

THE ROYAL NONESUCH: HOW TORT REFORMERS ARE
PULLING ONE OVER ON PENNSYLVANIA*

Scott B. Cooper**
Lara Antonuk***

I. INTRODUCTION

In Mark Twain's *The Adventures of Huckleberry Finn*,¹ the title character encounters a number of interesting individuals. Among the most memorable are two men who identify themselves as 'the duke' and 'the dauphin.'² In the story, the men make their way to a small town in Arkansas, where they put on a Shakespeare play that was not well received.³ As revenge on the town, they decided to put on a new play entitled "The Royal Nonesuch," a lowbrow comedy which they thought would be sure to draw a crowd.⁴ Playing for a full house, the dauphin appeared on stage wearing nothing but body paint, which amused the crowd.⁵ However, the dauphin walked off stage after an extremely brief performance, leaving the audience upset at being tricked.⁶ To avoid becoming the laughingstocks of their small town, the

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** Scott Cooper is a 1993 graduate of Widener University School of Law. He is currently a partner at Schmidt Kramer PC. An active member of the Pennsylvania Association for Justice (PAJ), Mr. Cooper served as its 2012-13 President. He is also Chairman of its Legislative Policy Committee and serves on both the Executive Committee and Board of Governors.

*** Lara Antonuk is a May 2014 graduate from Widener University School of Law, magna cum laude. She served as the Internal Managing Editor of the Widener Law Journal.

¹ MARK TWAIN, *THE ADVENTURES OF HUCKLEBERRY FINN* (1884).

² *Id.* at 170, 172.

³ *Id.* at 191, 207.

⁴ *Id.* at 207-08.

⁵ *Id.* at 209.

⁶ *Id.* at 209-10.

audience decided to get the rest of the town to see the play too.⁷ They praised the show, and on the second night, it was sold out again.⁸ The dauphin repeats his act, and the second audience is just as disappointed as the first one.⁹ On the third night, another full audience arrived, this time consisting of the first and second night's audiences seeking revenge, by way of rotten cabbages and eggs, for the dauphin's deception.¹⁰ But before the audience had their chance, the men skipped town, counting their money and laughing about how easily the townspeople were taken in by the act which had appeared to give the audience everything they wanted, but had instead taken advantage of them.¹¹

Although "The Royal Nonesuch" is just a story, it is also a fairly accurate representation of what has happened, and continues to happen, in Pennsylvania. Simply substitute 'tort reformers' for the duke and the dauphin. We are the audience.

Tort reform has been a contentious issue for decades, but it was not until recent years that Pennsylvanians truly began to feel its effect.¹² Corporations, under the pretext of "fairness," have been pushing reforms that our legislature has been all too happy to adopt, or at the very least, propose.¹³ The practical effect of this 'anti-victim' legislation is to limit the liability of negligent defendants to the detriment of innocent victims.¹⁴

In 2011, the legislature eviscerated the doctrine of joint and several liability, making it more difficult for a victim to recover the

⁷ TWAIN, *supra* note 1, at 210.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 211.

¹¹ *Id.* at 211-12.

¹² See Tricia Cooley, *ATRA's "Hellholes": Bankrolled by Insurance, Tobacco, Big Pharma*, AM. ASS'N FOR JUST. (Dec. 15, 2009), <http://www.justice.org/cps/rde/justice/hs.xsl/11257.htm>; 42 PA. CONS. STAT. § 7102(a.1) (2011); S. 749, 197th Gen. Assemb., Reg. Sess. (Pa. 2013) (explaining the evolution of tort reform).

¹³ Cooley, *supra* note 12; see also tit. 42, § 7102 (showing the willingness of the Pennsylvania legislature to adopt pro-corporate laws); S. 749, 2013-14 Gen. Assemb., Reg. Sess. (Pa. 2013) (displaying a recent amendment to section 7102).

¹⁴ See Cooley, *supra* note 12 (explaining the goal of the American Tort Reform Association (ATRA) is to "shut[] the courthouse doors on consumers").

damages they are justly owed by responsible defendants.¹⁵ Legislation has been proposed that will restrict the ability of victims to sue in the venue in which they live.¹⁶ Proponents of tort reform continue to push for caps on non-economic damages, causing reductions in damages that the jury clearly thought were appropriate compensation for the victim's injury.¹⁷ These reforms are zealously promoted through misinformation concerning frivolous lawsuits and a purported increase in the number of tort claims, although the tort system has, in fact, experienced a decrease in claims.¹⁸

The adoption of pro-victim legislation is insubstantial in comparison. Although the legislature has recently proposed a few amendments that would ease the blow of the effects of tort reform, none have been adopted.¹⁹ Further, many of these proposed amendments do not go far enough. Although we agree with the proponents of tort reform that the tort system needs to change, we propose that the change should benefit innocent victims instead of responsible defendants.

In Part II, we will discuss the doctrine of joint and several liability as it existed in Pennsylvania prior to 2011 and as it is now.

¹⁵ See tit. 42, § 7102(a.1).

¹⁶ See H.R. 1552, 196th Gen. Assemb., Reg. Sess. (Pa. 2011).

¹⁷ *Noneconomic Damages Reform*, ATRA, <http://www.atra.org/issues/noneconomic-damages-reform> (last visited Feb. 7, 2014) ("The broad and basically unguided discretion given juries in awarding damages for noneconomic loss is the single greatest contributor to the inequities and inefficiencies of the tort liability system.").

¹⁸ *The Truth About the American Tort Reform Association*, AM. ASS'N FOR JUST., <http://www.justice.org/cps/rde/xchg/justice/hs.xsl/17291.htm> (last visited Feb. 7, 2014); R. LaFountain et al., *Examining the Work of State Courts: An Analysis of 2010 State Court Caseloads*, CT. STAT. PROJECT, Dec. 2012, at 2, available at http://www.courtstatistics.org/Other-Pages/~media/Microsites/Files/CSP/DATA%20PDF/CSP_DEC.ashx (noting that civil caseloads in all state courts fell by three percent in 2010).

¹⁹ S. 749, 197th Gen. Assemb., Reg. Sess. (Pa. 2013) (proposing an exception to the joint and several law for minors); *Senate Co-Sponsorship Memoranda*, PA. ST. SENATE (Dec. 10, 2012, 2:29 PM), <http://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=S&SPick=20130&cosponId=9896> (proposing an amendment to section 8371 to allow "the trier of fact (judge or jury) to make a finding that an insurance company acted in bad faith toward an insured and to award punitive damages").

we will also explore the effects of this new law on victims, as well as possible constitutional challenges. In Part III, we will discuss the proposed venue legislation and its possible effects. In Part IV, we will explore caps on non-economic damages. Lastly, in Part V, we will propose several changes to the current tort system that would positively affect victims.

II. JOINT AND SEVERAL LIABILITY

A. *Overview of the Changes to Act No. 17*

The reason behind holding a person or a corporation jointly and severally liable is that an innocent person should not be forced to pay any of the costs of injuries they suffered due to another's misbehavior.²⁰ Under this concept, only parties that have legally caused an injury pay the costs of the damages.²¹

The joint and several law has traditionally been applied by Pennsylvania courts to any case where there is more than one defendant.²² In such a case, the verdict is the result of the jury's response to written interrogatories or questions submitted to them by the trial judge.²³ Only after a jury determines that each of the joint defendants is a 'legal cause,' or what is commonly referred to as a "substantial factor" in contributing to the plaintiff's injuries, is the jury asked to apportion responsibility by assigning a random percentage to each defendant.²⁴ The court's instruction requires that

²⁰ Richard W. Wright, *The Logic and Fairness of Joint and Several Liability*, 23 MEM. ST. L. REV. 45, 67 (1992) (quoting MAINE STATE LEGISLATURE, DRAFT REPORT OF THE COMMISSION TO EXAMINE PROBLEMS OF TORT LITIGATION AND LIABILITY INSURANCE IN MAINE 95-96 (Oct. 1, 1987) ("The law of joint and several liability is a key to assuring that someone at fault, as opposed to an innocent plaintiff, bears the cost of the plaintiff's harm.")).

²¹ *See id.*

²² *See, e.g., Harsh v. Petroll*, 887 A.2d 209, 217 (Pa. 2005) (seven defendants); *Neal v. Bavarian Motors, Inc.*, 882 A.2d 1022, 1027 (Pa. Super. Ct. 2005) (two defendants).

²³ *Leichter v. Eastern Realty Co.*, 516 A.2d 1247, 1250 (Pa. Super. Ct. 1986) (holding that "the jury is far better prepared for its task if its deliberations are aided by the orderly focus effected in special interrogatories").

²⁴ *Harsh*, 887 A.2d at 219.

the jury subdivide the defendant's responsibility in such a manner that the percentages assigned to each equal 100%.²⁵

Over many years, arguments were made that it is not fair to hold a company that is 1% at fault responsible for the entire award.²⁶ This argument is unfair and faulty.

There have been very few, if any, 1% verdicts in the Commonwealth.²⁷ Also, this "so called" 1% defendant was found negligent *and* a substantial factor or legal cause in the injuries.²⁸ Thus, absent any other defendant, this 1% defendant would be solely responsible. Also, if the 1% defendant pays more than 1%, there are still viable claims for contribution which can be made against any other responsible party.²⁹ Finally, none of the parties are allowed to argue the percentages that should be apportioned.³⁰

Eliminating joint liability discourages settlements, increases the likelihood of trying cases to a verdict, and handcuffs party defendants who wish to conclude cases before trial.³¹ Joint and several responsibility promotes fairness for the injured victim.³² In addition, eliminating joint and several liability and allowing only several liability in favor of several defendants will force the

²⁵ See, e.g., *Campbell v. Temple Univ. Hosp.*, 2011 WL 2838551 (Pa. C.P. Phila. Cnty. June 17, 2011) (jury interrogatories).

²⁶ See Michael P. Addair, *A Small Step Forward: An Analysis of West Virginia's Attempt at Joint and Several Liability Reform*, 109 W. VA. L. REV. 831, 839 (2007) (arguing that under the joint and several liability doctrine, "solvent defendants often end up paying much more than their share of the damages").

²⁷ There have been 1% verdicts in other jurisdictions, although these too have been rare. See, e.g., *Walt Disney World Co. v. Wood*, 489 So. 2d 61, 62 (Fla. Dist. Ct. App. 1986); *Kaeo v. Davis*, 719 P.2d 387, 390 (Haw. 1986).

²⁸ *Kaeo*, 719 P.2d at 390 (recognizing that although the city was 1% at fault, its knowledge of the dangerous winding road was a substantial factor).

²⁹ See *Oviatt v. Automated Entrance Sys. Co.*, 583 A.2d 1223, 1227 (Pa. Super. Ct. 1990) (noting that "contribution is . . . the enforcement of an equitable duty to share liability for the wrong done") (quoting *Svetz v. Land Tool Co.* 513 A.2d 403, 407 (Pa. Super. Ct. 1986)); 42 PA. CONS. STAT. § 8324 (2011) ("The right of contribution exists among joint tort-feasors."); *id.* § 7102(a.1)(4).

³⁰ See *infra* note 262 and accompanying text.

³¹ David K. DeWolf, *Several Liability and the Effect of Settlement on Claim Reduction: Further Thoughts*, 23 GONZ. L. REV. 37, 47-48 (1987).

³² H.R. 195-54, 2011 Sess., at 1554 (Pa. 2011).

plaintiff to sue all possible parties responsible for an injury in order to recover all damages to which he or she is entitled.³³ In some cases there could be dozens of parties as potential defendants.³⁴ Such a system causes cases to become unwieldy and complex.³⁵ For instance, there are many cases where a responsible defendant is located in a foreign country, and it is extremely difficult to pursue those claims.³⁶ Further, several companies are encouraged to set up "foreign defendant" companies in order to avoid being made a party to a case.³⁷

Eliminating joint liability impacts the innocent victim by depriving them of the full compensation owed.³⁸ As an example, suppose two or more defendants jointly cause an injury to a third person. If one of the defendants cannot pay damages, it is proper for the remaining defendants who would be otherwise be liable to pay the whole amount.³⁹ If not, the plaintiff is not properly compensated, and in the long run the taxpayers pay.⁴⁰

B. History of Act No. 17

On June 28, 2011, Governor Corbett signed Senate Bill 1131 into law.⁴¹ The Act amends title 42 of the Pennsylvania Judicial Code to essentially eliminate the doctrine of joint and several liability in the Commonwealth of Pennsylvania.⁴²

The eradication of joint and several liability came after several years of the legislation being introduced and then re-introduced

³³ See Wright, *supra* note 20, at 79.

³⁴ See, e.g., *Andaloro v. Amstrong World Indus., Inc.*, 799 A.2d 71, 71-73, 76 (Pa. Super. Ct. 2002) (listing dozens of defendants in an asbestos case).

³⁵ See *id.* at 77 (providing a complex procedural history).

³⁶ See 42 PA. CONS. STAT. § 5322(d)-(e) (2011).

³⁷ H.R. 195-54, 2011 Sess., at 1559 (Pa. 2011).

³⁸ See Wright, *supra* note 20, at 51-56.

³⁹ *Id.* at 54-55.

⁴⁰ See *id.* at 67 n.55.

⁴¹ S. 1131, 195th Gen. Assemb., Reg. Sess. (Pa. 2011); see also Kevin Harley, *Governor Corbett Signs 'Fair Share Act,' Important Tort Reforms Now Law*, PR NEWSWIRE (Jun. 28, 2011), <http://www.prnewswire.com/news-releases/governor-corbett-signs-fair-share-act-important-tort-reforms-now-law-124663103.html>.

⁴² See 42 PA. CONS. STAT. § 7102(a.1) (2011) (making each defendant responsible only for its proportion of liability).

over several sessions.⁴³ It had been passed twice by both Chambers of the General Assembly.⁴⁴

First, in 2002 the law was passed and enacted.⁴⁵ In 2005, it was declared unconstitutional.⁴⁶ Then, the law passed again, but was vetoed in 2006 by Governor Rendell who believed that the law, as passed, was much too harsh on injured victims.⁴⁷

In 2011, the law was re-introduced initially in the House as House Bill 1 and in the Senate as Senate Bill 2.⁴⁸ The House passed its version of the Bill in April 2011, and it was sent to the Senate.⁴⁹ Then, in June 2011, the Senate introduced Senate Bill 1131, which mirrored House Bill 1 and Senate Bill 2, but added two important exceptions, one for minors and one for economic damages.⁵⁰

Ultimately, Senate Bill 1131 was voted out of the Senate Judiciary Committee on June 14, 2011.⁵¹ Then Senator Jake Corman (R-Centre/Perry Counties) introduced an amendment striking the two exceptions for minors and economic damages.⁵² This amendment passed the Senate on June 20, 2011.⁵³ After this

⁴³ See *DeWeese v. Weaver*, 880 A.2d 54, 55-57 (Pa. Commw. Ct. 2005) (explaining the history).

⁴⁴ *Id.* at 56-57.

⁴⁵ *Id.* at 55.

⁴⁶ *Id.* at 62.

⁴⁷ Memorandum from Governor Edward Rendell to the Senate of the Commonwealth of Pennsylvania 2 (March 24, 2006), available at <http://www.philadelphiaabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/VETO.pdf> ("I am vetoing Senate Bill 435 because it does not effectively balance the critical needs of victims who should be adequately compensated for their injuries with the reasonable needs of businesses to limit their exposure to liability for damages caused by other parties.").

⁴⁸ H.R. 1, 195th Gen. Assemb., Reg. Sess. (Pa. 2011); S. 2, 195th Gen. Assemb., Reg. Sess. (Pa. 2011).

⁴⁹ *Bill Information – History*, PA. GEN. ASSEMBLY, http://www.legis.state.pa.us/cfdocs/billInfo/bill_history.cfm?year=2011&kind=0&body=H&type=B&bn=1 (last visited Feb. 2, 2014).

⁵⁰ S. 1131, 195th Gen. Assemb., Reg. Sess. (Pa. 2011).

⁵¹ *Bill Information – History*, PA. GEN. ASSEMBLY, http://www.legis.state.pa.us/cfdocs/billInfo/bill_history.cfm?year=2011&kind=0&body=S&type=B&bn=1131 (last visited Feb. 2, 2014).

⁵² S. 1131, 195th Gen. Assemb., Reg. Sess. (Pa. 2011).

⁵³ *Bill Information – History*, *supra* note 51.

amendment, Senate Bill 1131 became the *same* harsh version as the House and Senate Bills introduced earlier.⁵⁴

Without the exceptions for minors and economic damages, Senate Bill 1131 passed the Senate on June 21, 2011.⁵⁵ The House passed the Bill on June 27, 2011.⁵⁶ It was signed and became law effective June 28, 2011, and is now known as Act No. 17.⁵⁷

Over the several months before its passage, efforts were made in the House, primarily by Democrats, to make the overall language fair to protect injured victims.⁵⁸ The proposals that were rejected included: exceptions for minors, seniors, economic damages, and Marcellus Shale;⁵⁹ changing the 60% threshold discussed below to 50%;⁶⁰ and establishing a victim compensation fund.⁶¹

Significantly, despite promises, "there has not been any specific insurance company which has reduced an insurance premium in response to the new law."⁶² "Likewise, there has not

⁵⁴ S. 1131, 195th Gen. Assemb., Reg. Sess. (Pa. 2011).

⁵⁵ *Bill Information – History*, *supra* note 51.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *See supra* notes 48-54 and accompanying text (noting the back and forth between the House and Senate).

⁵⁹ Amendment to S. 1131, A03593, 195th Gen. Assemb., Reg. Sess. (Pa. 2011) (proposing an exception for economic damages); Amendment to S.B. 1131, A03594, 195th Gen. Assemb., Reg. Sess. (Pa. 2011) (proposing an exception for minors); Amendment to S.B. 1131, A03596, 195th Gen. Assemb., Reg. Sess. (Pa. 2011) (proposing an exception for seniors); H.R. 195-54, 2011 Sess., at 1554 (Pa. 2011) (urging a no vote on Senate Bill 1131, due in part to the absence of an exception for Marcellus Shale).

⁶⁰ *House Committee Roll Call Votes*, PA. HOUSE OF REPRESENTATIVES, <http://www.legis.state.pa.us/cfdocs/legis/RCC/PUBLIC/listVoteSummaryH.cfm?sYear=2011&sInd=0&cteeCde=24&theDate=06/22/2011&rNbr=759> (last visited May 15, 2014) (proposing changing the threshold to 50%).

⁶¹ *House Committee Roll Call Votes*, PA. HOUSE OF REPRESENTATIVES, <http://www.legis.state.pa.us/cfdocs/legis/RCC/PUBLIC/listVoteSummaryH.cfm?sYear=2011&sInd=0&cteeCde=24&theDate=04/04/2011&rNbr=186> (last visited May 15, 2014) (proposing a victim compensation fund).

⁶² Scott B. Cooper & David M. Landay, *PBI GPU Spring 2012 Civil Litigation Update: The New Joint and Several Law and How It Will Impact Civil Cases* (2012), available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCoQFjAA&url=http%3A%2F%2Fwww.schmidt-kramer.com%2Flibrary%2FPBI_Spring_2011.doc&ei=_hr4UsCMZOMyAHOo

been one [single] employer who has stated it hired any additional employees or added any jobs directly as a result of the changes to the law."⁶³

C. Provisions of Act No. 17

As stated, Act No. 17 virtually eliminates joint and several liability in the Commonwealth of Pennsylvania with only strict and narrowly tailored exceptions that will seldom apply.⁶⁴ Unless Act No. 17 is set aside in the future on constitutional grounds or a narrow exception applies, joint and several liability only applies in a case where a defendant is found liable and a legal cause of 60% or more of the total dollar amount of damages.⁶⁵

Effectively, in a case with two defendants, both 50% at fault, joint and several liability does not apply, even though the plaintiff is totally innocent, each defendant is equally at fault, and each defendant is equally a legal cause of the injuries.⁶⁶ The Act requires that a jury apportion liability to each defendant for a plaintiff's damages.⁶⁷

Any defendant found to be less than 60% at fault does not pay the full amount of the award unless the plaintiff shows the defendant intentionally injured the plaintiff;⁶⁸ made an intentional misrepresentation;⁶⁹ a Dram Shop claim exists;⁷⁰ or a toxic tort exception applies for clean-up.⁷¹ There is no exception for fraud, recklessness/gross negligence, or even a mandate that, for the Dram Shop exception to apply, a bar must have Dram Shop insurance.⁷²

YF4&usg=AFQjCNFe_iccHf1UpQYvju7aZaanrdBVUg&sig2=otWoVgwpHpG
YRHZ7jIYtaQ.

⁶³ *Id.*

⁶⁴ *See* 42 PA. CONS. STAT. § 7102(a.1) (2011).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* § 7102(a.1)(3)(ii).

⁶⁹ *Id.* § 7102(a.1)(3)(i).

⁷⁰ tit. 42, § 7102(a.1)(3)(v).

⁷¹ *Id.* § 7102(a.1)(3)(iv).

⁷² *Id.* § 7102(a.1)(3) (stating exceptions).

As noted above, there are some exceptions to allow joint and several liability.⁷³ Two such exceptions are a cause of action that arises out of the release or threatened release of a hazardous substance and for violations of section 497 of the Liquor Code by dram shops.⁷⁴

The Dram Shop exception does not appear to include claims for social host liability or illegal sales to minors.⁷⁵ Therefore, if several children are killed in an alcohol-related motor vehicle accident, under the new law, the rights and recoveries of the estates of the deceased children and the injured would be severely restricted against an individual who may have furnished the alcohol, such as in a case where a 20-year-old driver responsible for the accident was intoxicated and was provided the alcohol by an adult.⁷⁶

Some examples or situations of cases which, if they occurred under the new Act, joint and several liability would probably not apply and recovery would be limited to several liability are:

1. Tobacco Settlement
2. Bernie Madoff
3. MF Global
4. Priest Sexual Abuse Cases
5. Penn State Sex Scandal
6. Social Host Liability
7. Uninsured Defendants
8. Bankrupt Defendants
9. Insolvent Defendants
10. Economic Damages, and
11. Defendants 'Acting in Concert.'

These are just a few examples of cases where joint and several liability has been applied in the past. Also, most states which have changed joint and several liability have several exceptions which

⁷³ *Id.*

⁷⁴ *Id.* § 7102(a.1)(3)(iv)-(v).

⁷⁵ *Id.* § 7102(a.1)(3)(v) (stating the exception only applies to 47 PA. CONS. STAT. ANN. § 4-497 of the Dram Shop Act, which states "No licensee shall be liable to third persons on account of damages inflicted upon them off of the licensed premises by customers of the licensee unless the customer . . . was visibly intoxicated").

⁷⁶ tit. 42, § 7102(a.1)(3)(v).

allow joint and several liability to apply to many of the above situations.⁷⁷

The joint and several liability amendments clearly apply when the plaintiff timely sues multiple defendants in the same action.⁷⁸ However, based on a careful reading, these amendments do not apply when an additional defendant is joined after the plaintiff's statute of limitations expires.⁷⁹ This may provide a tactical approach that maximizes the plaintiff's recovery.

Under the Pennsylvania Rules of Civil Procedure, any party may join as an additional defendant any non-party who may be solely liable or "liable to or with the joining party" on any cause of action involving the occurrence on which the underlying cause of action is based.⁸⁰ The plaintiff can then recover from the additional defendant if the additional defendant is either alone liable to the plaintiff or is jointly liable with the original defendant.⁸¹ The plaintiff recovers as though the additional defendant had been originally sued.⁸²

When an additional defendant is joined after the plaintiff's statute of limitations has run, the additional defendant cannot be directly liable to the plaintiff.⁸³ Hence, an original defendant and a late-joined additional defendant can never be jointly and severally liable to the plaintiff.⁸⁴ An original defendant, however, can always

⁷⁷ See, e.g., NEV. REV. STAT. § 41.141 (1989) (allowing joint and several liability where the defendants have acted in concert); NEB. REV. STAT. § 25-21.185.10 (1992) (allowing joint and several liability for economic damages); CONN. GEN. STAT. § 52-572h (2013) (allowing a plaintiff to collect damages from other defendants where one defendant's share is uncollectable); UT. CODE ANN. § 78B-5-819 (2008) (allowing the jury to reallocate damages to other parties where one defendant is immune).

⁷⁸ See tit. 42, § 7102.

⁷⁹ See *id.* § 7102(c.2) ("Nothing in this section shall be construed in any way to create, abolish or modify a cause of action or to limit a party's right to join another potentially responsible party.").

⁸⁰ PA. R. CIV. P. 2252(a).

⁸¹ See generally *id.* (noting that the additional defendant can be solely liable to the plaintiff).

⁸² PA. R. CIV. P. 2255(d).

⁸³ *Dickson v. Lewandowski*, 323 A.2d 169, 171 (Pa. Super. Ct. 1974).

⁸⁴ See *id.* (discussing joint and several liability of an additional defendant when the additional defendant is joined after the statute of limitations has run).

join an additional defendant at any time for a claim of contribution or indemnity.⁸⁵ This claim is the original defendant's own separate cause of action.⁸⁶ It does not arise until the defendant has been held liable to the plaintiff.⁸⁷

The joint and several liability amendments, as already noted, limit the liability of a defendant who is less than 60% at fault to his proportionate share of liability.⁸⁸ Under the amendments' language, however, this only applies to defendants among whom liability is being apportioned are jointly liable to the plaintiff.⁸⁹

The operative subsection of the amended Act, subsection a.1, is titled "[r]ecover against joint defendant; contribution".⁹⁰ Although the term "joint tort-feasors" is defined by statute, the term "joint defendant" is not.⁹¹

Subsection a.1(1) provides that where liability is attributed to multiple defendants, each defendant is liable for his proportionate share.⁹²

Significantly, subsection a.1(2) provides that except as set forth in paragraph a.1(3) (which includes a defendant who is at least 60% at fault), "a defendant's liability shall be several and not joint, and the court shall enter a separate and several judgment *in favor of the plaintiff and against each defendant* for the apportioned amount of that defendant's liability."⁹³

"Statutes are not presumed to make changes in . . . the common law or prior existing law beyond what is expressly declared in their provisions."⁹⁴ Moreover, "a statute of limitations,

⁸⁵ PA. R. CIV. P. 2252; 42 PA. CONS. STAT. § 7102(a.1)(4) (2011).

⁸⁶ PA. R. CIV. P. 2252; tit. 42, § 7102(a.1)(4).

⁸⁷ Hileman v. Morelli, 605 A.2d 377, 382 (Pa. Super. Ct. 1992).

⁸⁸ tit. 42, § 7102(a.1)(3)(iii).

⁸⁹ *Id.* § 7102(a.1) (titling the subsection as "[r]ecover against joint defendant; contribution").

⁹⁰ *Id.*

⁹¹ *Id.* § 8322 ("As used in this subchapter 'joint tort-feasors' means two or more persons jointly or severally liable in tort for the same injury to persons or property, whether or not judgment has been recovered against all or some of them.").

⁹² *Id.* § 7102(a.1)(1).

⁹³ *Id.* § 7102(a.1)(2) (emphasis added).

⁹⁴ Krivijanski v. Union R.R. Co., 515 A.2d 933, 938 (Pa. Super. Ct. 1986).

like all statutes, must be read with reason and common sense."⁹⁵ "[I]ts application . . . must not be made to produce something that the [legislature] could never have intended."⁹⁶ Finally, it is presumed "[t]hat the General Assembly intends the entire statute to be effective and certain."⁹⁷

The only logical reading of a.1(1) and a.1(2) is that their provisions only apply to comparative fault among defendants, who can be directly liable to the plaintiff, that is, defendants who can be jointly liable (joint defendants).⁹⁸ Under any other interpretation, the court would have to enter a separate judgment for the plaintiff and against an additional defendant found liable, even if that defendant was joined after the expiration of the plaintiff's statute of limitations.⁹⁹ The legislature could not have intended such an absurd result. Hence, the amendments and their limitations do not apply to an additional defendant joined too late.

Under the amendments, when an additional defendant is joined late, the plaintiff is entitled to a judgment against the original defendant for the full amount of the verdict.¹⁰⁰ The original defendant is then entitled to a judgment against the additional defendant for the amount he pays in excess of his proportionate share.¹⁰¹

This analysis suggests a viable but sometimes risky strategy: suing the less culpable defendant at the last possible minute. This can be best illustrated by an example:

Assume that P is a passenger in D-1's car. D-1, who is speeding, wrecks into D-2, who has just pulled onto the

⁹⁵ *Fine v. Checcio*, 870 A.2d 850, 860 (Pa. 2005).

⁹⁶ *Id.*

⁹⁷ 1 PA. CONS. STAT. § 1922(2) (1975) (Statutory Construction Act).

⁹⁸ *See* tit. 42, § 7102(a.1)(1)-(2).

⁹⁹ *Id.*

¹⁰⁰ *Id.* § 7102(a.2) ("Nothing in this section shall affect the rules of joinder of parties as set forth in the Pennsylvania Rules of Civil Procedure."); *see also id.* § 7102(c.2) ("Nothing in this section shall be construed in any way to create, abolish or modify a cause of action or to limit a party's right to join another potentially responsible party.").

¹⁰¹ *Id.* §§ 8324, 7102(a.1)(4).

road without yielding the right of way. P is severely injured.

P's damages are \$1 million. D-1 has the minimum liability insurance limits of only \$15,000 while D-2 has liability insurance limits of \$1 million. There is no underinsured motorist coverage and D-1 is judgment proof.

Assume that a reasonable jury would determine that D-1 is 95% at fault while D-2 is only 5% at fault.

If P timely sues D-1 and D-2, then he can collect up to 95% of his damages from D-1 and his insurer (\$15,000). Applying the amendments, D-1 can only collect 5% of his damages from D-2 and his insurer (\$50,000).

If P is willing to risk losing the recovery of \$15,000 from D-1, he can sue D-2 alone right before the statute of limitations expires. Then, when D-2 joins D-1 as an additional defendant, D-1 cannot be directly (or jointly) liable to P. As discussed above, subsection a.1 does not apply. D-2 remains severally liable for the entire verdict even though he is only 5% at fault. P can collect \$1 million from D-2 and his insurer. D-2 still has a right to the contribution of \$15,000 from D-1.

If the court rejects the above analysis, P still collects \$50,000 from D-2, but collects nothing from D-1 because D-1 was joined too late. Therefore, this approach must be taken with the client's complete informed consent.

If D-1 is uninsured (assuming no applicable uninsured motorist coverage), then this approach may carry little or no risk. P then cannot recover anything from D-1 anyway. The main risk P takes in waiting to sue D-2 alone is losing the opportunity to do discovery to timely identify other viable defendants. A comprehensive investigation should eliminate this risk in most cases.

If the legislature had intended the limitations on joint and several liability to apply even when one or more of the defendants cannot be directly or jointly liable to the plaintiff, then it could have easily said so.

For instance, it could have written section 7102(a.1)(2) using some of the same language from former section 7102(b) now repealed, as follows:

A defendant's liability shall be several and not joint, and the court shall enter a separate and several judgment in favor of the plaintiff and against each defendant [*against whom the plaintiff is not barred from recovery*] for the apportioned amount of that defendant's liability.¹⁰²

After all, "[l]egislative intent controls."¹⁰³ "When the words of the statute are clear and free from all ambiguity, [they are] not to be disregarded under the pretext of pursuing its spirit."¹⁰⁴

D. Effect of a Release on a Defendant

The Act provides that:

For purposes of apportioning liability only, the question of liability of any defendant or other person who has entered into a release with the plaintiff with respect to the action and who is not a party shall be transmitted to the

¹⁰² *Id.* § 7102(a.1)(2); *id.* § 7102(b) (repealed 2011) (emphasis added). Prior to the amendment, the statute provided:

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 of 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.

Id. § 7102 (repealed 2011).

¹⁰³ 1 PA. CONS. STAT. §1921 (1975).

¹⁰⁴ *Id.* § 1921(b).

trier of fact upon appropriate requests and proofs by any party.¹⁰⁵

Therefore, liability may still be apportioned to any defendant who is released from a case and is not at trial.¹⁰⁶

As a result of this provision, a plaintiff will most likely not enter into any joint tortfeasor release in the future unless the defendant being released is a defendant substantially (more than 50%) at fault and has sufficient insurance coverage.¹⁰⁷ The plaintiff may not even entertain an offer to settle with one defendant even in a case where two defendants may be equally at fault.¹⁰⁸ This makes it more difficult for certain defendants to be released from cases.

Importantly, the Act also provides that a non-party defendant whose liability could be determined "does *not* include an employer to the extent that the employer is granted immunity . . . pursuant to the . . . Workers' Compensation Act."¹⁰⁹ Therefore, a defendant cannot argue that an employer immune by workers' compensation is responsible for the incident and should be apportioned damages.¹¹⁰ Thus, a phantom defendant argument cannot exist.

The House version of the Bill in 2002, before Senate amendments, actually allowed a defendant to ask a jury to apportion fault to a non-party who was never even a party to the case, or to argue the 'empty chair defense.'¹¹¹ Back in 2002, when introducing Senate Bill 1089 (as amended by the Senate) on the Senate Floor, Senator Piccola was asked and specifically indicated that Senate Bill 1089 (as being amended in the Senate) was amended to eliminate the empty chair defense.¹¹²

¹⁰⁵ tit. 42, § 7102(a.2).

¹⁰⁶ *See id.* (discussing non-party liability).

¹⁰⁷ *See id.* (discussing release of defendants and subsequent non-party liability).

¹⁰⁸ *See generally id.* (discussing release of defendants and subsequent non-party liability).

¹⁰⁹ *Id.* (emphasis added).

¹¹⁰ *See id.* (discussing that non-party defendant liability does not extend to an employer that is immune by workers' compensation).

¹¹¹ S. 1089, 186th Gen. Assemb., Reg. Sess. (Pa. 2002).

¹¹² S. 186-42, 2002 Sess., at 1909 (Pa. 2002). The exchange occurred as follows:

The express intention of the law is not to encourage defendants to place blame on a non-party and ask for an apportionment of liability on an entity that has not been made a party to a suit.¹¹³ In order for liability to be apportioned in any way, shape, or form, an entity must have at least been named as a defendant in the case.¹¹⁴

There is no definition in the Act as to what the legislature meant by "upon appropriate requests" and "proofs by any party."¹¹⁵ These will most likely lead to some appellate issues.

E. Applicability

The Act provides that the changes to joint and several liability apply to all causes of action that *accrue* on or after the effective date of "this section."¹¹⁶ The Act is effective the date the Bill was signed into law which is June 28, 2011.¹¹⁷ Therefore, the changes to joint and several liability apply to causes of action that arise on or after June 28, 2011.¹¹⁸

Hence, a person who is injured on June 27, 2011, by multiple tortfeasors who are found to be both negligent and substantial factors in causing injuries is still covered under the old joint and several law whereas, the same person injured by multiple tortfeasors in the same situation on June 28, 2011, will not have the right to compensation from any and all defendants under joint and

Senator O'PAKE: Mr. President, is it the intention of this amendment to remove from the original Senate Bill No. 1089, as sent over from the House, the so-called empty chair defense?

Senator PICCOLA: Yes, Mr. President.

Id.

¹¹³ tit. 42, § 7102(a.2).

¹¹⁴ *Id.*

¹¹⁵ *Id.* ("For purposes of apportioning liability only, the question of liability of any defendant or other person who has entered into a release with the plaintiff with respect to the action and who is not a party shall be transmitted to the trier of fact upon appropriate requests and proofs by any party.").

¹¹⁶ *Id.* § 7102.

¹¹⁷ *Id.*

¹¹⁸ *See generally id.* (showing the effective date as June 28, 2011).

several liability, even if one or more defendants was insolvent and/or uninsured.¹¹⁹

The date of filing a lawsuit is not what controls the effectiveness.¹²⁰ Therefore, it is not necessary to file a lawsuit to preserve the old law.

F. Practical Effect of the New Law

The practical effect of the new law is that plaintiffs and their attorneys should try and find out as much information about the insurance coverage on an individual and/or company *before* filing suit.¹²¹ A defendant may certainly have enough insurance coverage to cover any claims. Some trucking companies have insurance coverage information listed on the Internet, which can be obtained by accessing a web site called Safersys.org.¹²² Also, MEA Services can discover insurance information on a defendant for a relatively nominal fee.¹²³

Plaintiffs and their counsel will also be required to file causes of action against any and all potential defendants in order to safeguard allocation problems.¹²⁴ In some situations, defendants such as truck drivers may not be named at all in a lawsuit if the driver was an agent, servant, and/or employee for the trucking company.¹²⁵ There would then be only one defendant and no confusion or argument over apportionment.¹²⁶

¹¹⁹ See generally tit. 42, § 7102 (demonstrating that nothing in the statute indicates it is to be applied retroactively).

¹²⁰ See *supra* notes 102-03 and accompanying text.

¹²¹ See generally *id.* (discussing an example).

¹²² *Safety and Fitness Electronic Records (SAFER) System*, U.S. DEPARTMENT OF TRANSP., <http://www.safersys.org> (last visited Feb. 7, 2014).

¹²³ *MEA Insurance Request Form*, MEA SERVICES, INC., <http://nebula.wsimg.com/de76a84594045416244491282499fde1?AccessKeyId=46B7C6277091DD16A7FE&disposition=0> (last visited Feb. 7, 2014) (listing prices for the investigation of insurance information, ranging from \$425 to identify an insurer three years from the loss date to \$75 to identify a policy period).

¹²⁴ See generally *supra* Part II.E (discussing the applicability of the new law).

¹²⁵ See generally *id.* (discussing the applicability of the new law).

¹²⁶ See generally *id.* (discussing the applicability of the new law).

The effects of Pennsylvania Rule of Civil Procedure 1023.1 need to be kept in mind by both plaintiffs and defendants.¹²⁷ Under the new law, defendants may be encouraged to try and file counterclaims and/or third party complaints against any and all potential tortfeasors which, under the new Rules of Civil Procedure, could subject counsel to sanctions.¹²⁸

Joint and several liability traditionally applies to situations where a plaintiff is harmed by more than one defendant.¹²⁹ It is designed to protect an injured victim (for example, children and woman) to make sure that they recover the total amount of damages from any of the responsible defendants.¹³⁰ The defendant under joint and several liability still has protection because a defendant who pays an amount of damages greater than his or her percentage of liability can still seek indemnification from other defendants who are at fault.¹³¹

Under the new law, the defendants have other places to go for protection, whereas the victim is limited.¹³² Under the old law, the protection for the victim is that a defendant, under joint and several liability, fully compensates a plaintiff if other defendants are

¹²⁷ PA. R. CIV. P. 1023.1(d) ("If, after notice and a reasonable opportunity to respond, the court determines that subdivision (c) has been violated, the court may, subject to the conditions stated in Rules 1023.2 through 1023.4, impose an appropriate sanction upon any attorneys, law firms and parties that have violated subdivision (c) or are responsible for the violation.").

¹²⁸ *Id.*

¹²⁹ *See, e.g., Harsh v. Petroll*, 887 A.2d 209, 209 (Pa. 2005) (seven defendants); *Neal v. Bavarian Motors, Inc.*, 882 A.2d 1022, 1022 (Pa. Super. Ct. 2005) (two defendants).

¹³⁰ *See Wright, supra* note 20, at 51-56.

¹³¹ 42 PA. CONS. STAT. § 8324 (2011) ("The right of contribution exists among joint tort-feasors."); *id.* § 7102(a.1)(4).

¹³² Where more than one person was at fault, a plaintiff can only recover his full damages from a defendant who was at least 60% at fault, provided such a defendant was not judgment proof from that amount. tit. 42, § 7102(a.1)(3)(iii). However, such a defendant is protected against paying more than his share of damages because he can later recover any additional damages he paid from any at fault party not joined in the original action. *Id.* § 7102(a.1)(4). Additionally, a defendant may also be protected from any liability costs through insurance or similar forms of contractual indemnification. *Id.*

insolvent and/or uninsured.¹³³ Under joint and several liability, the injured victim is the paramount concern, even if it results in requiring a reckless corporation to pay more than its share of fault.¹³⁴

Governor Corbett and our legislature have essentially abolished joint and several liability and imposed a system of proportionate liability where a defendant can only be held liable for the percentage of harm caused.¹³⁵ Most people would argue that this results in an unjust result to the innocent person who no longer has more rights than defendants who have been found to be substantial factors in causing the victim's harm.¹³⁶ The Governor and legislature (unless the amendment is set aside on constitutional grounds) have made a change to the civil justice system that will limit the rights of women, children, and the elderly, who are often the victims of grossly negligent acts.¹³⁷ The ability of the injured victim has been greatly reduced.

One argument made against changing the law is that it is a choice between compensating a victim of negligence and protecting a negligent actor from disproportional liability.¹³⁸ When it first applied joint and several liability several hundred years ago, the legislature resolved that it was more important to compensate a victim of negligence than it was to have a joint tortfeasor pay only for the percentage of the damages that he or she was responsible for.¹³⁹ The current legislature chose the latter.¹⁴⁰

¹³³ tit. 42, § 7102(b) (repealed 2011).

¹³⁴ *See id.*

¹³⁵ *See* tit. 42, § 7102(a.1)(2) (repealing tit. 42, § 7102(b) and providing "a defendant's liability shall be several and not joint . . . for the apportioned amount of that defendant's liability").

¹³⁶ Arguing against the amendment, some legislators felt it "will tip those scales of justice in favor of the tortfeasors . . . against an innocent victim, a victim who needs to recover." S. 195-42, 2011 Sess., at 693 (Pa. 2011) (statement of Senator Costa).

¹³⁷ *See* Lucinda M. Finley, *Female Trouble: The Implications of Tort Reform for Women*, 64 TENN. L. REV. 847, 867 (1997).

¹³⁸ *See* Wright, *supra* note 20, at 51-56.

¹³⁹ *See generally* Nancy C. Marcus, *Phantom Parties and Other Practical Problems with the Attempted Abolition of Joint and Several Liability*, 60 ARK. L. REV. 437, 438-39 (2007) (discussing the origins of joint and several liability).

Joint and several liability reflected interests in deterring tortious conduct by Pennsylvania residents and ensuring that residents were fully compensated.¹⁴¹ The new law effectively moves the public interest away from that.¹⁴²

However, keep in mind that an argument exists that the new law no longer applies at all if you represent a totally innocent plaintiff who is not negligent.¹⁴³ If that is the case, then you should argue the old common law joint and several law applies to the case.

G. Prospects of Future Litigation Challenging Senate Bill 1131

Many people believe that there are several reasons why the new law is not constitutional.¹⁴⁴ As with any new law, there will be challenges which will work their way through the appellate courts. However, until any court authorization to the contrary, Senate Bill 1131 will be the law.

Some possible constitutional arguments are:

1. The new law violates the Pennsylvania's Constitution by placing a cap on damages;¹⁴⁵

¹⁴⁰ Proponents of the amendment argued it was justified, reasoning that to hold defendants liable for more than their share is tantamount to creating "new victims." S. 195-42, 2011 Sess., at 695 (Pa. 2011) (statement of Senator Corman).

¹⁴¹ *Farrell v. Davis Enters., Inc.*, 1996 WL 21128, at *3 (E.D. Pa. Jan. 19, 1996).

¹⁴² *Id.*

¹⁴³ Under the statute, it appears that the only way to use section b.1 is to go to section a first. The only way you can use § 7102(a) is if the plaintiff is contributorily negligent. Thus, you cannot use b.1 if the plaintiff is somehow at fault. The old common law concerning joint and several liability was never repealed legislatively, thus it would still be available for a plaintiff in this situation to use.

¹⁴⁴ See Wright, *supra* note 20, at 84 n.96 (suggesting several possible constitutional challenges to statutes that limit or eliminate joint and several liability).

¹⁴⁵ See PA. CONST. art. III, § 18 (prohibiting caps on damages in most cases).

2. The new law violates the equal protection rights of minors, senior citizens, and even landowners;¹⁴⁶

3. The new law violates the equal protection rights of a 60% defendant because there is no rational basis for 60% as a threshold.¹⁴⁷

H. Raising and Preserving a Challenge to Senate Bill 1131

Since Act No. 17 is dated June 28, 2011, it impacts causes of action which arose after June 27, 2011.¹⁴⁸ Only look at cases after that date with two or more tortfeasors.

In a new matter which raises contribution, indemnity, where someone else is responsible, comparative or contributory negligence, and issues where there are two or more tortfeasors, one recommendation is to respond that the new legislation was enacted in an improper and unconstitutional fashion and should be set aside in this instance. Also, from the defense side, if there are two or more tortfeasors, it is also recommended that this issue be raised in an answer, new matter, joinder, cross-claim or in some other fashion in the *original* pleadings.

Also important to preserving the issue is placing the Attorney General on notice of the claim.¹⁴⁹ The applicable Rule of Civil Procedure is PA. R. CIV. P. 235, which states in pertinent part:

In any proceeding in a court subject to these rules in which an Act of Assembly is alleged to be unconstitutional . . . the party raising the question of constitutionality . . . shall promptly give notice thereof by registered mail to the Attorney General of Pennsylvania together with a copy of the pleading or other portion of the record raising the issue and shall file proof of the giving of the notice If the circumstances of the case

¹⁴⁶ See generally Wright, *supra* note 20, at 84 n.96 ("The statutes eliminating or limiting joint and several liability might be struck down as being unconstitutional under various states' due process, equal protection, and access to the court provisions.").

¹⁴⁷ See *id.*

¹⁴⁸ See 42 PA. CONS. STAT. § 7102 (2011).

¹⁴⁹ PA. R. CIV. P. 235.

require, the court may proceed without prior notice in which event notice shall be given as soon as possible; or the court may proceed without waiting action by the Attorney General in response to a notice.¹⁵⁰

Probably, the safest thing to do is to review files where a challenge is made to the joint and several law, and immediately place the Attorney General on notice as specified by the Rule.¹⁵¹

I. The Future of Senate Bill 1131

Based upon the harshness of Senate Bill 1131, it is hopeful the law will be found unconstitutional, at some point in the future. *However*, everyone should assume that the law will not be set aside.

In 2013, a piece of legislation was introduced to amend the provisions of Act No. 17.¹⁵² This amendment would provide for joint and several liability to apply "[w]here a person under 18 years of age has a beneficial interest."¹⁵³ Thus, the legislature has at least recognized that the law is too harsh as is.¹⁵⁴ Despite this, a better solution for innocent plaintiffs would be for the legislature to repeal the law.

III. VENUE

Any venue legislation passed by the legislature is outside the powers of the General Assembly, is not necessary, and would lead to several logistical problems in the trial courts and adverse consequences to injured victims.

There are at least three serious problems with venue legislation:

¹⁵⁰ *Id.*

¹⁵¹ *See id.*

¹⁵² S. 749, 197th Gen. Assemb., Reg. Sess. (Pa. 2013).

¹⁵³ *Id.*

¹⁵⁴ Even prior to sponsoring Senate Bill 749, Senator Stewart Greenleaf pled with his colleagues that Senate Bill 1131 went "too far, because it, in effect, has a de facto repeal of joint and several liability." S. 195-42, 2011 Sess., at 691 (Pa. 2011) (statement of Senator Greenleaf).

1. The law is not necessary and does not allow for an injured victim to bring a claim in the county where any plaintiff resides.¹⁵⁵
2. The law is inconsistent with other venue rules already established by the Supreme Court of Pennsylvania through its Rules Committee and would also lead to conflicts with jurisdiction that are unfair or impractical.¹⁵⁶
3. The law is unconstitutional because it usurps the rule making power of the Supreme Court of Pennsylvania.¹⁵⁷

First, the legislation that has been proposed does not make a provision for filing suit in the county where any plaintiff resides, in addition to all of the other locales listed.¹⁵⁸ The 2011 Legal Reform Coalition Survey found that 86% of the respondents thought that venue laws should be that lawsuits can only be filed in the county where the defendant resides or where the injury or damages occur.¹⁵⁹ The 86% is an even higher percentage than those surveyed who wanted to change joint and several liability laws.¹⁶⁰ Therefore, even the Legal Coalition Survey does not support this bill.

The American Tort Reform Association (ATRA) advocates venue reform, but one which places venue "where they live or

¹⁵⁵ See *infra* note 159 and accompanying text.

¹⁵⁶ See *infra* notes 163-69 and accompanying text.

¹⁵⁷ See *infra* notes 170-71 and accompanying text.

¹⁵⁸ H.R. 1552, 195th Gen. Assemb., Reg. Sess. (Pa. 2011) (proposing amending 42 PA. CONS. STAT. § 5101.2 (2011) to read "Notwithstanding any other law, a civil action or proceeding brought to recover damages for death or injury to a person may only be filed in the county in which the cause of action arose").

¹⁵⁹ LEGAL REFORM COALITION, 2011 STATEWIDE SURVEY 5 (2011), available at http://www.pachamber.org/advocacy/studies_reports/pdf/Reform%20Coalition%202011%20Statewide%20Survey.pdf (noting that 86% of respondents answered "Yes" to the question "Should state law be changed so that lawsuits can only be filed in counties where the defendant resides or where the injury or damages occur?").

¹⁶⁰ *Id.* at 3 (noting that 82% of respondents answered "No" to the question "Generally speaking, should individuals or businesses be required to pay 100% of the damages when they are only partly to blame?").

where they were injured, or where the defendant's principal place of business is located."¹⁶¹ When legislation is not supported by 86% of our population or the major group which advocates this type of law, then the legislation is not needed.¹⁶²

Second, the law is inconsistent with already established venue rules in Pennsylvania and results in logistical issues that would make claims impossible to litigate in some cases within Pennsylvania.¹⁶³ The venue rules for District Magistrates already allow venue for injury claims if they are under a dollar threshold.¹⁶⁴ The District Magistrate venue in Pennsylvania is that the claim can be filed where a defendant resides or where the cause of action arose.¹⁶⁵ Passing the proposed venue legislation is obviously not consistent with this rule.

Also, the law does not cover the situation where a person is injured in an out-of-state accident with a Pennsylvania resident who caused the injury.¹⁶⁶ This often happens in single car accidents. The law also lacks a definition or explanation on what "cause of action arose" means, which could actually expand venue beyond present rules where something is delivered in one county and an injury occurs in a different county.¹⁶⁷

The proposed legislation also adds complications in uninsured and underinsured motorist claims. In more and more of these claims, insurance policies mandate that a lawsuit be filed in the

¹⁶¹ *Forum and Venue Reform*, ATRA, <http://www.atra.org/issues/forum-and-venue-reform> (last visited Feb. 5, 2014) ("ATRA supports venue reform that requires plaintiffs to bring their cases where they live or where they were injured, or where the defendant's principal place of business is located.").

¹⁶² See LEGAL REFORM COALITION, *supra* note 159, at 5.

¹⁶³ See, e.g., PA. BAR ASS'N, BRINGING SUIT BEFORE A MAGISTERIAL DISTRICT JUDGE 1 (2013), available at http://www.pabar.org/clips/bringing_suitBeforeDJ.pdf.

¹⁶⁴ *Id.* ("You may file a suit with a magisterial district judge (MDJ) . . . if you have a complaint against a person or business and wish to recover an amount of money totaling \$12,000 or less. This is called a civil lawsuit.").

¹⁶⁵ *Id.*

¹⁶⁶ See H.R. 1552, 195th Gen. Assemb., Reg. Sess. (Pa. 2011) (stating an injured party can only file "in the county in which the cause of action arose").

¹⁶⁷ *Id.*

county where the insured resides.¹⁶⁸ A litigant would have no way of determining where to file a case when there is a third party tortfeasor joined in a case which also involves an uninsured or underinsured motorist claim, and maybe even a bad faith claim.¹⁶⁹

Last, the law is unconstitutional because venue is a procedural and not substantive issue.¹⁷⁰ Pennsylvania's Constitution vests the sole authority to pass procedural rules in the Supreme Court of Pennsylvania through its civil procedure rules committee.¹⁷¹ Legislating venue usurps that power and is a violation of Pennsylvania's Constitution.

Proponents of the legislation argue that lawsuits are clogging up certain courts and plaintiffs are encouraged to venue shop.¹⁷² They cite their own funded and created studies in an annual "Judicial Hellhole" report.¹⁷³ Not only is the report unscientific and invalid, but it is incorrect.¹⁷⁴

The report is sponsored by the ATRA, which is funded by corporations.¹⁷⁵ Lawsuits have actually decreased.¹⁷⁶ Many of the cases and facts cited in the report are false or exaggerated.¹⁷⁷ In fact, the trial courts in Pennsylvania have instituted their own

¹⁶⁸ See *O'Hara v. First Liberty Ins. Corp.*, 984 A.2d 938, 942 (Pa. Super. Ct. 2009) (upholding a forum selection clause in an automobile insurance policy).

¹⁶⁹ See Paul J. Kozacky, *Narrow Venue Statutes and Third Party Practice: Some Third Party Defendants Get to Go Home*, 39 DEPAUL L. REV. 389, 404 (1990) (explaining the uncertainties that arise with statutes that limit venue, especially where third parties are concerned, or when such statutes contradict more general venue laws).

¹⁷⁰ See PA. CONST. art. V, § 10(c) ("The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts.").

¹⁷¹ *Id.*

¹⁷² See AM. TORT REFORM FOUND., JUDICIAL HELLHOLES 2012/13 1, 47 (2012-13), available at http://www.judicialhellholes.org/wpcontent/uploads/2012/12/ATRA_JH12_04.pdf.

¹⁷³ *Id.* at 2.

¹⁷⁴ See *The Truth About the American Tort Reform Association*, *supra* note 18.

¹⁷⁵ *Id.*; see also Cooley, *supra* note 12.

¹⁷⁶ LaFountain et al., *supra* note 18, at 8.

¹⁷⁷ *The Truth About the American Tort Reform Association*, *supra* note 18 (citing various examples of errors in the *Judicial Hellholes 2012/13* report).

measures to reduce caseloads and filings.¹⁷⁸ Thus, the proposed legislation presents a solution to a problem that does not exist.

IV. CAPPING DAMAGES

Caps are grossly unfair to the injured victims of negligence. A cap on non-economic damages discriminates particularly against children, housewives, and the elderly.¹⁷⁹ And, there has never been a documented admission or guarantee that capping awards at \$250,000 will reduce any insurance premiums for any lines of coverage.¹⁸⁰

Black's Law Dictionary defines tort as "a civil wrong, other than a breach of contract, for which a remedy may be obtained . . . in the form of damages; a breach of duty that the law imposes on persons who stand in a particular relation to one another."¹⁸¹ Throughout time, both civil justice and the tort system held our citizens accountable when their behavior falls below society's expectations of how we should treat one another.¹⁸² Eliminating joint liability and capping non-economic damages removes that accountability and most often benefits large corporations.¹⁸³ Caps were first imposed by legislation after the railroads were able to basically pay for special legislation in

¹⁷⁸ See, e.g., *In re: Mass Tort & Asbestos Programs General Court Regulation No. 2012-01*, at 2-5 (Pa. Ct. C.P. Phila. Cnty. Feb. 15, 2012), available at <http://www.courts.phila.gov/pdf/regs/2012/cpajgcr2012-01.pdf> (adopting fifteen protocols aimed at reducing caseloads in the Court of Common Pleas of Philadelphia County).

¹⁷⁹ See generally Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1280 (2004) (discussing the discriminatory impact of non-economic damage caps on women, children, and the elderly).

¹⁸⁰ See *id.* at 1265, 1293.

¹⁸¹ BLACK'S LAW DICTIONARY 1626 (9th ed. 2009).

¹⁸² See Andrew F. Popper, *In Defense of Deterrence*, 75 ALB. L. REV. 181, 181-82 (2011/2012).

¹⁸³ Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 69 (2002) ("Such caps permit a corporate entity to accurately predict its punishment in advance and to incorporate that cost into the price of doing business. Thus, corporations spread the costs to consumers rather than avoiding negligent behavior.").

1868.¹⁸⁴ There was a statute that specifically kept a person's damages at \$3,000 per incident, or \$5,000 for death.¹⁸⁵ As a result of the cap, there was an uproar throughout the Commonwealth of Pennsylvania, and during the Constitutional Convention of 1873, Pennsylvania initially enacted what was then section 21 of article III, which restricted the legislature from limiting a person's damages for injuries to person or property.¹⁸⁶

From reading the debates of the 1873 Constitutional Convention, it would appear that things are really no different today, with regards to corporations trying to pay for special interest legislation, than they were 140 or so years ago.¹⁸⁷ The debate is interesting, and there are some statements that could be used at some point in a future debate on the floor of the General Assembly.

For instance, on page 740 of the debate, Delegate Black stated:

¹⁸⁴ See Act of April 4, 1868, P.L. 58, Act 1986-26 (limiting railroads' tort liability).

¹⁸⁵ *Id.*

¹⁸⁶ PA. CONST. art. III, § 21 (1874). The amendment provided:

No act of the General Assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property; (c) and, in case of death from such injuries, the right of action shall survive, and the general assembly shall prescribe for whose benefit such actions shall be prosecuted. No act shall prescribe any limitations of time within which suits may be brought against corporations for injuries to persons or property, or for other causes different from those fixed by general laws regulating actions against natural persons; and such acts now existing are avoided.

Id.

¹⁸⁷ See, e.g., 2 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 740-43 (1873) [hereinafter DEBATES], available at http://www.duq.edu/Documents/law/pa_constitution/_pdf/conventions/1873/debates/debates-a-vol2.pdf; see also F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 HOFSTRA L. REV. 437, 472 (2006) (noting that today, those who support tort reform "have embraced the political model for addressing reform and have used their considerable resources to lobby and support candidates, to conduct massive publicity campaigns, and to fund conservative think tanks in order to place their common concern for reform on the political agenda in the states and in Congress").

You cannot say that a man who has suffered an injury at the hands of another shall not recover full compensation without committing an outrage upon the elementary principles of justice. If you give him less than that you may say he shall have nothing. If a man who has suffered to the amount of \$20,000, shall be permitted to recover only \$3,000 or \$5,000, why can you not say that he shall go uncompensated altogether?¹⁸⁸

On page 742, Delegate Cochran stated:

I am perfectly satisfied that there can be no good reason assigned why this limitation should continue to exist any longer. It has existed too long already in the State. We have already discriminated too long against individuals, and in favor of corporations; for and point of fact, although not in the express terms of the law, the limitation chiefly operates on them. Let us, then, make this matter explicit and clear, that this limitation shall no longer exist in the State, as to the amount of damages to be recovered.¹⁸⁹

He then goes on to stated:

This is always an action in the form of a tort, and the damages there are to be recovered according to the circumstances and rules that control the particular action. There is no reason in the world why we should attempt to impose an *arbitrary* limit here to the amount of recovery, more than there is in any other action which we bring in the same form.¹⁹⁰

He talked further about the death penalty and the idea of leaving things to the jury.¹⁹¹ He stated:

¹⁸⁸ See DEBATES, *supra* note 187, at 740.

¹⁸⁹ *Id.* at 742.

¹⁹⁰ *Id.* at 743 (emphasis in original).

¹⁹¹ *Id.*

[W]e submit these cases to precisely the same tribunal to which we submit the disposition to the question of life and death in other cases. Why, then, should we discriminate in cases like this, contrary to the usual manner and against the plaintiff, who has been injured by the negligence, the absolute, unqualified, negligence of a corporation, or an individual either?¹⁹²

It appears that there were not any problems with the enactment of the prohibition on capping damages.¹⁹³

The next change took place in 1915.¹⁹⁴ During that time, the Pennsylvania Legislature was enacting a workmen's compensation act.¹⁹⁵ The problem with creating no-fault absolute benefits for workmen's compensation was that, in theory, a worker could still sue his employer for tort and not be capped by damages under the statute.¹⁹⁶

In 1913 and 1915, the state legislature passed a joint resolution amending, at that time, section 21 of article III, to allow for the workmen's compensation immunity act.¹⁹⁷ The resolution was

¹⁹² *Id.*

¹⁹³ See PA. CONST. art. III, § 21 (1874) (amending the Constitution to prohibit caps on damages).

¹⁹⁴ See *infra* notes 200-01 and accompanying text.

¹⁹⁵ 1915 Pa. Laws 736, § 1.

¹⁹⁶ Compare *id.* (creating no-fault benefits for workmen's compensation), with PA. CONST. art. III, § 21 (1874) (prohibiting caps on damages).

¹⁹⁷ See PA. CONST. art. III, § 21 (1915). The amendment provided:

The general assembly may enact laws requiring the payment by employers, or employers and employees jointly, or reasonable compensation for injuries to employees arising in the course of their employment, and for occupational diseases of employees, whether or not such injuries or diseases result in death, and regardless of fault of employer of employee, and fixing the basis of ascertainment of such compensation and the maximum and minimum limits thereof, and providing special or general remedies for the collection thereof; but in no other cases shall the general assembly limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property, and in case of death from such injuries, the right of action shall survive, and the general assembly shall prescribe for whose benefit such actions shall be prosecuted. No act shall prescribe any limitations of time within which suits may be brought against

passed, initially, in the 1913 session,¹⁹⁸ and then at the beginning of the 1915 session.¹⁹⁹ It was voted on later in 1915, and then passed by act, at the end of 1915.²⁰⁰ Generally, it was about a two and a half year process to amend the Constitution in 1915, and then pass a workmen's compensation act.²⁰¹

V. PRO-VICTIM LEGISLATION PENNSYLVANIA NEEDS

Some of the legislative changes that many victims and lawyers propose as necessary to add fairness to the civil justice system are:

1. Amending title 42 sections 8301 and 8302 of the Wrongful Death and Survival Acts²⁰² to allow for the recovery of the loss of life and loss of life's pleasures;
2. Amending title 42 section 7302²⁰³ for an exception to minors being allowed to enforce joint and several liability;
3. Amending title 42 section 8301 of the Wrongful Death Act²⁰⁴ to allow for the recovery of loss of filial consortium arising out of the death of a parent or child;
4. Amending title 42 section 8371²⁰⁵ of the Judicial Code to apply to self-insurers as well as insurance companies and allow for bad faith actions in state court to be decided by the trier of fact;

corporations for injuries to persons or property, or for other causes, different from those fixed by general laws regulating actions against natural persons, and such acts now existing are avoided.

Id.

¹⁹⁸ 1913 Pa. Laws 1484.

¹⁹⁹ 1915 Pa. Laws 1103.

²⁰⁰ *Id.*

²⁰¹ *See* 1913 Pa. Laws 1484 (the joint resolution of 1913); 1915 Pa. Laws 1103 (the joint resolution of 1915); PA. CONST., art. III, § 21 (1915) (the amendment).

²⁰² 42 PA. CONS. STAT. § 8301-02 (1976).

²⁰³ *Id.* § 7302.

²⁰⁴ *Id.* § 8301.

²⁰⁵ *Id.* § 8371.

5. Amending title 42 section 7302 of the Pennsylvania Arbitration Act²⁰⁶ to require arbitration in any cases arising under the uninsured or underinsured motorists coverage of a motor vehicle insurance policy;
6. Amending title 40 section 1560 of the Health Maintenance Organization Act²⁰⁷ to include Health Maintenance Organizations in Pennsylvania to be defined as a "program, group contract or other arrangement";
7. Increasing the damage caps recoverable in claims under the Sovereign Immunity²⁰⁸ and the Political Subdivision Tort Claims Acts;²⁰⁹
8. Amending title 42 section 8553 of the Political Subdivision Tort Claims Act²¹⁰ to prohibit subrogation for any benefits paid as a result of injuries sustained as a result of a claim for which a sovereign and/or political entity may be subject to liability;
9. Allowing any party to argue the amount of damages to the trier of fact;
10. Amending title 42 section 7302 of the Comparative Negligence Act²¹¹ to allow for pure comparative negligence;
11. Amending title 42 section 7302 of the Comparative Negligence Act²¹² to allow for an exception for economic damages to be awarded based upon joint and several liability; and

²⁰⁶ *Id.* § 7302.

²⁰⁷ 40 PA. CONS. STAT. ANN. § 1560 (1999).

²⁰⁸ tit. 42, §§ 8521-28.

²⁰⁹ *Id.* §§ 8541-64.

²¹⁰ *Id.* § 8553.

²¹¹ *Id.* § 7302.

²¹² *Id.*

12. Amending title 75²¹³ to increase the mandatory liability limits for motor vehicle insurance coverage from 15/30 to 30/60.

Making these reforms to the Judicial Code in Pennsylvania will protect the rights of injured victims and consumers who elect the members of the Pennsylvania General Assembly.

Pennsylvania wrongful death and survival claims do not allow for recovery of loss of life or loss of life's pleasures once a victim of negligence or wrongdoing has died.²¹⁴ Wrongful death and survival claims do not really take into consideration the actual loss of a life itself and how that person contributes to the family.²¹⁵ An example for such a claim would be a claim for a homemaker. The homemaker's life provides comfort and care for the home and family. However, the homemaker does not necessarily earn a salary that can be quantified. When a homemaker is killed, there is an actual loss of life as well as a loss of the pleasure from the time of the injuries to the homemaker's life expectancy.²¹⁶ Our society should compensate loved ones for those damages to help promote people being active, healthy, loving, caring, and enjoying life. Not compensating a loved one for the loss of a homemaker or child's life diminishes the value of that person's life.²¹⁷ Further, the

²¹³ 75 PA. CONS. STAT. §§ 101-9901 (2011) (Motor Vehicle Code).

²¹⁴ See tit. 42, §§ 8301-02; *Willinger v. Mercy Catholic Med. Ctr. of Se. Pa., Fitzgerald Mercy Div.*, 393 A.2d 1188, 1190 (Pa. 1978) ("The rule is well established in Pennsylvania, however, that compensation for the loss of life's amenities is recoverable only if the victim survives the accident giving rise to the cause of action.").

²¹⁵ See Andrew Jay McClurg, *It's a Wonderful Life: The Case for Hedonic Damages in Wrongful Death Cases*, 66 NOTRE DAME L. REV. 57, 60 (1990) (discussing "the traditional legal notion that a lost life has no cognizable value apart from the lost economic benefits the decedent would have conferred upon her survivors").

²¹⁶ See generally Andrew J. McClurg, *Dead Sorrow: A Story About Loss and a New Theory of Wrongful Death Damages*, 85 B.U. L. REV. 1, 5-7 (2005) ("Current law attaches no monetary value to life itself. We consider life priceless, so we treat it as worthless").

²¹⁷ Gretchen L. Valentine, *Hedonic Damages: Emerging Issue in Personal Injury and Wrongful Death Claims*, 10 N. ILL. L. REV. 543, 548 (1990) (noting that the current system "provides only a lower boundary on the value of life,

treatment of the homemaker under the wrongful death and survival action statutes conflicts with their treatment under the equitable distribution statute.²¹⁸ In equitable distribution, the court may take into account "[t]he contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital property, including the contribution of a party as homemaker."²¹⁹ If a party's contribution as a homemaker is quantifiable in one area of the law, it should follow that it be treated the same in other areas of law.

As mentioned, Pennsylvania wrongful death claims fail to provide for a realistic measure of damages in cases involving fatal injuries. The loss of relationship between the parent and child, more often referred to as filial consortium, is also a damage that needs to be recovered and allowed.²²⁰ Unfortunately, fatal injuries are among the hardest for families to bear, especially those with small children.²²¹ However, Pennsylvania law is based upon an antiquated English statute called Lord Campbell's Act.²²² This Act fails to recognize two of the most obvious losses suffered by survivors of loved ones: the grief and loss of relationship between the parent and child.²²³

Lord Campbell's Act was based upon an antiquated view of children as economic units.²²⁴ The English statute fails to

because a person's earning capacity only reflects one aspect of the total value of his or her life").

²¹⁸ 23 PA. CONS. STAT. § 3502(a)(7) (2008) (allowing a court to place a monetary value on a homemaker's contribution in property division during divorce).

²¹⁹ *Id.*

²²⁰ See Susan J.G. Alexander, *A Fairer Hand: Why Courts Must Recognize the Value of a Child's Companionship*, 8 T.M. COOLEY L. REV. 273, 273 (1991) (noting that the courts need to realize the value of children).

²²¹ *Id.*

²²² See Katherine J. Santon, *The Worth of a Human Life*, 85 N.D. L. REV. 123, 129-30 (2009) (discussing Lord Campbell's Act and its effect on filial consortium claims).

²²³ *See id.*

²²⁴ *See id.*; *Palmer v. Moren*, 44 F. Supp. 704, 708 (M.D. Pa. 1942).

"The measure of damages in an action for wrongful death by the parents of a deceased minor according to a long line of Pennsylvania cases is the present worth of his earnings or the present worth of the probable value of his services until he reaches the age of 21, less what

recognize the emotional consequence of a child's untimely death.²²⁵ Several states have passed laws allowing damages for grief and emotional loss when a family member is injured by wrongful conduct.²²⁶

Pennsylvania law currently only allows for recovery on behalf of a minor dependent child who can claim damages for the loss of 'guidance and tutelage.'²²⁷ There is no such recovery for children past the age of majority even though they may maintain close relationships, or even live with their parents.²²⁸ The law also refuses to recognize the parents' loss of relationship with the child.²²⁹ For almost ninety years, the courts have consistently followed precedent and not allowed such claims, but time and time again the courts have indicated a desire for the legislature to pass a law recognizing these claims.²³⁰

In the 2004 Supreme Court of Pennsylvania decision in *Department of Public Welfare v. Shultz*,²³¹ Justice Saylor

the parents would be required in the meantime to pay for his maintenance."

Id. (internal quotation marks omitted).

²²⁵ Stanton, *supra* note 222, at 127, 129-30.

²²⁶ See, e.g., ARK. CODE ANN. § 16-62-102(f)(2) (2013) ("When mental anguish is claimed as a measure of damages under this section, mental anguish will include grief normally associated with the loss of a loved one."); NEV. REV. STAT. § 41.085(4) (1999) ("The heirs may prove their respective damages in the action brought pursuant to subsection 2 and the court or jury may award each person pecuniary damages for the person's grief or sorrow"); VA. CODE ANN. § 8.01-52(1) (1982) (allowing damages for "[s]orrow, mental anguish, and solace").

²²⁷ *Steiner by Steiner v. Bell Tel. Co. of Pa.*, 517 A.2d 1348, 1350 (Pa. Super. Ct. 1986) ("[U]nder Pennsylvania law, a child can recover in a wrongful death action for the loss of companionship, comfort, society and guidance of a parent."); *Buchecker v. Reading Co.*, 412 A.2d 147, 158 (Pa. Super. Ct. 1979) ("The evidence set forth loss of services in guidance, tutelage, and moral upbringing decedent provided for his children.").

²²⁸ See *Steiner*, 517 A.2d at 1350.

²²⁹ *Dep't of Pub. Welfare v. Schultz*, 822 A.2d 876, 878 (Pa. Commw. Ct. 2003) ("We find no support in our law for the proposition that a parent may recover for the non-economic loss of the guidance, support, comfort, maintenance, companionship and society of a child under the Wrongful Death Act.").

²³⁰ *Id.* at 877-78.

²³¹ *Dep't of Pub. Welfare v. Shultz*, 855 A.2d 753 (Pa. 2004)

concurring in the majority opinion denying recovery to parents who lost a child due to negligence on the part of the Commonwealth.²³² The Justice indicated that he would endorse a broader and more comprehensive definition of consortium and wrongful death actions.²³³ In a 1993 Superior Court of Pennsylvania Opinion, Judge McEwen argued strenuously that the elemental concepts of justice require the law to recognize a claim for loss of consortium on behalf of children whose parents have suffered injury, and he observed that "tortious behavior so impacts upon the entire family of the injured party that each member of the family is a victim."²³⁴ Interestingly, both of these distinguished jurists are Republicans.²³⁵

Our law should consider modern day principles that are consistent with ordinary human experience. Even those groups who do not support victim's rights would have an extremely hard time denying that when a close family member dies, the emotional toll and impact on the family is obvious. These victims left by the loss of a loved one are worthy of the law's protection.

Title 42 section 8371 should be modified from its current language, which states that a "court" may find that an insurer has acted in bad faith towards the insured.²³⁶ Federal courts allow for either a judge or jury to hear a bad faith case in Pennsylvania's federal system.²³⁷ However, the Supreme Court of Pennsylvania

²³² *Id.* at 756 (Saylor, J., concurring).

²³³ *Id.* ("I would tend toward the broader view of consortium, as reflected, for example, in Black's Law Dictionary, which includes filial and parental consortium under the general definition.")

²³⁴ *Wapner v. Somers*, 630 A.2d 885, 888 (Pa. Super. Ct. 1993) (McEwen, J., concurring).

²³⁵ Jan Murphy, *Profile: Pennsylvania Supreme Court Justice Thomas G. Saylor*, PENN LIVE (Aug. 18, 2012, 10:09 PM), http://www.pennlive.com/specialprojects/index.ssf/2012/08/profile_pennsylvania_supreme_c_1.html; James O'Toole & Timothy McNulty, *Judge Chosen to Lead Pa. Legislative Remapping Delegation: Republican to Look at Legislative Districts*, PITTSBURGH POST-GAZETTE (Apr. 20, 2011, 12:00 AM), <http://www.post-gazette.com/state/2011/04/20/Judge-chosen-to-lead-Pa-legislative-remapping-delegation/stories/201104200158>.

²³⁶ 42 PA. CONS. STAT. § 8371 (2011).

²³⁷ *Younis Bros. & Co., Inc. v. Cigna Worldwide Ins. Co.*, 882 F. Supp. 1468, 1476 (E.D. Pa. 1994).

recently held that in state court, only a judge can hear the case.²³⁸ Therefore, we recommend that the word "court" be replaced with the words "trier of fact" or add "or jury" in section 8371. This would make the bad faith process in Pennsylvania courts identical to the practice of federal courts.²³⁹ The ambiguity written in Act 6 of 1990 was certainly unanticipated. The law was not meant to encourage insurers or insureds to "forum shop" a bad faith action between federal and state court.

In 2013, a bill was introduced that would amend the language of section 8371.²⁴⁰ This proposed legislation would change the word "court" to "trier of fact."²⁴¹

Section 8371 also refers to the word "insurer."²⁴² More and more companies are self-insured, but acting as insurance companies.²⁴³ Even a self-insured entity is regulated under the Pennsylvania Motor Vehicle Financial Responsibility Law.²⁴⁴ Thus, the language of section 8371 should be amended to include self-insurers.

Section 7302 of title 42 known as the Uniform Arbitration Act should be amended to require arbitration in uninsured and underinsured motorist claims.²⁴⁵ By doing so, this would legislatively conclude an ongoing legal dispute between the insurance industry and the Pennsylvania Insurance Commissioner.²⁴⁶ The dispute centers on the department's initial ruling that an insurance contract could not eliminate arbitration from motor vehicle insurance policies.²⁴⁷ The Commonwealth

²³⁸ *Mishoe v. Erie Ins. Co.*, 824 A.2d 1153, 1156 (Pa. 2003).

²³⁹ *Compare Younis*, 882 F. Supp. at 1476 (allowing jury trials), *with Mishoe*, 824 A.2d at 1156 (disallowing jury trials).

²⁴⁰ S. 173, 197th Gen. Assemb., Reg. Sess. (Pa. 2013).

²⁴¹ *Id.*

²⁴² 42 PA. CONS. STAT. § 8371 (2011).

²⁴³ George E. Pataki, *An Escape Hatch from ObamaCare*, N.Y. POST, (Nov. 6, 2013, 4:22 AM), <http://nypost.com/2013/11/06/an-escape-hatch-from-obamacare/>.

²⁴⁴ 75 PA. CONS. STAT. § 1702 (2011) (defining "self-insurer" for the purposes of the Motor Vehicle Code).

²⁴⁵ tit. 42, §§ 7301-02.

²⁴⁶ *See Ins. Fed'n of Pa., Inc. v. Dep't of Ins.*, 889 A.2d 550, 551-52 (Pa. 2005) (discussing briefly the relationship between the two parties).

²⁴⁷ *Id.*

Court of Pennsylvania affirmed the decision, but stated that arbitration could be restricted to certain issues.²⁴⁸ The Supreme Court of Pennsylvania reversed.²⁴⁹

This issue first arose at the end of the Casey Administration.²⁵⁰ Trial judges from over fifty counties asked that arbitration clauses remain in motor vehicle insurance policies, citing its quickness of result and eliminating much of their backlog in resolving uninsured and underinsured motorists' claims.²⁵¹ The old practice of requiring arbitration in underinsured and uninsured motorist claims is fair and based upon contract law and not tort law. Thus, it would not deprive anyone of a jury trial under the tort system. This practice would allow an insurance company attorney and an attorney for an injured party to select arbitrators, and then a neutral arbitrator is selected to render a fair and impartial decision.

Further, trial judges from several counties filed letters with the Insurance Department, Commonwealth Court of Pennsylvania, and Supreme Court of Pennsylvania encouraging the old practice be continued.²⁵² This proposed system is fair, expedient, does not clog the court system, and is strongly supported by Common Pleas of Pennsylvania judges who are greatly concerned that the state trial court system will become overburdened with uninsured and underinsured motorist claims.²⁵³

Another recommended change is amending the HMO Act to include an HMO within the definition of a "program, group

²⁴⁸ *Ins. Fed'n of Pa., Inc. v. Koken*, 801 A.2d 622, 624-25 (Pa. Commw. Ct. 2002).

²⁴⁹ *Ins. Fed'n of Pa., Inc.*, 889 A.2d at 555.

²⁵⁰ *See id.* at 551.

²⁵¹ Brief of Appellee M. Diane Koken at 24, *Insurance Commissioner, Ins. Fed'n of Pa., Inc. v. Dep't of Ins.*, No. 207 MAP 2003 (Pa. Dec. 10, 2003) ("Numerous Pennsylvania trial judges have stated unequivocally that elimination of UM and UIM arbitration would virtually flood the courts with additional litigation, compromising the efficient and timely administration of justice.").

²⁵² *Id.* at 14 ("The stipulated record contains six letters from Pennsylvania Common Pleas Court judges that point out the added expense and delay which innocent victims of uninsured and underinsured motorists will suffer if they are required to litigate their cases in court.").

²⁵³ *See id.*

contract or other arrangement."²⁵⁴ This would legislatively resolve litigation involving PATLA and the Pennsylvania Defense Institute, which fought together in the Court of Appeals for the Third Circuit and Supreme Court of Pennsylvania on this issue.²⁵⁵ This reform would legislatively resolve an ambiguity in the law and minimize the risk of motor vehicle insurance premiums rising.

Two other recommended changes we alluded to earlier are to the Sovereign Immunity and Political Subdivision Torts Claims Acts.²⁵⁶ Reforms to these laws are long overdue. The current cap on the recovery for claims under the Sovereign Immunity Act is \$250,000 per person up to \$1 million in the aggregate²⁵⁷ and Political Subdivision Tort Claims Act is a maximum in the aggregate of \$500,000.²⁵⁸ These caps have been the limitations since the statutes were enacted over thirty years ago.²⁵⁹ At the very least, it would only be fair to increase these amounts in accordance with the present day value of these limitations. Also, prohibiting subrogation in claims arising under these statutes would codify the laws and make them consistent with the prohibition of subrogation in motor vehicle accident and medical malpractice cases. In 2013, a bill was proposed to amend the Political Subdivision Tort Claims Act.²⁶⁰ The bill would increase the cap on recovery under the Act to \$2 million.²⁶¹

We also recommend a law to allow any party to argue the amount of damages to the trier of fact. Pennsylvania is one of a very few states that does not allow arguing or asking a jury to award a specific amount of damages for non-economic losses or

²⁵⁴ 75 PA. CONS. STAT. § 1720 (2011).

²⁵⁵ See *Wirth v. Aetna U.S. Healthcare*, 904 A.2d 858, 859 (Pa. 2006).

²⁵⁶ 42 PA. CONS. STAT. §§ 8521-28, 8541-46 (2011).

²⁵⁷ *Id.* § 8528 ("Damages arising from the same cause of action or transaction or occurrence or series of causes of action or transactions or occurrences shall not exceed \$250,000 in favor of any plaintiff or \$1,000,000 in the aggregate.").

²⁵⁸ *Id.* § 8553 ("Damages arising from the same cause of action or transaction or occurrence or series of causes of action or transactions or occurrences shall not exceed \$500,000 in the aggregate.").

²⁵⁹ *Id.* §§ 8528, 8553.

²⁶⁰ S. 1065, 197th Gen. Assemb., Reg. Sess. (Pa. 2013).

²⁶¹ *Id.*

even a total verdict.²⁶² At least in the last two legislative sessions, a bill allowing a party to argue damages was proposed and one was passed.²⁶³ Allowing both sides to argue damages will certainly decrease the risk of, what some special interests argue, a defendant being held liable for an outrageous award or an injured plaintiff being denied justifiable compensation.²⁶⁴ When arguing damages, the parties help the jury by providing a framework and guidelines for members of the jury to use in rendering a fair and impartial verdict.²⁶⁵

VI. CONCLUSION

Pennsylvania victims have suffered from the effects of tort reform. Many changes have already been made to the existing tort system, and more have been proposed for the future. Although change to the system may be appropriate, this change must favor the victims instead of the defendants. Otherwise, responsible defendants will profit at the expense of innocent victims, an outcome that many would argue is unfair, especially when the defendant caused the victim's injury. Pro-victim legislation must be advanced to balance the inequities of the tort system as it exists today in Pennsylvania.

This is the Royal Nonesuch, and we are the audience. But in our story, we have the opportunity to change the outcome. The choice is ours: Do we stand back and wait to be taken advantage of, or do we simply stop buying into the act?

²⁶² H.R. 2246, 194th Gen. Assemb., Reg. Sess. (Pa. 2010).

²⁶³ *Bill Information – History*, PA. GEN. ASSEMBLY, http://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?syear=2009&sind=0&body=H&type=B&bn=2246 (last visited May 15, 2014).

²⁶⁴ H.R. 194-23, 2010 Sess., at 527 (Pa. 2010).

²⁶⁵ *Id.*