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Good afternoon, Chairman Gannon and members of the Judiciary Committee. My name is Jessie L. Smith and I am Chief of the Office of Attorney General Torts Litigation Section. I am also an active member of the Pennsylvania Bar Association, was a member of the Civil Litigation Section for many years, am a member of the PBA House of Delegates, but I am here to speak in favor of this Bill. Our Section defends Commonwealth agencies in negligence cases. About 80% of the cases we defend are filed against PennDOT, alleging highway design, maintenance or traffic control deficiencies.

You have heard a broad range of testimony today, so I will focus on an area not yet addressed - the impact of joint and several liability on the Commonwealth and its taxpayers. The doctrine of joint and several liability did not contemplate the Commonwealth being a jointly and severally liable party, as the Sovereign was immune from suit under the common law. Sovereign immunity was abrogated by the Pennsylvania Supreme Court in 1978, and the Sovereign Immunity Act became effective in 1980, so we have had almost 25 years experience with joint and several liability as applied to Commonwealth agencies. As you know, recoverable damages against the Commonwealth are limited to $250,000 per plaintiff and $1 million per occurrence, and the Commonwealth is self-insured with torts payouts coming from the Motor License Fund in PennDOT cases, and the General Fund in other cases.

On average, eleven tort suits are filed against the Commonwealth each week, and we are currently defending over 3300 active cases. A typical case against PennDOT involves an uninsured or minimally insured driver (minimum liability policy limits remain at $15,000/$30,000) who causes an accident through some combination of alcohol or drug impairment, speed and reckless driving such as running a stop sign, passing or turning without clearance, or leaving the road and hitting a fixed object. At least a handful of our cases each year involve a driver who has never had a license. The driver is sued by passengers and occupants of other vehicles, who may have been catastrophically injured or killed in the accident. PennDOT is sued as the "deep pocket," since the driver at fault cannot begin to pay for the damages. An expert report is procured, identifying some imperfect feature of the road. The case then goes to a county court jury, whose members may not think the world of PennDOT. The fact that PennDOT has met its own standards does not mean it cannot be found negligent by that jury.

The jury is not told about joint and several liability. One of the most common post-trial questions we hear from jurors is "Why didn't you attack the driver at fault?" They don't realize what a risky strategy this is - a big verdict against that driver is just a verdict that PennDOT will have to pay if it is found even 1% negligent. The Motor License Fund money is used for both tort payouts and road repairs. More payouts mean less repairs, and the average annual tort payout is $17 million.

Jurors take their role seriously, often deliberating for days to assign precise percentages of negligence to each party, not realizing their work will then be ignored. For this reason, The Honorable Thomas Kistler of Centre County, who represented both plaintiffs and defendants before becoming a judge in 1997, urged the Pa Bar Association House of Delegates not to oppose this Bill - he has come to the belief that joint and several liability disrespects the jurors' time and service, and contradicts what they are told about the importance of their role. Several years ago, a jury in Susquehanna County assigned fractional percentages of negligence to each party: 49.5% to a deceased 12-year-old motorcyclist who passed a vehicle on a curve and hit an oncoming car; 26.25% to his mother, the plaintiff, for letting her 12-year-old drive; and 24.25% to PennDOT for trees that allegedly impaired sight distance. The jury had been told that the Estate would not recover if over 50% negligent, and calculated the dollar amounts believing the mother would be liable for more than she received! Informing the jury of the

effect of joint and several liability would probably lead to a more fair result even if the doctrine is retained.

Another feature of joint and several liability in Pennsylvania is that the plaintiff can collect 100% of the verdict from any defendant regardless of other defendants' ability to pay. If five defendants are found 20% negligent, the plaintiff can demand 100% from one of them - that defendant then has the burden of collecting from the other four. The Commonwealth was involved in a Lebanon County trial in which the jury found Plaintiff 20% negligent, another driver 40% negligent, and PennDOT 40% negligent (based on lack of sight distance due to a hill crest). The plaintiff postrial agreed with the defendant driver, who had business assets and whose carrier was a large self-insurance fund, that plaintiff would seek all delay damages from the Commonwealth if that defendant dropped his meritorious appeal! This attempt to shift liability from a solvent defendant and insurer to the Commonwealth's taxpayers is but one example of why joint and several liability is particularly unfair as applied to the Commonwealth.

Some say there's no such thing as a 1% case, that it's just an urban legend. Let me give you an example of such a case. In February 1994, there was a snow whiteout on Cresson Mountain in Cambria County. Twenty-five drivers at the summit of the mountain couldn't see beyond their windshields. Some were involved in minor fender-bender accidents, others were just sitting on the road because they couldn't see. Into this scene came a tractor-trailer, who hit the rear of a van killing its four occupants, hit another vehicle seriously injuring the driver, and caused injury to another man who hurt his back when he dove to get away. These twenty-five drivers, including the Estate of the van driver, were brought into the case as defendants. They filed pleadings and were deposed. Their testimony was they couldn't see anything. The Court then ordered them to pay for and attend a mandatory mediation, to encourage them to settle the case. Were they negligent - in a way, since they were sitting on the road. Was this a substantial factor - in a way, because had they not been there the fatal accident would not have happened. So, rather than expend the time and money to proceed through a lengthy trial, with the court encouraging them to settle, they settled. These defendants could not take the 1% risk in a case of this magnitude.

I have submitted with my written testimony a chart of the 50 states and where they stand on this issue. Most states have either eliminated or abolished joint and several liability. Both Hawaii and West Virginia have modified it for government defendants. The various statutory schemes developed by other states demonstrate that change is possible while still maintaining an adequate level of compensation for injured parties.

In summary, joint and several liability impacts the Commonwealth in an especially negative way in that the taxpayers, rather than a private entity, are left paying the verdict share that others, typically uninsured or underinsured drivers, cannot (or the share that plaintiffs choose not to collect from others).

Thank you for your time and courtesy. I would be happy to answer any questions.

State	Statutory Citation	Treatment of Joint and Several Liability
Alabama	Common law, *See e.g., Matkin v. Smith*, 643 So. 2nd 949, 951 (1994)	JOINT AND SEVERAL Where actions of two or more tort-feasors combined, concur, or coalesce to produce injury, each tort-feasor's act is proximate cause of injury, and each tort-feasor is jointly and severally liable for entire injury. No right to contribution.
Alaska	Alaska Stat. §09.17.080(d) (1997)	FAIR SHARE The court shall enter judgment against each party liable on the basis of several liability in accordance with that party's percentage of fault.
Arizona	Ariz.Rev.Stat. §12-2506	FAIR SHARE The liability of each defendant is several only and not joint. Joint and several liability for intentional torts.
Arkansas	Common Law, *See e.g.*, City of Caddo Valley v. George, 95 W 3rd 481, 487-88 (Ark. 2000).	JOINT AND SEVERAL Has Uniform Contribution Among Joint Tortfeasors Act (UCATA) statute, so the right of contribution exists among joint tortfeasors.
California	Cal. Civ. Code § 1431.2 (1986)	MODIFIED Each tortfeasor liable only for amount of *non-economic* damages allocated to that tortfeasor in direct proportion to that defendant's percentage of fault. Fair Responsibility Act of 1986.
Colorado	Colo.Rev.Stat.. § 13-21-111.5 (01)(1986)	FAIR SHARE No defendant is held liable for an amount greater than that represented by the percentage or degree of the negligence or fault attributable to the defendant. Joint and several liability for intentional torts.

Connecticut	Conn.Gen.Stat. § 52-572h (1999)	MODIFIED Each tortfeasor liable only for his/her proportionate share of the recoverable damages. Upon motion, the court shall reallocate among the defendants according to their respective percentages of fault that portion of plaintiff's economic damage award that is found to be uncollectible.
Delaware	Common Law *See e.g.*, Brown v. Comegys, 500 A.2d 611, 613 (Del. Super. 1985)	JOINT AND SEVERAL Injured person is entitled to recover his damages from either or both tortfeasors. Has UCATA statute.
Florida	Fla. Stat. § 768.81	MODIFIED Each defendant liable on basis of that defendant's percentage of fault, subject to exceptions based on negligence percentage of defendant, comparative negligence of plaintiff, size of award, and applying to economical damages only.
Georgia	Ga. Code, 51-12-31	MODIFIED Plaintiff may recover damages for the greatest injury done by any of the defendants against all of them. In its verdict, the jury may specify the particular damages to be recovered of each defendant. Judgment in such a case must be entered severally.
Hawaii	HawaiiRev.Stat. § 663-10.9 (1986) and § 663-10.5 (1986)	MODIFIED No joint and several liability for government entities. No joint and several liability for *non-economic* damages if less than 25% negligent. Joint and several liability for intentional torts.
Idaho	Idaho Code § 6-803 (3) (1987)	FAIR SHARE Each joint tortfeasor responsible for amount equal to his/her proportionate share of the total damages awarded to plaintiff.

Illinois	735 Ill.Rev.Stat. 5/2-1117 (1994)	MODIFIED Joint and several liability for medical expenses. A defendant whose fault is less than 25% only severally liable for other damages. Proportionate liability statute, 735 I.L.C.S. 5/2- 1116 and 1117 (1995) declared unconstitutional in 1997 as special legislation because of medical malpractice claims exception. Best v. Taylor Machine Works, 689 N.E.2d 1057 (Ill. 1997).
Indiana	Ind. Code §34-51-2-8(b)(4) (1998)	FAIR SHARE Comparative Fault Act went into effect in 1985 and abrogated common law doctrine of joint and several liability.
Iowa	Iowa Code. § 668.4 (1997)	MODIFIED Joint and several liability does not apply to joint tortfeasors found to bear less than 50 % of the total fault assigned to all parties.
Kansas	Kan.Stat.. § 60-258a(d) (2000)	FAIR SHARE Where recovery is allowed against more than one defendant, each defendant is liable for damages in proportion to his/her causal negligence.
Kentucky	Ky.Rev.Stat. § 411.182(3) (1988)	FAIR SHARE Each joint tortfeasor's equitable share of the damage award is determined in accordance with his/her percentage of fault.
Louisiana	La.Civ.Code Art. 2324 (1996)	FAIR SHARE Several liability. A joint tortfeasor shall not be liable for more than his degree of fault and shall not be jointly liable for damage attributable to the fault of any other person. Joint and several liability for intentional torts.

Maine	Me.Rev.Stat., tit.14 § 156	JOINT AND SEVERAL Each defendant is jointly and severally liable to the plaintiff for the full amount of the plaintiff's damages. No right to contribution.
Maryland	Common Law; *see e.g.* Parler & Woffer v. Miles & Stockbridge, 756 A.2d 526 (Md. 2000)	JOINT AND SEVERAL Has UCATA statute.
Massachusetts	Common Law *See e.g.*, Chase v. Ray, 294 NE2d 336, 340 (Mass. 1973)	JOINT AND SEVERAL The right of a plaintiff is not limited by questions or rights of contribution between joint tortfeasors. Has UCATA statute.
Michigan	Mich.Comp.Laws §600-2925b (1995)	JOINT AND SEVERAL The injured party has the right to a joint and several judgment. Has UCATA-type statute.
Minnesota	Minn.Stat. § 604.02	MODIFIED When 2 or more defendants are jointly liable, contributions to damage awards are made in proportion to the percentage of fault attributed to each except that each is jointly and severally liable for the whole award. Upon motion, the court shall reallocate among the defendants according to their respective percentages of fault that portion of plaintiff's award that is found to be uncollectible. Additionally, a defendant whose fault is 15% or less is liable for a percentage of the whole award no greater than four times his/her percentage of fault.

Mississippi	Miss. Code Ann. § 85-5-7 (1989)	MODIFIED Normally, joint tortfeasors only liable for damages corresponding to their percentage of fault. However, if plaintiff is unable to recover 50% of his/her damages under the proportional liability scheme, the liability of joint tortfeasors will become joint and several only to extent necessary for plaintiff to recover 50% of his/her damages. Joint and several liability for intentional torts.
Missouri	Mo.Stat.§537.067 (1987)	MODIFIED Defendants are jointly and severally liable for the amount of damages rendered against them. In cases where plaintiff is assessed a portion of the fault, any party may move for reallocation of uncollectible amount. Court then reallocates uncollectible amounts among the defendants and plaintiff according to their respective percentages of fault.
Montana	Mont.Code § 27-1-703 (1997)	MODIFIED Each defendant is jointly and severally liable for plaintiff's damage award. However, a defendant whose negligence is determined to be 50% or less is responsible for only that portion of the award corresponding to his/her percentage of negligence.
Nebraska	Neb. Rev. St. § 25-21, 185.10 (1992)	MODIFIED Each defendant's liability for economic damages is joint and several. However, each defendant is liable only for the amount of *non-economic* damages allocated to that defendant in proportion to that defendant's percentage of negligence. Joint and several liability for intentional torts.
Nevada	Nev.Rev.Stat. §41.141. 4 and 5 (1989)	FAIR SHARE Each defendant is severally liable to plaintiff for only that portion of the judgment that represents the percentage of negligence attributable to him. Joint and several liability for intentional torts.

New Hampshire	N.H.Stat.§ 507:7-e	MODIFIED Each defendant is jointly and severally liable for plaintiff's damage award. However, a defendant whose negligence is determined to be 50% or less is responsible for only that portion of the award corresponding to his/her percentage of negligence. Joint and several liability for intentional torts.
New Jersey	N.J.Stat. 2A:15-5.3	MODIFIED If defendant is found to be less than 60% responsible for plaintiff's total damages, that defendant is only responsible for percentage of damages directly attributable to his/her negligence. Plaintiff may recover full amount of his/her damage award from defendant who is 60% or more responsible for the total damages.
New Mexico	N.M.Stat. § 41-3A-1A (1987)	FAIR SHARE Liability of joint tortfeasors is several. Each defendant liable only for that portion of plaintiff's award that is equal to the ratio of the defendant's fault to the total fault attributed to all persons. Joint liability for intentional acts.
New York	N.Y. CPLR § 1601	MODIFIED If liability of defendant is 50% or less of the total liability assigned, that defendant's liability for *non-economic* damages shall not exceed that defendant's equitable share determined in accordance with the relative culpability of each person causing or contributing to the total liability for non-economic loss.
North Carolina	Common law *See, e.g.*, Hunsucker v. High Point Bending and Chair Co., 75 S.E.2d 768 (N.C. 1953).	JOINT AND SEVERAL Has UCATA statute.

North Dakota	N.D.Cent.Code § 32-03.2-02 (1987)	FAIR SHARE Liability of defendants is several only and not joint. Each party is only liable for the amount of damages attributable to the percentage of fault of that party. Statute withstood equal protection challenge, Kavadas v. Lorenzen, 448 NW 2d 219 (N.D. 1989).
Ohio	Common Law See, e.g., Bowling v. Heil Co.,511 N.E.2d 373 (Ohio 1987).	JOINT AND SEVERAL Has UCATA statute.
Oklahoma	Common Law, *See e.g.* Morava v. Central Oklahoma Medical Group, Inc., 26 P.3rd 779 (Okla. Ct. App. 2001).	JOINT AND SEVERAL Has UCATA statute.
Oregon	Or.Stat. § 18.485	MODIFIED Liability of each defendant is several. The amount of each defendant's liability is equal to that portion of the judgment that represents the percentage of negligence attributable to him. Upon motion, the court shall reallocate any uncollectible share among the other parties who were more than 25% at fault and more at fault than the plaintiff. The reallocation shall be made on the basis of each party's respective percentage of fault.
Pennsylvania	42 Pa. C.S. §7102(b) (1978)	JOINT AND SEVERAL Right to contribution; no UCATA statute.
Rhode Island	Common Law See e.g. Merrill v. Trenn, 706 A.2d 1305, 1315 (R.I. 1998)	JOINT AND SEVERAL Has UCATA statute.

South Carolina	Common law *See e.g.*, Fernanders v. Marks Const. of South Carolina, Inc., 449 S.E. 2d 509, 511-512 (S.C. App. 1998)	JOINT AND SEVERAL Has UCATA statute.
South Dakota	S.D. Comp. Laws § 15-8-15.1	MODIFIED Any party who is allocated less than 50% of the total fault may not be jointly liable for more than twice the percentage of fault allocated to that party.
Tennessee	Tenn. Code § 25-1-104	FAIR SHARE McIntyre v. Balentine, 833 S.W. 2d52 (Tenn. 1992) – "a particular defendant will be liable only for the percentage of a plaintiff's damages occasioned by that defendant's negligence."
Texas	Tex. Civ. Code. Ann. §33.013(Vernon 1995)	MODIFIED Defendants are liable only for the percentage of the damages found by the trier of fact equal to their percentage of responsibility with respect to plaintiff's harm, unless the percentage of responsibility attributed to the defendant is greater than 50 %; then that defendant is jointly and severally liable.
Utah	Utah Code 1953 § 78-27-40 (1986)	FAIR SHARE Defendant is only liable for percentage or proportion of damages equivalent to the percentage or proportion of fault attributable to that defendant, part of 1986 Liability Reform Act.
Vermont	12 Vt. Stat. § 1036 (1979)	FAIR SHARE Each defendant is liable for only that portion of the total amount awarded as damages in the ratio of the amount of his/her causal negligence to amount of causal negligence contributed by all defendants.

Virginia	Va. Code § 8.01-469 (1977)	JOINT AND SEVERAL A judgment against several persons jointly may be collected against any or all. Right to contribution, no UCATA statute.
Washington	Wash.Rev.Code §4.22.070	MODIFIED The liability of each defendant is several only, unless there is no negligence attributed to plaintiff- then it is joint and several.
West Virginia	Common Law, see e.g., Sitzes v. Anchor Motor Freight, Inc., 289 S.E. 2d 679 (W. Va. 1982) W. Va. Code 29-12A-7 (political subdivisions) W. Va. Code 55-7B-9 (medical professional liability)	MODIFIED Common law joint and several liability except in cases against government entities and medical professional liability cases, where liability is joint and several only for defendants more than 25% negligent.
Wisconsin	Wis.Stat. §895.045	MODIFIED The application of joint and several liability limited to defendant who is found to be 51% or more causally negligent.
Wyoming	Wyo.Stat. § 1-1-109 (1977)	FAIR SHARE Each defendant is liable only to the extent of that defendant's proportion of the total fault.

3.25 (Civ) LEGAL CAUSE

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

SUBCOMMITTEE NOTE

Confusion has been generated, compounded and perpetuated by various attempts to make clear to the jury the ramifications of the distinction between a factual cause of an accident and a legal cause of an accident. It is not sufficient merely to tell the jury that the negligence must have been a "cause", because there is rarely a case where a properly named defendant has not, in some manner, "caused" the accident; however, this is not to say that the conduct is the legal cause. For example, if a defendant negligently brings his vehicle to a sudden stop at a traffic light, where he is struck from the rear one minute later by another defendant, his passenger's injuries have been "caused" by his conduct of merely being on the road, but no court would say that his negligent conduct was the "legal cause" of the accident.

On the other hand, it does not serve justice to make the above stated common sense proposition of legal cause so cumbersome as to be unintelligible to all but the legally educated juror. For this reason most of the usual legal phrases have been jettisoned from the charge on legal cause. The term "legal cause" is retained to inform the jury that the plaintiff must also prove causation, and that not all causes are the "legal cause." But "proximate cause," a term that attempts to give substance to the distinction between factual cause and legal cause, but which "means nothing to an ordinary jury", *Rodgers v. Yellow Cab Co.*, 395 Pa. 412, 422, 147 A.2d 611 (1959), has been deleted. Similar synonyms such as "efficient cause" and "substantial cause" have been rejected.

Also rejected are the unnecessarily confusing concepts of "foreseeability" and "natural and probable consequence." To charge a jury that causation does not exist unless the defendant reasonably should have "foreseen" the harm invites them to speculate about factors properly having no place in the consideration of legal cause. For example, all persons would foresee that if they ignored a red light, an accident could result; however, how many could foresee that as a result of that negligence, a motorist legally entering the intersection would suddenly stop, causing the following vehicle to swerve onto the sidewalk, hitting a telephone pole, which landed on the plaintiff? See *Hoover v. Sackett*, 221 Pa. Super. 447, 292 A.2d 461 (1972). Further confusion invariably results if the same standard of foreseeability is used with respect to the personal injuries sustained. "Natural and probable consequence" is merely another synonym for "foreseeability" and invites the jury to the same speculation. The confusion is compounded by the consideration whether the jury should look backward from the results, or forward from the initiating conduct. It is for these reasons that the Restatement specifically rejects the concept of "foreseeability" as having relevance to the issue of legal cause. Restatement (Second) of Torts § 435 (1965). In *Brown v. Tinneny* 280 Pa. Super. 512, 421 A.2d 839 (1980), it was held that the trial judge had committed reversible error by reading

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Restatement (Second) of Torts § 435(2) almost verbatim to the jury as an instruction. Judge Spaeth, speaking for a three member panel of the Superior Court, stated that the section cited described the function of the judge, not the jury. The section states that the defendant's conduct may be held not to be a legal cause of harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears "to the court" highly extraordinary that it should have brought about the harm. The appellate court analyzed the facts and found that relief under § 435 (2) was not available to the defendants in this case and further that any decision regarding its applicability was a decision of the court.

The substantial factor test has been adopted exclusively by the Restatement and has been cited with approval by Pennsylvania courts. Restatement (Second) of Torts § 431(a) (1965); *Whitner v. Lojeski*, 437 Pa. 448, 263 A.2d 889 (1970). It is a test that circumvents the use of legally embellished phrases, while retaining the crucial distinction between factual cause and legal cause. It is simple and direct, and leaves to the jury what, after all, is its fundamental, common sense task: apportioning responsibility for an accident causing personal injury.

Also deleted is the sometimes quoted requirement that legal cause exists only if, "but for" the negligence of the defendant, the accident would not have occurred. This "but for" requirement adds nothing to the "substantial factor" test, and frequently serves only to confuse. In a large percentage of cases where causation is a significant issue because of the concurrent negligence of more than one actor, the "but for" test is inaccurate since both actors may be responsible even though the accident would have occurred in absence of the acts of either one of them. See Section 3.27 *infra*. The Restatement of Torts limits the "but for" test to specific situations where certain antecedent precautions have not been taken. See, e.g., Restatement (Second) of Torts § 432(1), Comment b, Illustration 1 (1965) (lifeboats not provided; storm so severe that lifeboats, even if present, could not have been launched). In those instances, the "but for" test is linked to the "substantial factor" test incorporated in this charge, and thus is merely duplicative; Section 432(1) provides: "the actor's negligent conduct is not *a substantial factor* in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent." However, Section 432(1) specifically excludes from this test all situations where two or more forces are actively operating at the time of the accident. The omission of the "but for" test avoids the confusion inevitable in such a charge, and is in keeping with the holding of *Whitner v. Lojeski, supra*, where the court held that the "but for" terminology is but a variation of the "substantial factor" test, and treats the "substantial factor" test as the "true note" of causation.

The charge also relates causation to the happening of the accident, rather than to the injury or to the harm. Where causation of an injury (rather than degree of injury) is in issue, it is unnecessarily confusing to charge a jury that a plaintiff can recover only if he proves that the defendant's negligence caused his "injury." For example, in a rearend accident where the plaintiff's principal complaint, in addition to minor strains, is a severance of the optic nerve, the jury might well believe the defendant to be negligent, but not responsible for the plaintiff's blindness. Nevertheless, the plaintiff would be entitled to a verdict, although greatly diminished in amount. To avoid the possibility of confusion in such situations, causation of injuries, as opposed to the accident itself, is covered in the damage portions of the charge.

3.26 (Civ) CONCURRING CAUSES

There may be more than one substantial factor in bringing about the harm suffered by the plaintiff. When negligent conduct of two or more persons contributes concurrently to an occurrence or incident, each of these persons is fully responsible for the harm suffered by the plaintiff regardless of the relative extent to which each contributed to the harm. A cause is concurrent if it was operative at the moment of the incident, and acted with another cause as a substantial contributive factor in bringing about the harm.

SUBCOMMITTEE NOTE

This charge should be given whenever the joint negligence of more than one actor is involved. It incorporates both the Restatement and Pennsylvania law, as and by requiring that the cause be "operative at the moment of the incident", but does not draw any distinction between "active" and "passive" negligence on the part of one actor, as such a distinction is no longer valid. See *Flickinger Estate v. Ritsky*, 452 Pa. 69, 305 A.2d 40 (1973), discussed in the note to Instruction 3.28, *infra*. See also *Ford v. Jeffries*, 474 Pa. 588, 379 A.2d 111, 114-15 (1977) (so long as the defendant's conduct has created or increased the risk that a particular type of harm may be suffered by one in the same general class as the plaintiff, the manner in which that harm occurs is immaterial, even if by intentionally tortious or criminal intervention where such is within the scope of the risk).

The charge is also applicable on the issue of liability in comparative negligence situations, since the comparative negligence statute deals solely with the allocation of damages once the plaintiff is determined to be 50% or less comparatively negligent.

Note: This charge deals specifically with the conduct of "two or more persons". For situations in which the conduct of more than one actor combines with one or more circumstance or force, such as an act of God, see Instruction 3.27, *infra*.

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3.27 (Civ) CONCURRING CAUSES - EITHER ALONE SUFFICIENT

Where the negligent conduct of a defendant combines with other circumstances and other forces to cause the harm suffered by the plaintiff, the defendant is responsible for the harm if his negligent conduct was a substantial contributive factor in bringing about the harm, even if the harm would have occurred without it.

SUBCOMMITTEE NOTE

This charge incorporates the essence of Section 432(2) of the Restatement of Torts, 2d. It should be used in the relatively rare situation where there is an issue of causation involving a defendant whose conduct is negligent and one or more forces generated by an innocent act of another person or of unknown origin or for which no one can be responsible, such as an Act of God. Although the Subcommittee has found no Pennsylvania case approving or disproving Section 432(2), Illustration 4 to the Restatement subsection posits the situations where a fire negligently set by the defendant joins with a fire of unknown origin or one set by a stroke of lightning to burn a house and timber, and either fire alone would have been sufficient to bring about the harm. Since it is the policy of Pennsylvania courts to follow the Restatement where it is applicable, liability should be imposed in such a situation. Moreover, Sections 435(1) and 448 and Comment b of Section 442B were approved in *Ford v. Jeffries*, 474 Pa. 588, 379 A.2d 111, 114-15 (1977), in the closely related situation where the defendant created or increased the risk of fire and the other operating force was unknown and could have been sufficient in itself to bring about the harm.

This charge may also be used as a supplement to Instruction 3.26, *supra*, where the second force is the negligent conduct of another defendant, and either act alone would have brought about the harm. Illustration 3 to 432(2) covers this point. A defendant cannot escape liability where his negligent conduct would have brought about the harm by itself simply because another force coincidentally would also have brought about the harm if acting alone.

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