we would start to
24 get discounted verdicts with comparative negligence, and we
25 were very happy about that. And that is in fact what's

1 happened. So comparative negligence, I think when you
2 started to talk about it, you refreshed my recollection
3 that we were looking for better discounts on verdicts and
4 we were very, very happy when comparative negligence came
5 into effect.

6 MR. GOLOMB: And what this bill would do, Mr.
7 Chairman, in terms of a full abolishment of joint and
8 several liability, you've already got, in the case of
9 comparative negligence, you've already got the first
10 reduction, a fair reduction in accordance with the
11 percentage of negligence placed on the plaintiff.

12 In the situation where you've got an
13 underinsured defendant or an insolvent defendant, with the
14 abolishment of joint and several liability, what you're
15 doing is you're now, you're making a second, an unfair
16 reduction to the plaintiff for something they have
17 absolutely no control over.

18 CHAIRPERSON GANNON: I think that's a fair
19 statement from, in this context. And if you go back to the
20 original common law before the development of joint and
21 several, if you had 3 defendants and they were all found
22 responsible, it was they were found responsible for the
23 entire harm, each one.

24 So that the plaintiff could choose which one
25 he wanted to recover his, his compensation from. It seems

1 to me that as it developed in terms of the equity among the
2 defendants, not vis-a-vis the plaintiff but vis-a-vis
3 themselves, that they wanted to look for a method where
4 they, you know, one person who, or one individual or
5 company or whatever it was was required to make payment
6 even though there were 2 other people involved or 2 other
7 individuals, that the equity was that they should be able
8 to recover something from those individuals although their
9 separate acts caused the entire harm, you know, the "but
10 for" analogy and the substantial factor.

11 It seems to me that the advocates of this,
12 abolishing joint and several, if they really were honest
13 about it, just do away with joint and several. Let's go
14 back to the common law the way it was. If we want to go
15 back in time, let's go back in time.

16 And you bring in 3. The case is tried.
17 They're all found guilty. We're not going to try to
18 allocate anybody. You know, plaintiff just collects from
19 whoever he wants. This idea that trial lawyers go around
20 looking for deep pockets all the time and that, you know,
21 it's always the bankrupt defendant, I can't remember a
22 case -- and I had 600 files on my desk. I'm talking about
23 20 years
24 ago -- where we had a problem with a bankrupt defendant and
25 we were trying to look for indemnity.

1 And I think the lady who spoke, the defense
2 lawyer --

3 MR. GOLOMB: Steinour.

4 CHAIRPERSON GANNON: Steinour, yeah. We did.
5 We sat down. And invariably, you probably see this in your
6 practice. The problem wasn't they're bankrupt. The
7 problem was trying to get somebody to pay their limits on a
8 low limit policy so you could settle the case.

9 Everybody else is sitting there with a
10 \$300,000 limit, and you got the guy with the \$50,000 policy
11 and you got a \$2 million case and they won't pay 50,000
12 when you know that the thing is worth more than that.
13 That's what our problem was.

14 And I'm -- I don't know if you see that or
15 you've seen that in your practice. That was always the
16 problem in trying to get cases settled.

17 MR. GOLOMB: More so than ever.

18 CHAIRPERSON GANNON: Where you got some
19 insurance claim adjuster who just won't pay the -- he'll
20 pay 35, or he'll pay 40. But damn it, he's not going to
21 pay 50 on a million-dollar case. And we end up in court,
22 and everybody gets socked.

23 And then he writes, Well, I guess I'll just
24 pay my limits. You know, that's the reality. And this
25 fabrication about the bankrupt, you know, or somebody being

1 driven into bankruptcy, who's being driven into bankruptcy?
2 Polluters? That's where they ought to be, in bankruptcy.

3 People that have killed and maimed people
4 because of asbestos, maybe that's where they belong, in
5 bankruptcy. Look at Crown Cork, you know, their stock was
6 at 89 cents the day we passed that legislation. It's
7 selling for \$12.

8 Do you know the value of that company to those
9 stockholders, what's happened because of what we've done?
10 Have they offered any of that money back to the victims who
11 are suffering from asbestosis that was caused by products
12 that were made by that company? I doubt it.

13 What's probably happening is the executives
14 are buying more condos and chalets around the country, you
15 know, and ski resorts and down on the islands. That's what
16 they're doing with that money. They're not putting
17 anything back in the pockets of victims.

18 So this idea that, you know, somehow the
19 plaintiff is selecting his targets, what this is going to
20 do is going to force, it's going to force plaintiffs to go
21 after everybody. It's going to reduce settlements. Just
22 based on what the defense lawyer said today, Why should I
23 settle? I'm only 10 percent. There's no longer any risk
24 factor or calculation here. I'm not going to settle.

25 And when you have a number of defendants

1 involved, the cases just don't settle because everybody
2 wants somebody to kick into the pot to get the case
3 resolved. And I never, in my recollection, never saw us
4 sit down and somebody who had a \$50,000 policy and say now
5 you got to reach into your own pocket for more. Just give
6 us the policy limits. You got a million-dollar liability
7 here. We can get rid of this with the policy limits.

8 I don't remember in my recollection of ever
9 seeing that. And how cold you can be when you look at
10 somebody like your son, somebody with a spinal cord injury,
11 somebody who's been burned horribly over their entire body,
12 they don't have any ears, they don't have any eyelids, they
13 can't, their hands are like webs, and say, Oh, you're only
14 going to get 10 percent of your damages. That's a
15 disgrace.

16 I can't believe people would be that
17 coldhearted and call themselves elected officials to
18 represent the people of this Commonwealth. I think it's a
19 disgrace. Thank you for coming here to testify. The next
20 witness is David Wilderman --

21 MR. GOLOMB: Thank you, Mr. Chairman.

22 CHAIRPERSON GANNON: Thank you -- Director of
23 Legislation for the Pennsylvania AFL-CIO. Welcome, Mr.
24 Wilderman. Thank you for your patience.

25 MR. WILDERMAN: Thank you, Chairman Gannon.

1 It's a pleasure for me to testify. And I'm glad to be the
2 last person.

3 CHAIRPERSON GANNON: You may proceed when
4 you're ready.

5 MR. WILDERMAN: I'm the cleanup guy here.

6 CHAIRPERSON GANNON: We saved the best for
7 last.

8 MR. WILDERMAN: I'm going to be brief. I'm
9 not going to read my testimony. I want to respond to
10 several of the things that were raised earlier. And I'm
11 going to focus specifically on the areas that workers are
12 particularly concerned about.

13 And we've seen here today, we've heard the
14 broad scope, the breadth that changing the joint and
15 several liability would have on all of our relationships.
16 And that's really what this is about. This is about
17 accountability. This is about our relationships to each
18 other and our responsibilities. We are defining that by
19 the law.

20 And the first thing I want to mention is that
21 this issue about economic development which was raised and
22 it's of great concern to the labor movement, it has been
23 raised as kind of a phantom issue from my point of view. I
24 have studied the Harvard Business School site Selection
25 Criteria.

1 I have asked the business community to come
2 forward and show me anywhere where in any survey or in any
3 site selection process the issue of joint and several
4 liability is on the table. And I have gotten -- it's not
5 on any list. It's not, it's not part of -- you can make
6 any issue you want, consideration that you want to.

7 But as a practical matter, the issues that
8 were described by Sam Marshall as the more important issues
9 in part of his testimony were very, are very critical; that
10 is, the work force, our education system, our
11 infrastructure, how close are you to your markets, what's
12 the availability of our products? Those are the issues.

13 I'm talking especially about product liability
14 or manufacturing in terms of economic development. Those
15 are the issues. The issues of the taxes as a practical
16 matter, even workers' compensation are not in the top 10,
17 all right, in this selection process because basically
18 between the states, as has been described by other people
19 who have testified, you could find some part of joint and
20 several aspect different in one state than in another.

21 But when you dig into the New York law, you
22 find out that there are all these loop holes. Our
23 so-called competitor states of Maryland have a law similar
24 to us on joint and several. Delaware has. And the state
25 that I find most interesting is that we're often compared

1 to North Carolina, which I never have been able to figure
2 out. But they have the same rule on joint and several
3 liability as the state of Pennsylvania.

4 So there really -- but our main concern is
5 not, is in the area of product liability and in other areas
6 that affect workers; and it has to do with the standard of
7 care. We have studied and we first pushed -- we wanted to
8 have safe workplaces. We want to work with safe
9 machinery. Employers share that same vision.

10 Our first effort as a labor movement was going
11 to adopt the Occupational Safety and Health Act. That has
12 been a miserable failure. It is underfunded. It has been
13 ragged. The most recent changes was the killing of the
14 ergonomic standard which would have reduced and saved
15 businesses thousands of dollars and saved individuals
16 hundreds of thousands of dollars and pain and suffering of
17 the injuries that come from ergonomic problems that could
18 be solved.

19 This was an issue that was started 10 years
20 ago by Secretary of Labor Elizabeth Dole. It has been
21 endorsed. And yet it was rejected as the first order of
22 business by the, by the most recent Congress and under
23 President Bush.

24 We have also found the workers' compensation
25 system to be an abysmal failure in the state of

1 Pennsylvania for compensating victims. It simply does not
2 provide the compensation that was originally anticipated.
3 And the law has become, through Act 57 and other changes in
4 Act 44, much more complicated to win a case.

5 The amount of compensation that you received
6 was originally intended to be two-thirds of your lost
7 wages. It is nowhere near two-thirds of a person's lost
8 wages. People do not get health care. They do not
9 get -- when you get injured on the job, you lose your
10 health care benefits after a period of time or immediately,
11 depending if you have a union contract or not.

12 You lose your pension. You lose, you lose
13 your seniority. You lose about everything, health care
14 protection for your family if you have that negotiated. So
15 all that, you know. Those laws have failed us. And the
16 only law, the only law that is an umbrella to incent safety
17 in the workplace with machinery and in construction sites
18 just with employers who are, multiple employers on a
19 construction site because we're -- the exclusive remedy of
20 workers' compensation is so broad, that it includes
21 intentional harm.

22 You cannot sue an employer who has caused
23 intentional harm under, because of the exclusive remedy of
24 workers' compensation. So workers' compensation has been a
25 march backwards to the sea and a failure to incent

1 employers to make a workplace safe.

2 The only law that we have, the only law that
3 we have that incents the manufacturers of equipment that
4 our people use in the work site -- and two-thirds of these
5 cases on products liability come from workplace injuries.

6 So this is an area of particular concern to
7 the working men and women of the Commonwealth of
8 Pennsylvania, is the product liability law. And if we did
9 not have joint and several in the product liability law,
10 people would not be able to recover for the serious damages
11 and injuries that occur in the work site.

12 So that's the first area that is critically
13 important to us. It's an umbrella. The threat of a
14 lawsuit is the single most important incentive to safe
15 machines, safe products that our people use on the work, in
16 the work site.

17 The other areas that I wanted to just bring to
18 your attention where we will be directly affected were you
19 to change the law on joint and several liability have to do
20 with our health and welfare funds, our pension funds, our
21 fiduciary responsibilities, and the accountability, the
22 reliability that we, that we get from accountants, lawyers,
23 those that we depend upon for financial advice on
24 investments.

25 Take the Andersen-Enron situation, which is

1 obviously before everybody's mind today. Our pension
2 funds, our Taft-Hartley Funds, are regularly in court
3 against parties that have intentionally or negligently
4 given them misinformation and investment decisions have
5 been made.

6 Clearly, there will be a lot of litigation
7 against -- and if you take the law, eliminating joint and
8 several liability is eliminating not only the joint aspect
9 but it makes it severally liable. So in a situation of
10 Enron and Andersen, which I assume we would sue both
11 parties, if they were only severally liable and each was
12 found 50 percent liable, we would only be able to collect
13 50 percent of the judgment or our state funds, which are
14 the pension funds that cover yourselves, that cover our
15 state workers and our school teachers who lost a total of
16 \$89 million.

17 When we get around to bringing those suits
18 against Andersen, if we eliminate joint and several
19 liability, we would only be entitled to, assuming that
20 there was a 50 percent responsibility of both parties, we
21 would only be entitled, we would only get 50 percent
22 reimbursement.

23 That is a severe damage to senior citizens, to
24 people who retire and to our, to our dependents on those,
25 on those programs that we have collectively bargained. And

1 remember, in all that process, we've given up wages, we've
2 given up other things in order to get collectively
3 bargained pensions, health and welfare funds, and so on.

4 We must be able, in all of these situations,
5 to get down to the bottom line, that people perform their
6 duties with due diligence, that there is accountability,
7 that negligence, you can't just be asleep at the switch and
8 give people advice and depend upon that advice and then
9 make a decision and they know that that decision is going
10 to cost them possible, possibly their pension or their
11 health and welfare protection.

12 So those are just some of the areas we of
13 course, our members and our consumers, that's an area that
14 has been touched on. And the automobile -- in fact,
15 one-third of the automobile accidents that occur occur as
16 workplace injuries.

17 Deaths that occur -- I'm especially talking
18 about deaths -- that occur are workers who are driving as
19 part of their job. So this is a monumental, monumental
20 change. And the prospect -- the proposal to simply
21 eliminate this concept is not in the realm of fairness.

22 This is just a huge change, proposed change in
23 the law that would very adversely affect the working men
24 and women of this state. And I thank you for the
25 opportunity to give my brief comments. I'll be glad to

1 answer any questions.

2 CHAIRPERSON GANNON: I don't believe we have
3 any questions, Mr. Wilderman. But I really want to thank
4 you for, first, coming to the hearing today and presenting
5 your testimony and also for being so patient with the
6 longevity. But this is a very important issue. And I
7 think the testimony that was presented was extremely
8 helpful to the committee as part of its deliberations.

9 We have written testimony from the following:
10 The Pennsylvania Orthopaedic Society; Vince Phillips,
11 Contract Lobbyists with the Independent Insurance Agents of
12 Pennsylvania. And we will be submitting that written
13 testimony as part of the record of this hearing.

14 Thank you again for being here, ladies and
15 gentlemen. If there's no further business to be brought
16 before the committee, this meeting is, this hearing is
17 adjourned.

18 (Whereupon, at 4:30 p.m., the hearing
19 adjourned.)
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1 I hereby certify that the proceedings and
2 evidence are contained fully and accurately in the notes
3 taken by me during the hearing of the within cause and that
4 this is a true and correct transcript of the same.

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JENNIFER P. McGRATH

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Registered Professional Reporter

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My Commission Expires:

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April 30, 2005

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