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*Frank J. Vandall**

In May of 1999, the American Law Institute ("ALI") adopted the provisions of the *Restatement (Third) of Torts: Apportionment of Liability* ("*Restatement (Third), Apportionment*"). At first blush this appears to be an arcane and academic subject, but upon closer analysis it becomes clear that the *Restatement (Third), Apportionment* touches the substance of civil damage suits, especially those involving two or more defendants, whether they are sued as parties or not, and whether they are solvent or bankrupt. Two points are important in regard to the *Restatement (Third), Apportionment*. First, this is a technical subject with substantial policy implications. Second, the *Restatement (Third), Apportionment* is a thinly veiled attempt by the Reporters to accomplish tort reform judicially because such reform could not be accomplished legislatively in all states. I have selected Pennsylvania for comparison with the *Restatement (Third), Apportionment* because it is a large industrial and technological state with traditional rules for joint and several liability and apportionment. The critique of the *Restatement (Third), Apportionment* begins with a historical evaluation of joint and several liability.

I. A SHORT HISTORY OF JOINT AND SEVERAL LIABILITY

Apportionment is a study of joint and several liability, contributory negligence, comparative fault, and contribution. This Part will provide a brief historical background of the first two of these components of apportionment and analyze their development in Pennsylvania.

Joint and several liability originated over 300 years ago in the English report of *Sir John Heydon's Case*,[1] resting on the theory of concerted action.[2]

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[1] 77 Eng. Rep. 1150 (K.B. 1613). Sir John Heydon brought a trespass of battery action against three defendants and the court found that when "the jury find[s] for the plaintiff. . . the jurors cannot assess several

In 1916, joint liability was expanded to include defendants who caused an indivisible injury to the plaintiff.[3] The rationale for allowing a victim to recover for her injuries from one tortfeasor was based upon practicality. The Virginia Supreme Court found no basis for separating the amount caused by one actor from the amount caused by another. In adopting this rationale, other courts wanted to make certain that there was a source of recovery for the plaintiff.[4] The tortfeasor was negligent and had caused the injury in fact. By 1980 almost all states had adopted the concept of joint liability.[5]

Pennsylvania's tort law regarding joint liability and comparative fault has paralleled the development in other states and in England. Over a century ago, joint and several liability among multiple defendants was recognized in *Bourough of Carlisle v. Brisbane*[6] and *Gallagher v. Kemmerer*,[7] each holding that injury caused concurrently by two or more persons permits the plaintiff to take action against them either jointly or severally.[8] Three years after the *Brisbane* decision in 1889, the Pennsylvania Supreme Court held that a

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damages against the defendants because all is one trespass." *Id.* at 1151.

[2] Concerted action requires that "there was a common purpose, with mutual aid in carrying it out; in short, there was a joint enterprise, so that 'all coming to do an unlawful act, and of one party, the act of one is the act of all of the same party being present.'" W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 46, at 323 n.3 (5th ed. 1984) (citing Sir John Heydon's Case, 77 Eng. Rep. 1150 (K.B. 1613)). For an early view of concerted action in Pennsylvania, see *Bard v. Yohn*, 26 Pa. 482 (1856), which held that joint liability was not present where there was not concerted action.

[3] *See* Carolina, Clinchfield & Ohio Ry. Co. v. Hill 89 S.E. 902 (Va. 1916). The plaintiff brought suit based on damage to his property caused by the railway's construction of a railroad and the contributing harm by Yellow Poplar Lumber Company, which was engaged in removing large numbers of trees from the area and floating them downstream past the plaintiff's property. *See id.* at 902-903. The Supreme Court of Virginia found that it was impossible to separate the damages (if any) caused by the two defendants. *See id.* at 903.

[4] *See* KEETON ET AL., *supra* note 2, § 47, at 327 n.25. Prosser and Keeton state that the result of refusing to permit joinder is that "in . . . separate suits it is open to each defendant to prove that the other was solely responsible, or responsible for the greater part of the damage," a situation that can lead to a minimal recovery for plaintiff or no recovery at all. *Id.*

[5] *See* Richard W. Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. DAVIS L. REV. 1141, 1164-65, 1185 (1988).

[6] 6 A. 372, 372 (Pa. 1886). The plaintiff in this case suffered a broken leg when the sleigh he was a passenger in turned over due to poor street conditions. *See id.* at 372.

[7] 22 A. 970, 971 (Pa. 1891) (holding that unless the "negligence of two persons is joint and concurrent, each is liable for his own negligence only"). The action was brought in trespass to recover for damages to the plaintiff's land due to a deposit of mine waste accumulated through run-off from the defendants' separate mining operations. *See id.* at 970.

[8] *Brisbane*, 6 A. at 373; *Gallagher*, 22 A. at 971; *see also* O'Malley v. Philadelphia Rapid Transit Co., 93 A. 1014 (Pa. 1915); Leidig v. Bucher, 74 Pa. 65 (1873). The *Brisbane* court also held that where the plaintiff contributed to his injury, no recovery was afforded because of the theory of contributory negligence. 22 A. at 373.

plaintiff had the option of proceeding against a single joint tortfeasor for recovery of the entire judgment.[9] However, once the judgment was satisfied, by settlement or otherwise, the plaintiff was barred from pursuing a claim against any other joint tortfeasor.[10] Recent cases continue to embrace the doctrine of joint and several liability in Pennsylvania.[11] *Voyles v. Corwin*[12] identified the factors that should be considered in determining joint tortfeasor status.[13] In *Capone v. Donovan*,[14] a Pennsylvania court applied joint and several liability to a case where two defendants caused an indivisible injury.[15]

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[9] *See* Seither v. Philadelphia Traction Co., 17 A. 338 (Pa. 1889) (holding that once a judgment was obtained the plaintiff had the option of pursuing any joint tortfeasor for the full amount); *see also* Baker v. AC&S Inc., 729 A.2d 1140, 1146 (Pa. 1998) (citing Glomb v. Glomb, 530 A.2d 1362, 1365 (Pa. Super. Ct. 1987)), which held that "[i]mposition of joint and several liability enables the injured party to satisfy an entire judgment against any one tortfeasor, even if the wrongdoing of that tortfeasor contributed only a small part of the harm inflicted"); Halsband v. Union National Bank of Pittsburgh, 465 A.2d 1014, 1018 (Pa. 1983); Jones v. Harrisburg Polyclinic Hospital, 437 A.2d 1134, 1141 (Pa. 1981) (holding that a plaintiff is not required to sue all joint tortfeasors jointly but may choose to sue a particular joint tortfeasor for the full amount); Smith v. Philadelphia Transp. Co., 173 F.2d 721, 724 n.2 (3d Cir. 1949) (holding that full recovery may be had against any one of several joint tortfeasors).

[10] *See Seither*, 17 A. at 338. The plaintiff in this case was riding as a passenger in a rail car owned by People's Passenger Railway Company that was struck by a car owned by the defendant, Philadelphia Traction Company. *See id.* Plaintiff sued both companies, settled with People's, executed a release in its favor, and was not permitted also to seek recovery against the defendant as People's had satisfied the claim in full. *See id.*; *see also* Thompson v. Fox, 192 A. 107, 109 (Pa. 1937) (holding that a release of one joint tortfeasor operates to release all joint tortfeasors as there can be only one satisfaction, "either as payment of a judgment recovered or consideration for a release executed by him").

[11] *See* Little v. Dresser Indus., Inc. 599 F.2d 1274, 1277-78 (3d Cir. 1979) (citing *Gallagher* as establishing joint liability in Pennsylvania and holding that the incidents leading to plaintiff's injury were separated by an expanse of time; therefore, joint tortfeasor status was not created); Kendrick v. Piper Aircraft Corp., 265 F.2d 482, 485 (3d Cir. 1959) (holding that an accident can be caused by the negligence of two or more parties); Carpini v. Pittsburgh & Weirton Bus Co., 216 F.2d 404, 407 (3d Cir. 1954) (citing Pennsylvania law and holding that there can be more than one legal responsible cause for a given injury); Pennine Resources, Inc. v. Dorwart Andrew & Co., 639 F. Supp. 1071, 1075 (E.D. Pa. 1986) (holding that the evidence of the case could establish that the defendants were joint tortfeasors); Panichella v. Pennsylvania, 150 F. Supp. 79, 81 (W.D. Pa. 1957) (holding that there was "no concert of action, common design or duty, joint enterprise or other relationship" between the defendants that would make them joint tortfeasors); *Baker*, 729 A.2d at 1146 (citing Kovalesky v. Giant Rug Market, 618 A.2d 1044 (Pa. Super. Ct. 1993)); Koller v. Pennsylvania R.R. Co., 40 A.2d 89, 90 (Pa. 1944) (holding that one is a joint tortfeasor where there is community of fault causing injury).

[12] 441 A.2d 381 (Pa. Super. Ct. 1982).

[13] The court recognized that "the existence of a common or like duty"; evidence that supported an action against all defendants; whether the injury was indivisible in nature; "identity of the facts as to time, place or result"; and "responsibility of the defendants for the same [injury]" were factors that had to be considered in deciding whether defendants were joint tortfeasors. *Id.* at 383 (citing WILLIAM L. PROSSER, LAW OF TORTS 46 n.2 (4th ed. 1971)).

[14] 480 A.2d. 1249 (Pa. Super. Ct. 1984).

[15] *Id.* at 1251; *see also* Rabatin v. Columbus Lines, Inc., 790 F.2d 22, 26 (3d Cir. 1986) (holding that actors may be joint tortfeasors where their acts combined to produce a single indivisible result).

In *Capone*, the plaintiff suffered a broken arm that was improperly set and diagnosed by three separate doctors.[16] The court held that "[i]f two or more causes combine to produce a single harm which is incapable of being divided on a logical, reasonable, or practical basis," then apportionment would be "arbitrary," and the actors should be held to be joint tortfeasors, each liable for the entire injury.[17]

Until 1910, contributory negligence functioned as an absolute bar to suit.[18] The impact of contributory negligence was weakened with the widespread adoption of comparative fault.[19] The purpose of comparative fault is to eliminate the plaintiff's negligence as a complete bar; instead, a jury may reduce the recovery in proportion to the plaintiff's negligence.[20] At present, only five states allow contributory negligence to function as a complete bar to the plaintiff's recovery.[21] The result of comparative fault has been that a plaintiff who is partially at fault is able to recover her proportionate share of damages from a defendant who was at fault only to a small degree. Conversely, a joint tortfeasor, who is at fault and has caused the injury, often has to pay more than her share of liability.[22]

Pennsylvania began realizing the importance of liability apportionment in 1951 by enacting the Pennsylvania Contribution Among Tortfeasors Act ("PaCATA"),[23] modeled after the Uniform Contribution Among Tortfeasors Act,[24] which advocated allocating joint tortfeasor liability comparatively. Pennsylvania initially chose instead to adopt a pro rata theory of comparative

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[16] *Capone*, 480 A.2d at 1250.

[17] *Id.* at 1251. The court held further that a release executed in favor of one defendant did not release the other two, but merely reduced any potential recovery against them by the amount received in settlement. *See id.* at 1251-52.

[18] *See* KEETON ET AL., *supra* note 2, § 67, at 471. In 1910, Mississippi was the first state to adopt a comparative negligence statute, followed shortly by Georgia. *See id.* However, by the mid 1960's, only seven states had comparative negligence statutes in force. *See id.* By the early 1980's, more than forty states had comparative negligence statutes or analogous judicially created doctrines. *See id.*

[19] *See* KEETON ET AL., *supra* note 2, § 67, at 472.

[20] *See id.*

[21] Only Alabama, Maryland, North Carolina, Virginia, and the District of Columbia still consider contributory negligence to be a complete bar to recovery. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 7 cmt. a, at 99 (Proposed Final Draft (Revised), 1999).

[22] Prosser and Keeton state that "[t]he rule of joint liability favors plaintiffs, since the aggregate wealth of the defendants stands behind the judgment, without regard to the proportionate responsibility of the defendants individually for the loss." KEETON ET AL., *supra* note 2, § 67, at 475.

[23] Pennsylvania Contribution Among Tortfeasors Act, 1951 Pa. Laws 1130 (codified at 42 PA. CONS. STAT. ANN. § 8321 (West 1998)).

[24] 12 U.L.A. 57-59 (1975).

fault, which provided that the total liability would be equally apportioned among joint tortfeasors.[25] Pennsylvania later adopted the concept of comparative fault by statute in 1976,[26] but followed the modified form of comparative fault, meaning that the plaintiff can recover as long as her fault is not greater than the defendant's fault.[27] Moreover, where there are multiple joint tortfeasors, Pennsylvania follows the theory of aggregation in comparative fault, which measures the plaintiff's liability against the aggregate liability of all joint tortfeasors to determine whether plaintiff can recover.[28] Therefore, as long as the plaintiff's liability is less than the total aggregate liability of all joint tortfeasors, then the plaintiff can recover her proportionate share of damages from one or all of the joint tortfeasors.[29]

The impetus for tort reform in the law of apportionment was provided by a recent Florida case, *Walt Disney World v. Wood*.[30] In *Disney World*, a woman was injured at the "Grand Prix" automobile racing attraction when her fiancé's "race car" bumped into hers.[31] She sued Disney World and was found fourteen percent at fault while her then-husband was found to be eighty-five percent at fault, and Disney World was found to be only one percent at fault.[32] Because of the doctrine of spousal immunity, the plaintiff's husband could not be required to pay the judgment, so Disney World was held liable for eighty-six percent of the damages (approximately $75,000) when it was only one percent at fault.[33]

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[25] See R. Michael Lindsey, *Compensation, Fairness, and the Costs of Accidents–Should Pennsylvania's Legislature Modify or Abrogate the Rule of Joint and Several Liability Among Concurrently Negligent Tortfeasors?*, 91 DICK. L. REV. 947 (1987), which stated that in 1943, a bill proposing comparative fault was introduced at the Pennsylvania General Assembly and failed. *Id.* at 956 n.48 (citing H.B. 604, 135 Gen. Assembly, 1942 Sess., 1 Pa. Leg. J. 725 (1943)); *see also* Arthur R. Harris, Note, *Comparative Negligence in Pennsylvania?*, 17 TEMP. L.Q. 276 (1943).

[26] Comparative Negligence Act of 1976, 1976 Pa. Laws 855 (codified at 42 PA. CONS. STAT. ANN. § 7102 (West 1998)). This act modified Pennsylvania law as to joint tortfeasors and apportionment of damages.

[27] *See, e.g.*, Elder v. Orluck, 515 A.2d 517 (Pa. 1986).

[28] In *Elder*, fault was apportioned to plaintiff at twenty-five percent; defendant Orluck at sixty percent; and defendant Harrisville at fifteen percent. 515 A.2d at 518. Defendant Harrisville argued that because its liability was less than that of the plaintiff, it was not required to pay damages. *See id.* The Pennsylvania Supreme Court held otherwise. *See id.* at 525.

[29] *Id.*

[30] 515 So. 2d 198 (Fla. 1987).

[31] *Id.* at 199.

[32] *See* Walt Disney World Co. v. Wood, 489 So. 2d 61, 62 (Fla. Dist. Ct. App. 1986). The jury found Disney's liability based on negligent design of the bumper car ride, I assume.

[33] Florida "imposes joint and several liability for economic damages on any independent tortfeasor whose comparative responsibility is greater than the plaintiff's." *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 28E cmt. b, at 349 (Proposed Final Draft (Revised), 1999); *see also* AMERICAN LAW INST., REPORTER'S STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, VOL. II:

In response to *Disney World* and similar cases, the ALI has initiated a massive fundamental change in the law of joint and several liability and apportionment by adopting the *Restatement (Third) Apportionment.* The goal of this project appears to have been to prevent a corporate defendant who is slightly at fault from being held liable for a large portion of the damages.[34]

The ALI's massive reform of joint and several liability and apportionment is an extreme over-reaction to the rare fact pattern of *Disney World.*[35] The main theme of the *Restatement (Third), Apportionment* is that anything is better than joint and several liability. The Reporters seem to have adopted their novel "track" approach in order to avoid weighing and evaluating the large number of cases that have applied joint and several liability theory over the past 380 years. The Reporters' method is first to present the basic rule of joint and several liability, in section 28A (Track A): "If the independent . . . conduct of two or more persons is a legal cause of an indivisible injury, each person is jointly and severally liable . . . ."[36] Then they present four separate and unique tracks implying they are equal to, or better than, joint and several liability. Track B is presented in section 28B: "If two or more persons' independent tortious conduct is the legal cause of an indivisible injury, each defendant . . . is severally liable . . . ."[37] This is the opposite of Track A and is a complete rejection of joint and several liability. Track C is introduced in section 28C: "If the independent tortious conduct of two or more persons is a legal cause of an indivisible injury, each person is jointly and severally liable . . . subject to the reallocation provision of [a later section]."[38] Track C allows the plaintiff's recovery to be reduced merely because the judgment cannot be

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APPROACHES TO LEGAL AND INSTITUTIONAL CHANGE 151 n.28 (1991); June F. Entman, *The Nonparty Tortfeasor*, 23 MEM. ST. U. L. REV. 105, 106 (1992).

[34] I make this inference from the text of the *Restatement (Third), Apportionment* based on an assessment of who is benefitted (defendants) and who is harmed (plaintiffs) in almost every section.

[35] No mention has been made of the fact that the injury would not have occurred if Disney World had carefully designed the dangerous amusement park ride. Further, holding Disney World liable for eighty-six percent of the plaintiff's damages can be justified on the basis of Judge Calabresi's theory that Disney World is the "cheapest cost avoider." Guido Calabresi & Jon T. Hischoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1073 (1972) (discussing the history of assumption of risk and stating that the emphasis should be not on "whether the defendant had the 'right' to impose the risk on the plaintiff," but on "knowledge and appreciation of the risk and availability of alternatives" which could easily serve to "absolve the defendants only in those situations where . . . the cost-benefit analysis was better left to the plaintiff") (citations omitted). Here, Disney can evaluate the risk created by bumper cars and do something about it. The plaintiff does not realize the risk and can do little to alter it.

[36] RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 28A, at 206 (Proposed Final Draft (Revised), 1999).

[37] *Id.* § 28B, at 221.

[38] *Id.* § 28C, at 245-46.

collected from an insolvent defendant. Track D is introduced in section 28D: "If the . . . conduct of two or more persons is a legal cause of an indivisible injury, each defendant who is assigned a percentage of comparative responsibility equal to . . . the legal threshold is jointly and severally liable, and each defendant who is assigned a percentage . . . below the legal threshold is . . . severally liable."[39] Section 28D introduces a mathematical concept, the threshold, which serves to reduce the plaintiff's recovery in certain cases. Track E is presented in section 28E: "If the . . . conduct of two or more persons is a legal cause of an indivisible injury, each defendant is jointly and severally liable for . . . economic damages . . . and . . . is severally liable for the comparative share . . . of the remaining non-economic damages . . . ."[40] Track E divides the plaintiff's damages into economic losses and pain and suffering, with different standards of recovery for each.

The implied conclusion is that any of these new and complicated approaches to indivisible injury is better than joint and several liability. The Reporters' radical approach allows them to criticize joint and several liability without acknowledging the common law or the underlying policies. Unfortunately, it also allows the ALI to grant its imprimatur to a work that is not a new Restatement. It is instead a critique of joint and several liability without engagement, without the labor of a new Restatement. In contrast, this Article will compare the law and policies of each of the important sections of the *Restatement (Third), Apportionment* with the corresponding law of Pennsylvania in order to demonstrate that much of the *Restatement (Third), Apportionment* contradicts the law of Pennsylvania, disregards the policies underlying joint and several liability, and violates economic theory.

An examination of the ALI's proposals, as compared with Pennsylvania law, will make clear that the *Restatement (Third), Apportionment* is biased tort reform, designed to benefit two specific clients: the defense bar and the insurance industry. If adopted, the *Restatement (Third), Apportionment* would constitute a radical reversal of fundamental Pennsylvania law, the representative jurisdiction for this Article. Part II will analyze the apportionment provisions in terms of the five tracks proposed by the Reporters. Part III will evaluate important apportionment provisions that are not directly related to the tracks.

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[39] *Id.* § 28D, at 300-01.
[40] *Id.* § 28E, at 337.

II. ANALYSIS OF THE POTENTIAL IMPACT OF THE *RESTATEMENT (THIRD), APPORTIONMENT* ON THE PENNSYLVANIA LAW OF JOINT AND SEVERAL LIABILITY

Section 27 of the *Restatement (Third), Apportionment* begins the critique of joint and several liability by refusing to take a position on whether joint and several liability should apply and instead looks to each jurisdiction for a determination of the issue.[41] Section 27 provides "if the independent tortious conduct of two or more persons is a legal cause of an indivisible injury, whether those persons are jointly and severally . . . or severally liable is determined by the law of the applicable jurisdiction."[42] By failing to adopt the majority view, section 27 harms plaintiffs because it means that in many situations they will be unable to recover their full damages, or even any damages at all, because the tortfeasors who caused the injury will not be held jointly and severally liable.

The Reporters suggest, without discussion, that there are five different answers, or "tracks," to the question of joint liability. Over one-third of the 479 pages of the *Restatement (Third), Apportionment* are devoted to these replacements for joint and several liability.[43] In addition to the amount of coverage the tracks are given, the new Restatement has two vices. First, it suggests that the five tracks are interchangeable. Second, it is not a restatement of the law.

By presenting the five tracks without ranking and evaluating each, the Reporters imply that one track can serve as well as another. In fact, each track is dramatically different, and all except the first are clear rejections of Pennsylvania apportionment law. The law of Pennsylvania is that if two or more tortfeasors cause an indivisible injury, they will be held jointly and severally liable.[44]

In addition to the inequality of the tracks, the Restatement is not what it purports to be. The traditional role of the ALI was to restate the common law. The five-track proposal is not a restatement of the common law. With the

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[41] *Id.* § 27, at 203. The Comment asserts that "there is currently no majority rule on this question" and states further that both comparative fault and tort reform are largely responsible for substantial modifications of joint and several liability in most jurisdictions. *Id.* cmt. a.

[42] *Id.*

[43] *See generally* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY.

[44] *See* KEETON ET AL., *supra* note 2, § 52, at 347; *supra* notes 6-17 and accompanying text.

exception of Track A, the *Restatement (Third), Apportionment* is merely a catalogue of the tort reform accomplished in the past nineteen years. What is missing from the *Restatement (Third), Apportionment* is a restatement of the cases, the common law. The implication of the five-track proposal is that the law of Pennsylvania needs to be changed. The Reporters' argument for this point is missing, however. In contrast to the new Restatement, the Pennsylvania law of joint and several liability rests on the policy that the injured victim should have a source for her recovery, and that wrongdoers should be deterred. It builds on the concept that those who cause injury are at fault and are liable to the plaintiff for damages. As will be shown, the new *Restatement (Third), Apportionment* rejects these foundational policies of Pennsylvania law.

A. Track A: Joint and Several Liability

Section 28A presents what the Reporters call Track A. It provides that tortfeasors who cause indivisible injury to the plaintiff may be held jointly and severally liable:[45] "a plaintiff may sue any of those [independent tortfeasors] who are jointly and severally liable and recover all damages" from any one of those defendants.[46] From a plaintiff's perspective, Track A is the best track to use in determining her recovery because the plaintiff does not bear the risk of a decreased recovery if one tortfeasor is judgment proof, immune, or outside the jurisdiction. Unlike Track A, the other four tracks reduce the plaintiff's recovery through various novel and sometimes radical devices.

Section 29A contributes only a procedural rule providing that in cases of indivisible injury the question of allocation among defendants, other parties, and settlers is submitted to the jury:[47] "if one defendant and at least one other party . . . may be found responsible . . . for plaintiff's indivisible injury, each of the parties . . . is submitted to the factfinder for assignment of a percentage of comparative responsibility."[48] Approximately ninety-two percent of cases are

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[45] RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 28A, at 207. Track A is based on pure joint and several liability and "results in the imposition of joint and several liability on all tortfeasors who are the legal cause of an indivisible injury." *Id.*

[46] *Id.* As an example of an indivisible result, Prosser and Keeton describe a collision between two automobiles that injures a third person. KEETON ET AL., *supra* note 2, § 52, at 347 (citations omitted).

[47] RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 29A, at 214.

[48] *Id.* Section 29A of the *Restatement (Third), Apportionment* favors the consumer in part because damages are allocated only among parties to the exclusion of non-parties. *Id.*

settled and never go to the jury;[49] therefore, section 29A will not be helpful in the majority of cases.

B. Track B: Several Liability

Section 28B introduces Track B and provides that "[i]f two or more persons' . . . conduct is the . . . cause of an indivisible injury, each defendant . . . is severally liable."[50] This track is a complete rejection of the Pennsylvania law of joint and several liability. Pennsylvania law, following the traditional rule of joint and several liability, assigns full responsibility to each defendant.[51] Under Track B, however, the plaintiff can recover from each defendant only in proportion to each defendant's fault.[52]

Several distinguished economists disagree with the *Restatement (Third), Apportionment* and conclude that economic efficiency is better served by a rule of joint and several liability than by one of several liability only.[53] For example, Professors Kornhauser and Revesz concluded that negligence rules are efficient under joint and several liability as long as the standard of care for each of the actors is set at the socially optimal level but that negligence rules are not efficient in the absence of joint and several liability.[54] Professors Theodore Eisenberg, Henry Mark, and Stuart Schwab also conclude that joint and several liability is more efficient:

> The basic law and economics model suggests that joint and several liability is more efficient than several-only liability. By ensuring that each actor faces the full social costs of its actions, joint and several liability induces optimal behavior. The [economic] models reach less determinate outcomes when insolvency . . . and settlements are considered. But no model shows that several liability is generally

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[49] *See, e.g.*, Marc Galanter, *Reading the Landscape of Disputes: What We Know (And Think We Know) and Don't Know About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 28 (1983).

[50] RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 28B, at 221. The Comment notes that for this section to become applicable, "defendants must not have a relationship or connection that would justify imposition of liability pursuant to §§ 23, 24, or 25." *Id.* § 28B cmt. c, at 222.

[51] *See supra* notes 6-17 and accompanying text.

[52] RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 28B, cmt. d, at 197 (Proposed Final Draft, 1998). In this earlier draft, the Reporters observed that the rationale behind imposing several liability is to "limit the liability of any tortfeasor to the plaintiff's damages." *Id.* It was noted further that this change shifts the "obligation to join additional parties . . . from the defendant to the plaintiff." *Id.*

[53] Lewis A. Kornhauser & Richard L. Revesz, *Sharing Damages Among Multiple Tortfeasors*, 98 YALE L.J. 831, 834 (1989). Because joint and several liability is a "unitary share rule," it produces efficient outcomes. *Id.* at 851. Several liability, on the other hand, is a "fractional share rule and, in general, is not efficient." *Id.*

[54] *Id.* at 870.

> more efficient. The [economic] models suggest then, that one should skeptically view empirical claims that several liability is more efficient than joint liability. This is particularly so when there are no studies that can cleanly separate the effects of joint and several liability reforms from other factors.[55]

In addition to providing for several liability only, section 28B permits the fact finder to assign responsibility not only to all parties, settling tortfeasors, and immune persons, but also to other identified persons for which there is sufficient evidence introduced at trial to permit the fact finder to determine that the person's tortious conduct was a legal cause of the indivisible injury.[56] This enables the fact finder to assign responsibility reflecting the percentage share of the plaintiff's damages for which each tortfeasor is liable.

The Reporters define a "person" as someone who is not a party to the suit and who has not entered into a settlement with the plaintiff but who is alleged by one or more parties to have caused in fact the plaintiff's injury.[57] This formulation creates a legal quagmire for the injured victim. It is possible to have both a pure several liability rule and a rule that does not permit the fact finder to assign comparative responsibility to non-parties.[58] Track B rejects this harmonization and permits an allocation of responsibility to non-parties. Under section 28B, the risk of not joining a party or being unable to join a party is borne by the plaintiff.[59] Section 28B is best explained by looking at comment (d) of the 1998 Proposed Final Draft, which provides the section's rationale: "the obligation to join additional parties and have their liability determined by the fact finder is shifted from the defendant to the plaintiff."[60] However, there is a continuing debate over what should happen when someone has caused injury to the plaintiff, but is not joined in the suit because that person is unidentified or is judgment proof, and therefore is not a party.[61]

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[55] Theodore Eisenberg & Stuart Schwab, Analysis of Proposed Pennsylvania Civil Justice Reforms and Projected Economic Impact of Such Reforms (June 7, 1999) (unpublished manuscript, on file with the author).

[56] RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 28B cmt. c, at 196-97.

[57] RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 29D cmt. c, at 317 (Proposed Final Draft (Revised), 1999).

[58] The Reporters made this point. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 28B cmt. d, at 197 (Proposed Final Draft, 1998). The import of pure several liability is to place the risk of insolvent persons who are not joined on the defendant rather than the plaintiff.

[59] *Id.* § 28B cmt. d, at 198. Additionally, the Reporters note that the decision to apportion responsibility to non-parties is "[c]onsistent with the large majority of jurisdictions with either pure several liability or a hybrid system that submit nonparties to the factfinder for an apportionment of responsibility." *Id.*

[60] *Id.* § 28B cmt. d, at 197. This Comment was deleted from the 1999 Revised Draft.

[61] *See* KEETON ET AL., *supra* note 2, § 67, at 475-76 n.64. Prosser and Keeton identify the wide range of solutions that individual jurisdictions have created to handle the problem. *Id.*

Section 28B answers that question by allowing an allocation of responsibility to the non-party.[62] The problem for plaintiffs is that this will reduce their recovery and may entirely eliminate it in some cases.

In the American civil justice system, all roads lead to the trial and the various rules and procedures for the trial have developed over hundreds of years. The purpose of these historic rules and procedures is to accomplish justice and provide fair treatment to each party.[63] One of the foundations of the trial system is that only properly joined parties can influence and affect the plaintiff's recovery.[64] For example, an unknown person who drives in front of another driver, causing her to swerve into oncoming traffic, and resulting in injury to the passenger, cannot affect the passenger's recovery against the driver. The tort reform statutes of the 1980s softened this result.[65]

The rule that "only parties" may affect the allocation of damages provides a predictable and efficient laboratory in which to apply the procedural and evidentiary rules that lead to justice. The Reporters, in contrast, allow persons, including immune persons such as an employer, a spouse, or the state, to be considered by the jury in apportionment and to reduce the plaintiff's recovery, even though they have not been joined.[66] The result will likely be chaos.

By allowing liability to be apportioned to non-parties, the Restatement approach reduces the plaintiff's recovery because the plaintiff cannot recover from a non-party. The more at fault the non-party is, the less the plaintiff recovers. The solution to the patent injustice of section 28B is to eliminate the concept that the fault of non-parties can reduce the victim's recovery. Section 28B is contrary to Pennsylvania law. Pennsylvania case law has uniformly rejected the theories underlying the Reporters' track system. In *Ball v. Johns-*

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[62] RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 28B cmt. b, at 196. This notion was perpetuated in the 1999 revision. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 28B cmt. a, at 222 (Proposed Final Draft (Revised), 1999); *id.* § 29B, at 228. An exception to section 28B is that an individual who has intentionally caused an injury is still held jointly and severally liable by means of section 22. *See id.* § 28B cmt. c, at 222. Whether the tortfeasor has met the intentional tort standard is measured by the tortfeasor's "intent" as defined in § 8A of the *Restatement (Second) of Torts*. *See id.*

[63] FED. R. EVID. 102.

[64] *See generally id.*; *see generally also* FED. R. CIV. P.

[65] The Reporters noted that "[f]ourteen states have abolished joint and several liability for multiple tortfeasors whose independent actions result in an indivisible injury to plaintiff." RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 27B, at 193 (Proposed Final Draft, 1998).

[66] *Id.* § 28B at 198-99. It was the Reporters' position in the 1998 draft that "at a minimum" responsibility should be apportioned to "all parties and settling tortfeasors, including those against whom the plaintiff may not recover pursuant to § 2 of this Restatement." *Id.* § 28B cmt. c, at 196.

Manville Corp.,[67] the court stated, "We are aware of no principle of Pennsylvania law that allows a jury to make a finding of liability against a party who has not been sued,"[68] and the court in *Gross v. Johns-Manville Corp.*[69] refused to instruct the jury to apportion damages among settling and non-settling defendants. The reason is that to do so would destroy the policy favoring settlement. If settling parties are put before the jury, it would decrease the incentive for settlement.[70]

Pennsylvania statutory law also clearly rejects the theory of the track system that responsibility can be assigned to non-parties. In *Kemper National P & C Cos. v. Smith*,[71] the Pennsylvania Superior Court held that while other jurisdictions "permit[ted] the apportionment of liability among all tortfeasors, even those not made parties," Pennsylvania's statute was not as permissive.[72] Additionally, the court chose not to extend apportionment of liability to non-parties because to do so would "disrupt the legislative scheme."[73] Moreover, the court reasoned that "[i]f a new theory of recovery is to be recognized in Pennsylvania, it should come from either our Supreme Court or the legislature."[74]

C. Track C: Joint and Several Liability with Reallocation

Section 28C presents Track C, which provides that "if the independent tortious conduct of two or more persons is a legal cause of an indivisible injury each person is jointly and severally liable for the damages."[75] However, this basic rule of joint and several liability is modified in three important respects by the other sections of Track C. First, the comparative responsibility of immune parties cannot be considered by the jury.[76] Second, the basic rule is subject to a reallocation provision that imposes at least part of the risk that a defendant will be insolvent on the plaintiff who is even slightly at fault.[77] Third, Track C alters the traditional rule that applies when one of the negligent

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67 625 A.2d 650 (Pa. Super. Ct. 1993).
68 *Id.* at 659-60.
69 600 A.2d 558 (Pa. Super. Ct. 1991).
70 *See id.* at 565.
71 615 A.2d 372 (Pa. Super. Ct. 1992).
72 *Id.* at 380.
73 *Id.*
74 *Id.*
75 RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 28C, at 245-46 (Proposed Final Draft (Revised), 1999).
76 *Id.* § 29C, at 253.
77 *Id.* § 31C, at 276.

parties is the plaintiff's employer.[78] Each of these modifications is discussed in turn.

1. Section 29C: Assignment of Responsibility

Section 29C makes clear that under Track C only parties, not "persons," as in section 28C, are submitted to the fact finder for an assignment of responsibility.[79] This is an attempt by the Reporters to reflect the rule in numerous jurisdictions, that only "parties" may be considered for apportionment. Comment (e) to section 29C provides that "this section does not permit submission of immune parties to the fact finder for an allocation of responsibility."[80] A number of immunities exist that may cause a party to be omitted from the calculation. Examples include sovereign immunity, other governmental immunities, intrafamily immunities, and charitable immunities.[81] The Reporters acknowledge that a serious consequence "of omitting immune persons from an assignment of comparative responsibility is that the omission of the immune party . . . may result in increasing the plaintiff's share of comparative responsibility above the threshold for barring the plaintiff's claim in modified comparative responsibility jurisdictions."[82]

Section 29C shifts the proportional responsibility of the immune party onto the plaintiff because the responsibility of the plaintiff is weighed but not that of the immune party. The Reporters offer the following illustration:

> A sues B, alleging negligence by B in permitting the front steps of B's condominum to become rotted and thereby collapse . . . . B claims that C, the municipality that recently inspected B's condominium, is also responsible . . . . C is immune from tort liability. C should not be submitted to the fact finder for a comparative share of responsibility.[83]

Thus, if plaintiff A is found to be at fault to any degree, A's proportionate share of responsibility will be greater (because ther is only one defendant, B, whose negligence may be considered by the jury in assignment of fault) than it

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[78] *Id.* § 30C, at 265-66.
[79] *Id.* § 29C, at 253.
[80] *Id.* cmt. e, at 254.
[81] *See id.*
[82] *Id.* at 256. The Reporters offer other reasons for not submitting immune parties to the fact finder, including administrative convenience, and avoiding "complicated and difficult" determinations of the origin of one's immunity. *Id.* at 255-56.
[83] *Id.* cmt. e illus. 1, at 256.

would be if C's responsibility also could be considered. Section 29C will therefore reduce the amount recovered by the plaintiff. Indeed, the plaintiff may recover nothing, depending on the amount of responsibility allocated to the immune party.

Pennsylvania law clearly prohibits the weighing of immune parties by the fact finder. In *Ryden v. Johns-Manville Products,*[84] the court held that an employer was immune from liability in a negligence action under the Worker's Compensation Act.[85] The court concluded, by citing unambiguous language from Pennsylvania's statute, that only defendants who could be found liable were subject to apportionment.[86]

Following suit, the Pennsylvania Supreme Court in *Heckendorn v. Consolidated Rail Corp.*[87] stated that "[t]he Workers' Compensation Act provides that '[t]he liability of an employer under this act shall be exclusive' and that the employer 'shall not be liable to a third party for damages, contribution or indemnity in any action at law, or otherwise . . . .'"[88] Additionally, "the Workers Compensation Act provides that '[a]n employer is one against whom recovery can neither be 'sought nor allowed.'"[89] In this case, the plaintiff argued that the Comparative Negligence Act reflected "a legislative intent to permit joinder of an employer as an additional defendant for the purpose of apportioning fault."[90] The court disagreed, stating that the Act's legislative history revealed the opposite intent.[91] In conclusion, the court

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[84] 518 F. Supp. 311 (W.D. Pa. 1981).

[85] *Id.* at 316; *see also* Daniel Levi, Note, *A Comparison of Comparative Negligence Statutes: Jury Allocation of Fault–Do Defendants Run the Risk Paying for the Fault of Nonparty Tortfeasors?*, 76 WASH. U. L.Q. 407, 414 (1998) (stating that *Ryden* was the "leading Pennsylvania case in the area").

[86] *See Ryder*, 518 F. Supp. at 315-16. The court held that the focus of the inquiry should not be on the inequities that could result from exclusion of immune parties from the jury's determination of apportionment. *See id.* at 316. Defendants argued that the inequities of a culpable third party's being forced to pay the entire award and the possibility that a negligent employer could regain worker's compensation benefits payments through subrogation should have been enough for the court to look beyond statutory language. *See id.* The court disagreed. *See id.*

[87] 465 A.2d 609 (Pa. 1983).

[88] *Id.* at 612 (citing Workers' Compensation Act, PA. STAT. ANN. tit. 77 §§ 1-1603 (West 1992)).

[89] *Id.*; *see also* Derro v. Lisle Corp., No. Civ.A. 90-5244, 1992 WL 20322 (E.D. Pa. Jan. 31, 1992); Kelly v. Carborundum Co., 453 A.2d 624 (Pa. 1982); Bell v. Koppers Co., 392 A.2d 1380 (Pa. 1978); Brozzetti v. Hempt Bros., 456 A.2d 595 (Pa. Super. Ct. 1983); Arnold v. Borbonus, 390 A.2d 271 (Pa. Super. Ct. 1978); Hefferin v. Stempkowski, 372 A.2d 869 (Pa. Super. Ct. 1977). *But see Pennsylvania Supreme Court Review*, 54 TEMP. L.Q. 729-41 (1981) (criticizing the *Heferin* decision and suggesting that section 303 should not preclude joinder of employers for comparative negligence purposes).

[90] *Heckendorn*, 465 A.2d at 612.

[91] *See id.*

stated more broadly that an immune joint tortfeasor does not relieve any other tortfeasor of full liability is a "longstanding common-law principle."[92]

2. *Section 31C: Reallocation of Damages Based on Unenforceability of Judgment*

Section 31C states that "if a defendant establishes that a judgment for contribution cannot be fully enforced against another defendant, the court will reallocate liability. The unenforceable portion is reallocated to all of the other parties, including the plaintiff."[93] This section is injurious to plaintiffs because it establishes a preference for tortfeasors over innocent plaintiffs. Specifically, it unjustly allows a reduction in the plaintiff's recovery solely because a judgment against one defendant cannot be executed. This goes against the history of tort law. Precedent suggests that if there is a choice between a tortfeasor and an innocent plaintiff, the innocent plaintiff is to be preferred.[94]

Joint and several liability requires a defendant to bear the burden of an insolvent defendant's negligence on the basis that as between a defendant who was at fault and an innocent plaintiff, it makes more sense to put the loss on the defendant.[95] The Reporters argue that this no longer makes sense because of the adoption of comparative fault.[96] This meaning is neither explained nor self-evident, however.

The theme of the *Restatement (Third), Apportionment* is that victims, actors, parties, and persons are all equal, and that responsibility is merely a matter of mathematical percentages.[97] This of course ignores history and reality. For example, there is a great difference between the tortious conduct of O.J. Simpson and any hypothetical carelessness on the part of his wife Nicole in going out late at night or perhaps not carrying a flashlight or a whistle. In product liability cases, the manufacturer is the expert and knows

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[92] *Id.* at 612-13 (citing RESTATEMENT (SECOND) OF TORTS § 880 (1979)).

[93] RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 31C(a), at 276 (Proposed Final Draft (Revised), 1999). Section 31C excepts from the reallocation provision intentional defendants and those who acted in concert. *Id.*

[94] *See, e.g.*, Bowman v. Redding & Co., 449 F.2d 956 (D.C. Cir. 1971); Summers v. Tice, 199 P.2d 1 (Cal. 1948).

[95] This is the policy of joint and several liability. *See* KEETON ET AL., *supra* note 2, §52, at 347.

[96] RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT § 31C reporters' note, at 292-93. It is noted that a responsible party's insolvency would be fully placed on defendant provided that plaintiff was found free of fault. *See id.*

[97] *Id.* § 31C cmts. a-m, at 277-91. Comment a to section 31C states that the imposition of a party's insolvency is proportionally shifted to all "remaining legally responsible parties." *Id.* cmt. a, at 277-78.

every aspect of the design of the product. Consider an automobile. The consumer, especially with today's "sealed hoods," is often clueless as to the design and function of a modern automobile.[98] Nevertheless, the Reporters argue in section 31C that all parties can be thrown into the same pot and weighed together.[99] By contrast, Pennsylvania law elevates the victim over the tortfeasor: "as between the rights of victims and competing tortfeasors, the rights of victims shall be paramount."[100]

The second half of the Reporters' flawed theory of apportionment is that joint and several liability is somehow directly linked to comparative fault.[101] The Reporters' position is that because of the widespread adoption of comparative fault, the risk of bankrupt, immune, and extra-jurisdictional tortfeasors must be placed on (or at least shared by) the victim rather than the defendants who are before the court. Professor Wright notes that no authority has been presented for this linking of comparative fault with joint and several liability and that the artificial chaining together conceals "the fundamental issue in the debate over joint and several liability: the question of whether the injured plaintiff, the defendant tortfeasors, or both should bear the expense and risk of apportionment of liability when there are multiple responsible causes of the same injury."[102] Pennsylvania has settled the debate: the risk should rest on the tortfeasor.[103]

A jurisdiction is able to have both joint and several liability and comparative fault at the same time. A state, like Pennsylvania, is able to follow comparative fault and provide that the risk of unenforceability rests on the actor, not the victim. The two concepts of joint and several liability and comparative fault are not inherently linked as the Reporters suggests.

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98 For example, an average consumer is unlikely to be aware of designs and functions such as the Global Positioning System and traction control.

99 *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 31C, at 276.

100 Baker v. AC&S, Inc., 729 A.2d 1140, 1152 (Pa. Super. Ct. 1999). The plaintiff in this case was the widow of a worker who died from exposure to asbestos products. *See id.* at 1143. She brought suit against several manufacturers under strict liability and negligence theories. *See id.* The court found that the "fundamental question" presented by the lawsuit and the surrounding facts was "whether under the unique circumstances of this case the plaintiffs or the non-settling tortfeasor should bear the burden of the shortfall between the consideration paid by the Manville Trust . . . and its allocated share of the damages awarded to the plaintiff." *Id.* at 1144. The court determined that the non-settling tortfeasor was the best choice for bearing the additional damages. *See id.* at 1151.

101 *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 31C cmts. a-m, at 277-91.

102 Wright, *supra* note 5, at 1154.

103 *See Baker*, 729 A.2d at 1152.

Section 31C raises the dangerous implication that it is permissible to shift the risk of unenforceability to plaintiffs merely because they may be partly at fault.[104] Section 31C in effect proclaims that, although we used to place the risk of unenforceability on defendants, after 1999 we will place it on plaintiffs.[105] No reason is presented why plaintiffs are better able to bear the loss than defendants.

Moreover, section 31C is offensive to Pennsylvania law to the extent that it urges the submission of bankrupt parties to the jury for appointment and allocation purposes.[106] The superior court recently stated:

> [A]s to those parties who were in bankruptcy when this case was submitted to the jury, we need only refer . . . to the recent en banc decision of this court in *Ottavio v. Fliberboard* Corp. where we analyzed this selfsame issue. The *Ottavio* court concluded that bankrupt defendants did not have to participate in the trial, and their names should not be submitted to the jury for a finding of liability. The court opined: Nothing precludes the solvent manufacturers in this case from obtaining contribution from the bankrupts when (and if) they emerge from reorganization proceedings. . . . Finally, the bankruptcy rules seem to preclude an apportionment of liability for a party operating under the automatic stay provisions of the Bankruptcy Code.[107]

The *Restatement, Third* thus contradicts the established law of Pennsylvania by placing part of the risk that a defendant will be bankrupt on the plaintiff, rather than on the other defendants.

Section 31C is clearly contrary to Pennsylvania law. Pennsylvania has adopted both comparative fault and joint and several liability.[108] This means that, although a negligent plaintiff may have her total recovery reduced by the amount of her fault, once her percentage is calculated, she may recover the

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[104] RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 31C cmt. a, at 276-78. Section 31C provides, however, that reallocation will not apply where the defendants are intentional tortfeasors, acted in concert, or, through vicarious liability, are assigned fault from another party. *Id.* § 31C, at 276.

[105] *Id.* § 31C.

[106] *Id.* cmt. e, at 282-83 (permitting consideration of bankrupt defendants for apportionment of comparative responsibility, with subsequent reallocation to "other liable parties," if the bankruptcy court can be "persuaded" to lift the automatic stay).

[107] Ball v. Johns-Manville Corp., 625 A.2d 650, 660 (Pa. Super. Ct. 1992) (citation omitted).

[108] See *supra* notes 6-17, 23-29 and accompanying text for a discussion of Pennsylvania's adoption of joint and several liability and comparative fault, and *infra* notes 241-42 and accompanying text for further discussion of Pennsylvania's Comparative Negligence Act.

whole remaining amount from any jointly liable defendant.[109] In Pennsylvania the debate is settled: the risk of uncollectability rests on the defendants, not the plaintiff.[110] Pennsylvania has recognized that comparative fault and pure joint and several liability can work together harmoniously.[111]

3. *Section 30C: Effect of Responsibility Assigned to Immune Employer*

Section 30C provides that if the plaintiff's employer bears some share of fault, then the employer, even if immune, is submitted to the fact finder for an assignment of comparative responsibility (and a corresponding reduction in the damages recoverable by the plaintiff) in jurisdictions permitting such a reduction.[112] To exemplify section 30C, imagine that an injured worker brings suit against the manufacturer of a defective product such as a steam boiler.[113] Assume that the defective boiler exploded and injured the worker. The worker has already recovered from the negligent employer a small set amount through workers' compensation. Three main issues are raised by section 30C.[114] First, whether the employer is immune from a suit for contribution by the manufacturer. Second, whether the employer is entitled to a set-off for the amount of worker's compensation it has paid the injured worker. Third, what happens to a negligent employer that thought it was protected from suit under worker's compensation.

Section 30C inquires whether the jurisdiction in question allows a reduction of recoverable damages. If so, then the employer (who is otherwise immune from suit) is submitted to the fact finder for the assignment of a percentage of comparative responsibility.[115] If the applicable law does not permit a reduction, the employer is not submitted to the fact finder.[116]

A risk is that the employee's share could be reduced in some states. The Reporters state: "Where joint and several liability does not exist and the

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109 *See* Baker v. AC&S, Inc., 729 A.2d 1140, 1152 (Pa. Super. Ct. 1999).

110 *See id.*

111 *See generally* Elder v. Orluck, 515 A.2d 517 (Pa. 1986).

112 RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 30C, at 265-66 (Proposed Final Draft (Revised), 1999). As previously noted, Pennsylvania does not permit consideration by the jury of immune employers. *See supra* notes 84-92 and accompanying text; *infra* notes 120-21 and accompanying text.

113 *See, e.g.*, Kotecki v. Cyclops Welding Corp., 585 N.E.2d 1023 (Ill. 1991).

114 RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 30C, at 265-66. The Reporters examine several approaches to the problem of coordinating workers' compensation and tort. *See id.* cmt. b, at 267-68.

115 *See id.* § 30C(a), at 266.

116 *See id.* § 30C(b), at 266.

employer as a nonparty is submitted to the fact finder for a determination of responsibility, the difference between the employer's comparative share . . . and the workers' compensation benefit is borne by the employee . . . ."[117]

Under this radical concept, immune employers may be submitted to the fact finder for an assignment of a percentage of responsibility thus permitting a reduction in the amount that is recovered by the plaintiff.[118] The Reporters redefined an "immune person" (not subject to suit) to allow for the reduction in the amount that the other defendants will pay and therefore also to reduce the injured victim's recovery.[119]

Fortunately for injured Pennsylvania workers, the shifting sands and needless complexity of the section 30C proposal were rejected almost twenty years ago in *Heckendorn v. Consolidated Rail Corp.*[120] Pennsylvania refuses to submit the employer's responsibility to the jury in a third-party action, such as a suit for contribution by the product manufacturer.[121]

D. Track D: Hybrid Liabiity Based on Threshold Percentage of Comparative Responsibility

Section 28D can be best understood in light of statutes that have been adopted since 1980 that characterize the liability of tortfeasors based on a threshold amount of responsibility. The threshold, which may range from ten percent to sixty percent, is usually fifty percent.[122] Section 28D provides that "if the independent tortious conduct of two or more persons is a legal cause of

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[117] *Id.* reporters' note, at 274.

[118] *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY cmt. f, at 268 (Proposed Final Draft, 1998). The Comment notes that for the sake of consistency, employers who are immune because of the exclusive remedy provided by Workers' Compensation are still submitted to the factfinder for apportionment of responsibility as long as "one or more defendants maybe found severally liable." *Id.*

[119] *Id.* § 28D cmt. g, at 269.

[120] 465 A.2d 609 (Pa. 1983).

[121] *See id.* at 611; *see also supra* notes 84-92 and accompanying text.

[122] RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 28D reporters' note, at 316 (Proposed Final Draft (Revised), 1999). The Reporters' Note states that "[b]ecause there is no logical or policy argument that might justify one threshold value over another, the text of the rule stated in this section does not specify a value for the threshold." *Id.* Additionally, a number of jurisdictions are cited for their approach to setting the threshold percentage: a Texas statute requires that defendants with greater than ten percent of responsibility be held jointly and severally liable provided that plaintiff is free from fault; a Montana statute requires a defendant to be held jointly and severally liable if its responsibility is apportioned at greater than fifty percent; New Jersey has determined that a defendant will be held jointly and severally liable for all of plaintiff's harm if the defendant was found to be greater than sixty percent at fault, or jointly and severally liable for plaintiff's economic loss only if found to be more than twenty but less than sixty percent at fault. *See id.*

indivisible injury, each defendant who is assigned a percentage of comparative responsibility equal to or in excess of the legal threshold is jointly and severally liable."[123] However, "each defendant who is assigned a percentage of comparative responsibility below the legal threshold, is [only] severally liable."[124]

The Reporters' rationale for excluding tortfeasors from joint and several liability is that because of the expansion of liability over the past several years, tortfeasors who are marginally at fault are being held liable for the entire amount of damages. The solution presented in section 28D is a threshold that will exclude some joint tortfeasors from joint liability. An example of the problem is illustrated in *Walt Disney World Co. v. Wood*.[125] If Florida had used the fifty percent threshold as proposed by section 28D as a basis for liability, Disney World would have been liable for only one percent of damages because its percentage of fault would have fallen below the threshold standard of fifty percent. Therefore, Disney World would have been only severally responsible. The plaintiff's concern with the threshold limitation is that her recovery could be greatly reduced. In *Disney World*, the plaintiff's fiancé's proportionate share of responsibility would never be recovered by the plaintiff because of immunity laws, and the threshold limits proposed by Track D greatly would have limited her recovery from Disney World. The Reporters admit that "there is no logical or policy argument [to] justify one threshold value over another."[126]

There are two fundamental problems with Track D. First, it is merely an invitation to the legislature to make a guess as to the appropriate line to draw (somewhere between ten percent and sixty percent) in order to hold a defendant jointly liable. Law is based on logic and experience, not guesses. It is patently biased when the legislature, in order to reduce the consumer's recovery, pulls a number out of a hat and calls it justice. Not surprisingly, only fourteen states have adopted Track D.[127]

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[123] *Id.* § 28D, at 300. Again, the Reporters cite the advent of comparative fault as one of the reasons justifying "a variety of hybrid schemes," one of which limits "joint and several liability to those tortfeasors whose responsibility exceeds a numerical threshold set by law." *Id.* at 301.

[124] *Id.* § 28D, at 300-01.

[125] 515 So. 2d 198 (Fla. 1987). For a complete discussion of this case, see *supra* notes 30-33 and accompanying text.

[126] RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 28D reporters' note, at 316.

[127] Georgia, Hawaii, Iowa, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Texas, Washington and Wisconsin have all adopted threshold limitations similar to those proposed by Track D. *See id.* at 312-15.

The second problem is that ninety-two percent of all cases are settled and therefore cases such as *Disney World* are extremely rare. Similar cases generally have involved corporations with substantial assets, and the facts of each case need to be examined carefully. Often it is apparent that the corporate defendant was more at fault than the assigned percentage. For example, Disney designed the high-speed attraction with knowledge of likely bumping. Indeed, Grand Prix racing cars beg to be misused and abused by their very nature. With bumper cars, a certain number of injuries are sure to occur. Disney World clearly was a cause of the injury and was negligent. It is, therefore, appropriate to place the loss on the park owner. Finally, the amount of damage in the Disney World case was small, $75,000. This is hardly an appropriate foundation for throwing out joint and several liability for a vast number of indivisible result cases.

Applying Judge Calabresi's theory of "cheapest cost avoider"[128] to the facts of *Disney World* provides insight. Disney World is best able to understand the problem and best able to do something about it. Disney is clearly the "cheapest cost avoider." For example, Disney could redesign the bumper car ride or remove it. Because Disney World sells excitement, it is appropriate to place the costs of such excitement on it. The plaintiff, in contrast, understands little about bumper cars. She and her fiancé likely assumed they were safe.

Pennsylvania has not adopted the threshold limitation proposed in section 28D. In support of Pennsylvania's refusal to limit a plaintiff's recovery by artificial and restrictive thresholds, the Pennsylvania Supreme Court adopted the aggregate theory of comparative fault in *Elder v. Orluck*.[129] In *Elder*, the plaintiff was braking for a long line of traffic stopped for a passing parade when he was rear-ended and injured.[130] The defendant, Orluck, joined the Harrisville municipality as a party, and fault was apportioned at twenty-five percent for the plaintiff, sixty percent for defendant Orluck, and fifteen percent for Harrisville.[131] Citing the language and legislative history of Pennsylvania's comparative fault statute for support, Harrisville objected to paying damages because its fault percentage was less than that apportioned to the plaintiff.[132]

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128 Calabresi & Hischoff, *supra* note 35, at 1073.

129 515 A.2d 517 (Pa. 1986).

130 *Id.* at 518.

131 *See id.*

132 *See id.* Harrisville argued that the plural language of the statute, providing that the plaintiff's negligence is to be compared to "the causal negligence of the defendant or defendants against whom recovery is sought," was simply a recognition that many tort actions are brought against multiple defendants. *Id.* at 519. To support this argument, Harrisville stated that if the legislature had wanted the plaintiff's negligence to be

The court refuted Harrisville's argument, looked to how similar situations were handled in other states, and determined that Pennsylvania's statute

> was enacted to eliminate the harsh common law doctrine of "contributory negligence" and replace it with the more equitable principles of comparative negligence. The intent of the legislature was to remedy those situations where an injured plaintiff would go uncompensated because of the rigid "contributory negligence" doctrine. The Act adopts the notion that injured victims will obtain a recovery in all cases where the victim's negligence contributing to the injuries is not greater than that of the defendant or defendants. The policy purposes of the Act are met by comparing the plaintiff's negligence to the combined negligence of all defendants. We hold, therefore, that under the provisions of the Pennsylvania Comparative Negligence Act, recovery by an injured plaintiff will be precluded only where plaintiff's negligence exceeds the combined negligence of all defendants.[133]

In addition to Pennsylvania's refusal to adopt harsh threshold standards in other areas of damage apportionment, several noted economists have argued that joint liability is more efficient than several liability.[134] Thus, the percentage limits of section 28D embrace a proposal that is economically inefficient.

1. Section 29D: Assignment of Responsibility: Both Jointly and Severally Liable and Severally Liable Defendants

Section 29D is a critical section to Track D. The point of this section is that liability can be apportioned to non-parties when liability is several only.[135] Thus, by alleging that various non-parties bear some part of the responsibility for the plaintiff's injuries, the defendants can reduce the amount they will pay and thereby decrease the amount the plaintiff will recover. The rationale for this is summarized as follows:

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compared with the aggregate of all the defendants' negligence, then the statute would have incorporated such language. *See id.* Additionally, Harrisville argued that the legislative history of the Act revealed that the statute was patterned on a Wisconsin statute that had been interpreted conversely. *See id.* at 521.

133 *Id.* at 525.

134 *See* Kornhauser & Revesz, *supra* note 53; *see also supra* note 55 and accompanying text.

135 *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 29D cmts. a-e, at 316-19 (Proposed Final Draft (Revised), 1999). The section allows persons as well as parties to be apportioned responsibility. "Person" is defined as one "who is not a party to the suit and has not entered into a settlement with the plaintiff but who is alleged by one or more parties whose tortious actions (even if protected by immunity) were a legal cause of plaintiff's indivisible injury." *Id.* § 29D cmt. c, at 317.

> Subsection (a) of this section permits the factfinder to assign responsibility not only to all parties, settling tortfeasors, and immune employers but also to any other identified person for which there is sufficient evidence introduced at trial to permit the factfinder to determine that the person's tortious conduct was a legal cause of the plaintiff's injury. This enables the fact finder's assignment of responsibility to reflect the percentage share of the plaintiff's damages for which each tortfeasor is liable.[136]

The rationale continues: "the rule in subsection (a) of this section permits the fact finder to assign responsibility to persons who are not parties to the action."[137]

Pennsylvania defines "parties" in the traditional manner: a person who has been served and is before the court.[138] The court in *Ball v. Johns-Manville Corp.*[139] stated: "We are aware of no principle of Pennsylvania law that allows a jury to make a finding of liability against a party who has not been sued."[140] The reason for this is both practical and fair. To allow the consideration of non-parties by the jury would lead to decisions that could not be enforced and would be woefully unfair to the plaintiff. This is because the plaintiff has no recourse against the non-party. The proposal for allowing the consideration of non-parties undermines the theory and the foundation of the judicial process.[141] The Reporters admit that there is little authority for allowing the consideration of non-parties by the jury.[142]

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[136] *Id.* § 29D cmt. i, at 322. Comment i notes that this hybrid system creates further complications because of the uncertainty of who has the burden to join additional parties. *Id.* at 323. This is because the parties will not know who is above the threshold limitations until after a verdict is rendered. *See id.* at 323-24. This could greatly reduce the plaintiff's ability to recover damages if it is determined that the plaintiff had the burden to join additional parties to whom liability could have been apportioned.

[137] *Id.*

[138] *See* Baker v. AC&S Inc., 729 A.2d 1140, 1147 (Pa. Super. Ct. 1999).

[139] 625 A.2d 650 (Pa. Super. Ct. 1993).

[140] *Id.* at 659.

[141] *See* Richards v. Owens-Illinois, Inc., 928 P.2d 1181 (Cal. 1997). In this case, a retired shipyard worker sued the manufacturer of asbestos products under the theories of negligence and strict liability. *See id.* at 1183. The defendant argued that plaintiff's longtime smoking habit contributed to his reduced lung capacity, and sought to apportion fault to absent tobacco companies. *See id.* at 1188-90. The court, denying the defendant's argument, stated that the "Court of Appeal erred by reversing the judgment on the grounds that Owens-Illinois should have been allowed to assign 'fault' to absent tobacco companies in order to reduce its liability for [plaintiff's] 'non-economic' damages." *Id.* at 1192.

[142] *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 29D cmt. j, at 332-33 (Proposed Final Draft (Revised), 1999). The Reporters note that the issue of assignment of responsibility to non-parties has "little clear precedent." *Id.* at 332. Additionally, several jurisdictions are cited for concluding that "unidentified parties" should not be submitted for apportionment of fault. *Id.* In the jurisdictions that

E. Track E: Hybrid Liability Based on Type of Damages

Following the Reporters' theme that anything is better than joint and several liability, section 28E introduces Track E. This needlessly complicated section draws a distinction between economic damages and non-economic damages that are suffered by the plaintiff.[143] It provides that if two or more persons are a legal cause of an individual injury, each defendant is jointly and severally liable for the economic damages and is severally liable for the non-economic damages.[144] Economic damages are defined as "damages for which markets exist" such as "past and future wage loss, medical expenses and care, burial costs, [and] damages to property."[145] Non-economic damages include "pain and suffering, inconvenience, disfigurement, emotional distress, [and the] loss of society and companionship."[146] Only five to ten jurisdictions support Track E.[147]

The Reporters acknowledge "[t]he rule stated in this section imposes the financial risk of insolvency of a legally responsible party on defendants for the plaintiff's economic damages and on the plaintiff for the plaintiff's noneconomic damages."[148] Under this policy, the Reporters admit that "[t]hose with high earnings and access to the best medical care will fare better under the rules stated in this 'E' series than those who have low earnings or are unemployed."[149] This class-based distinction cuts short the recovery of the injured plaintiffs. The Reporters cite only five state statutes that support this arbitrary proposal.[150]

A basic problem with the reasoning behind Track E is that the Reporters risk confusion of the term "economic damages" with the accepted phrase

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have concluded that non-parties should be submitted, no distinction has been made between identified and unidentified non-parties. *See id.* at 333.

143 *See id.* § 28E, at 337.

144 *See id.*

145 *Id.* cmt. c, at 338.

146 *Id.*

147 Florida, Ohio, California, Nebraska, and New York impose joint and several liability and several liability depending on whether the damages are economic or non-economic. *See id.* reporters' note cmt. b, at 349-51. Additionally, Hawaii, Iowa, Mississippi and Missouri have statutory provisions in which joint and several liability is determined in part by the nature of the damages. *See id.*

148 *Id.* § 28E cmt. d, at 339. This is based on the theory that providing for plaintiff's economic damages is "more important than providing full recovery of noneconomic damages." *Id.* The Reporters argue that this is comparable to a no-fault compensation system which places recovery of economic damages above recovering non-economic damages. *See id.*

149 *Id.* at 340.

150 *See supra* note 147.

"economic loss." Economic loss is neither personal injury nor property loss, but rather business expectations that lie outside proximate cause. In *Kinsman Transit Co. v. City of Buffalo*,[151] for example, the Second Circuit held that a grain dealer was unable to recover the costs of shipping and purchasing additional grain when the Buffalo River was flooded due to the defendants' negligence.[152] The court held that the plaintiff had suffered an unrecoverable economic loss.[153] In contrast to "economic loss," the "economic damages" proposed by the Reporters traditionally have been recoverable by the plaintiff.[154]

States that follow the traditional joint and several liability doctrine do not distinguish between economic and non-economic damages, however. For instance, Pennsylvania follows the traditional rule of joint and several liability.[155] It permits the victim to recover all damages needed to make the injured party whole. Contrary to Pennsylvania law, section 28E wrongly draws a distinction between economic damages and pain and suffering. Often in personal injury cases, the pain and suffering is more debilitating than the bodily injury.[156] For example, in a rape case the emotional trauma may far outweigh the physical injury. In a car crash, the emotional problems stemming from the loss of a leg may greatly outweigh the lost wages and medical expenses. With no policy justification for Track E, the Reporters shift these disabling losses onto the victim in order to save money for the insurance company or corporate defendant. The Reporters apparently believe that most pain and suffering is trivial or faked, but offer no authority for this position.

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[151] 388 F.2d 821 (2d Cir. 1968) (commonly referred to as the *Kinsman II* case). In this case, a vessel broke loose from its moorings, began drifting down the river, struck another vessel which became unmoored and began drifting with the first vessel, and struck a bridge, causing it to collapse and form a dam, which resulted in flooding and expenses for the transportation, storage, and replacement of wheat for the plaintiff. *See id.* at 822.

[152] *See id.* The court found that the link between the flooding and consequent damage to plaintiff and defendant's negligence to be "too tenuous and remote to permit recovery." *Id.*

[153] *See id.* at 824.

[154] RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 28E cmt. d, at 339 (Proposed Final Draft (Revised), 1999).

[155] *See* Baker v. AC&S Inc., 729 A.2d 1140, 1146 (Pa. 1998); *see also supra* notes 6-17 and accompanying text.

[156] *See, e.g.*, State Rubbish Collectors Ass'n v. Siliznoff, 240 P.2d 282 (Cal. 1952).

1. *Section 29E: Assignment of Responsibility: Joint and Several Liability for Economic Damages and Several Liability for Non-Economic Damages*

The Reporters acknowledge that "it is possible to have a . . . several-liability system and exclude nonparties from consideration by a factfinder in assigning comparative responsibility."[157] Section 29E rejects this option, however. Instead "this section permits the factfinder to assign responsibility not only to all parties and settling tortfeasors but also to any other identified person."[158] The resulting liability for non-economic damages is several. This Track E section permits assignment of "responsibility to nonparties [only] when the plaintiff may recover . . . non-economic damages."[159] This occurs "whether or not economic damages are also sought."[160]

There are three serious problems with section 29E. First, the rule permits identified persons to be submitted to the fact finder for assignment of a percentage of responsibility. The Reporters propose that "[t]hose persons do not have to be joined in the case as parties."[161] Second, the resulting liability for non-economic damages is several.[162] "Several" always means that the plaintiff risks recovering less than all of her damages.[163] Third, this section permits the plaintiff's recovery to be reduced by allocating responsibility to non-parties, although it suggests that the amount of the reduction will be determined by the court.[164] Because ninety-two percent of all cases are settled,[165] the court will not decide the proportionate responsibility. Rather, the *Restatement (Third), Apportionment* will form the basis for dramatically reducing recoveries by plaintiffs during settlement discussions. On the face of

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157 RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 29E cmt. h, at 367.

158 *Id.*

159 *Id.*

160 Id. § 29E, at 358.

161 *Id.* at 360. The many serious problems with considering "persons" are discussed in the critique of section 28C. *See supra* notes 67-75 and accompanying text.

162 *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 29E(b), at 358 (Proposed Final Draft (Revised), 1999); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 28B(b), at 298 (Proposed Final Draft, 1998).

163 RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 29E cmt. e, at 359-61 (Proposed Final Draft (Revised), 1999).

164 *See id.* at 360-61. Section 29E provides that for both economic and non-economic damages, each party and identified persons who are a "legal cause of plaintiff's indivisible injury" is submitted to the factfinder, who apportions liability. *Id.*

165 *See supra* note 49 and accompanying text.

the *Restatement (Third), Apportionment* sections here under discussion, this appears to be a substantial portion of the Reporters' mission.

In contrast to the Reporters, Pennsylvania law rejects the notion that in every case a means should be created, no matter how complex and extreme, to reduce the injured plaintiff's recovery.[166] If she is negligent, the Pennsylvania plaintiff's recovery is reduced through comparative fault, in proportion to the amount of her fault.[167] The plaintiff may recover all of her remaining damages from any one of the jointly liable tortfeasors. In responding to a similar issue, Justice Musmanno of the Pennsylvania Supreme Court stated:

> "No person may negligently injure another without being responsible for damages." To authorize [defendant] to pay less than the jury decided he must pay is to immunize him in a manner that has no justification in precedent or reason .... For [defendant] now to receive a monetary benefit at the expense of those to whom he brought grief is preposterous to the point almost of incredulity.[168]

Comparative fault has the great benefit of deterring both the negligent defendant and the negligent plaintiff. The courts have uniformly accepted this approach.[169] The complex micro-engineering of Track E is unnecessary and thus is revealed as merely a tort reform scheme intended to reduce the plaintiff's recovery further than it would be reduced by the application of comparative fault alone.

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[166] See *supra* notes 129-33 and accompanying text, which discuss other analogous areas of the apportionment of damages where Pennsylvania has refused to place harsh limitations on a plaintiff's ability to recover compensation for her injuries.

[167] *See* Ryden v. Johns-Manville Prods., 518 F. Supp. 311 (W.D. Pa. 1981) (holding that simple contributory negligence was no longer a bar to a plaintiff's recovery); Ferguson v. Panzarella, 664 A.2d 989 (Pa. Super. Ct. 1995), *reargument denied, appeal granted*, 674 A.2d 1072 (Pa. 1996), *rev'd*, 700 A.2d 927 (Pa. 1997) (concluding that the Comparative Negligence Act presumes a jury's ability to establish and apportion the negligence of all parties); Glock v. Coca-Cola Co., 639 A.2d 1191 (Pa. Super. Ct. 1994) (recognizing comparative fault as the law of Pennsylvania); Gross v. Johns-Manville Corp., 600 A.2d 558 (Pa. Super. Ct. 1991) (holding that warnings placed on products concerning the possibility of inhaling asbestos did not provide a basis for apportioning liability); Lopa v. McGee, 540 A.2d 311 (Pa. Super. Ct. 1988) (holding that a finding of fifty percent plaintiff liability did not bar plaintiff from recovering damages).

[168] Daugherty v. Hershberger, 126 A.2d 730, 735-36 (Pa. 1956) (Musmanno, J., dissenting) (quoting Johnson v. Hetrick, 150 A. 477, 479 (Pa. 1930)). Justice Musmanno's dissent became the majority rule in Pennsylvania in *Charles v. Giant Eagle Markets*, 522 A.2d 1, 3 (Pa. 1987) (acknowledging Justice Musmanno's conclusions from *Daugherty*). Therefore, the *Charles* court overturned *Daugherty*. *Charles*, 522 A.2d at 5 n.4.

[169] *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 28E cmt. d, at 353 (Proposed Final Draft (Revised), 1999). Most jurisdictions have determined that "comparative fault does not require modification of joint and several liability," a position that is contrary to the Reporters' theme. *Id.*

III. OTHER IMPORTANT PROVISIONS OF THE *RESTATEMENT (THIRD), APPORTIONMENT* AND THEIR IMPACT ON PENNSYLVANIA LAW

In addition to the radical proposals of the track system, the *Restatement (Third), Apportionment* restructures many important aspects of a personal injury suit. This Part will consider modifications apart from the tracks examined in Part II.

A. Section 1: Issues and Causes of Action Addressed by This Restatement

The Reporters begin by stating that they will consider statutory rules as well as rules of common law in the proposal.[170] This is a radical departure from the traditional approach taken by the ALI. The purpose of a Restatement is to restate the common law, not the statutory law. The Reporters gloss over many years of serious debate by asserting that the rules they propose apply regardless of the basis of liability.[171] There has been substantial judicial and scholarly discussion over whether comparative fault should apply in strict liability cases, in addition to traditional negligence cases.[172] The *Restatement (Third), Apportionment* glosses over this spirited debate. This means that comparative fault will apply in a great many situations where it has not applied in the past. Under the *Restatement (Third), Apportionment*, a plaintiff will not be able to argue, for example, that her negligence cannot be compared with the strict liability of the defendant.[173]

Section 1 is directly contrary to Pennsylvania law. Pennsylvania considers strict liability to be different from negligence. Therefore, in a products liability suit based on strict liability, the negligence of the injured consumer cannot be considered by the jury.[174] In *Conti v. Ford Motor Co.*, the district court stated that "the Pennsylvania Supreme Court, perhaps more than any other state appellate court in the nation, has been emphatic in divorcing negligence

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[170] *Id.* at xii. The Preface notes that while many legislatures have intervened to reform apportionment law, "the legislation often bears the marks of crude compromise rather than coherent analysis." *Id.*

[171] *Id.* § 1, at 1.

[172] *See* KEETON ET AL., *supra* note 2, § 67, at 478; *see also infra* Part III.H.

[173] RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 1 cmt. b, at 6.

[174] *See* Conti v. Ford Motor Co, 578 F. Supp. 1429 (E.D. Pa. 1983), *rev'd on other grounds*, 743 F.2d 195 (3d Cir. 1984). In *Conti*, a products liability action was brought against a car manufacturer for failure to warn adequately of the possibility of injury by starting a stick-shift model without depressing the clutch pedal. *Id.* at 1429-30. The defense argued comparative negligence, and the District Court, applying Pennsylvania law, determined that "comparative-fault doctrine has no place in this litigation." *Id.* at 1435.

concepts from product-liability doctrine."[175] A few years later, in *McMeekin v. Harry M. Stevens Inc.*,[176] the superior court reiterated that the Comparative Negligence Act did not apply to strict liability actions.[177] Additionally, the superior court determined that "[i]n Pennsylvania, liability among joint tortfeasors is allocated differently in a negligence action than it is in a strict liability action. In a negligence action, liability is allocated among responsible tortfeasors according to percentages of comparative fault.... However, in strict liability cases ... liability is allocated equally among responsible tortfeasors, without regard to fault."[178] Strict liability is intended to deter the manufacturer from producing faulty products by placing the loss on it rather than on the injured consumer. The Pennsylvania Supreme Court in 1998 stated: "In our attempts to place inevitable financial burdens on those best positioned to bear them, we have continually protected the injured plaintiffs and held manufacturers responsible for the products they have put into the stream of commerce."[179] The *Restatement (Third), Apportionment* reverses this policy by permitting negligence to be compared with strict liability. Moreover, Pennsylvania likely would not allow, for example, the negligence of a rape victim to be considered in a suit against the rapist, although the *Restatement (Third), Apportionment* permits such a weighing. The majority rule, however, rejects contributory negligence as a defense in an intentional tort case.[180]

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[175] *Id.* at 1434 (citing Azzarello v. Black Brothers Co., Inc., 391 A.2d 1020 (Pa. 1978); Berkebile v. Brantly Helicopter Corp., 337 A.2d 893 (Pa. 1975)). The *Conti* court stated that it was "extremely unlikely that the Pennsylvania Supreme Court would hold that the comparative negligence statute directly governs product liability cases." 578 F. Supp. at 1434. Additionally, the court concluded that "strict liability of the manufacturer is not on the same legal plane as the negligence of the user." *Id.* at 1435 (citing Rhoads v. Ford Motor Co, 374 F. Supp. 1317, 1320 (W.D. Pa. 1974), *aff'd on other grounds*, 514 F.2d 931 (3d Cir. 1975)).

[176] 530 A. 2d 462 (Pa. Super. Ct. 1987). While dining in a restaurant, plaintiff sustained injuries when his chair collapsed. *See id.* at 463. The restaurant owner joined the chair manufacturer as an additional defendant. *See id.*

[177] *Id.* at 464-65 (citing 42 PA. CONS. STAT. ANN. § 7102(b)). The court did find, however, that the Uniform Contribution Among Tortfeasors Act could be applied so that "joint tortfeasors may obtain contribution from each other, despite the fact that one joint tortfeasor has been found liable in negligence and the other in strict liability." *Id.* at 465 (citing 42 PA. CONS. STAT. ANN. § 8322).

[178] Baker v. AC&S Inc., 729 A.2d 1140, 1148 (Pa. Super. Ct. 1999).

[179] *Id.* at 1149 n.26 (citing Walton v. Avco Corp., 610 A.2d 454 (Pa. 1992)).

[180] *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 1 cmt. c, at 8 (Proposed Final Draft (Revised), 1999). The Reporters state that a position is not taken regarding use of a plaintiff's negligence as a defense to intentional torts. *See id.*

B. Section 2: Contractual Limitations on Liability

Section 2 provides that "a contract between the plaintiff and another person to absolve the person from liability for future harms bars the plaintiff's recovery."[181] This section is a trap for victims because very few understand contract law. Also, the new provision shifts the protection to the defendant who is able to draft the contract in her favor and thereby preclude the victim from recovery. The Reporters do acknowledge that under the UCC, and in several product situations, contract disclaimers are precluded.[182] However, the placement of contractual disclaimers as an introductory provision in the *Restatement (Third), Apportionment* elevates its force and should raise great concern for consumer advocates.

Section 2 and the other related sections that build upon it[183] are potentially the most dangerous sections for the consumer because they rest on a contract between the defendant and the injured party. For example, section 40 governs the enforceability of settlement agreements. The *Restatement (Third), Apportionment* gives enormous weight to such an agreement and does not provide for the settlement or the disclaimer to be examined by a court to determine whether it is fair or just, or whether the amount paid is adequate. Under the *Restatement (Third), Apportionment*, the court can ask only whether the agreement meets the requirements of a contract.[184]

Frequently, the circumstances surrounding the accident prevent the making of a fair and equitable contract. The injured and unrepresented victim will often be confined in a hospital or a nursing home, struggling to find a means to

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[181] *Id.* at 20. This rule is a replacement for express assumption of risk, *see* RESTATEMENT (SECOND) OF TORTS § 496B (1965), and the Reporters reason that, where appropriate, "the parties to a transaction should be able to agree between themselves who should bear the risk of injury when the injury is caused by one party's legally culpable conduct." RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 2 cmt. b, at 21.

[182] *See id.* cmt. h, at 23. Additionally, some contracts are unenforceable as a matter of public policy. *See id.* cmt. e, at 22. Factors to be considered are whether there is a dependent relationship between the parties, whether the service provided by the contract is subject to public regulation, and whether the contract is "standardized," as well as which party drafted the contract, "the economic setting of the transaction," and "whether the party seeking exculpation was willing to provide greater protection against negligence for a reasonable, additional fee." *Id.*

[183] *See id.* §§ 26, 32, 33, 40, 41.

[184] *Id.* § 40 cmt. f, at 427. This applies where a "non-settling tortfeasor claims the benefit of an 'all persons' provision." *Id.* § 40 cmt. g, at 427-28. The non-settling tortfeasor will only be able to claim the benefit of the provision if: " 1) release of the nonsettling tortfeasor is appropriate to effectuate the intention of the parties and 2) the circumstances reveal that the settling tortfeasor intended that nonsettling tortfeasors be released." *Id.* at 428.

cover enormous medical bills. On the other hand, the defendant will be represented by his or her insurance company and lawyer, and the agreement will be drafted to benefit the defendant. The agreement will be vague and biased, and the consumer will be tempted to give up his or her rights because of financial necessity. Such unilateral contracts are extremely injurious and should be deleted from the *Restatement (Third), Apportionment.* The New Jersey Supreme Court criticized them as traps in *Henningson v. Bloomfield Motors, Inc.*, stating:[185]

> The weaker party . . . is frequently not in a position to shop around for better terms, because the author . . . has a monopoly . . . . [The consumer's] contractual intention is but a subjection . . . to terms dictated by the stronger party, terms whose consequences are often understood in a vague way, if at all. . . . No bargaining is engaged in . . . .[186]

The law of Pennsylvania allows a court to evaluate the settlement agreement to determine whether it was unfair or overreaching. In *Standard Venetian Blind Co. v. American Empire Insurance Co.*,[187] the Supreme Court of Pennsylvania held that the "task of interpreting a contract is generally performed by a court," and "[t]he goal of that task is, of course, to ascertain the intent of the parties as manifested by the language of the written instrument."[188] Moreover, in *Lyncott Corp. v. Chemical Waste Management, Inc.*,[189] the district court, applying Pennsylvania law, stated: "[w]here the

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[185] 161 A.2d 69, 70 (N.J. 1960) (holding that due to the gross inequity of bargaining power in the automobile buying context, a manufacturer's "attempted disclaimer of an implied warranty of merchantability and of the obligations arising therefrom was so inimical to public good as to compel an adjudication of its invalidity").

[186] *Id.* at 86-87 (citing Albert A. Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072, 1075, 1089 (1953); Friedrich Kessler, *Contracts of Adhesion–Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943)).

[187] 469 A.2d 563 (Pa. 1983).

[188] *Id.* at 566 (citing Gonzalez v. United States Steel Corp., 398 A.2d 1378 (Pa. 1979); Community College of Beaver County v. Society of the Faculty, 375 A.2d 1267 (Pa. 1977); Mohn v. American Cas. Co. of Reading, 326 A.2d 346 (Pa. 1974)). Here, the plaintiff sought a declaratory judgment to force the defendant insurance company to pay a damages claim. *See id.* at 565. The court held that because the language of the policy expressly precluded coverage over the damages sought, plaintiff was not entitled to a declaratory judgment. *See id.* at 566. The court did state, though, that because of unequal bargaining power between an insurance company and the insured, an occasion could present itself where the court felt compelled to look beyond the plain language of the policy if it found that the contract or any clause of the contract was unconscionable at the time it was made. *See id.* at 567; *see also* Sparler v. Fireman's Ins. Co., 521 A.2d 433, (Pa. Super. Ct. 1986) (holding that the court would not relieve parties of an improvident contract but would also not allow a "rigid literalness" to be used to create an improvident contract contrary to the parties' intent).

[189] 690 F. Supp. 1409 (E.D. Pa. 1988). Chemical Waste sought recovery of the costs associated with clean-up of a landfill where several defendants dumped hazardous waste. *See id.* 1410. The question

language of the written contract is ambiguous, extrinsic or parol evidence may be considered to determine the intent of the parties . . . a court must consider the words of the agreement, alternative meanings suggested by counsel, and extrinsic evidence offered in support of [a] meaning."[190]

In *Charles v. Giant Eagle Markets*,[191] the Pennsylvania Supreme Court looked carefully at the amount of the settlement and said: "Giant Eagle has no basis for receiving a windfall by way of contribution, if by hindsight it is determined that it overestimated the extent of its exposure."[192] In 1998, the superior court carefully examined the amount paid in settlement and said: "a tortfeasor is not entitled to contribution from another tortfeasor until he or she has discharged the common liability or paid more than his or her *pro rata* share .... [I]f the plaintiff settles pursuant to a *pro tanto* release, the plaintiff reduces his or her recovery against a non-settling joint tortfeasor by the amount of consideration paid for the release."[193] Clearly, the *Restatement (Third), Apportionment*'s theory, that the contract is conclusive, contradicts Pennsylvania law.

Pennsylvania recognizes the risks involved in certain settlements and the inherent bias on the part of the insurance companies and defendants. The legislature has, therefore, provided: "No person whose interest is or may become adverse to a person injured who is confined to a hospital . . . shall, within 15 days after the date of the occurrence causing injury to such patient: negotiate . . . a settlement . . . [or] obtain . . . a general release of liability from such patient."[194] The Reporters apparently did not consider Pennsylvania's statutory law on this subject.

The best way to deal with the contractual provisions of the *Restatement (Third), Apportionment* is to delete them; the Reporters have attempted a restatement of tort, not contract. Failing this, a provision should be inserted in

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presented to the court was whether "the [settlement] agreements entitle the plaintiffs to indemnification against the claims of the third-party plaintiffs in the CERCLA litigation." *Id.* at 1411.

190 *Id.* at 1415.

191 522 A.2d 1 (Pa. 1987).

192 *Id.* at 3. While entering a Giant Eagle Market retail store, plaintiff was injured when he slipped and fell. *See id.* at 2. Plaintiff settled with Giant Eagle for $22,500. *Id.* The jury returned a verdict for $31,000, and apportioned fault to Giant Eagle at sixty percent and Stanley Magic Door at forty percent. *Id.* Stanley argued that paying plaintiff's their proportionate share would result in a windfall to the plaintiff and argued their proportionate share should be reduced by the amount that Giant Eagle's settlement exceeded that defendant's sixty percent apportionment. *Id.* The court rejected that argument. *Id.* at 4.

193 Baker v. AC&S Inc., 729 A.2d 1140, 1147 (Pa. Super. Ct. 1999).

194 42 PA. CONS. STAT. ANN. § 7101 (West 1998).

sections 2, 26, 32, 33, 40, and 41, stating that the amount offered in the settlement can always be weighed to evaluate whether the settlement was fair.[195]

C. Section 3: Plaintiff's Negligence Defined

Section 3 is misleading because it states the opposite of the black letter law. The language of the Restatement states that the plaintiff will be judged on "the standard to which the plaintiff should conform."[196] The comments, in stark contrast, completely equate the standard of the defendant with the standard of the plaintiff.[197]

Several cases have suggested that the plaintiff's negligence, because she has failed to take care for herself, differs from the defendant's negligence, which is a failure to take care in regard to others.[198] Professor Wright argues:

> Plaintiffs, having exposed themselves rather than others to a risk of injury, were (and are) held to a more lenient standard of care than defendants. Plaintiffs were almost always allowed to get to the jury on the issue of contributory negligence.... [T]he jury, when appropriate, would refuse to find contributory negligence even when it actually existed and instead would reduce the plaintiff's damages by taking into account his relative degree of responsibility.[199]

In contrast, Section 3 provides that "[u]nder the rule stated in this section, the formal standard of negligence employed to evaluate a plaintiff's conduct is the same standard of negligence employed to evaluate a defendant's conduct."[200] This means, in practical application, comparative fault will often be applied in

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195 *See supra* notes 185-94. For a more complete discussion of section 40, see *infra* Part III.I.

196 RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 3, at 33 (Proposed Final Draft (Revised), 1999). This section is intended to both draw upon and replace RESTATEMENT (SECOND) OF TORTS § 463 (1965). *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 3 cmt. a, at 34. However, it is not intended to "define the standard under which a party is judged to be negligent." *Id.*

197 *Id.* at 34, 40. Indeed, the Reporters state that the "standard of negligence employed to evaluate a plaintiff's conduct is the same as the standard of negligence employed to evaluate a defendant's conduct." *Id.* at 34 (citing RESTATEMENT (SECOND) OF TORTS §§ 282-328 (1965)).

198 *See* KEETON ET AL., *supra* note 2, § 65, at 453-55, and cases cited therein. Identical conduct should not be demanded from the plaintiff and the defendant because there is too much variation in what one could reasonably expect from one to the other. *See id.* at 454. For example, "the greater number of courts have recognized that a passenger in an automobile is entitled to rely upon the driver, and may take and keep his eyes off of the road, and may even go to sleep, where it is quite clear that the driver cannot reasonably do either." *Id.* at 454-55 (citations omitted).

199 Wright, *supra* note 5, at 1157.

200 RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 3 cmt. a, at 31 (Proposed Final Draft, 1998).

situations where it had not been applied in the past because the court did not think the plaintiff's negligence was of the same magnitude as the defendant's negligence.

The distinction between the fault of the plaintiff and that of the defendant is so obvious that Harper and James suggested that there should be two different standards, one for plaintiffs and one for defendants.[201] This approach has not been formally adopted, however, and few courts have even commented on the issue.[202]

However, the courts, although not developing separate standards for each, nevertheless treat plaintiffs differently from defendants. In the products area, the courts give the plaintiff a substantial benefit through the strict liability cause of action. Prosser explains this by saying that the "defendant may have more information than the plaintiff as to risk, or . . . the enterprise in which he is engaged may be required to obtain [such information]; or the risk of harm to others may be more apparent . . . than the risk to the actor himself."[203]

Throughout the *Restatement (Third), Apportionment*, the Reporters equate the fault of the plaintiff with that of the defendant and treat the fault of each the same.[204] In order to propel the *Restatement (Third), Apportionment*'s linchpin concept of micro-balancing of responsibility, such equal treatment is necessary.[205] Thus, plaintiffs and defendants must be treated the same in order to allow this micro-balancing concept to flourish in the later sections.

Equating the fault of the plaintiff with the fault of the defendant misstates the trial process and will mislead the jury. As indicated above, often the negligence of the plaintiff is not the same as that of the defendant. It varies in kind, perception, and application. The plaintiff may not understand the setting,

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[201] 2 FOWLER V. HARPER & FLEMING JAMES, JR., LAW OF TORTS § 22.10 (1956) (concluding that because of so much differentiation in decisions concerning plaintiff and defendant negligence, there should be a separate standard for each); *see also* KEETON ET AL., *supra* note 2, § 65, at 455.

[202] *See* KEETON ET AL., *supra* note 2, § 65, at 453-56. Only *Peterson v. Campbell*, 434 N.E.2d 1169, 1172 (Ill. 1982), is cited for the proposition that there ought to be separate standards for plaintiff and defendant negligence. *See* KEETON ET AL., *supra* note 2, § 65, at 455 n.41.

[203] KEETON ET AL., *supra* note 2, § 65, at 455.

[204] *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 1 cmt. a, at 1 (Proposed Final Draft (Revised), 1999). The Reporters state that applying the same standards to both plaintiffs and defendants will promote the reduction of "practical problems" and "conceptual tensions" associated with applying "different apportionment rules to different parts of a multi-party, multi-theory lawsuit." *Id.* at 2.

[205] *See id.* cmt. a, at 2; *id.* cmt. b, at 2-7. The Reporters prefer the word "responsibility" to "fault." This allows them to suggest that strict liability and intent on the part of the defendant can be weighed against plaintiff's negligence. *See id.*; *see also id.* § 8 cmt. a, at 116.

may lack insurance, rarely has legal sophistication, and is often underfunded.[206] The best solution is to reject the suggested equality between actor and victim and the concept of micro-balancing of responsibility, then to remove them both from the *Restatement (Third), Apportionment.*

The Pennsylvania courts have not faced this issue directly, but there is language suggesting that Pennsylvania draws a clear distinction between the standard for the defendant and the standard for the plaintiff. For example, Pennsylvania gives plaintiffs the benefit of strict liability in products cases to ensure that the loss rests upon the seller.[207]

D. Section 4: Proof of Plaintiff's Negligence and Legal Causation

Section 4 provides that the defendant must "prove the plaintiff's negligence . . . . [And the defendant must prove] that the plaintiff's negligence . . . was a legal cause of the plaintiff's damages."[208] This is a clear statement that the defendant has the burden of proving the plaintiff's negligence. However, the section is likely to provoke much additional litigation because it relies on the concept of "legal cause,"[209] which is the *Restatement (Third), Apportionment*'s phrase for proximate cause, and proximate cause is the most challenging concept in tort law.[210] The comment to section 4 is important in that it provides that the defendant, once having shown the plaintiff's negligence, has no burden of proving the particular percent of negligence on the part of the plaintiff, for purposes of allocation. Therefore, the jury can decide a critical question, the amount of the plaintiff's recovery, based on whim. In practical application, this speculation will be injurious to plaintiffs, reducing their recovery by an indeterminate percentage without the necessity of proof to support such a reduction. A better approach would be to require the defendant to show the percent to which the plaintiff was negligent.[211]

The "lost chance" doctrine provides a reason for the existence of section 4. Comment (f) provides: "[w]here the harm for which the plaintiff seeks to

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206 *See* Wright, *supra* note 5.

207 *See* Baker v. AC&S Inc., 729 A.2d 1140, 1149 n.26 (Pa. Super. Ct. 1999) (citing Walton v. Avco Corp., 610 A.2d 454 (Pa. 1992)).

208 RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 4, at 54. The defendant can use circumstantial evidence, statute, regulations, and custom to prove plaintiff's negligence. *See id.* cmt. b, at 56.

209 *Id.* cmt. a, at 55.

210 See Frank J. Vandall, *Constructing a Roof Before the Foundation is Prepared: The Restatement (Third) of Torts: Products Liability Section 2(b) Design Defect*, 30 U. MICH. J.L. REFORM 261, 278 (1997).

211 *See* KEETON ET AL., *supra* note 2, § 67, at 474. Currently, only Nebraska and South Dakota follow this form of apportionment and contributory negligence. *See id.*

recover is the lost chance itself, the plaintiff's negligence in causing the loss of chance reduces the plaintiff's recovery."[212] Lost chance deals with the case, for example, where a doctor fails to detect what becomes terminal cancer in a patient.[213] If the patient would have had a twenty-five percent chance of living longer with a careful diagnosis, can she recover from the defendant doctor for the lost chance? Lost chance has been irksome to the medical community and the Reporters are apparently laying a foundation for an attack on the concept.

Pennsylvania adopted the lost chance concept in the 1978 case of *Hamil v. Bashline*.[214] The *Hamil* court held: "Once a plaintiff has introduced evidence that a defendant's negligent act . . . increased the risk of harm to a person in plaintiff's position . . . it becomes a question for the jury as to whether or not that increased risk was a substantial factor in producing the harm."[215] The physician's act does not have to be the *sole cause* of the patient's injury.[216] Three years after *Hamil*, the Pennsylvania Supreme Court revisited the lost chance doctrine, refining its requirements by concluding that establishment of a prima facie case required a "medical opinion that . . . [the] defendant's conduct increased the risk of the harm actually sustained."[217] Following these decisions, Pennsylvania courts continue to "grapple[ ] with the application of the lost chance recovery in the context of common law principles of causation."[218]

Comment (f) is substantive law and has no place in the *Restatement (Third), Apportionment*, a procedural document. Also, the Reporters fail to suggest how a plaintiff might be negligent in a lost chance case.

E. Section 5: Negligence Imputed to a Plaintiff

Section 5 provides that "[a] plaintiff is vicariously responsible for the negligence of another person whenever the plaintiff would have been

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212 RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 4 cmt. f, at 59.

213 *See id.* illus. 7, at 60.

214 392 A.2d 1280 (Pa. 1978).

215 *Id.* at 1286.

216 *See id.* at 1289. The court determined that the *Restatement (Second) of Torts*, § 323(a) (1965), permitted the plaintiff's case to go to the jury on a lesser showing of proof. *See Hamil*, 392 A.2d at 1289; *see also* Robert Marc Chemers & Robert J. Franco, *The Lost Chance Doctrine Could Bring Recovery for the Increased Risk of Harm*, CBA RECORD, Apr.-May 1991, at 27, 28. Therefore, "a *prima facie* case is made by establishing that the defendant's conduct increased the risk of harm to another." *Id.* at 28.

217 Jones v. Montefiore Hospital, 431 A.2d 920, 924 (Pa. 1981). Plaintiff in this case brought a medical malpractice suit against her physicians for failure to diagnose breast cancer. *Id.* at 922.

218 Chemers & Franco, *supra* note 214, at 28.

vicariously responsible as a defendant" for that person's negligence.[219] The Reporters provide the example of the employer-employee relationship.[220] The negligence of the employee in driving an employer-owned truck is imputed to the employer plaintiff; however, the driver's negligence is not imputed to the non-employee passenger who sues.[221] According to the comments, the negligence of a parent is not imputed to a child.[222]

Numerous jurisdictions provide that the owner of a car is responsible for the negligence of the driver.[223] This theory, known as the family purpose doctrine, was developed to provide deep pockets in order to allow people injured by the negligent driver to recover.[224] The doctrine is rejected in the *Restatement (Third), Apportionment.*[225] More than mere ownership of the car is required on the part of the defendant for her to be held responsible.[226] The only apparent purpose for this exclusion is to protect the assets of the defendant's insurance company. After all, the car owner would not have been sued unless she had had sufficient insurance. The automobile owner purchased insurance to provide a fund for the injured motorist. Section 5 allows the insurance company to keep the premium and the fund. This windfall for the insurance company runs counter to logic, and rejects fifty years of legislative

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219 RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 5, at 70 (Proposed Final Draft (Revised), 1999). This is the adoption of the "both ways" rule. *Id.* cmt. b, at 70. Typically, the situations in which the negligence of one would be imputed to another are in the employment arena, in which an employee's negligence is imputed to the employer; in a "joint enterprise"; and, in limited circumstances, in situations involving independent contractors. *Id.*

220 *See id.* at 70-72. The Reporters make the distinction that if one would not normally be vicariously liable for another's conduct, then they will not, on the basis of the new rule alone, be liable. *See id.* § 5 reporters' note cmt. b, at 74. Therefore, the negligence of spouses, children, parents, bailees, bailors, and drivers of automobiles would not be imputed to the plaintiff to bar plaintiff's recovery. *See id.* at 75.

221 *See id.* § 5 cmt. b, at 70. Originally, some jurisdictions imputed the negligence of a driver onto the passenger where the passenger was suing a third party. *See id.* reporters' note cmt. b, at 75. It is further noted that "[r]ecent decisions have uniformly rejected [that] doctrine[]." *Id.*

222 *Id.* § 5 cmt. b, at 71. *But see id.* § 5 reporters' note cmt. b., at 75 (citing Orr v. First Nat'l Stores, Inc., 280 A.2d 785 (Me. 1971) (retaining imputed plaintiff's negligence for the parent/child relationship)); *see also infra* Part III.F.

223 For example, Florida has determined that an automobile is a "dangerous instrumentality"; therefore, liability of the driver will be imputed to the owner. *See* KEETON ET AL., *supra* note 2, § 73, at 524. Other states, including Arizona, Colorado, Connecticut, Georgia, Nebraska, New Mexico, North Carolina, North Dakota, Oregon, South Carolina, Washington, and West Virginia have accomplished the same effect through the implementation of the family purpose doctrine. *See id.* n.15. Additionally, other states have accomplished owner liability through automobile consent statutes. *See id.* at 527. Michigan, Connecticut, Minnesota, New York, Iowa, Idaho, Nevada, and California have such statutes. *See id.*

224 *See id* at 524.

225 RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 5 cmt. c, at 73.

226 Section 5 does not allow a driver's negligence to be imputed to the owner solely based on ownership or consent to use. *See id.*

and judicial advancement in the development of the family purpose doctrine.[227] Quite simply, under the *Restatement (Third), Apportionment*, many automobile collision victims will not be able to recover for their injuries if the driver is judgment-proof, regardless of who owns the car. Section 5 is strong evidence that a primary purpose of the *Restatement (Third), Apportionment* is protection of the insurance industry's assets.

Pennsylvania accomplishes the goal of the family purpose doctrine by presuming that a driver has the consent of the owner to use the vehicle and placing the burden of disproving the presumption of consent upon the owner.[228] This is an expansion of the long-standing Pennsylvania presumption that a commercial vehicle involved in an accident was being used in the course of business, with the burden to prove otherwise placed on the owner.[229]

F. Section 6: Negligence Imputed to a Plaintiff When the Plaintiff's Recovery Derives from a Claim That the Defendant Committed a Tort Against a Third Person and in Claims Under Survival Statutes

Section 6 will be enormously important in automobile collision cases. The section applies in survival and wrongful death claims and states that any negligence of the decedent driver will reduce the recovery by the spouse or child of the driver.[230] For example, if the wife was the driver of the automobile, her negligence is imputed to persons seeking recovery under a wrongful death statute for support, grief, lost consortium, lost inheritance, or other injury.[231] This means that the husband's or child's claims against the driver of the other car will be reduced by the negligence of the wife.[232]

Under the concept of comparative fault, this seems to be a fair approach. That is, a claimant should not be able to recover one-hundred percent when the wife-driver of the car was negligent to the extent of perhaps seventy-five

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227 *See supra* note 213.

228 *See* Bechler v. Oliva, 161 A.2d 156, 158 (Pa. 1960) (reiterating the holding of Waters v. New Amsterdam Cas. Co., 144 A.2d 354, 356-57 (Pa. 1958) (holding that "ownership of a non-commercial automobile raised a presumption that the use of the vehicle was with the permission of the owner," the effect of which "require[s] the defendant to come forward with credible evidence" to rebut the presumption)).

229 *See Waters*, 144 A.2d at 356 (citing Commonwealth v. Wucherer, 41 A.2d 574 (Pa. 1945); MacDonald v. Pennsylvania R. Co., 36 A.2d 492 (Pa. 1944); Watkins v. Prudential Ins. Co., 173 A. 644 (Pa. 1934)).

230 RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 6 & cmts., at 78-80.

231 *See id.* cmt. c, at 79. Further illustrations include a situation where a child (A) is driving and his father (B) and brother (C) are passengers. A's car collides with a third party's car (D), killing B. If A and C sue D, A's negligence affects his recovery but does not affect C's recovery. *See id.* illus. 3, at 80-81.

232 *See id.* cmt. c, at 79-80.

percent. However, some jurisdictions have not followed the approach of imputing the negligence of the driver to the members of the family who seek to recover.[233] In these jurisdictions, it may be important whether the plaintiff is claiming under the wrongful death act or a survival statute. Under the survival act, the negligence of the driver is uniformly imputed to the claimants,[234] but the driver's negligence is not always imputed under wrongful death acts.[235]

G. *Section 7: Effect of Plaintiff's Negligence When Plaintiff Suffers an Indivisible Injury*

The old rule was that if the plaintiff was a scintilla negligent, it was a complete bar to her claim.[236] Section 7 is a keystone provision because it eliminates contributory negligence as a complete bar and instead substitutes comparative fault.[237] It allows the plaintiff to recover even though her negligence is fifty percent or greater.[238] To that extent it adopts the pure form and rejects the modified form of comparative fault.[239]

The adoption of comparative fault in place of contributory negligence has two opposing implications for the plaintiff. First, it means that a plaintiff cannot be barred merely because she was partially negligent. However, it also means that the recovery for the plaintiff is not one-hundred percent or nothing. Rather, the recovery will be reduced in proportion to the plaintiff's negligence. This outcome will have a substantial impact on settlements as well as on litigation, because during the settlement process the defendant will argue that the plaintiff's negligence was ninety percent, for example, while the plaintiff will argue that her negligence was only twenty percent. To that extent, it gives the defendant leverage. However, the plaintiff can go forward to trial if she wishes, and can argue in the settlement process that the jury may well find that the plaintiff's negligence was only ten percent and therefore the settlement figure should be ninety percent.

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233 *See* KEETON ET AL., *supra* note 2, § 127, at 958. *But see* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 6 reporters' note cmt. c, at 84 (indicating that "nearly all courts" hold otherwise).

234 *See* KEETON ET AL., *supra* note 2, § 127, at 958.

235 *See id.* at n.50.

236 *See id.* § 65, at 461. Many legislatures and courts have now changed this rule and have adopted some form of comparative fault, including Pennsylvania. *See id.* § 67, at 471.

237 RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 7 & cmt. a, at 86-87.

238 *See id.* cmt. a, at 87. The Reporters note that section 7 is meant to apply where there has been a violation of a statute, ordinance, or regulation (unless the purpose of the rule is to impute complete liability to the party), *see id.* cmt. d, at 87, and where there is an indivisible injury. *See id.* cmt. e, at 88.

239 *See id.* cmt. a, at 87.

This section is favorable to plaintiffs in that it adopts pure comparative fault. This system results in fewer appeals of the jury determination because many appeals in modified comparative fault jurisdictions regard as determinative the issue of whether the plaintiff's negligence was forty-nine percent or fifty percent.[240] The Reporters state that only four states and the District of Columbia retain contributory negligence as a complete bar.[241]

Section 7 of the *Restatement (Third), Apportionment* is contrary to Pennsylvania law. Pennsylvania adopted the modified form of comparative fault by statute.[242] Section 7102 of the Pennsylvania Code provides:

> In all actions brought to recover damages for negligence resulting in death or injury to person or property, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or his legal representative where such negligence was not greater than the causal negligence of the defendant or defendants against whom recovery is sought, but any damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.[243]

This is the only instance where the *Restatement (Third), Apportionment*'s variation from Pennsylvania law is beneficial to the plaintiff.

H. Section 8: Factors for Assigning Shares of Responsibility

Weighing factors is essential to the Reporters' master plan: "the mandate of comparative responsibility is that the factfinder should roughly compare the relative responsibility of all actors who contributed to an injury."[244] Section 8 sets out four factors that are to be considered in assigning shares of responsibility.[245] Simply stated, shares of responsibility are what each party

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240 *See* KEETON ET AL., *supra* note 2, § 67, at 473.

241 Alabama, Maryland, North Carolina, Virginia, and the District of Columbia consider contributory negligence to be a complete bar to recovery. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 7 reporters' note cmt. a, at 97.

242 *See* 42 PA. CONS. STAT. ANN. § 7102(a) (West 1982 & Supp. 1993).

243 *Id.*; *see also* Rutter v. Northeastern Beaver County Sch. Dist. 437 A.2d 1198, 1210 n.6 (Pa. 1981) (holding that abolishment of assumption of risk doctrine is appropriate in light of the adoption of comparative negligence in Pennsylvania); Fish v. Gosnell, 263 A.2d 104, 108 (Pa. Super. Ct. 1983).

244 RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 8 reporters' note cmt. c, at 121.

245 The four factors are

> (a) factors necessary to determine whether a person is liable; (b) the character and nature of each person's risk-creating conduct; (c) the causal connection between the risk-creating conduct and the harm; and (d) each person's actual awareness, intent, or indifference with respect to the risk created by the conduct.

will pay. Calculating this is far from simple, however. How can a jury effectively compare apples and oranges by assigning shares to plaintiffs and defendants?[246] How, for example, can a jury compare strict liability with negligence? Section 8 adopts the conclusion that juries and courts are capable of accomplishing this daunting task.[247] Dean Wade has argued that juries just close their eyes and do it.[248] This section requires the courts and juries to compare intent, negligence, and strict liability on the part of various parties. It rejects the term "comparative fault" and instead adopts the term "comparative responsibility."[249] The Reporters propose that the jury assign shares of responsibility rather than compare incommensurate concepts such as negligence and strict liability.[250]

The basic concept in this section is that courts, juries, and others should look at various factors in deciding on proportionate allocation. The courts likely will not be caught up in the specific language of the four factors because the language is vague and not helpful. Instead, the courts will consider various factors in assigning the proportionate allocation to each party, with the specific factors to consider emerging from the facts of each case.[251] Section 8 is misleading in stating that the jury will assign the share. Most cases are settled and never reach the jury.[252]

Id. § 8, at 115-16.

[246] *See* John W. Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 15 (1965); John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 835, 837 (1973).

[247] RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 8 cmt. a, at 116.

[248] *See generally* John W. Wade, *Products Liability and Plaintiff's Fault—The Comparative Fault Act*, 29 MERCER L. REV. 373 (1978).

[249] RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 8 cmt. a, at 116.

[250] *See id.* This is the primary impetus behind the Reporters' desire to use the term "proportionate allocation" as that term conveys the task of assigning rather than comparing. *Id.*

[251] *See* Wade, *Strict Tort Liability of Manufacturers*, *supra* note 246, at 17. In determining the safety of a product, Wade argues that a standard should be used that determines whether the elements of negligence are present. *Id.* Factors that should be considered are:

> (1) the usefulness and desirability of the product, (2) the availability of other and safer products to meet the same need, (3) the likelihood of injury and its probable seriousness, (4) the obviousness of the danger, (5) common knowledge and normal public expectation of the danger (particularly for established products), (6) the avoidability of injury by care in use of the product (including the effect of instructions or warnings), and (7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive.

Id. While these factors are helpful for judges, Wade suggests that a jury should be told that its negligence decision should be based on "what a reasonably prudent man would do under the same or similar circumstances." *Id.*

[252] *See* Thomas A. Eaton & Susette M. Talarico, *A Profile of Tort Litigation in Georgia and Reflections on Tort Reform*, 30 GA. L. REV. 627, 654 (1996).

Section 8 applies the "proportional allocation" concept even when the defendant's conduct is governed by a strict liability standard.[253] Therefore, this section removes the traditional argument that the plaintiff's negligence cannot be compared to the strict liability of the defendant.[254] Therefore, plaintiffs will recover less in strict liability products cases, and some cases will be lost. Contrary to *Restatement (Third), Apportionment*, numerous states refuse to permit the plaintiff's negligence to be weighed against strict liability in a products case, on the basis that the plaintiff's negligence is qualitatively different from strict liability.[255]

Pennsylvania law follows joint and several liability, and therefore, weighing a list of factors is irrelevant.[256] However, under comparative fault, Pennsylvania permits causal negligence to be weighed for contribution among tortfeasors. The Pennsylvania comparative fault statute provides:

> Where recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio or the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed. The plaintiff may recover the full amount of the allowed recovery from any defendant against whom the plaintiff is not barred from recovery. Any defendant who is so compelled to pay more than his percentage share may seek contribution.[257]

In a strict liability products case, Pennsylvania does not permit recovery to be reduced because of the negligence of the plaintiff.[258] The superior court

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253 RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 8 cmt. a, at 116.

254 *See id.* This is accomplished by the discussion of terminology. The Reporters state that the use of terms like comparative fault and comparative negligence are not adequate because some causes of action, like strict liability, "are not based on negligence or fault." *Id.*

255 Colorado, Oklahoma, Washington, and California are among the states that have held that a "user's fault" cannot be compared with a "maker's fault" because it "would undermine the strict products liability goal of encouraging manufacturers to anticipate and protect against consumer negligence." KEETON ET AL., *supra* note 2, § 67, at 478 & n.93.

256 *See* Baker v. AC&S, Inc. 729 A.2d 1140, 1147, 1152 (Pa. Super. Ct. 1999).

257 42 PA. CONS. STAT. ANN. § 7102 (b) (West 1982); *see also Baker*, 729 A.2d at 1150.

258 *See* Parks v. AlliedSignal, Inc., 113 F.3d 1327, 1333 (3d Cir. 1997) ("Pennsylvania has determined that it is economically and socially desirable to hold manufacturers liable for accidents caused by their defective products, without introducing negligence concepts of comparative fault that would weigh the manufacturer's negligent conduct against that of the injured product user.") (citation omitted); Kimco Dev. Corp. v. Michael D's Carpet Outlets, 637 A.2d 603, 606-07 (Pa. 1993) (holding that strict liability is premised on the concept of "liability for casting a defective product into the stream of commerce," and that the "deterrent effect of imposing strict product liability standards would be weakened" if actions could be defeated or recoveries reduced by comparative fault concepts); McCown v. International Harvester Co., 342 A.2d 381,

recently held that "in strict liability cases ... liability is allocated equally among responsible tortfeasors, without regard to fault."[259] The reason is "to place inevitable financial burdens on those best positioned to bear them."[260] The *Restatement (Third), Apportionment*, section 8, is therefore contrary to Pennsylvania products liability law. Additionally, the court in *Walton v. Avco Corp.*[261] held that comparative fault principles had no place in strict liability cases.[262] The court stated that adopting the *Restatement (Second) of Torts* section 402A in *Webb v. Zern*[263] meant that the Pennsylvania consumers were provided with "an equitable avenue of recovery based on damage-causing defects without regard to fault. Manufacturers are held as guarantors upon a finding of defect and causation."[264]

Section 8 should be challenged because it is contrary to the concept behind strict liability in products cases, which is to place the loss on the manufacturer or seller. Placing any portion of the loss on the consumer does little to reduce injuries. In allowing previously inadmissible evidence of the plaintiff's negligence to be considered by the jury, section 8 turns the trial process upside down. The Reporters ask the courts to set aside well-developed rules of evidence, to be replaced by the mere whim of the jury. Section 8 provides:

> [A]ny evidence that is relevant to an evaluation of the actor's basic culpability and the causal connection between the tortious act and the plaintiff's injury is relevant to the factfinder's task of assigning percentages of responsibility, even if the evidence is not necessary to prove the existence of the underlying claim or defense.[265]

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382 (Pa. 1975) (disagreeing with defendant's argument that the plaintiff's contributory negligence should be considered in a products liability action and stating that it would be unwise to "create a system of comparative assessment of damages for [RESTATEMENT (SECOND) OF TORTS §]402A actions").

259 *Baker*, 729 A.2d at 1148.

260 *Id.* at 1149 n.26. A challenge might be made to the Reporters to delete the words "strict liability" from section 8 so that strict liability cannot be compared to negligence. This would help to bring the *Restatement (Third), Apportionment* into line with Pennsylvania law.

261 610 A.2d 454 (Pa. 1992). The case arose after the crash of a helicopter. *See id.* at 456. The helicopter manufacturer was found to be strictly liable. *See id.* at 457. Additionally, the court determined that comparative fault concepts could not be commingled with strict liability theory. *See id.* at 462.

262 *Id.* at 462.

263 220 A.2d 853, 854 (Pa. 1966) (adopting strict liability under RESTATEMENT (SECOND) OF TORTS § 402A (1965)).

264 *Walton*, 610 A.2d at 462 (citing Azzarello v. Black Bros. Co., 391 A.2d 1020 (Pa. 1978); Berkebile v. Brantly Helicopters Corp., 337 A.2d 893 (Pa. 1975); Salvador v. Atlantic Steel Boiler Co., 319 A.2d 903 (Pa. 1974); Webb v. Zern, 220 A.2d 853 (Pa. 1966)). Additionally, the *Walton* court noted that introducing comparative fault concepts into strict liability cases "would serve only to muddy the waters." *Walton*, 610 A.2d at 462.

265 RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 8 reporters' note cmt. c, at 123

The Reporters use strict products liability as an example:

> One example of this problem is strict liability for manufacturing defects .... The plaintiff is ... relieved of the necessity of proving fault to prove that the product was defective, but the defendant can introduce evidence relating to the absence of fault to reduce its percentage of responsibility.[266]

This is legal heresy. The rules of evidence were developed over hundreds of years in order to provide a just and predictable venue for trying cases.[267] The Reporters are asking that history and the precise rules of evidence be set aside so that an occasional defendant will pay less. The Reporters' suggestion is heresy because it violates the rules of evidence. They urge that material that is unrelated to the "claim or defense" should now be admitted to prove the actor's "culpability."

Setting aside the rules of evidence will lead to confusion for attorneys, judges, and juries. The attorneys will not be sure how the evidence will be used and the juries will not know whether the evidence can be considered and for what purposes. This confusion likely will turn the trial into a farce. More cases will be appealed and reversed. In the strict liability example presented by the Reporters, the jury might become confused and think that the plaintiff must show negligence in order to win, which would defeat the entire purpose of the strict liability doctrine. Thus, the plaintiff would lose when she should have won.

The solution to this serious flaw is simple. All mention of considering evidence that is irrelevant to the claim must be deleted from the discussion and comments to section 8. Indeed, no law is cited to support the Reporters' radical suggestion to permit the jury to consider irrelevant evidence.[268] It is pure tort reform.

(Proposed Final Draft, 1998); *cf.* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 8 reporters' note cmt. c, at 121 (Proposed Final Draft (Revised), 1999).

[266] RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 8 cmt. c, at 124 (Proposed Final Draft, 1998); *see also* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT § 8 cmt. c, at 122 (Proposed Final Draft (Revised), 1999) (restating this idea in only slightly modified form).

[267] *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 1-2 (1995).

[268] *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 8 cmt. c, at 123 (Proposed Final Draft, 1998). The Reporters state that "any evidence that is relevant to an evaluation of an actor's basic culpability and the causal connection between the tortious act and the plaintiff's injury is relevant to the factfinder's task of assigning percentages of responsibility." *Id.*

Following the ALI's approval of the *Restatement (Third), Apportionment*, section 8 was changed.[269] The changes do not alter the most serious flaws in section 8, however. After the post-approval changes, negligence can still be compared with strict liability and inadmissable evidence can still be used to decide the amount each party should pay. The Reporters' comment states: "In addition to any matter admissible to prove an underlying claim or defense, relevant factors for assigning percentages of responsibility include . . . ."[270]

Pennsylvania allows the jury to consider only evidence that is relevant to the claim. In *Vockie v. General Motors Corp.*,[271] the plaintiff sued General Motors for damages resulting from a failure of the engine mounts.[272] In determining whether evidence concerning the engine mounts and specifications of other GM cars was admissible, the court stated that "[a]dmissibility is not a fixed concept. First the relevance of the offered evidence must be considered."[273] Additionally, the court stated that the determination of admissibility did not end with relevancy.[274] The evidence could still be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."[275] In this case, the court found that the evidence sought to be admitted was "overly broad" and "contained irrelevant material whose potential for confusion and prejudice far outweighed any possible probative value."[276]

Similarly, in *Duchess v. Langston Corp.*,[277] a worker brought a products liability suit after losing some of his fingers while working with a machine owned by the defendant.[278] The defendant attempted to admit the product manual into evidence and the court stated that "[s]ince Mr. Duchess had not read the manual, the manual was not relevant to this accident. By suggesting that the manual would have prevented these injuries, appellee opened the door

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269 American Law Inst., *Restatement Third, Torts: Apportionment of Liability, Revision of § 8* (visited Aug. 27, 1999) <http://207.103.196.3/ali/1999_sec8_Revised_Txt.htm>.

270 *Id.*

271 66 F.R.D. 57 (E.D. Pa. 1975), *aff'd*, 523 F.2d 1052 (3d Cir. 1975).

272 *Id.* at 59.

273 *Id.* at 60 (citing FED. R. EVID. 401, which states that "[r]elevant evidence means evidence having any tendency to make existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence").

274 *See id.*

275 *Id.* (Citing FED. R. EVID. 403).

276 *Id.*

277 709 A.2d 410 (Pa. Super. Ct. 1998).

278 *Id.* at 411.

to the evidence, which was not otherwise admissible."[279] Thus, section 8 is in conflict with the accepted law of Pennsylvania.

I. Section 40: Definition and Effect of Settlement

The Reporters argue that settlement agreements and releases are contracts and as such are subject only to contract law.[280] Thus an unfair settlement agreement, heavily biased in favor of a defendant, signed by an injured consumer, may be given effect.[281]

The Reporters make clear what a settlement will mean under the provisions of the *Restatement (Third), Apportionment*: "[w]hen a settlement is reached between the plaintiff and all potentially liable tortfeasors, there will not be the occasion for further judicial proceedings, except to the extent of interpreting the scope of the settlement."[282] The conclusion is that "[w]hen a settlement is reached between a plaintiff and a potentially liable tortfeasor that releases only the settling tortfeasor, the settling tortfeasor should ordinarily be dismissed from the law suit."[283] There is a substantial risk under the *Restatement (Third), Apportionment* that non-contracting parties may be released by the agreement. This is a grave problem for the plaintiff.[284] The comment to section 40 provides that "[w]hen a non-settling tortfeasor claims the benefit of an 'all persons' provision, contract law governs." [285]

Secret settlements called "Mary Carter agreements" have perplexed the courts.[286] These occur when one tortfeasor secretly settles with the plaintiff

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279 *Id.* at 412 (citing Jamison v. Ardes, 182 A.2d 497 (Pa. 1962); Gigliotti v. Machuca, 597 A.2d 655 (Pa. Super. Ct. 1991)); *see also* Madonna v. Harley Davidson, Inc., 708 A.2d 507, 509 (Pa. Super. Ct. 1998) (holding that in strict liability actions, a user's negligence is not relevant if the product defect contributed in any way to the resultant harm).

280 *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 40 cmt. f, at 427 (Proposed Final Draft (Revised), 1999). The Reporters state that in determining the validity of an agreement, the primary focus should be placed "on the intent of the parties to the agreement." *Id.* Additionally, the contractual concepts of fraud, duress, and mutual mistake "are grounds for rescission of a settlement agreement." *Id.*

281 *See id.* cmt. a, at 425.

282 *Id.*

283 *Id.* cmt. e, at 427.

284 *See id.* cmt. g, at 427-28. Comment (g) addresses a "frequently occurring problem" for the plaintiff, in that plaintiffs enter into releases that provide for an "all persons" release without appreciating the "language, its implications, or an intent to release all potentially liable tortfeasors, who often are unknown or unappreciated at the time the release is entered into." *Id.* at 428.

285 *Id.* The Reporters state that a nonsettling tortfeasor will be the beneficiary of the agreement only if "1) release of the nonsettling tortfeasor is appropriate to effectuate the intention of the parties and 2) the circumstances reveal that the settling tortfeasor intended that nonsettling tortfeasors be released." *Id.*

286 The term "Mary Carter Agreement" originated in *Booth v. Mary Carter Paint Co.*, 202 So. 2d 8 (Fla.

and may indeed align himself with the plaintiff against other defendants. The Reporters do not take a position in regard to Mary Carter agreements, but rather leave the issues to local law.

The settlement section contains no mention of the amount paid (satisfaction) during the settlement.[287] Many states use the amount paid by the settler as a test for the validity of the release of tortfeasors,[288] that is, the court determines whether the plaintiff received an amount that covered the appropriate share of damages.[289] The *Restatement (Third), Apportionment* shifts the scrutiny from the adequacy of satisfaction to the validity of the contract. The contract of settlement will be prepared by a defense attorney, likely hired by an insurance company, and will be carefully drafted to favor the tortfeasor rather than the injured consumer.

If the settlement agreement is held to be valid with no evaluation of the amount paid, the plaintiff may end up releasing many of the other defendants along with the defendant putting forward the offer of settlement.[290] For example, Comment (g) provides that "[w]hen a nonsettling tortfeasor claims the benefit of an 'all persons' provision, contract law governs."[291] This statement is hazardous to the victim because often she is not represented by an attorney, may be seriously injured, is in a hospital and is quite willing to accept the quick payment of a modest amount. She may be unaware of her right to a substantial recovery and may not understand the impact of the "all persons" phrase.

Dist. Ct. App. 1967). The plaintiff's wife died in an automobile accident and he entered into a secret settlement agreement with two of the four defendants. *See id.* at 10. Scholars have identified three distinct components to Mary Carter agreements: the settling defendant agrees to remain a party in the litigation, the agreement is kept secret, and the plaintiff is guaranteed to receive a given sum, provided she fails to recover the sum from other defendants after "appropriate attempts." Pat Shockley, *The Use of Mary Carter Agreements in Illinois*, 18 S. ILL. U. L.J. 223, 225 (1993). Pennsylvania allows the use of Mary Carter Agreements and recently held that the "court, as with all proffered evidence, should review the agreement, balance the relevancy of it against the potential prejudice, and, exercising judicial discretion, admit or exclude as much as it deems appropriate." Hatfield v. Continental Imports, Inc., 610 A.2d 446, 452 (Pa. 1992). For a short discussion of the *Hatfield* case, see Shockley, *supra*, at 240-41.

287 RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 40 & cmts., at 425-31.

288 It appears that the most "desirable" rule would be "that a plaintiff should never be deprived of a cause of action against any wrongdoer when the plaintiff has neither intentionally surrendered the cause of action nor received substantially full compensation." KEETON ET AL., *supra* note 2, § 49, at 335. Additionally, it is noted that only where a plaintiff has received full satisfaction should no other claims remain. *See id.* Prosser and Keeton cite case law from the District of Columbia, Montana, New Hampshire, Minnesota, Indiana, California, Colorado, and Maryland for support of these propositions. *See id.* at 35 nn.36-37.

289 *See* KEETON ET AL., *supra* note 2, § 49, at 332-36; *see also supra* notes 185-94 and accompanying text.

290 *See* KEETON ET AL., *supra* note 2, § 49, at 332.

291 RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 40 cmt. g, at 428.

Pennsylvania rejects the anti-justice provisions of section 40, holding that contract law does not absolutely control a release, and that the amount paid, as well as the overall fairness of the agreement, may be considered in deciding whether the agreement should be given effect. For example, in *Lanci v. Metropolitan Insurance Co.*,[292] the Pennsylvania Superior Court set aside a general release because the insurance carrier prepared the release knowing that the plaintiff was mistaken about the policy limit.[293] Additionally, in *Three Rivers Motors Co. v. Ford Motor Co.*,[294] the court held that the intentions of the parties, as provided by the language of the release, was the governing rule in the construction of releases.[295] Citing *Three Rivers* as Pennsylvania Law on release, and *Tigg Corp. v. Dow Corning Corp.*[296] for the proposition that other factors may be examined in addition to the express terms of a contract, the federal district court in *Lyncott Corp. v. Chemical Waste Management, Inc.*[297] found that an indemnity provision was neither expressly nor impliedly present in a settlement agreement.[298]

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[292] 564 A.2d 972 (Pa. Super. Ct. 1989).

[293] *Id.* at 975.

[294] 522 F.2d 885 (3d Cir. 1975).

[295] *Id.* at 892 (citing Evans v. Marks, 218 A.2d 802 (Pa. 1966)); *see also* Bainsville v. Hess Oil V.I. Corp., 837 F.2d 128, 130 (3d Cir. 1988) (standing for the proposition that the parties' mutual interest, as reflected in the contract language, is the rule in construing the effect of indemnity contracts); Mellon Bank, N.A. v. Aetna Bus. Credit, Inc., 619 F.2d 1001, 1011 (3d Cir. 1980) (holding that where contract terms are ambiguous, the court must consider the words of the agreement as well as alternative meanings); Z & L Lumber Co. v. Nordquist, 502 A.2d 697, 700 (Pa. Super. Ct. 1985) (same).

[296] 822 F.2d 358, 363 (3d Cir. 1987) ("The contract of the parties is not to be found in its express terms alone but includes their bargain in fact as found in their language or by implication from other circumstances."). *But see* Hutchison v. Sunbeam Coal Corp., 519 A.2d 385, 388 (Pa. 1986) ("The law will not imply a different contract than that which the parties have expressly adopted. To imply covenants on matters specifically addressed in the contract itself would violate this doctrine.").

[297] 690 F. Supp. 1409 (E.D. Pa. 1988).

[298] *Id.* at 1415. For general information on the choices of releases available in the state of Pennsylvania, see Gerald A. McHugh, Jr., *Joint Tortfeasor Releases: Negotiating the Maze*, 62 PA. B. ASS'N Q. 180 (1991). Additionally, the effect of Pennsylvania's Uniform Contribution Among Tortfeasors Act and Comparative Negligence Act on a non-settling tortfeasor's responsibility to pay damages is discussed in Brian E. Koeberle, Recent Decisions, 27 DUQ. L. REV. 163 (1988). The Note examines *Charles v. Giant Eagle Markets*, 522 A.2d 1 (Pa. 1987) and its overturning of *Daugherty v. Herschberger*, 126 A.2d 730 (Pa. 1956) and *Mong v. Herschberger*, 186 A.2d 427 (Pa. Super. Ct. 1962), by holding that a plaintiff's claim is reduced proportionately by the relative liability of a settling tortfeasor rather than by the amount of the settlement.

J. *Section 50: Apportionment of Liability When Damages can be Divided by Causation*

Section 50 addresses "apportionment of liability when damages can be divided by causation."[299] The Reporters admit that few cases address the specific issues involved in how these two processes fit together in the same case: "[c]urrent law simply does not provide much guidance."[300] The Reporters suggest that states follow three different approaches. First, "[s]ome courts 'muddle' through these cases by using comparative responsibility percentages to make what appears to be a division by causation."[301] Second, "[o]ther courts seem to divide the damages by causation, without any reference to apportioning responsibility among multiple causes of the component parts."[302] Third, "[s]till other courts seem to suggest that division by causation and apportionment by responsibility are two separate steps."[303]

The Reporters propose that two conflicting issues are involved. The first is that no party should be liable for harm that party did not cause; and second, that an injury caused by two or more persons should be apportioned according to their respective shares of comparative responsibility.[304] The theory in section 50 is that divisible injuries are first divided by causation and "then each indivisible part can be apportioned by responsibility."[305] Professor Wright argues that causation in fact is insufficient as a basis for apportioning

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299 RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 50 cmt. a, at 453 (Proposed Final Draft (Revised), 1999).

300 *Id.* reporters' note cmt. a, at 466. The Reporters do note, however, that Gerald W. Boston performed an "excellent analysis of causal apportionment" in his article, *Apportionment of Harm in Tort Law: A Proposed Restatement*, 21 U. DAYTON L. REV. 267 (1996). RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 50 reporters' note cmt. a, at 467.

301 RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 50 reporters' note cmt. a, at 466. Michigan and Texas are good examples of jurisdictions using this approach. *See id.*

302 *Id.* The Ninth Circuit has subscribed to this approach in two cases from Oregon and Montana. *See id.*

303 *Id.* (citing *Phelan v. Lopez*, 701 S.W.2d 327 (Tex. App. 1985, no writ)).

304 RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 50 reporters' note cmt. h, at 399 (Proposed Final Draft, 1998).

305 *Id.* cmt. a, at 378.

damages.[306] He reasons that cause in fact is not a matter of degree.[307] He argues that fault is a much better basis for apportionment.[308]

This section is in part a definition of indivisible injury, because if the injury is not divisible based on the formula presented in section 50, it is then classified as an indivisible injury and is relegated to other sections of the *Restatement (Third), Apportionment.* However, section 50 emasculates joint and several liability by defining indivisible injury in such a way that all injuries are divisible. The Reporters state, for example: "splitting the injury on a per capita basis . . . leads to . . . greater fairness."[309]

The serious flaw in subsection (b) is the proposal that the damages can be apportioned per capita among all parties.[310] Section 50 challenges the foundation of joint and several liability, by stating that no one should pay more than her share.[311] The foundation of joint and several liability in Pennsylvania is that sometimes a tortfeasor should pay more than her share,[312] but that this result is justified by the policies underlying joint and several liability.[313]

An additional flaw in this section centers on the substantial confusion provided by the term "legal cause." This is usually understood to mean proximate cause, but the Reporters also mention cause in fact or "but for" cause.[314] Attorneys, judges, and juries will be confused as to the meaning of "legal cause," and the Reporters offer no guidance.[315]

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306 Wright, *supra* note 5, at 1146. Professor Wright argues that there is "no way, based purely on causation, to identify one cause of an injury as more important or significant than any other cause of the same injury." *Id.*

307 *See id.*

308 *See id.* at 1147. Wright argues that the "traditional allocation method, including joint and several liability with contribution and indemnity . . . is the clearly preferred method for allocating liability among the multiple responsible causes of the same injury." *Id.*

309 RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 50 reporters' note cmt. h, at 402 (Proposed Final Draft, 1998). The Reporters acknowledged in the 1999 draft that "support for per capita division of damages is sparse. [Section 50] does not endorse it." RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 50 reporters' note cmt. h, at 475 (Proposed Final Draft (Revised), 1999).

310 Prosser and Keeton suggest that some states allowed apportionment equally among the "wrongdoers." KEETON ET AL., *supra* note 2, § 52, at 350, 351; *see also* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 50 reporters' note cmt. h, at 400-02 (Proposed Final Draft, 1998).

311 RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 50 reporters' note cmt. h, at 470 (Proposed Final Draft (Revised), 1999).

312 *See* KEETON ET AL., *supra* note 2, § 52, at 347.

313 *See id.* § 46, at 323.

314 *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 50 reporters' note cmt. f, at 470 (Proposed Final Draft (Revised), 1999). The Reporters state that "[d]etermining what constitutes a

In Pennsylvania, the parties divide their liability based on causal negligence. In *Fish v. Gosnell*,[316] the superior court stated: "[the trial court] explained the law concerning negligence and causation and then properly instructed the jury to determine appellant's causal negligence, if any, appellee's causal negligence, if any, and then to apportion the combined causal negligence between the parties."[317] Additionally, the court held that apportionment based on causal negligence is a matter of statutory law in Pennsylvania.[318]

K. Section 26: Effect of Partial Settlement on Jointly and Severally Liable Tortfeasors' Liability

The goal of section 26 apparently is to encourage settlement among the plaintiff and joint tortfeasors.[319] In order to promote settlement, section 26 provides that the settling tortfeasor should be released and the non-settling tortfeasors may benefit from the settlement. All of this is done on a percentage basis determined by the jury.

Section 26 provides that "[t]he plaintiff's recoverable damages . . . are reduced by the comparative share of damages attributable to a settling tortfeasor. . . . The settling tortfeasor's comparative share of damages is the percentage of comparative responsibility assigned to the settling tortfeasor multiplied by the total damages of the plaintiff."[320] Section 26 creates a risk, from a plaintiff's perspective, because of its emphasis on the terms of the agreement.[321] Instead, the emphasis should be on the amount paid by the settling party.[322]

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divisible injury requires a predicate understanding of the applicable rules of *legal causation*, including the *'but for'* requirement and the applicable rules under the *'substantial factor'* test." *Id.* (emphasis added).

315 *See* Vandall, *supra* note 210, at 278.

316 463 A.2d 1042 (Pa. Super. Ct. 1983). The case involved the injury of the driver of a garden tractor who was clearing snow from the end of his driveway and was struck by a passing car. *See id.* at 1045.

317 *Id.* at 1050.

318 *Id.* The Comparative Negligence Act was adopted in Pennsylvania in 1976, and was codified at 42 PA. CONS. STAT. ANN. § 7102 (1982). *See supra* note 247 and accompanying text. The Act modified law as to joint tortfeasors and apportionment of damages. *Charles v. Giant Eagle Markets*, 522 A.2d 1 (Pa. 1987), is the first case in which Pennsylvania examined the effect of the Act on settlements, contribution, and liability of non-settling tortfeasors. *See* Stephen J. Del Sole, *Recent Decisions*, 31 DUQ. L. REV. 643, 655-56 (1993).

319 *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26 cmt. c, at 181-82.

320 *Id.* at 181.

321 *See id.* § 26 reporters' note cmt. c, at 192. The Reporters were evidently concerned about the effect of partial settlements and assurance to the settling party that the agreement would be final. *See id.* In order to secure that assurance, "§ 33, Comment i, provides that there is no contribution claim available against a party who has settled with the plaintiff." *Id.* Therefore, the Reporters reasoned, it was necessary to afford the

Pennsylvania rejects the Restatement theory that the non-settling tortfeasor should receive a benefit from the settlement because it has a tendency to discourage settlements. Justice Musmanno's dissenting position in *Daugherty v. Hershberger*[323] was later adopted as the majority rule in Pennsylvania.[324] However, a recent Pennsylvania Superior Court case[325] supports the *Restatement (Third), Apportionment* in the "[r]elease of both the agent and the vicariously liable party upon a settlement with one of those parties."[326]

L. Section 1: Issues and Causes of Action Addressed by this Restatement

Prosser states the majority rule that contributory negligence is not a defense to intentional conduct on the part of the defendant.[327] Thus, the plaintiff's contributory negligence is not a defense to assault, battery, or willful conduct.[328] The reason is that this is not a difference in the degree of fault, but rather in the "kind of fault."[329] This extends to contribution: there is no contribution among those who commit intentional torts under the majority rule.[330]

Section 1 of *Restatement (Third), Apportionment* rejects the traditional view and provides that negligent conduct can be compared with intentional conduct.[331] Section 1 is radical tort reform that starts anew. The point of section 1 is that the conduct of a negligent plaintiff can be compared with the

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nonsettling parties "some credit against the damages recoverable by plaintiff in the judgment," in exchange for their inability to pursue contribution. *Id.*

322 *See supra* note 271 and accompanying text.

323 126 A.2d 730, 734 (Pa. 1956).

324 *See* Charles v. Giant Eagle Mkts., 522 A.2d 1, 3 (Pa. 1987); *see also supra* note 168 and accompanying text.

325 *See* Pallante v. Harcourt Brace Jovanovich, 629 A.2d 146, 149 (Pa. Super. Ct. 1993). The *Pallante* case involved an injured passenger who fell when a tour bus negligently began to move before plaintiff was seated. *Id.* at 146.

326 RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26 reporters' note cmt. d, at 198.

327 KEETON ET AL., *supra* note 2, § 65, at 462. The defense of contributory negligence "never has been extended to such intentional torts." *Id.*

328 *See id.* Prosser and Keeton state that the rule is the same for the "aggravated form of negligence, approaching intent, which has been characterized variously as 'willful,' 'wanton,' or 'reckless.'" *Id.*

329 *Id.*

330 *See id.* § 50, at 339. However, some cases and statutes allow contribution in intentional tort cases. *See id.*

331 RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY at 1, 7. Topic 1 states that the *Restatement (Third), Apportionment* deals with issues of apportioning liability "regardless of the basis of liability." *Id.* at 1. Additionally, the aim of the Restatement is to apply to all bases of liability as well as providing "flexibility to fashion appropriate special rules for victims of intentional torts." *Id.* at 7.

intentional act of the defendant.[332] Thus, the Reporters suggest that a negligent clerk who is shot at a convenience store may not be able to recover all of her damages from the attacker.[333] The Reporters admit that this is the minority view[334] and adopt it for administrative convenience apparently because joint liability is too difficult to apply in a lawsuit that may involve negligence as well as intent.[335]

The irrationality of the *Restatement (Third), Apportionment* is shown by the following example. The Reporters would perhaps argue that if Nicole Brown Simpson were negligent in going out at night, her parents' recovery against O.J. Simpson for wrongful death should be reduced by the amount of her negligence, if any. This represents a disregard of justice for mere administrative convenience, and leads to ludicrous results. This radical *Restatement (Third), Apportionment* view should be rejected in favor of the majority rule (intent cannot be compared with negligence) and section 1 should be amended to exclude intentional conduct. It has taken perhaps 600 years to develop the separate categories of intent, negligence and strict liability, and they rest on sound policies.[336]

The apparent purpose of section 1, in balancing the intent of the tortfeasor against the negligence of the victim, is to enable a reduction of the contribution by toxic tortfeasors. Some of the apportionment cases involve toxic torts where often the defendant corporation knows what it has buried or discharged and knows that it is harmful to people and the environment.[337] The Reporters are apparently laying a foundation for these intentional polluters to reduce their payments under the *Restatement (Third), Apportionment.* The plaintiffs in toxic-tort cases are often governmental entities who have arguably been negligent in regulating, preventing, or cleaning up the environmental hazard. Pennsylvania has not considered whether intent can be weighed against

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[332] *See id.* at 1, 7.

[333] *Id.* at 12. The Restatement argues that it would be difficult to allocate responsibility between the attacker, the convenience store for lack of security, and the doctor who aggravated the injury through negligence "without using the same comparative responsibility system for all the tortfeasors." *Id.*

[334] *See id.* at 14.

[335] *See id.* at 12. Additionally, the Reporters suggest that the "rules stated in this Restatement often reflect compromises between the particular policy goals of the individual torts and the general goal of workability." *Id.* at 13.

[336] *See* Brown v. Kendall, 60 Mass. 292 (1850); Anonymous Y.B. Edw. 4, Fol. 7 (1466), *reprinted in* PROSSER ET AL., CASES AND MATERIALS ON TORTS 4 (9th ed. 1994).

[337] *See* Gould, Inc. v. A&M Battery & Tire Service, 901 F. Supp. 906 (M.D. Pa. 1995); Lyncott Corp. v. Chemical Waste Management, Inc., 690 F. Supp. 1409 (E.D. Pa. 1988); Ball v. Johns-Manville Corp. 625 A.2d 650 (Pa. Super. Ct. 1993).

negligence in apportionment cases. However, Pennsylvania's preference for the victim over the manufacturer in products liability cases suggests that the Restatement's radical notion will be rejected.[338]

CONCLUSION

The essential purpose of a Restatement is to restate the common law.[339] There has occasionally been a small amount of prospective content in a Restatement, but it has heretofore been clearly presented as non-law. An example is the gesture requirement for assault. The Reporters for the *Restatement (Second) of Torts* stated that a person who reasonably suffers great fear, even in the absence of a gesture, should be able to recover for an assault.[340] It is crystal clear that this was not supported by case law, however.[341]

The Reporters' goal in issuing the *Restatement (Third), Apportionment* is to make four minority rules appear to be both well-supported and logical. To accomplish this, they call these weak precedents "tracks." Thus, the Reporters argue that they have generated a Restatement when, in fact, all they have presented is four tort reform alternatives.

If the Reporters had wanted to restate the law, they would have determined that the application of joint and several liability for indivisible injury is the dominant rule.[342] Additionally, they would have presented the four other approaches as statutory alternatives used in a minority of jurisdictions.[343] This would have made clear that much of their document was pure tort reform and not a Restatement. The document reflects that the Reporters have not

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338 *See, e.g.* Baker v. AC&S, Inc., 729 A.2d 1140 (Pa. Super. Ct. 1999).

339 *See* Frank J. Vandall, *The Restatement (Third) of Torts, Products Liability, Section 2(b): Design Defect*, 68 TEMP. L. REV. 167, 196 (1995); *see also* Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631, 633 (1995).

340 *See* RESTATEMENT (SECOND) OF TORTS § 27 (1965).

341 *See* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 39 n.12 (4th ed. 1971).

342 *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 27, at 203 (Proposed Final Draft (Revised), 1999). The Reporters state that joint and several liability is the rule in sixteen states, including Alabama, Arkansas, Delaware, the District of Columbia, Illinois, Idaho, Maine, Maryland, Massachusetts, North Carolina, Pennsylvania, Rhode Island, South Carolina, South Dakota, Virginia, and West Virginia. *Id.* § 28B reporters' note cmt. b, at 225-27.

343 *See id.* at 178-180 (presenting the alternative approaches to joint and several liability, including Tracks A, B, C, and D).

compared, critiqued, evaluated, and synthesized the law of apportionment as has been done in earlier Restatements.[344]

The Reporters describe the track system as follows:

> The Institute takes no position on whether joint and several liability, several liability, or some combination of the two should be adopted for independent tortfeasors who cause an indivisible injury. As noted in § 20, Comment *a*, there is currently no majority rule on this question, although joint and several liability has been substantially modified in most jurisdictions both as a result of the adoption of comparative fault and tort reform during the 1980s and 1990s. Nevertheless, five different versions of joint and several, several, and combination of the two are presented in the five separate and independent tracks that follow this section. These five tracks are mutually exclusive, although modifications (or combinations of some) of them are possible.[345]

The Reporters admit that there is little case authority for each track except joint and several liability (Track A), which is followed by sixteen states, including Pennsylvania.[346]

The track system contained in the *Restatement (Third), Apportionment* is a presentation by the Reporters of defense and insurance policy. How this has occurred is important to an understanding of the *Restatement (Third), Apportionment.* During the 1980s the myth of a litigation crisis was created and widely disseminated.[347] This myth provided the opportunity for the insurance industry to lobby state legislatures for tort reform that restricted plaintiffs' opportunities to recover.[348] A popular approach for limiting consumer suits was modification of the rules of apportionment by means of

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[344] *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 1, at 1-20; § 28E, at 337-48; § 50, at 453-79.

[345] *Id* § 27, cmt. a, at 203.

[346] *See id.* at § 28A reporters' note cmt. a, at 211. "B" track: "Fourteen states have abolished (or virtually abolished) joint and several liability for multiple tortfeasors whose independent actions results in an indivisible injury to plaintiff. . . . In most jurisdictions, however, the abolition of joint and several liability was the result of tort legislation in the latter part of the 1980s . . . ." *Id.* § 28B reporters' note cmt. b, at 225. "C" track: "a few jurisdictions." *Id.* § 27 cmt. a, at 204. "D" track: "The 'D' series reflects legislation in approximately a dozen states . . . ." *Id.* at 205. "E" track: "The 'E' series reflects legislation in about a half dozen states . . . ." *Id.* at 180.

[347] *See* Eaton & Talarico, *supra* note 252; Marc S. Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1996); Marc S. Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77 (1993); Galanter, *supra* note 49.

[348] The Reporters state: "joint and several liability . . . gained wide acceptance before the tort reform legislation of the mid and late 1980s." *Id.* at 250.

state legislation.[349] The Reporters label these insurance-driven legislative intrusions into the common law as tracks.

This pro-insurance and defense document has emerged from the ALI because of the recent expansion of the ALI's purview to include statutory as well as common law.[350] The apparent purpose of the tracks is to mask the fact that the Reporters are opposed to joint and several liability.[351] A true Restatement would adopt the dominant position, which is joint and several liability.[352] Therefore, the debate over the future of the *Restatement (Third), Apportionment* becomes one of policy: which tracks make more sense, those protecting victims or those protecting tortfeasors? The courts of each state will have to examine the precedent and policy of their jurisdiction in order to answer the question. When a provision of the *Restatement (Third), Apportionment* is argued before a court, the first question from the bench should be, "Why should the loss be shifted once again to the victim?"

The solution is for the ALI to return to a Restatement of the common law and to ignore the state statutes. This would result in a Restatement resembling joint and several liability as followed in Pennsylvania.[353] The tracks could be treated in one short comment, as interesting variations among the states. By contrast, the *Restatement (Third), Apportionment*'s presentation of the tracks consumes over a third of the draft.[354]

The law of Pennsylvania holds that sometimes a jointly liable defendant should pay more than her numerical percentage.[355] The argument against the *Restatement (Third), Apportionment*'s "single set of percentages" assigned by the jury is that in order to implement it, the categories of strict liability, negligence, and intent that have developed over hundreds of years of English and American history, would have to be tossed aside.[356] Accepted American

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349 *See id.* at 193.

350 *See generally* Vandall, *supra* note 339.

351 In the Foreword, the Director refers to the *Restatement (Third), Apportionment* as "a major work of original scholarship." RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY at xiii (Proposed Final Draft (Revised), 1999). Does "original work" mean it is an opinion piece and not a restatement of the law? If so, the title should be changed to "Apportionment Study."

352 *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 27A reporters note cmt. a at 183 (Proposed Final Draft, 1998).

353 *See supra* notes 6-17, 342 and accompanying text.

354 *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY at 206-383 (Proposed Final Draft (Revised), 1999).

355 KEETON ET AL., *supra* note 2, § 52, at 347 n.26.

356 *See supra* note 327 and accompanying text.

tort law must not be traded for foundationless tort reform in the guise of administrative feasibility.

Justice is the goal of the American legal system, and that goal can best be attained by means of joint and several liability. Under this system, the intentional conduct of a defendant cannot be compared to the plaintiff's negligence. Apportionment of damages is complex and messy under joint liability only because of the focus on important justice considerations.

The courts in evaluating the *Restatement (Third), Apportionment* must realize that, except for joint and several liability, there are no predominant rules in the document.[357] The courts should acknowledge that there never was a litigation crisis, and that the state apportionment statutes adopted during the 1980s were a creation of the insurance industry.[358] Therefore, the courts should look to their pre-1980 precedent, which predominantly embraces joint and several liability, as reflected in the law of Pennsylvania.

In order to have a Restatement, there must be a substantial body of decisions to restate. In the area of apportionment the Reporters admit there is no meaningful volume of case law on any subject.[359] In its present form, the *Restatement (Third), Apportionment* is a choppy and poorly organized law review article, not a Restatement. Because the track concept has little support in the case law, the Restatement, if taken at face value, will cause misunderstanding, and will not help to clarify this important and complex field.

Overturning 600 years of civil law because of a minor injury at Disney World is an extreme over-reaction to a rare problem. In that case, the defendant was both negligent and a cause in fact of the injury. The radical tort-reform nature and pro-defendant bias of the *Restatement (Third), Apportionment* makes clear that the American Law Institute should return to its original and valuable purpose of restating the law.

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[357] *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 27A & cmts., at 178-80, 183 (Proposed Final Draft, 1998); *see also supra* note 334 and accompanying text.

[358] *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 27 cmt. a, at 203 (Proposed Final Draft (Revised), 1999) (explaining that alternative versions of joint and several liability are offered because of the advent of comparative fault and the tort reform of the 1980s and 90s).

[359] *See id.* (stating that there is no majority rule on the issue of apportionment for independent tortfeasors causing an individual injury).