
THE FAIR SHARE ACT: ANALYZING ITS IMPACT ON MAJOR
AUTOMOBILE MANUFACTURERS, PLAINTIFFS, AND THE
COURTS THEMSELVES IN PENNSYLVANIA
CRASHWORTHINESS CASES*

I. INTRODUCTION

Since 1994, Pennsylvania courts have explicitly permitted recovery under the crashworthiness doctrine,¹ which is a subset of a cause of action for products liability.² The crashworthiness doctrine provides that a manufacturer is liable in “situations in which the defect did not cause the accident or initial impact, but rather increased the severity of the injury over that which would have occurred absent the defective design.”³ The Pennsylvania Supreme Court continually and steadfastly refused to allow crashworthiness actions to become contaminated by negligence principles, and joint and several liability rules applied when the actions of multiple defendants combined to cause an indivisible injury.⁴

With the adoption of the Fair Share Act, however, joint and several liability no longer applies in cases where a defendant is less than sixty percent liable for the damages.⁵ Furthermore, because the Fair Share Act specifically permits fault to be apportioned in strict liability actions, Pennsylvania courts will have to reconcile the new law with both crashworthiness doctrine and comparative liability.⁶ This Comment will argue that in order to do so, courts should dispense with the current *Fox-Mitchell* approach to the burden of proof in crashworthiness actions and fashion a new approach based on apportionment of fault.⁷

* Melissa A. Jabour, J.D., Temple University James E. Beasley School of Law, 2013. I would like to thank the staff and editors of the *Temple Law Review*, in particular Dan Mozes and Nikos Kaplanov, for all of your hard work and time spent on improving this Comment. I would also like to express my gratitude to Professor Theresa Glennon for her academic guidance. Most importantly, thank you to my family for encouraging my love of learning and providing me with endless support over the years, and thank you to Kyle Wood and Laura Cook for making three years of law school truly enjoyable. Finally, I would like to dedicate this piece to my mom, Robin, who will always inspire me to be the best possible lawyer.

1. The terms “crashworthiness doctrine” and “enhanced injury doctrine” are used interchangeably throughout this Comment.

2. *Kupetz v. Deere & Co.*, 644 A.2d 1213, 1218 (Pa. Super. Ct. 1994).

3. *Mills v. Ford Motor Co.*, 142 F.R.D. 271, 272 (M.D. Pa. 1990) (quoting *Barris v. Bob’s Drag Chutes & Safety Equip., Inc.*, 685 F.2d 94, 99 (3d Cir. 1982)).

4. *See, e.g.*, *Lewis v. Coffing Hoist Div., Duff-Norton Co.*, 528 A.2d 590, 594 (Pa. 1987) (concluding that admitting evidence of industry standards would have improperly influenced jury and distracted from proper strict liability determination); *Remy v. Michael D’s Carpet Outlets*, 571 A.2d 446, 452 (Pa. Super. Ct. 1990) (plaintiff’s comparative fault is irrelevant in a products liability action).

5. 42 PA. STAT. ANN. § 7102(a.1)(1) (West 2013).

6. *Id.*

7. The *Fox-Mitchell* approach comes from *Fox v. Ford Motor Co.*, 575 F.2d 774 (10th Cir. 1978) and *Mitchell v. Volkswagenwerk, AG*, 669 F.2d 1199 (8th Cir. 1982). The court in *Fox* emphasized the burden of

Parts II.A and II.B discuss the history of products liability actions in Pennsylvania, in particular, three Pennsylvania Supreme Court cases that drastically changed consumers' ability to hold manufacturers liable for product defects. Additionally, Part II.B notes the development of the crashworthiness doctrine generally and its applicability to Pennsylvania products liability cases.

Part II.C examines the interaction of joint and several liability with comparative negligence principles and explains the difficulty courts have found in reconciling the two doctrines. This Comment then discusses the competing approaches that have developed in the courts concerning the burden of proof that must be met in order to prevail on a crashworthiness theory: the *Huddell-Caizzo* approach and the *Fox-Mitchell* approach. An in-depth discussion of the Pennsylvania Supreme Court case *Harsh v. Petrol*⁸ follows, which articulated Pennsylvania's approach to liability in crashworthiness cases. Part II.C culminates with an overview of the Fair Share Act, adopted in 2011, which calls for the apportionment of liability in all cases, including actions for strict liability.

Part III.A examines potential problems Pennsylvania courts may face in reconciling the crashworthiness doctrine and comparative liability. This Comment argues that Pennsylvania courts should reject both the *Huddell-Caizzo* approach and the *Fox-Mitchell* approach and instead require that juries apportion fault between parties in every case. Part III.B discusses the shifting incentives that major automobile manufacturers will face in crashworthiness actions, including the effect that the new Act will have on their approach to defending these cases. Finally, Part III.C considers the likely significance of the Act on the size of plaintiffs' recoveries. This Comment will thus analyze the impact of the Fair Share Act on Pennsylvania courts, the liability of major automobile manufacturers, and the recoveries awarded to plaintiffs injured by morally culpable initial tortfeasors in crashworthiness causes of action.

II. OVERVIEW

After Pennsylvania courts adopted the crashworthiness doctrine, manufacturers became legally obligated to design and manufacture their products to be reasonably crashworthy.⁹ For "strict products liability, this means that a manufacturer has to include accidents among the 'intended' uses of its product . . . [and failure] to fulfill this legal duty [creates liability] to the passenger of a car whose injuries are increased

manufacturers to apportion liability in enhanced injury cases, rejecting principles of joint liability. 575 F.2d at 787. The *Mitchell* court found joint and several liability appropriate when the defect is a "substantial factor in causing an indivisible injury." 669 F.2d at 1206. The term "*Fox-Mitchell* approach" was first used in *Stecher v. Ford Motor Co.*, 779 A.2d 491, 495 (Pa. Super. Ct. 2001). See *infra* Part II.C.1.b for a more thorough discussion of the *Fox-Mitchell* approach.

8. 887 A.2d 209 (Pa. 2005).

9. See, e.g., *Jeng v. Witters*, 452 F. Supp. 1349, 1361 (M.D. Pa. 1978) (applying *Huddell* and the crashworthiness doctrine in the absence of further guidance from Pennsylvania courts); see also *Huddell v. Levin*, 537 F.2d 726, 735 (3d Cir. 1976) (requiring manufacturers to consider "accidents as among the 'intended' use" of products and to design vehicles that "minimize the unavoidable danger"). Crashworthiness doctrine was explicitly adopted in *Kupetz v. Deere & Co.*, where the court held, "that the 'crashworthiness' or 'second collision' doctrine . . . is a permissible theory of recovery in this Commonwealth." *Kupetz v. Deere & Co.*, 644 A.2d 1213, 1219 (Pa. Super. Ct. 1994).

due to the design defect in the automobile.”¹⁰ Formerly, the normal rules of concurrent causation and joint and several liability that operated in products liability cases also applied in the crashworthiness context.¹¹ The interaction of joint and several liability, comparative negligence, and the crashworthiness doctrine has led to a dynamic area of Pennsylvania tort law, which will continue evolving due to the new several-only liability regime.

A. *The History of Products Liability Actions in Pennsylvania*

In the 1960s and 1970s, a new tort cause of action was developed, which permitted consumers injured by a product to recover based on that product’s defect, rather than based on the manufacturer’s conduct in selling the product.¹² In a products liability case, a consumer could recover for his injuries without regard to the cause of the defect, since liability was based solely on the dangerous condition of the product.¹³ Traditionally, consumers injured by products could recover only under causes of action for negligence, breach of warranty, and fraud; however, the creation of the products liability cause of action allowed many more consumers to recover for their injuries.¹⁴

The history of Pennsylvania’s modern law of products liability begins with *Webb v. Zern*.¹⁵ In that case, the Pennsylvania Supreme Court adopted section 402A of the *Restatement (Second) of Torts*, which reads:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
 - (a) the seller is engaged in the business of selling such a product, and
 - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although
 - (a) the seller has exercised all possible care in the preparation and sale of his product, and
 - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.¹⁶

10. *Barris v. Bob’s Drag Chutes & Safety Equip.*, 685 F.2d 94, 100 (3d Cir. 1982) (quoting *Huddell*, 537 F.2d at 735).

11. *Harsh*, 887 A.2d at 217.

12. Theodore J. Leopold et al., *The Importance of D’Amario v. Ford and How It Protects Florida’s Consumers*, 85 FLA. B.J. 18, 18 (2011).

13. *Id.* In other words,

[t]he essence of the strict liability conception is that liability may be imposed upon the manufacturer without the necessity of proving negligence. A claimant need only demonstrate that at the time it was sold the product was defective and that the defect caused injury. Those elements established, the care or lack of care of the manufacturer is simply irrelevant.

Huddell, 537 F.2d at 734.

14. Leopold et al., *supra* note 12, at 18.

15. 220 A.2d 853 (Pa. 1966).

16. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

Two years after its adoption of section 402A in *Webb*, the Pennsylvania Supreme Court held that “lack of proper safety devices can constitute a defective design for which there may be recovery.”¹⁷

During the 1970s, the Pennsylvania Supreme Court decided three cases that further developed the Pennsylvania’s law of products liability: *Salvador v. Atlantic Steel Boiler Co.*,¹⁸ *Berkebile v. Brantly Helicopter Corp.*,¹⁹ and *Azzarello v. Black Brothers Co.*²⁰

1. *Salvador v. Atlantic Steel Boiler Co.*

In the first of these cases, *Salvador v. Atlantic Steel Boiler Co.*, the Pennsylvania Supreme Court permitted an employee, who was injured when a defective steam boiler purchased by his employer exploded, to proceed in a suit against the boiler’s manufacturer.²¹ *Salvador* abolished Pennsylvania’s horizontal privity requirement, which had prevented consumers injured by a defective product from recovering against a manufacturer with whom they had no contractual relationship.²² The *Salvador* court explained:

Today . . . a manufacturer by virtue of section 402A is effectively the guarantor of his products’ safety. Our courts have determined that a manufacturer by marketing and advertising his product impliedly represents that it is safe for its intended use. . . . [A manufacturer] may not preclude an injured plaintiff’s recovery by forcing him to prove negligence in the manufacturing process. Neither may the manufacturer defeat [a breach of warranty] claim by arguing that the purchaser has no contractual relation to him. Why then should the mere fact that the injured party [in a products liability action] is not himself the purchaser deny recovery?²³

Thus, manufacturers were held strictly liable to consumers, regardless of the lack of proven negligence or contractual relation between the manufacturer and the injured party.

2. *Berkebile v. Brantly Helicopter Corp.*

A year after *Salvador*, the Pennsylvania Supreme Court decided *Berkebile v. Brantly Helicopter Corp.* with a plurality opinion.²⁴ Whereas *Salvador* addressed the issue of to whom the product manufacturer may be held liable, *Berkebile* examined the concept of defectiveness, defining it broadly. The court held that a “defective condition” is “not limited to defects in design or manufacture. The seller must provide

17. *Bartkewich v. Billinger*, 247 A.2d 603, 606 (Pa. 1968); *see also* *Hammond v. Int’l Harvester Co.*, 691 F.2d 646, 649 (3d Cir. 1982) (stating that “[t]he *Bartkewich* rule has been followed repeatedly by federal courts applying Pennsylvania law in diversity”).

18. 319 A.2d 903 (Pa. 1974).

19. 337 A.2d 893 (Pa. 1975).

20. 391 A.2d 1020 (Pa. 1978).

21. *Salvador*, 319 A.2d at 904.

22. *Id.*

23. *Id.* at 907 (citations omitted).

24. 337 A.2d 893 (Pa. 1975).

with the product every element necessary to make it safe for use.”²⁵ Furthermore, the seller is “responsible for injury caused by his defective product even if he ‘has exercised all possible care in the preparation and sale of his product.’”²⁶

Berkebile thus rejected any suggestion that the use of the phrase “unreasonably dangerous” in the text of *Restatement* section 402A brings issues of fault and negligence back into Pennsylvania products liability law.²⁷ The court explained that the words “unreasonably dangerous” appear in the text only to ensure that liability is limited to defective products, so that manufacturers of innately dangerous products such as whiskey and knives are not “automatically [held] responsible for all the harm that such things do in the world.”²⁸

3. *Azzarello v. Black Brothers Co.*

The case of *Azzarello v. Black Brothers Co.* in 1978 completed the Pennsylvania trilogy. *Azzarello*, a unanimous opinion of the Pennsylvania Supreme Court, clarified the plurality opinion in *Berkebile*. Although the “unreasonably dangerous” phrase from *Restatement* section 402A has “no independent significance,” it does “represent a label to be used where it is determined that the risk of loss should be placed upon the supplier.”²⁹ This issue is a question of law for the court to decide with an eye toward the “social policy” underlying Pennsylvania products liability law.³⁰ *Azzarello* concludes by reemphasizing the high standards to which manufacturers are held under Pennsylvania law:

[T]he supplier must at least provide a product which is designed to make it safe for the intended use. . . . [T]he jury may find a defect where the product left the supplier’s control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use.³¹

Thus, in order to submit a section 402A products liability case to a jury, it must be shown that: (1) the product was defective, (2) that the defect existed while the product was in the control of the manufacturer or retailer, and (3) that “the defect was the proximate cause of [the] plaintiff’s injuries.”³² A product is defective when it is not fit for the intended or reasonable use for which it is sold.³³ Manufacturers are held strictly liable for injury-producing product defects; the strict liability of section 402A is founded in part upon the belief that as between the sellers of products and those who use them, the former are better able to bear the losses caused by defects in the products

25. *Berkebile*, 337 A.2d at 902.

26. *Id.* at 899 (quoting RESTATEMENT (SECOND) OF TORTS § 402A(2)(a) (1965)).

27. *Id.*

28. *Id.* (quoting William L. Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9, 23 (1966)).

29. *Azzarello*, 391 A.2d at 1025.

30. *Id.* at 1026.

31. *Id.* at 1027.

32. *Walton v. Avco Corp.*, 610 A.2d 454, 458 (Pa. 1992); *Forry v. Gulf Oil Corp.*, 237 A.2d 593, 599 (Pa. 1968).

33. *Barris v. Bob’s Drag Chutes & Safety Equip.*, 685 F.2d 94, 101 (3d Cir. 1982); *Azzarello*, 391 A.2d at 1027; *Salvador v. Atl. Steel Boiler Co.*, 319 A.2d 903, 907 (Pa. 1974).

involved.³⁴ Because manufacturers' abilities to bear the losses caused by product defects are completely unrelated to their negligence, defendants in section 402A actions are subjected to liability without regard to fault.³⁵

4. Crashworthiness Actions in Pennsylvania

The crashworthiness doctrine is merely one theory of recovery for a products liability action pursuant to section 402A and usually arises in the context of a vehicular accident.³⁶ "The term crashworthiness means the protection that a motor vehicle affords its passenger against personal injury or death as a result of a motor vehicle accident."³⁷ The Eighth Circuit first adopted the crashworthiness doctrine, and it was ultimately adopted by Pennsylvania as well.³⁸ The crashworthiness doctrine encompasses the "enhanced injury" and "second collision" concepts, which refer to the idea that because of the way the vehicle has been manufactured, a person's injuries have been aggravated unnecessarily; in such instances, courts hold the automobile manufacturers liable for the aggravation of such injuries.³⁹ The doctrine provides that a manufacturer is liable in "situations in which the defect did not cause the accident or initial impact, but rather increased the severity of the injury over that which would have occurred absent the design defect."⁴⁰

a. *Larsen v. General Motors Corp.: The Eighth Circuit's Formulation of Crashworthiness Doctrine*

Crashworthiness doctrine was first introduced as such in the Eighth Circuit decision, *Larsen v. General Motors Corp.*⁴¹ The doctrine renders a vehicle manufacturer civilly liable for a plaintiff's increased or enhanced injuries over and above those which would have been sustained as a result of an initial impact, where a

34. See *Bialek v. Pittsburgh Brewing Co.*, 242 A.2d 231, 236 n.2 (Pa. 1968) (Section 402A "is based on the theory that a seller is a 'better risk bearer,' i.e., can spread the cost of accidents resulting from his product through its price and liability insurance. Strict liability itself indicates that liability is not based on fault. To require that plaintiff prove that the seller caused the defect would be inconsistent with the 'better risk bearer' theory and would revert to fault as the basis of liability").

35. See, e.g., *LaGorga v. Kroger Co.*, 275 F. Supp. 373, 379-80 (W.D. Pa. 1967) (affirming jury verdict holding manufacturer liable in absence of showing of negligence when jury concluded that product was unreasonably dangerous). Recovery was permitted against manufacturer of a child's jacket, which ignited when a spark from a rubbish fire fell upon it. *Id.* at 377, 386. The court held that a jury could properly find, on the issue of normal use, that defendant should reasonably have anticipated that exposure to fire might occur during normal wear. *Id.* at 380.

36. See *Roe v. Deere & Co.*, 855 F.2d 151, 154 (3d Cir. 1988) (applying crashworthiness doctrine when tractor without safety device rolled over, causing death of operator); *Kupetz v. Deere & Co.*, 644 A.2d 1213, 1217 (Pa. Super. Ct. 1994) (applying crashworthiness to a construction vehicle accident).

37. *Mills v. Ford Motor Co.*, 142 F.R.D. 271, 272 n.3 (M.D. Pa. 1990) (quoting *Barris*, 685 F.2d at 96-97) (citing 15 U.S.C. § 1901(14) (1976)).

38. *Jeng v. Witters*, 452 F. Supp. 1349, 1355 (M.D. Pa. 1978); *Kupetz v. Deere & Co.*, 644 A.2d 1213, 1219 (Pa. Super. Ct. 1994). Crashworthiness doctrine was first adopted in 1968 by the Eighth Circuit. *Larsen v. General Motors Corp.*, 391 F.2d 495, 501-02 (8th Cir. 1968).

39. *Barris*, 685 F.2d at 96-97.

40. *Mills*, 142 F.R.D. at 272 (M.D. Pa. 1990) (quoting *Barris*, 685 F.2d at 99).

41. 391 F.2d 495, 502 (8th Cir. 1968).

vehicle defect increased the severity of the injury.⁴² The *Larsen* case centered on severe injuries suffered by the plaintiff when the steering mechanism of his 1963 Chevrolet Corvair thrust backwards and struck him in the head after a head-on collision.⁴³ The plaintiff claimed that the steering assembly was defective and caused him to suffer enhanced injuries that he would not have suffered had it been properly designed.⁴⁴

The defendant manufacturer, General Motors, argued that it had “no duty whatsoever to design and manufacture a vehicle which is otherwise ‘safe’ or ‘safer’ to occupy during collision impacts.”⁴⁵ The court disagreed, observing that “[w]hile automobiles are not made for the purpose of colliding with each other, a frequent and inevitable contingency of normal automobile use will result in collisions and injury-producing impacts.”⁴⁶ After concluding that such collisions and injuries were foreseeable, the court held that a manufacturer has a duty to use reasonable care in the design of its vehicle to minimize the unreasonable risk of injury in the event of a collision.⁴⁷

b. McCown v. International Harvester Co.: Pennsylvania’s Recognition of the Crashworthiness Doctrine

The Pennsylvania Supreme Court first implicitly recognized the crashworthiness doctrine in *McCown v. International Harvester Co.*⁴⁸ In *McCown*, the appellee was attempting to make a sharp turn when his truck collided with a guardrail.⁴⁹ As a result of the impact, the steering wheel began spinning rapidly in the opposite direction, striking the appellee’s arm and fracturing his wrist and forearm.⁵⁰ The appellant conceded that the truck’s steering system was defective but argued that the appellee’s recklessness made him contributorily negligent for his injuries.⁵¹ Ultimately, the Pennsylvania Supreme Court rejected contributory negligence as an available defense in a products liability action.⁵² The court also recognized that in a products liability case, the defect itself did not have to cause the accident; thus, the appellee was able to recover because the defect caused his injuries after the collision.⁵³

B. Current Crashworthiness Doctrine

Although Pennsylvania courts had implicitly recognized the crashworthiness doctrine for decades, in 1994 it was explicitly adopted as a permissible theory of

42. Kupetz v. Deere & Co., 644 A.2d 1213, 1218 (Pa. Super. Ct. 1994).

43. *Larsen*, 391 F.2d at 496.

44. *Id.* at 497.

45. *Id.*

46. *Id.* at 502.

47. *Id.*

48. 342 A.2d 381 (Pa. 1975).

49. *McCown*, 342 A.2d at 381.

50. *Id.*

51. *Id.* at 382.

52. *See id.* (“Adoption of contributory negligence as a complete defense in 402A actions would defeat one theoretical basis for our acceptance of Section 402A.”).

53. *Id.*

recovery.⁵⁴ After the court's decision in *Kupetz v. Deere & Co.*, a manufacturer now "has a legal duty to design and manufacture its product to be reasonably crashworthy."⁵⁵ In the context of strict liability, a manufacturer must "include accidents among the 'intended' uses of its product. A manufacturer who fails to fulfill this legal duty will be liable to the passenger of a car whose injuries are increased due to the design defect in the automobile."⁵⁶ Thus, the manufacturer will be held liable even though the defect in manufacture or design did not cause the initial accident or impact.⁵⁷

The United States Court of Appeals for the Third Circuit, in *Huddell v. Levin*, stated that in order to prevail on a crashworthiness theory in a products liability action under section 402A, a plaintiff must demonstrate: (1) that the design of the vehicle was defective and that when the design was made, "an alternative, safer design, practicable under the circumstances" existed; (2) "what injuries, if any, would have resulted" to the plaintiff had the "alternative, safer design," in fact, been used; and (3) some method of establishing the extent of plaintiff's enhanced injuries attributable to the defective design.⁵⁸ Despite Pennsylvania courts' basic adherence to this approach since 1976, in *Stecher v. Ford Motor Co.*,⁵⁹ the court reconsidered its former case law and instead adopted the *Fox-Mitchell* approach.⁶⁰ This approach requires the plaintiff to prove only that the defect was a "substantial factor" in causing his injury; once he has done so, the burden of proof shifts to the defendants to apportion damages between them.⁶¹

C. *The Interaction of Joint and Several Liability and Comparative Negligence Principles*

The foundations of joint liability began hundreds of years ago in the English

54. Accordingly, as our Supreme Court has long explicitly recognized the viability of a cause of action for products liability pursuant to Section 402A, and has implicitly recognized the viability of the 'crashworthiness' or 'second collision' doctrine in *McCown v. International Harvester Co.*, we hold that the 'crashworthiness' or 'second collision' doctrine, which is merely a subset of a cause of action for products liability under Section 402A, is a permissible theory of recovery in this Commonwealth.

Kupetz v. Deere & Co., 644 A.2d 1213, 1219 (Pa. Super. Ct. 1994) (citation omitted).

55. *Kupetz*, 644 A.2d at 1218–19 (quoting *Barris v. Bob's Drag Chutes & Safety Equip., Inc.*, 685 F.2d 94, 98 (3rd Cir. 1982)); see also *Huddell v. Levin*, 537 F.2d 726, 735 (3d Cir. 1976) ("The manufacturer is not required to design against bizarre accidents; the manufacturer is not required to produce an accident-proof vehicle. But the manufacturer is required to take reasonable steps—within the limitations of cost, technology, and marketability—to design and produce a vehicle that will minimize the unavoidable danger.").

56. *Kupetz*, 644 A.2d at 1218 (citation omitted) (quoting *Barris*, 685 F.2d at 100).

57. *Id.*

58. *Huddell v. Levin*, 537 F.2d 726, 737–38 (3d Cir. 1976); see also *Craigie v. Gen. Motors Corp.*, 740 F. Supp. 353, 357 (E.D. Pa. 1990) (providing the *Huddell* requirements).

59. 779 A.2d 491 (Pa. Super. Ct. 2001).

60. *Stecher*, 779 A.2d at 496.

61. See *Mitchell v. Volkswagenwerk, AG*, 669 F.2d 1199, 1206–07 (8th Cir. 1982) (using the "substantial factor" approach); *Fox v. Ford Motor Co.*, 575 F.2d 774, 787 (10th Cir. 1978) (articulating the "substantial factor" approach). These cases formed what has come to be known as the *Fox-Mitchell* approach, which Pennsylvania has adopted. *Stecher*, 779 A.2d at 496. For a more complete discussion of the competing approaches, see *infra* Part II.C.1.

common law system.⁶² Initially, only tortfeasors who were found to have acted in concert were subject to joint liability.⁶³ Over time, however, English courts began to apply joint and several liability to independent tortfeasors not acting in concert.⁶⁴ This rationale carried over into American common law as well, and courts found that complete liability could be "accorded to any or all joint tortfeasors," whether or not they acted together.⁶⁵

In addition, over the course of the twentieth century, many states replaced contributory negligence, which had prohibited partially negligent plaintiffs from recovery, with comparative negligence, "which only proportionally lowered their recovery."⁶⁶ By 1982, forty states had adopted some form of comparative negligence, and most states continued to maintain joint and several liability as well.⁶⁷ Many states, including Pennsylvania, adhered to the Uniform Contribution Among Tortfeasors Act, which allowed liability to be reapportioned among joint tortfeasors after an initial verdict held them joint and severally liable.⁶⁸ The interaction of principles of joint and several liability and contribution ensured both that plaintiffs were made whole for their injuries, and defendants could distribute responsibility between themselves.⁶⁹

In Pennsylvania products liability actions, a plaintiff cannot be precluded from recovery because of his own negligence; thus, comparative negligence could never be a defense to a products liability action.⁷⁰ Although the *McCown* decision preceded the enactment of Pennsylvania's Comparative Negligence Act,⁷¹ the Pennsylvania Supreme Court continually refused to allow a products liability action under section 402A to become "contaminated by negligence principles."⁷² In particular, the

62. Nancy C. Marcus, *Phantom Parties and Other Practical Problems with the Attempted Abolition of Joint and Several Liability*, 60 ARK. L. REV. 437, 438 (2007); see also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 46, at 323 n.3 (5th ed. 1984 & Supp. 1988) (tracing the origins of joint and several liability to an English case from the seventeenth century).

63. Marcus, *supra* note 62, at 438.

64. *Id.* (citing RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § A18 cmt. a (2000)). The Reporters' Note appended to comment a of the *Restatement (Third)* states that "[j]oint and several liability for independent tortfeasors can be traced to the 1771 case of *Hill v. Goodchild*, 98 Eng. Reprints 465, 5 Buff. 2790 (K.B. 1771) (Mansfield, J.). "In *Hill*, the court held that two defendants, apparently acting independently, could not have damages imposed on them severally, but were jointly liable for the plaintiff's total damages." RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § A18 cmt. a.

65. Marcus, *supra* note 62, at 439. "Joint tortfeasor" has come to mean both those acting independently and in concert under American common law. See generally Richard W. Wright, *The Logic and Fairness of Joint and Several Liability*, 23 MEM. ST. U. L. REV. 45 (1992).

66. Marcus, *supra* note 62, at 439.

67. *Id.*

68. See *Mills v. Ford Motor Co.*, 142 F.R.D. 271, 272 (M.D. Pa. 1990) ("Pennsylvania has adopted the Uniform Contribution Among Tortfeasors Act, . . . which defines joint tortfeasors as 'two or more persons jointly or severally liable in tort for the same injury to persons or property . . .'" (second omission in original) (quoting 42 PA. STAT. ANN. § 8322 (West 1982))).

69. Marcus, *supra* note 62, at 439.

70. *McCown v. Int'l Harvester Co.*, 342 A.2d 381, 382 (Pa. 1975); see also *Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893, 902 (Pa. 1975) (stating that contributory negligence does not preclude recovery in strict liability).

71. 42 PA. STAT. ANN. § 7102(b) (West 2000) (amended 2002).

72. *Remy v. Michael D's Carpet Outlets*, 571 A.2d 446, 452 (Pa. Super. Ct. 1990); e.g., *Lewis v. Coffing*

Pennsylvania Supreme Court declined to permit the concept of comparative fault to creep into a products liability action.⁷³ Because of the Pennsylvania Supreme Court's emphatic divorce of negligence concepts from products liability law, it declined to follow other states in holding comparative negligence principles applicable to products liability actions.⁷⁴ Therefore, despite the general adoption of comparative negligence principles, the Pennsylvania Supreme Court held that the comparative fault of a plaintiff is irrelevant in products liability cases.⁷⁵

Over time, however, many other states modified joint and several liability principles with respect to products liability actions after the adoption of comparative negligence principles.⁷⁶ Beginning in the 1980s, many state legislatures curtailed the application of joint and several liability in tort actions.⁷⁷ Other states, including Pennsylvania, initially refrained from doing so,⁷⁸ although some of these states also eventually limited joint and several liability.⁷⁹ Section 7102(b) of the Pennsylvania Comparative Negligence Act, in effect through 2002, 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.⁸⁰

Thus, the Act gave plaintiffs a statutory right to recover the full amount of the judgment from each of the defendant-tortfeasors.

In Pennsylvania, to be a joint tortfeasor, "the parties must either act together in committing the wrong, or their acts, if independent of each other, must unite in causing a single injury."⁸¹ Thus, whenever "tortious conduct of each of two or more persons is a legal cause of harm that cannot be apportioned, each is subject to liability for the

Hoist Div., Duff Norton Co., Inc., 528 A.2d 590, 591 (Pa. 1987); *Azzarello v. Black Bros. Co., Inc.*, 391 A.2d 1020, 1027 (Pa. 1978).

73. See *Walton v. Avco Corp.*, 610 A.2d 454, 462 (Pa. 1992) (finding it unnecessary to consider comparative fault in strict liability action).

74. *Remy*, 571 A.2d at 452 (quoting *Staymates v. ITT Holub Indus.*, 527 A.2d 140, 144 (Pa. Super. Ct. 1987)).

75. *Id.*

76. Marcus, *supra* note 62, at 440.

77. Mike Steenson, *Recent Legislative Responses to the Rule of Joint and Several Liability*, 23 TORT & INS. L. J. 482, 482 (1988).

78. Marcus, *supra* note 62, at 441, n. 18. "In 2000, the authors of the Restatement Third estimated that the District of Columbia and fifteen states still apply joint and several liability." *Id.* at 441. These states were: Alabama, Arkansas, Delaware, Illinois, Idaho, Maine, Maryland, Massachusetts, North Carolina, Pennsylvania, Rhode Island, South Carolina, South Dakota, Virginia, and West Virginia. *Id.* at 441 n. 18.

79. Marcus, *supra* note 62, at 441. For examples of states' joint and several liability statutes, see for example ARK. CODE ANN. § 16-55-201 (West 2013); IDAHO CODE ANN. § 6-803 (West 2013); S.C. CODE ANN. § 15-38-15 (2012); S.D. CODIFIED LAWS § 15-8-15.1 (2013); W. VA. CODE ANN. § 55-7-24 (West 2013).

80. 42 PA. STAT. ANN. § 7102(b) (West 2000) (amended 2002).

81. *Lasprogata v. Qualls*, 397 A.2d 803, 805 n.4 (Pa. Super. Ct. 1979) (quoting BLACK'S LAW DICTIONARY 1661 (4th ed. 1968)).

entire harm, irrespective of whether their conduct is concurring or consecutive.”⁸² If a combination of causes, each of which is a substantial factor in bringing about the harm, produces a single harm that is “incapable of being divided on a logical, reasonable, or practical basis, . . . an arbitrary apportionment should not be made.”⁸³ The court determines whether harm can be apportioned as a matter of law,⁸⁴ however, most personal injuries are by their very nature incapable of division.⁸⁵ In addition, “[i]t is immaterial to a finding of joint tortfeasor status that [one defendant] may be strictly liable and [the other defendant] negligent. Theories of liability do not determine joint tortfeasor status.”⁸⁶

1. Joint Tortfeasor Liability in Crashworthiness Actions

In general, concurrent tortfeasors are not jointly liable where their acts caused distinct injuries or where there is some reasonable basis for apportioning damages.⁸⁷ The negligent driver of an automobile, however, has been held jointly and severally liable for all of the plaintiff’s injuries since the injuries are “indivisible” and the liability therefore cannot be allocated with reasonable certainty to the successive

82. *Capone v. Donovan*, 480 A.2d 1249, 1251 (Pa. Super. Ct. 1984) (citing RESTATEMENT (SECOND) OF TORTS § 879 (1979)); *see, e.g., Pratt v. Stein*, 444 A.2d 674, 705 (Pa. Super. Ct. 1982) (stating that the record establishes that acts and omissions of defendant doctors not only represented a breach of their duty but also coalesced to cause appellee’s hearing loss and paraparesis).

83. *Capone v. Donovan*, 480 A.2d 1249, 1251 (Pa. Super. Ct. 1984); RESTATEMENT (SECOND) OF TORTS § 433A cmt. i (1979).

84. *Voyles v. Corwin*, 441 A.2d 381, 383 (Pa. Super. Ct. 1982); *see also Lasprogata*, 397 A.2d at 806 (holding that court determines whether harm can be apportioned); RESTATEMENT (SECOND) OF TORTS § 434(1)(b). Comment d to this section states:

The question whether the harm to the plaintiff is capable of apportionment among two or more causes is a question of law, and is for the decision of the court in all cases. Once it is determined that the harm is capable of being apportioned, the actual apportionment of the damages among the various causes is a question of fact, which is to be determined by the jury, unless the evidence is such that reasonable men could come to only one conclusion.

RESTATEMENT (SECOND) OF TORTS § 434 cmt. d.

85. RESTATEMENT (SECOND) OF TORTS § 433A cmt. i.

Certain kinds of harm, by their very nature, are normally incapable of any logical, reasonable, or practical division. Death is that kind of harm, since it is impossible, except upon a purely arbitrary basis for the purpose of accomplishing the result, to say that one man has caused half of it and another the rest. The same is true of a broken leg, or any single wound, or the destruction of a house by fire, or the sinking of a barge. Such harms can be apportioned, if at all, only upon the basis of a prior reduction in value of what has been destroyed. By far the greater number of personal injuries, and of harms to tangible property, are thus normally single and indivisible. . . . The typical case is that of two negligently driven vehicles which collide and kill a bystander. The two drivers have not acted in concert, and the duties which they owe are separate and distinct, and may not be identical in character or scope; but the entire liability of each rests upon the obvious fact that each has caused the single result, and that no rational basis for division can be found.

Id.

86. *Smith v. Kolcraft Prods., Inc.*, 107 F.R.D. 767, 770 (M.D. Pa. 1985); *see also Chamberlain v. Carborundum Co.*, 485 F.2d 31, 31 (3d Cir. 1973) (stating that it is irrelevant that in one defendant’s case the law imposes an absolute duty of care to manufacture a nondefective product, while in the other defendant’s case the law imposes only the standard of reasonable care).

87. RESTATEMENT (SECOND) OF TORTS § 433A (1965).

collisions.⁸⁸ In *Hill v. Macomber*, the court stated that “[i]n these days of chain collisions, it is better that a plaintiff, injured through no fault of his own, should be compensated by both tortfeasors, even though one of them may pay more than his theoretical share of the damage . . . than that the injured party have no recovery.”⁸⁹

A particular point of contention within the courts concerns the burden of proof that must be met in order for a plaintiff to prevail on a crashworthiness theory. Courts generally have adhered to one of two approaches: the *Huddell-Caiazzo* approach or the *Fox-Mitchell* approach.

a. Huddell-Caiazzo Approach

For decades, Pennsylvania courts roughly adhered to the *Huddell-Caiazzo* approach,⁹⁰ which requires a plaintiff to quantify the extent of his injuries that were caused by the defect.⁹¹ The approach permits recovery from the manufacturer of the product that allegedly enhanced the injuries only for the precise injuries caused by the defective product.⁹²

In *Huddell v. Levin*, Dr. Huddell was sitting in his Chevrolet Nova after it had run out of gas on a bridge when his car was struck from behind by another vehicle traveling at a speed of fifty to sixty miles per hour.⁹³ The impact allegedly forced Dr. Huddell’s head back into the head restraint and resulted in a fatal skull fracture.⁹⁴ Dr. Huddell’s widow sued the automobile manufacturer, claiming that her husband’s death was

88. *Hill v. Macomber*, 246 A.2d 731, 736 (N.J. Super Ct. App. Div. 1968). “This has come to be known as the ‘single, indivisible injury’ rule.” *Id.* As the *Hill* case describes, this rule has been applied in a number of other jurisdictions. *E.g.*, *Holtz v. Holder*, 418 P.2d 584 (Ariz. 1966) (superseded by statute on other grounds); *Maddux v. Donaldson*, 108 N.W.2d 33 (Mich. 1961); *Brantley v. Couch*, 383 S.W.2d 307 (Mo. Ct. App. 1964); *Berryman v. People’s Motor Bus Co.*, 54 S.W.2d 747 (Mo. Ct. App. 1932).

89. *Hill*, 246 A.2d at 737. Although not binding on Pennsylvania courts, the *Hill* case articulated the rationale behind the single, indivisible injury rule used in crashworthiness cases in neighboring New Jersey. *See Fosgate v. Corona*, 330 A.2d 355, 358 (N.J. 1974) (“[W]here the malpractice or other tortious act aggravates a preexisting disease or condition . . . the burden of proof should be shifted to the culpable defendant who should be held responsible for all damages unless he can demonstrate that the damages for which he is responsible are capable of some reasonable apportionment and what those damages are.”).

90. This approach was first articulated by the United States Court of Appeals for the Third Circuit, predicting New Jersey law in *Huddell v. Levin*, 537 F.2d 726, (3d Cir. 1976). The Second Circuit adopted the *Huddell* approach in *Caiazzo v. Volkswagenwerk A.G.*, 647 F.2d 241 (2d Cir. 1981). That case involved a rear-end collision, which caused the Volkswagen to spin and roll over, ejecting the unrestrained passengers, causing them serious injury. *Caiazzo*, 647 F.2d at 243. The Second Circuit determined that “the plaintiff should be required to prove the extent of the enhanced injuries attributable to the defective design.” *Id.* at 250. The *Huddell-Caiazzo* approach has been followed by the Third Circuit and the district courts within Pennsylvania when predicting Pennsylvania law. *E.g.*, *Roe v. Deere & Co.*, 855 F.2d 151, 153 n.2 (3d Cir. 1988) (applying *Huddell-Caiazzo* approach to Pennsylvania crashworthiness case); *Dorsett v. Am. Isuzu Motors Inc.*, 805 F. Supp. 1212, 1218 (E.D. Pa. 1990) (same); *see also* 3 WEST’S PA. PRAC., TORTS: LAW AND ADVOCACY § 9.37 (2012). In addition, the *Kupetz* court acknowledged the *Roe* and *Dorsett* cases and their discussions of the correct burden of proof in crashworthiness actions. *Kupetz v. Deere & Co.*, 644 A.2d 1213, 1218 (Pa. Super. Ct. 1994).

91. *Huddell*, 537 F.2d at 738.

92. *Id.*

93. *Id.* at 732.

94. *Id.*

caused by the defective design of the head restraint.⁹⁵ In reversing a jury verdict in favor of the plaintiff, the Third Circuit Court of Appeals reasoned that enhanced injury cases “require a highly refined and almost invariably difficult presentation of proof,” which the plaintiff had failed to sustain, since she could not establish the extent of the enhanced injury attributable to the design defect.⁹⁶

This approach has been followed or supported by at least one other circuit predicting the law of two states, and by the appellate courts of at least seven other states.⁹⁷ The *Huddell-Caiazzo* approach has been praised “as consistent with both the theoretical basis of *Larsen* and with broader themes of products liability law.”⁹⁸ Courts adhering to this approach have recognized that the plaintiff asserting a crashworthiness cause of action must prove the extent of the injuries enhanced by the alleged product defect, in order to establish the existence of a defect, proximate causation, and liability.⁹⁹ Thus, the manufacturer will not be found liable if there is no difference between the actual injury sustained and the hypothetical injury that “would have been expected to occur under the same circumstances had the design been different.”¹⁰⁰

In *Huddell*, Judge Rosenn concurred with an opinion that would subsequently become quite influential.¹⁰¹ He stated that in some circumstances, the majority’s requirements of proof would be “unreasonably burdensome to an innocent plaintiff.”¹⁰² Judge Rosenn argued that the tortfeasor who caused the initial accident and the tortfeasor who caused the enhanced injury should be treated as concurrent tortfeasors, and the burden of proving apportionment of injury should shift to the defendant.¹⁰³

b. Fox-Mitchell Approach

A competing approach, the *Fox-Mitchell* approach, requires a plaintiff to prove only that a defect “was a substantial factor in producing damages over and above those

95. *Id.*

96. *Id.* at 737.

97. For cases predicting other states’ law, see *Chretien By & Through Chretien v. Gen. Motors Corp.*, 959 F.2d 231, 1992 WL 67356, at *10 (4th Cir. 1992) (unpublished opinion, cited in Table as 959 F.2d 231) (predicting Virginia law using *Huddell*); *Stonehocker v. Gen. Motors Corp.*, 587 F.2d 151, 158 (4th Cir. 1978) (predicting South Carolina law using *Huddell*); *Caiazzo v. Volkswagenwerk A.G.*, 647 F.2d 241 (2d Cir. 1981) (predicting New York law). For cases adopting the *Huddell* approach, see *Mazda Motor Corp. v. Lindahl*, 706 A.2d 526, 533 (Del. 1998); *Hillrichs v. Avco Corp.*, 478 N.W.2d 70, 75 (Iowa 1991); *Sumner v. General Motors Corp.*, 538 N.W.2d 112, 114–15 (Mich. Ct. App. 1995); *Brooks v. Beech Aircraft Corp.*, 902 P.2d 54, 64 (N.M. 1995); *Garcia v. Rivera*, 553 N.Y.S.2d 378, 379–80 (N.Y. App. Div. 1990); *Murphey v. Ga. Pac. Corp.*, 417 S.E.2d 460, 463–64 (N.C. 1992); *Couch v. Mine Safety Appliances, Co.*, 728 P.2d 585, 590–91 (Wash. 1986).

98. Heather Fox Vickles & Michael E. Oldham, *Enhanced Injury Should Not Equal Enhanced Liability*, 36 S. TEX. L. REV. 417, 429 (1995).

99. *Id.* at 429–30.

100. *Id.* at 430.

101. *Huddell*, 537 F.2d 744–47 (Rosenn, J., concurring). Judge Rosenn’s concurrence has been cited in numerous cases. *E.g.*, *White v. Gen. Motors Corp.*, 541 F. Supp. 190, 193 (D. Md. 1982); *Harsh v. Petroll*, 887 A.2d 209, 217 (Pa. 2005); *Thrower v. Smith*, 406 N.Y.S.2d 513, 522–23 (App. Div. 1978).

102. *Huddell*, 537 F.2d at 744 (Rosenn, J., concurring).

103. *Id.* at 745.

which were probably caused as a result of the original impact or collision,”¹⁰⁴ and the burden of proof will shift to the defendants to apportion the damages between them.¹⁰⁵ If the defect “is found to be a substantial factor in causing an indivisible injury such as paraplegia, death, etc., then absent a reasonable basis to determine which wrongdoer actually caused the harm, the defendants should be treated as joint and several tortfeasors.”¹⁰⁶

In *Fox v. Ford Motor Co.*,¹⁰⁷ two passengers were killed in a head-on collision with a truck that had driven into their lane.¹⁰⁸ Both passengers, despite wearing lap belts, suffered fatal abdominal and spinal injuries.¹⁰⁹ The plaintiffs alleged that the seat belts’ design was defective, while the defendant manufacturer argued that the seat belts were properly positioned and that the severity of the injuries was due to the high speed of the crash.¹¹⁰

In affirming jury verdicts in favor of the plaintiffs, the *Fox* court rejected *Huddell* as refusing to follow principles of joint liability for injuries that flow from a single impact.¹¹¹ The court saw no difference between an enhanced injury case and one in which a passive tortfeasor and an active tortfeasor “cooperate” to produce an injury; thus, the burden was on the manufacturer to apportion the injuries if possible.¹¹²

In addition to the United States Court of Appeals for the Eighth and Tenth Circuits, at least three other circuit courts, predicting state law in the absence of controlling precedent, and the appellate courts of at least twenty states either have adopted this approach explicitly or expressed a consistent rationale.¹¹³

104. *Mitchell v. Volkswagenwerk*, AG, 669 F.2d 1199, 1206 (8th Cir. 1982). In *Mitchell*, an unrestrained front-seat passenger was ejected from the car during an accident. *Id.* at 1201. The driver of the car was not ejected and suffered only minor injuries, while Mitchell was rendered a paraplegic. *Id.* The plaintiff asserted that he was ejected through the passenger door, which had a defectively designed door latch, and was injured after his ejection from the vehicle, while the defendant argued that Mitchell was injured while he was still in the vehicle. *Id.* The Eighth Circuit held that if the jury determined that the defect was a substantial factor in producing the injury, the manufacturer was joint and severally liable. *Id.* at 1201–02. The court found that the paraplegic injury was “indivisible as a matter of law” and thus incapable of apportionment. *Id.* at 1201.

105. *Trull v. Volkswagen of Am., Inc.*, 761 A.2d 477, 482 (N.H. 2000). In contrast, under the *Huddell-Caiazza* approach, the plaintiff must prove what injuries would have resulted, had there been no product defect, and the defendant manufacturer is only liable for these enhanced injuries. *Huddell*, 537 F.2d at 738. The burden of proof cannot be placed on the defendant in these cases. *Id.*

106. *Mitchell*, 669 F.2d at 1206.

107. 575 F.2d 774 (10th Cir. 1978).

108. *Fox*, 575 F.2d at 777.

109. *Id.*

110. *Id.* at 778.

111. *Id.* at 787–88.

112. *Id.*

113. *Stecher v. Ford Motor Co.*, 779 A.2d 491, 495, n. 10 (Pa. Super. Ct. 2001). *See, e.g.*, *Gen. Motors Corp. v. Edwards*, 482 So. 2d 1176, 1189–91 (Ala. 1985) (adopting *Fox* approach); *Gen. Motors Corp. v. Farnsworth*, 965 P.2d 1209, 1218–20 (Alaska 1998) (same); *Czarnecki v. Volkswagen of Am.*, 837 P.2d 1143, 1147–48 (Ariz. Ct. App. 1991) (same); *Polston v. Boomershine Pontiac-GMC Truck, Inc.*, 423 S.E.2d 659, 660–62 (Ga. 1992) (same); *Fouche v. Chrysler Motors Corp.*, 646 P.2d 1020, 1024 (Idaho Ct. App. 1982) (same); *Jackson v. Warrum*, 535 N.E.2d 1207, 1215–16 (Ind. Ct. App. 1989) (same); *Lahocki v. Contee Sand & Gravel Co., Inc.*, 398 A.2d 490, 498–501 (Md. Ct. Spec. App. 1979) (same); *Lally v. Volkswagen*

Despite having roughly adhered to the *Huddell-Caiazzo* approach for decades, in *Stecher v. Ford Motor Co.*,¹¹⁴ the court concluded that the *Fox-Mitchell* approach toward allocation of the burden of proof in enhanced-injury cases is more consistent with Pennsylvania tort law than the *Huddell-Caiazzo* approach.¹¹⁵ The court believed that the rationale behind the *Fox-Mitchell* approach was more in line with Pennsylvania's concerns of fairness.¹¹⁶ According to the court, imposing the burden upon the plaintiff to prove the precise causation of his harm "would actually be expressing a judicial policy that it is better that a plaintiff, injured through no fault of his own, take nothing, than that a wrongdoer pay more than his theoretical share of the damages arising out of a situation which his wrong has helped to create."¹¹⁷ In its adoption of the *Fox-Mitchell* approach, the court recognized that Pennsylvania courts "have adopted principles of strict liability, successor liability and joint and several liability in recognition of similar public policy concerns."¹¹⁸

c. *Harsh v. Petroll: The Pennsylvania Supreme Court's Application of Concurrent Causation and Joint Liability to Enhanced Injuries in Crashworthiness Cases*

With this background, the Pennsylvania Supreme Court came to decide the case of *Harsh v. Petroll*. The court held that "although crashworthiness theory establishes a basis to support manufacturer liability for enhanced injury, it does not require that a manufacturer be the exclusive cause of such injury, nor does it diminish the causal link that exists between an initial collision and all resultant harm."¹¹⁹ Since the defendant driver's negligence and the automobile design defect were both determined to have been substantial factors in causing the deaths of the Harsh family, the defendants were jointly and severally liable.¹²⁰

In the *Harsh* case, a tractor-trailer driven by Frederick Petroll, traveling above the posted speed limit, struck the rear of a nearly stationary Chevrolet Lumina.¹²¹ The

Aktiengesellschaft, 698 N.E.2d 28, 38 (Mass. App. Ct. 1998) (same); Kudlacek v. Fiat S.p.A., 509 N.W.2d 603, 611–12 (Neb. 1994) (same); Polisenio v. Gen. Motors Corp., 744 A.2d 679, 686–87 (N.J. Super. Ct. App. Div. 2000) (same); Staas v. McAllister, 99-CA-34, 2000 WL 262661, at *3–4 (Ohio Ct. App. Mar. 10, 2000) (same); Lee v. Volkswagen of Am., Inc., 688 P.2d 1283, 1288 (Okla. 1984) (same); Tracy v. Cottrell, 524 S.E.2d 879, 893–94 (W. Va. 1999) (same); Sumnicht v. Toyota Motor Sales, U.S.A., Inc., 360 N.W.2d 2, 10–11 (Wis. 1984) (same); Chrysler Corp. v. Todorovich, 580 P.2d 1123, 1130–31 (Wyo. 1978) (same)).

114. 779 A.2d 491 (Pa. Super. Ct. 2001).

115. *Stecher*, 779 A.2d at 496.

116. *Id.*

117. *Id.* (quoting *Mitchell v. Volkswagenwerk, AG*, 669 F.2d 1199, 1208 (8th Cir. 1982)).

118. *Id.* at 497; see, e.g., *Walton v. Avco Corp.*, 610 A.2d 454, 458 (Pa. 1992) ("The exigencies of our complex technologies required the development and adoption of strict liability when it became clear that the circumstances behind some injuries would make negligence practically impossible for an injured plaintiff to prove."); *Glomb v. Glomb*, 530 A.2d 1362, 1365 (Pa. Super. Ct. 1987) (en banc) ("A court can direct the apportionment of liability among distinct causes only when the injured party suffers distinct harms or when the court is able to identify 'a reasonable basis for determining the contribution of each cause to a single harm.'" (quoting RESTATEMENT (SECOND) OF TORTS, § 433A(1) (1965))).

119. *Harsh v. Petroll*, 887 A.2d 209, 219 (Pa. 2005).

120. *Id.*

121. *Id.* at 210.

Lumina was crushed against a third vehicle and caught on fire; all three occupants died in the accident.¹²² The estates of the deceased sought damages from General Motors on a strict liability crashworthiness theory, arguing that a design defect in the Lumina's fuel system was a substantial cause of the fatal fire.¹²³ General Motors and the Petroll defendants brought cross-claims against each other, seeking contribution relative to any assessed liability.¹²⁴ The jury assigned sixty percent of the responsibility to General Motors and forty percent to Petroll; the verdict was entered and held the defendants jointly and severally liable.¹²⁵

In posttrial motions, the Petroll defendants argued that the plaintiffs' crashworthiness claims must establish enhanced harm over and above that which would have been sustained from the initial accident.¹²⁶ Therefore, the Petroll defendants argued that where claims against separate defendants are premised on distinct theories of liability, and the injuries attributable to each are reasonably capable of division, the negligent driver and the manufacturer cannot be subject to joint and several liability.¹²⁷

Ultimately, the trial court rejected the defendants' position. The court found: [N]othing in the strict-liability, crashworthiness context that would justify departure from time-honored principles of Pennsylvania law maintaining that: a tortfeasor whose negligence was the legal cause of a plaintiff's injury is responsible for all injuries proximately flowing from his conduct; two or more persons bear joint and several liability, although they may have acted independently, if their tortious conduct causes a single harm that cannot be apportioned; [and] the indivisible nature of an injury is a weighty factor in determining whether the harm to a plaintiff is capable of apportionment; and death, by its nature, is an indivisible injury.¹²⁸

The estates had offered the enhanced injury evidence to demonstrate that both Petroll and General Motors were responsible for the deaths of the Harsh family.¹²⁹

122. *Id.*

123. *Id.* at 210–11.

124. *Id.* at 211.

125. *Id.*

126. *Id.* at 211–12 (“[T]o support the claim that the Harshes’ injuries were capable of rational division, Appellants relied on the Estates’ evidence as demonstrating that the Harsh family survived the initial impact with moderate physical injuries and would not have died absent the fire caused by the Lumina’s defective fuel distribution system.”).

127. *Id.* at 213. In support of separate theories of liability, the defendants looked to relevant federal court decisions. *See id.* at 211 (“[W]hen claims against separate defendants are premised on negligence and crashworthiness, the causes of action are separate because the injuries are mutually exclusive, and the manufacturer and the negligent driver can never be joint tortfeasors.” (quoting *Carrasquilla v. Mazda Motor Corp.*, 963 F. Supp. 455, 459 (M.D. Pa. 1997))).

128. *Harsh*, 887 A.2d at 212 (footnotes omitted). As described in the opinion, the trial court relied on a previous decision from the Superior Court of Pennsylvania in reaching its conclusions. “[I]f the defect ‘is found to be a substantial factor in causing an indivisible injury such as paraplegia, death, etc., then absent a reasonable basis to determine which wrongdoer actually caused the harm, the defendants should be treated as joint and several tortfeasors.’” *Stecher v. Ford Motor Co.*, 779 A.2d 491, 495 (Pa. Super. Ct. 2001) (quoting *Mitchell v. Volkswagenwerk, AG*, 669 F.2d 1199, 1206 (8th Cir. 1982)), *vacated and remanded*, 812 A.2d 553 (Pa. 2002).

129. *Harsh*, 887 A.2d at 212.

Because Petroll's negligence caused the collision that led to the fire and the subsequent fatalities, and the harm was indivisible, the trial court found that joint and several liability applied.¹³⁰ On appeal, the Commonwealth Court affirmed.¹³¹

The Pennsylvania Supreme Court held that normal rules of concurrent causation and joint and several liability apply in crashworthiness cases.¹³² "When the plaintiff proves defect-caused increased harm . . . liability of the seller and other tortfeasors is joint and several."¹³³ The court stated that holding the defendants joint and severally liable was proper because there was no reasonable apportionment that could accurately reflect the separate causal contributions of the tortfeasors.¹³⁴

The court noted that "joint and several liability evolved on the theory that, as between an injured, innocent plaintiff and defendants whose breach of some duty is proximately related to the injury, it is preferable to allocate the risk of a default in the payment of due compensation to the defendants."¹³⁵ According to the court, "[t]he doctrine has been codified in Pennsylvania in the version of the Comparative Negligence Act that was in effect at the time of the trial of this case, as well as in the Uniform Contribution Among Joint Tortfeasors Act . . . and is thus firmly grounded."¹³⁶

In addition, the court stated that "multiple substantial factors may cooperate to

130. *Id.* at 213. Defendants who are liable under principles of strict liability and those who are liable in negligence may be joint tortfeasors. *E.g.*, *Svetz v. Land Tool Co.*, 513 A.2d 403, 408 (Pa. Super. Ct. 1986). In *Svetz*, a motorcyclist was served alcohol at an inn, despite being visibly intoxicated. *Id.* at 405. Later that night, Svetz lost control of his motorcycle and hit his head on the pavement; this caused his helmet to split, leading to head injuries and, ultimately, to his death. *Id.* at 404–05. Among others, his estate sued the manufacturer of the helmet and the inn that had served him the alcohol. *Id.* at 405. The court held that "defendants who are liable under principles of strict liability and defendants who are liable because of negligence may be joint tortfeasors." *Id.* at 408

131. *Harsh*, 887 A.2d at 213.

132. *Id.* at 217. In particular, the plaintiffs argued that a number of other jurisdictions supported the application of the traditional principles of joint and several liability. *Id.* at 216 n.15. (citing *Craigie v. Gen. Motors Corp.*, 740 F. Supp. 353, 359–60 (E.D. Pa. 1990); *Meekins v. Ford Motor Co.*, 699 A.2d 339, 346 (Del. 1997); *Buehler v. Whalen*, 374 N.E.2d 460, 465 (Ill. 1977)).

133. *Id.* at 216 n.13 (omission in original) (quoting RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 16(d), cmt. e, illus. 7 (1997)).

134. *Id.* at 216–17.

135. *Id.* at 217; *see also* *Huddell v. Levin*, 537 F.2d 726, 746 (3d Cir. 1976) (Rosenn, J., concurring) ("The underlying rationale of the courts has been that justice is better served by allowing an innocent plaintiff to recover his entire damages from independent and concurrent wrongdoers, when he cannot reasonably apportion his damages, than by protecting a proven wrongdoer from possible overpayment. The burden is placed squarely upon the defendant to limit his liability in such circumstances. The rule applies *a fortiori* to injuries which are inherently incapable of division, such as death.").

136. *Harsh*, 887 A.2d at 217–18 (footnote omitted); *see also* 42 PA. STAT. ANN. § 7102 (West 2000) (amended 2002) (prescribing the right of contribution and directing that "the plaintiff may recover the full amount of the allowed recovery from any defendant against whom the plaintiff is not barred from recovery"); 42 PA. STAT. ANN. §§ 8321–8327 (West 2013) (codifying the Uniform Contribution Among Joint Tortfeasors Act in Pennsylvania). In 2002, the Pennsylvania General Assembly amended the Comparative Negligence Law to curtail joint and several liability. *See* 2002 Pa. Laws 394, 402–04. However, such legislation was deemed invalid by the Commonwealth Court based on the procedures employed in its enactment. *See DeWeese v. Weaver*, 880 A.2d 54, 61–62 (Pa. Commw. Ct. 2005) (holding act in violation of state constitution due to violation of the "single subject requirement").

produce an injury, and . . . concurrent causation will give rise to joint liability.”¹³⁷ The court extended the principle of concurrent causation to cases involving enhanced injuries.¹³⁸ The court stated:

While in fashioning a just and coherent crashworthiness jurisprudence it has been necessary to rely on the concept of enhancement to delineate the basis for and extent of a manufacturer’s responsibility . . . the interests of justice do not require that the same line of demarcation operate automatically to relieve from liability a negligent tortfeasor whose concurrent conduct also served as a substantial factor in producing the additional harm.¹³⁹

After setting forth these principles of joint and several liability, the court continued on to suggest that “a judicially imposed policy insulating a negligent tortfeasor from liability for enhanced injuries based on his status as the sole cause of some other distinct harm would engender substantial incongruities in Pennsylvania law.”¹⁴⁰ Thus, the Pennsylvania Supreme Court rejected the reasoning used in *Huddell*, where the court refused to apply the principles of concurrent causation and joint liability to enhanced injuries in crashworthiness cases.¹⁴¹ Subsequent cases applied these principles as well.¹⁴²

137. *Harsh*, 887 A.2d at 218 (citations omitted); see also *Mitchell v. Volkswagenwerk, AG*, 669 F.2d 1199, 1206 (8th Cir. 1982) (“If the manufacturer’s negligence is found to be a substantial factor in causing an indivisible injury . . . then absent a reasonable basis to determine which wrongdoer actually caused the harm, the defendants should be treated as joint and several tortfeasors.”); *Powell v. Drumheller*, 653 A.2d 619, 622 (Pa. 1995) (stating that “[w]here a jury could reasonably believe that a defendant’s actions were a substantial factor in bringing about the harm, the fact that there is a concurring cause does not relieve the defendant of liability”); *Jones v. Montefiore Hosp.*, 431 A.2d 920, 923 (Pa. 1981) (stating that “[p]roximate cause is a term of art, and may be established by evidence that a defendant’s negligent act or failure to act was a *substantial factor* in bringing about the harm inflicted upon a plaintiff”).

138. *Harsh*, 887 A.2d at 218.

139. *Harsh*, 887 A.2d at 218. This comports with other views on joint and concurrent causation, as articulated by the *Restatement*. See, e.g., Michael Hoenig, *Resolution of ‘Crashworthiness’ Design Claims*, 55 ST. JOHN’S L. REV. 633, 703–04 (1981) (“In the enhanced injury case, the claimant does *not* apportion the total injuries sustained in the collision between the negligent driver causing the accident and the manufacturer whose design aggravated the injury. Similarly, the plaintiff is not required to divide up an indivisible injury The plain fact is that the tortfeasor who precipitated the accident is liable for *all* of the plaintiff’s injuries.”).

140. *Harsh*, 887 A.2d at 218.

141. *Id.*

142. See, e.g., *United States v. Sunoco, Inc.*, 501 F. Supp. 2d 656, 662 (E.D. Pa. 2007) (finding that defendants should be subject to joint tortfeasor status when their “acts combined as substantial factors to form one physical injury”). The lawsuit concerned petroleum pollution that contaminated a nearby United States property and had allegedly emanated from a section of a refinery formerly and currently owned by the petroleum companies. *Id.* at 659. The Pennsylvania legislature deemed violations under the Pennsylvania Storage Tank and Spill Prevention Act to be a kind of tort, giving rise to liability under the Uniform Contribution Against Tortfeasors Act, which gives a right of contribution to joint tortfeasors. *Id.* at 660. An examination of Pennsylvania case law showed that the parties were joint tortfeasors. *Id.* at 661.

Here, the plaintiff has alleged that one tract of land was polluted by numerous polluters who cumulatively added to a common, indivisible physical injury Like *Capone* and *Harsh*, that the violations occurred sequentially rather than simultaneously does not bar joint tortfeasor status where the acts combined as substantial factors to form one physical injury.

Id. at 662.

2. The Fair Share Act: Revamping Principles of Liability in Pennsylvania

On June 28, 2011, Pennsylvania Governor Tom Corbett signed the Fair Share Act into law.¹⁴³ The Act altered Pennsylvania's longstanding practice of joint and several liability, replacing it with a several liability model that permits a jury to award damages based on a percentage of fault.¹⁴⁴ A prior iteration of the Act was signed into law in 2002 but was found to violate the Pennsylvania Constitution on procedural grounds.¹⁴⁵

The Republicans in the State House and Senate, as well as business associations and health care providers, primarily championed the Fair Share Act.¹⁴⁶ The legislation was viewed as an avenue for shifting the risk of frivolous claims away from employers.¹⁴⁷ Governor Corbett stated, "[t]he Fair Share Act is a key component in addressing one of the most important issues to Pennsylvania—jobs."¹⁴⁸ Business associations have identified Pennsylvania's legal climate as a hindrance for starting and growing an enterprise.¹⁴⁹ Additionally, individuals in business have come to believe that the inherent unfairness of joint liability has hurt doctors, hospitals, nursing homes, colleges, universities, and municipal governments.¹⁵⁰ Champions of the Fair Share Act believe that it can benefit businesses and ultimately save tax dollars.¹⁵¹

Although Republicans were particularly enthusiastic about the new law, Democrats referred to it as "The Wrongdoers Protection Act."¹⁵² Opponents of the Act argued that it limits accident victims' ability to seek legal recourse and asserted that the "rights of victims should be the No. 1 priority of our legal system."¹⁵³ The Pennsylvania Democratic Party condemned the legislation as a "handout to business" and argued that it endorses corporate interests over the interests of victims.¹⁵⁴

The new Fair Share Act amends the Comparative Negligence Act. This statute now reads:

(1) Where recovery is allowed against more than one person, *including actions for strict liability*, and where liability is attributed to 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 that defendant's liability to the amount of liability attributed to all defendants and other persons to whom liability is apportioned under subsection (a.2).

143. Patrick J. Healey, *The Fair Share Act: Changes in Medical Liability Claims in Pennsylvania*, BENCHMARK, Third Quarter 2011, at 4, available at <http://www.mccumberdaniels.com/userfiles/files/Benchmark/The%20Benchmark%20Third%20Quarter%202011.pdf>.

144. 42 PA. STAT. ANN. § 7102(a.1)(1) (West 2013).

145. *DeWeese v. Weaver*, 880 A.2d 54, 62 (Pa. Commw. Ct. 2005).

146. Chris Mondics, *Pennsylvania Trial Lawyers, Business Groups Square Off Over Lawsuit Reform*, PHILA. INQUIRER, Apr. 19, 2011, at C1.

147. Jared Edgerton & Keegan Gibson, *Corbett Signs Tort Reform Compromise*, POLITICS PA (June 28, 2011, 2:50 PM), <http://www.politicspa.com/corbett-signs-tort-reform-compromise/25739/>.

148. *Id.*

149. Mondics, *supra* note 146, at C1.

150. *Id.*

151. *Id.*

152. Edgerton & Gibson, *supra* note 147.

153. *Id.*

154. *Id.*

(2) . . . [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.¹⁵⁵

In addition, the Act allows the trier of fact to consider, "[f]or [the] 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."¹⁵⁶ This allows defendants to specifically identify and demonstrate the liability of any nonparties who may have settled prior to the commencement of the lawsuit, as well as any parties who settled prior to trial.

The Act has not totally abolished joint and several liability, however. It remains in existence in five defined areas:

- (i) Intentional Misrepresentation.
- (ii) An intentional tort.
- (iii) Where the defendant has been held liable for not less than 60% of the total liability apportioned to all parties.
- (iv) A release or threatened release of a hazardous substance under . . . the Hazardous Sites Cleanup Act. [And]
- (v) A civil action in which a defendant violated section 497 of the . . . Pennsylvania Liquor Code.¹⁵⁷

Prior to the Fair Share Act, under Pennsylvania law, joint and several liability required a defendant found responsible for any portion of a plaintiff's injury to be liable for one hundred percent of the damages owed to the plaintiff, regardless of the apportionment of fault.¹⁵⁸ Under the Act, a defendant that is found less than sixty percent liable will only be responsible for its proportionate share of the total.¹⁵⁹ Conversely, a defendant that is found to be liable for sixty percent or more of the damages will be jointly and severally liable for the total damages owed to the plaintiff. If joint and several liability applies, a defendant that has paid more than its proportionate share of damages may seek to recover contributions from codefendants.¹⁶⁰

The effect of the Fair Share Act remains to be seen; however, it will certainly have a profound impact on the litigation strategies pursued by major automobile manufacturer defendants and their ultimate liability in actions brought in Pennsylvania. Additionally, the Act will affect the size of plaintiffs' recoveries, particularly those injured by morally culpable initial tortfeasors.

155. 42 PA. STAT. ANN. § 7102(a.1) (West 2013) (emphasis added).

156. *Id.* § 7102(a.2).

157. *See id.* § 7102(a.1)(3)(i)-(v) (listing remaining tort areas).

158. Healey, *supra* note 143, at 4; *see, e.g., Baker v. AC&S, Inc.*, 729 A.2d 1140, 1146 (Pa. Super. Ct. 1999) (stating that in Pennsylvania, joint tortfeasors, including those in strict liability actions, are jointly and severally liable, so plaintiff may recover entire damages award from only one of the joint tortfeasors).

159. 42 PA. STAT. ANN. § 7102(a.1)(3)(iii).

160. *Id.* § 7102(a.1)(4).

III. DISCUSSION

Prior to the adoption of the Fair Share Act, Pennsylvania courts were clear in their understanding of crashworthiness cases—plaintiffs need only prove that the defect was a substantial factor in causing their harm, and the defendants were to be held jointly and severally liable for the indivisible damage.¹⁶¹ Because crashworthiness doctrine is merely a subset of a cause of action for products liability, courts understood that negligence principles should be completely absent from any crashworthiness discussion.¹⁶² With the adoption of the Fair Share Act, however, courts face an entirely new set of problems. Crashworthiness doctrine and comparative liability will have to be reconciled.

In order to do so, courts should dispense with the *Fox-Mitchell* approach and fashion a new approach based on apportionment of fault.¹⁶³ Additionally, automobile manufacturers will face new incentives in their defense of crashworthiness causes of action, which may drastically affect the procedure of such cases.¹⁶⁴ Finally, the shifting burdens of proof and causation will certainly impact plaintiffs' recoveries, especially in cases involving morally culpable third-party tortfeasors.¹⁶⁵

A. Reconciling Crashworthiness Doctrine and Comparative Liability

Previously in Pennsylvania, once the plaintiff proved that the product defect caused increased, indivisible harm, the liability of the manufacturer and other tortfeasors was joint and several.¹⁶⁶ Under the prior Comparative Negligence Act, fault was to be apportioned only with respect to negligent torts.¹⁶⁷ Under the new Act, however, the Pennsylvania legislature broadened the apportionment of responsibility to include actions for strict liability.¹⁶⁸ Before the adoption of the new Act, courts were adamant that negligence concepts should be completely divorced from crashworthiness, strict liability actions.¹⁶⁹

Because the Fair Share Act specifically permits fault to be apportioned in strict liability actions, courts must radically depart from their previous philosophy of nonapportionment. This will require courts to revisit the issue of the burden of apportionment. In addition, courts must reconcile the new Act with their prior rationales for imposing strict liability on automobile manufacturers—justice and

161. See *supra* Parts II.A and II.B for a discussion of the law regarding crashworthiness cases prior to the adoption of the Fair Share Act.

162. See *supra* Part II.C.1 for a discussion of the absence of negligence principles from Pennsylvania crashworthiness cases.

163. See *infra* Part III.A.2 for a discussion of the burden of proof that should be adopted under the new liability regime.

164. See *infra* Part III.B for a discussion of the new incentives major automobile manufacturers will face under the new liability regime.

165. See *infra* Part III.C for a discussion of the Act's potential effect on plaintiff's recoveries.

166. *Harsh v. Petroll*, 887 A.2d 209, 216 n.13 (Pa. 2005).

167. 42 PA. STAT. ANN. § 8324 (West 2013).

168. *Id.* § 7102(a.1).

169. See *supra* Part II.C for a discussion of courts' refusal to allow a products liability action under section 402A to become contaminated by negligence principles.

fairness. The introduction of comparative negligence principles into actions for strict liability will therefore place a significant burden on the courts to justify such a significant departure from previous cases.

1. Other Jurisdictions

Courts in other jurisdictions have held that the legislative abolition of joint and several liability extends to strict products liability actions and that fault must be apportioned among tortfeasors.¹⁷⁰ The majority view now holds that a plaintiff's comparative negligence in causing the initial collision is a proper issue in a crashworthiness action.¹⁷¹ Courts adhering to the majority view note the particular applicability of comparative fault "in crashworthiness cases where the product defect causes or enhances injuries but does not cause the accident."¹⁷² In such cases, the conduct that actually causes the accident "would not cause the same degree of harm if there were no product defect."¹⁷³ Rather, multiple factors combine to cause the plaintiff's injuries, so the jury should "apportion responsibility between all whose action or products combined to cause the entirety of the plaintiff's injuries."¹⁷⁴ Notably, this is also the position ultimately adopted by the *Restatement (Third)*,¹⁷⁵ after having rejected the minority view.¹⁷⁶ Because comparative negligence now applies to strict liability crashworthiness actions, Pennsylvania courts must adhere to the majority view.

Courts in other jurisdictions have refused to apply comparative negligence to strict liability actions based on public policy¹⁷⁷ and different statutory interpretations of

170. See, e.g., *State Farm Ins. Co. v. Premier Manufactured Sys., Inc.*, 172 P.3d 410, 413 (Ariz. 2007) (describing how to apportion fault among tortfeasors).

171. *Bravo v. Ford Motor Co.*, No. CV000594807, 2001 WL 477275, at *3 (Conn. Super. Ct. Apr. 16, 2001). In support of this proposition, the court cited a number of other jurisdictions following this principle. E.g., *Montag v. Honda Motor Co., Ltd.*, 75 F.3d 1414, 1419 (10th Cir. 1996) (applying Colorado law); *Keltner v. Ford Motor Co.*, 748 F.2d 1265, 1267 (8th Cir. 1984) (applying Arkansas law); *Hinkamp v. Am. Motors Corp.*, 735 F. Supp. 176, 178 (E.D. N.C. 1989) (applying North Carolina law); *Trust Corp. of Mont. v. Piper Aircraft Corp.*, 506 F. Supp. 1093, 1098 (D. Mont. 1981) (applying Montana law); *Meekins v. Ford Motor Co.*, 699 A.2d 339, 346 (Del. Super. Ct. 1997); *Estate of Hunter v. Gen. Motors Corp.*, 729 So.2d 1264, 1269 (Miss. 1999); *Oltz v. Toyota Motor Sales, U.S.A., Inc.*, 531 P.2d 1341, 1343 (Mont. 1975); *Whitehead v. Toyota Motor Corp.*, 897 S.W.2d 684, 693 (Tenn. 1995); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 423 (Tex. 1984).

172. *Bravo*, 2001 WL 477275, at *3 (quoting *Duncan*, 665 S.W.2d at 428).

173. *Id.* (quoting *Duncan*, 665 S.W.2d at 428).

174. *Id.* (quoting *Duncan*, 665 S.W.2d at 428).

175. RESTATEMENT (THIRD) OF TORTS § 16 cmt. f (1997).

176. *Estate of Hunter*, 729 So. 2d at 1271-72. Although the "first draft of the proposed Restatement (Third) of Torts had originally set forth the minority view that, in enhancement cases, the plaintiff's fault in causing the accident constitutes an exception to the general apportionment rule set forth in the draft." *Id.* at 1271. The exception was eliminated, however, when the issue became "a major controversy" and "it proved exceedingly difficult . . . to justify fault in causing the accident in an enhanced injury case as the only exception to the strict tort products liability apportionment rule." *Id.* at 1271-72 (quoting William J. McNichols, *The Relevance of the Plaintiff's Misconduct in Strict Tort Products Liability, the Advent of Comparative Responsibility, and the Proposed Restatement (Third) of Torts*, 47 OKLA. L. REV. 201, 275 (1994)).

177. See, e.g., *Owens v. Truckstops of Am.*, 915 S.W.2d 420, 432 (Tenn. 1996) (recognizing policy rationales rooted in equity and supporting the rejection of comparative negligence principles as applied to strict

“fault,”¹⁷⁸ but the new Pennsylvania statute does not allow Pennsylvania courts to do so. Rather, under the doctrine of strict products liability, a manufacturer breaches its legal duty when it distributes a defective and unreasonably dangerous product, and a claimant, after proving causation, is entitled to recover against any such defendant under the new statutory regime of several-only liability.¹⁷⁹ Given that accidents are foreseeable, an automobile manufacturer will always have a duty to design a crashworthy product.¹⁸⁰

Any negligence on the part of the plaintiff will not affect the manufacturer’s duty, but it is not necessarily irrelevant to the causation of his injuries.¹⁸¹ If that were the case, the alleged defect would be the “sole proximate cause of the plaintiff’s enhanced injuries,” as a matter of law.¹⁸² Ultimately, a jury must determine whether proximate cause exists in each case.¹⁸³ Thus, juries will face a much weightier task in crashworthiness cases, given that their determinations of causation will now be applicable to, and impact, all parties involved in a particular suit.

2. Burden of Proof Under New Liability Regime

The abolition of joint and several liability raises an issue as to the applicable burden of proof in crashworthiness actions.¹⁸⁴ Under the new several-only liability regime, Pennsylvania courts may return to their adherence to the *Huddell-Caiazzo* approach.¹⁸⁵ Previously, under the *Fox-Mitchell* approach, Pennsylvania courts held that if the defect is found to be a substantial factor in causing an indivisible injury such as paraplegia or death, and absent a reasonable basis to determine which wrongdoer actually caused the harm, the defendants should be treated as joint and several tortfeasors.¹⁸⁶ The *Huddell-Caiazzo* approach, which holds manufacturers liable only for enhanced injuries attributable to the defective product, rejects the idea that the burden can shift to the defendant manufacturer to prove part of the plaintiff’s case.¹⁸⁷ This approach “separates the injury and the circumstances surrounding it into distinct,

products liability).

178. See *Wimberly v. Derby Cycle Corp.*, 65 Cal. Rptr. 2d 532, 536–41 (Cal. Ct. App. 1997) (rejecting principles of comparative negligence in strict liability due to ambiguity in the comparative negligence statute and definition of “fault”).

179. See *supra* Part II.C.2 for a discussion of the new several-only liability regime.

180. *Bravo v. Ford Motor Co.*, No. CV000594807, 2001 WL 477275, at *4 (Conn. Super. Ct. Apr. 16, 2001); see also *Meekins v. Ford Motor Co.*, 699 A.2d 339, 341 (Del. Super. Ct. 1997) (stating that the “cause of the collision therefore has no bearing on the duty of the manufacturer to design a vehicle so as to minimize injuries from collisions which the manufacturer knows will in many cases occur”).

181. *Bravo*, 2001 WL 477275, at *4.

182. *Id.*

183. *Id.*

184. See *supra* Parts II.C.1.a and II.C.1.b for a discussion of the burden of proof in crashworthiness actions.

185. See *supra* Part II.C.1.a for a discussion of Pennsylvania’s previous adherence to the *Huddell-Caiazzo* approach.

186. *Harsh v. Petroll*, 887 A.2d 209, 218–19 (Pa. 2005).

187. *Huddell v. Levin*, 537 F.2d 726, 738 (3d Cir. 1976).

disparate events, with the burden on the plaintiff to prove who caused what harm.”¹⁸⁸

The concern for plaintiffs faced with difficult issues of proof, as espoused by the *Fox-Mitchell* approach, neglects to adequately address the equally valid concern that enhanced injury defendants receive fair treatment through the weeding out of frivolous cases. Opponents of the *Huddell-Caiazzo* approach often focus on the “perceived difficulty of plaintiffs in retaining and compensating the expert witnesses usually necessary to prove an enhanced injury claim,” however, scholars have shown that such arguments are exaggerated.¹⁸⁹ Plaintiffs do, in fact, succeed in satisfying the criteria enunciated by *Huddell* and *Caiazzo*.¹⁹⁰ Furthermore, no commentator has provided specific evidence “that any deserving plaintiff has lost a specific case for lack of an expert witness over the past twenty years.”¹⁹¹ Additionally, both plaintiffs and defendants “routinely retain experts who are able to reach opinions about hypothetical injuries.”¹⁹² Even the *Larsen* court recognized that identification of enhanced injuries or damages may be difficult, but the court nevertheless stated that the “obstacles are not insurmountable, noting that similar apportionments are regularly performed under comparative negligence statutes.”¹⁹³

While the *Huddell-Caiazzo* approach seems to be more in line with ideas of comparative negligence and several-only liability, it poses difficulties in determining how to deal with indivisible injuries, since joint and several liability is unavailable. The *Huddell-Caiazzo* approach, adopted under a joint and several liability regime, claims that even if plaintiffs fail to meet their burden to apportion damages between a

188. *Egbert v. Nissan Motor Co.*, 228 P.3d 737, 744 (Utah 2010).

189. *Vickles & Oldham*, *supra* note 98, at 435. In an enhanced injury case, expert testimony is normally required in areas such as occupant kinematics, biomechanics, human impact tolerance, accident reconstruction, engineering, medicine, etc. *Id.*; see also Edward T. O’Donnell, *Public Policy and the Burden of Proof in Enhanced Injury Litigation: A Case Study in the Dangers of Trends and Easy Assumptions*, 17 W. ST. U. L. REV. 325, 353 (1990) (stating that burden of proof pressures each side to produce its best evidence).

190. *Vickles & Oldham*, *supra* note 98, at 435; see, e.g., *Seese v. Volkswagenwerk A.G.*, 648 F.2d 833, 845 (3d Cir. 1981) (applying the *Huddell* standard to alternative design, injury causation, and injury enhancement evidence).

191. *Vickles & Oldham*, *supra* note 98, at 435; see also O’Donnell, *supra* note 189, at 345 (pointing out that today, “products liability litigation offers great monetary rewards to the plaintiff’s bar and its allied experts”).

192. *Vickles & Oldham*, *supra* note 98, at 436 (identifying seatbelt defense as example where expert must reach opinion on hypothetical injury); see also *Caiazzo v. Volkswagenwerk A.G.*, 647 F.2d 241, 246 (2d Cir. 1981) (placing burden of proof on defendant to prove hypothetical injuries would have resulted if plaintiff had been wearing seatbelt).

193. Specifically, the Eighth Circuit explained:

Any design defect not causing the accident would not subject the manufacturer to liability for the entire damage, but the manufacturer should be liable for that portion of the damage or injury caused by the defective design over and above the damage or injury that probably would have occurred as a result of the impact or collision absent the defective design. The manufacturer argues that this is difficult to assess. This is no persuasive answer and, even if difficult, there is no reason to abandon the injured party to his dismal fate as a traffic statistic, when the manufacturer owed, at least, a common law duty of reasonable care in the design and construction of its product. The obstacles of apportionment are not insurmountable. It is done with regularity in those jurisdictions applying comparative negligence statutes.

Larsen v. Gen. Motors Corp., 391 F.2d 495, 503 (8th Cir. 1968).

negligent original tortfeasor and a manufacturer, they may still recover from the original tortfeasor, who remains liable for all damages.¹⁹⁴ This result, however, is no longer permitted under Pennsylvania's liability regime, where the liability of any given defendant is limited to only that proportion of fault attributed to that defendant.¹⁹⁵

For this reason, if an indivisible injury cannot be apportioned, then the original tortfeasor can be no more liable than the manufacturer. Thus, under the *Huddell-Caiazzo* approach, if apportionment is impossible, both defendants "walk," resulting in "complete non-recovery for plaintiffs, even where defective products have certainly contributed to their injuries."¹⁹⁶ Pennsylvania courts have always been hesitant to allow a loss due to failure of proof to fall on an innocent plaintiff, so it seems unlikely that courts would now adhere to an approach that permits such a result.¹⁹⁷

As such, under the new liability scheme, Pennsylvania courts should reject both approaches and instead fashion a new approach based on apportionment of fault. Utah, another state that abolished joint and several liability, faced a similar problem in the context of crashworthiness cases in *Egbert v. Nissan Motor Co.*¹⁹⁸ The Utah Supreme Court stated that despite both approaches' reasoning that some enhanced injuries cannot be apportioned, Utah's statute contains an explicit declaration that "fault . . . is always apportionable."¹⁹⁹ Similarly, Pennsylvania's new Act calls for apportionment in all cases "[w]here recovery is allowed against more than one person, including actions for strict liability."²⁰⁰ Thus, the defendant manufacturer will be liable only for the enhanced injury as determined by a fact finder's apportionment.

A court can direct the apportionment of liability among distinct causes only when the injured party suffers distinct harms or when the court is able to identify "a reasonable basis for determining the contribution of each cause to a single harm."²⁰¹ This reasonable basis standard,²⁰² however, does not demand the precise, explicit evidence the *Huddell-Caiazzo* approach requires.²⁰³ In addition, as discussed previously, "the dilemma of the apportionment of indivisible injuries is nonexistent when viewed from a practical perspective. Experts regularly provide such opinions and

194. See *Huddell v. Levin*, 537 F.2d 726, 739 (3d Cir. 1976) ("The burden of apportionment applies only to plaintiff's claim against General Motors. Should plaintiff fail to meet her burden on this claim, the brute fact is that the negligent driver would *not* escape liability on the same ground. Traditional negligence concepts determine the case against Levin and the extent of his liability.").

195. See *supra* Part II.C.2 for a discussion of the new several-only liability regime.

196. *Egbert v. Nissan Motor Co.*, 228 P.3d 737, 745 (Utah 2010).

197. See, e.g., *Harsh v. Petroll*, 887 A.2d 209, 217 (Pa. 2005) (loss due to failure of proof should not be borne by innocent plaintiff); *Walton v. Avco Corp.*, 610 A.2d 454, 458 (Pa. 1992) (same); *Stecher v. Ford Motor Co.*, 779 A.2d 491, 496–97 (Pa. Super. Ct. 2001); *Taylor v. Celotex Corp.*, 574 A.2d 1084, 1096 (Pa. Super. Ct. 1990) (same); *Glomb v. Glomb*, 530 A.2d 1362, 1365 (Pa. Super. Ct. 1987) (same).

198. See *Egbert*, 228 P.3d 737, 744–46 (adopting a new rule for apportionment).

199. *Id.* at 746.

200. 42 PA. STAT. ANN. § 7102(a.1)(1) (West 2013) (emphasis added).

201. RESTATEMENT (SECOND) OF TORTS § 433A(1) (1965); see also *Martin v. Owens-Corning Fiberglas Corp.*, 528 A.2d 947, 949 (Pa. 1987) (stating that Pennsylvania's apportionment rules are consistent with Restatement); *Wade v. S.J. Groves & Sons Co.*, 424 A.2d 902, 907 (Pa. Super. Ct. 1981) (refusing to apportion damages based on Restatement's requirements).

202. RESTATEMENT (SECOND) OF TORTS § 433A(1).

203. *Egbert*, 228 P.3d at 746.

juries regularly perform similar apportionments in other contexts.”²⁰⁴ Thus, Pennsylvania courts should require that in crashworthiness cases, when a plaintiff proves that a defect caused increased harm and which party caused which harm, the jury must apportion fault between all parties.

3. Public Policy Benefits of the Act

The introduction of comparative negligence principles into actions for strict liability provides a valuable opportunity for the court to justify the Act’s benefits based on public policy. Rather than merely blame the legislature for passing the Act, Pennsylvania courts should reexamine their prior justifications for crashworthiness liability in light of the current economic and social environment. Because of the nature of an enhanced injury claim and the abolition of joint and several liability, a defendant product-seller cannot become liable for the entire injury merely by virtue of being a codefendant.²⁰⁵ This will likely result in lower prices to consumers, since previously, manufacturers simply passed the costs of liability and of designing safer products on to consumers.²⁰⁶

Additionally, if Pennsylvania courts require plaintiffs to prove harm and ask the jury to apportion damages, manufacturers’ costs associated with enhanced injury litigation may be significantly lower. Because crashworthiness cases have become incredibly complex and costly to litigate, and because a successful claim often results in a multimillion-dollar verdict, these cases impose significant burdens on the judicial system.²⁰⁷ Previously, plaintiffs would engage in “shotgun pleading,” which involved the joinder of minimally responsible entities in lawsuits where they would not otherwise be joined, in the absence of joint and several liability, due to their mere peripheral involvement.²⁰⁸ The use of shotgun pleading increased the likelihood that plaintiffs could convince the jury to assign at least minimal responsibility to one defendant, assuring that, because of the principles of joint and several liability, at least one defendant would be forced to pay the entirety of a potentially high damage award.²⁰⁹ This results in excessive litigation costs for both parties, as well as the courts, which are ultimately passed onto the rest of society.

Thus, the uncertainty that exists in the crashworthiness doctrine improperly

204. Vickles & Oldham, *supra* note 98, at 450. Moreover, “[j]uries have little difficulty with either the fact or the reality of assessing comparative fault among parties using numerous different formulae.” *Id.* at 436 n.119.

205. See *supra* Part II.C.1.a for a discussion on enhanced injury claims and the development of joint and several liability in Pennsylvania.

206. Vickles & Oldham, *supra* note 98, at 418 (stating that in the enhanced injury context, “rising litigation and settlement costs [are] passed on to consumers and businesses”).

207. *Id.*

208. *E.g.*, Daddona v. Thind, 891 A.2d 786, 796 (Pa. Commw. Ct. 2006); see also Joe E. Basenberg & S. Leanna Bankster, *Notice Pleading in the Mass Tort Arena: What Is Sufficient Notice?*, ALA. LAWYER, Jan. 2007, at 74, 75 (defining “shotgun pleading”). See generally Han-Duck Lee et al., *How Does Joint and Several Tort Reform Affect the Rate of Tort Filings? Evidence from the State Courts*, 61 J. OF RISK & INS. 295, 298 (1994).

209. Lee, *supra* note 208, at 298.

encourages litigation, resulting in high costs to society as a whole.²¹⁰ Unrestrained expansion of the doctrine poses a genuine threat to American manufacturers' ability to compete favorably in international markets, as well as to the ability of average Americans to afford products, since rising litigation costs continue to be passed on to consumers.²¹¹ Given the current state of our economy, courts should be hesitant to encourage such wasteful and costly practices.

B. Liability of Major Auto Manufacturers: Facing New Incentives

A primary criticism of joint and several liability in the context of crashworthiness cases is that it encourages plaintiffs to sue "deep pocket" defendants.²¹² Opponents of joint and several liability argue that it encourages abusive litigation practices because it allows plaintiffs to sue any defendant who may be only marginally responsible, yet able to pay the full verdict in the event the plaintiff is able to establish merely one percent liability against them.²¹³ Therefore, a deep pocket defendant who has minimal liability may be unduly burdened in order to compensate for other negligent defendants who are unable to pay their share.²¹⁴ With the abolition of joint and several liability, automobile manufacturers will face different incentives and will likely adjust their litigation strategies accordingly. In particular, plaintiffs and joint defendants will focus their efforts on proving that the manufacturer is found liable for at least sixty percent of the damage, while the manufacturer will expend considerable resources to convince the factfinder otherwise.

1. Sixty Percent Threshold

Plaintiffs will devote significant resources to proving that the automobile manufacturer is at least sixty percent liable; conversely, manufacturers will devote their resources to refuting this claim.²¹⁵ For this reason, one may reasonably expect that discovery costs will increase and that the parties will rely on experts to get them (or not) to that sixty percent liability line. Plaintiffs may rely on a new trial strategy—targeting one defendant—rather than joining as many parties as possible. Under a joint and several liability regime, plaintiffs were encouraged to name as many defendants as possible, particularly if it appeared that the defendants only had minimal liability, in the hopes that at least one defendant would be found liable and forced to pay the entire

210. See *Caiazza v. Volkswagenwerk A.G.*, 647 F.2d 241, 246 (2d Cir. 1981) (expressing concern that the manufacturer would be forced to show "a plethora of hypothetical and speculative possibilities," which might result in high litigation costs); *Vickles & Oldham*, *supra* note 98, at 433 n.97 (describing the Second Circuit's concerns in *Caiazza*).

211. See *Vickles & Oldham*, *supra* note 98, at 451 (pointing out that "American manufacturers are already hobbled by the enormous costs of liability insurance and products litigation").

212. See *Wright*, *supra* note 65, at 49 (stating that one of the criticisms of joint and several liability is that "it is applied to 'deep pocket' defendants who have not behaved tortiously or are only 'minimally responsible' and who thus are required to provide 'social insurance' for others' wrongful behavior").

213. See *Marcus*, *supra* note 62, at 495–96 (explaining that if each defendant is fully liable for the plaintiffs' harm, "it is virtually guaranteed that every tortfeasor who can legally be sued will be").

214. *Id.*

215. Recall that under the Fair Share Act, joint and several liability is applied to a defendant found liable if the jury assigns sixty percent or greater liability. 42 PA. STAT. ANN. § 7102(a.1)(3)(iii) (West 2013).

amount of the judgment.²¹⁶ Under the new several-only liability regime, plaintiffs may choose not to sue a known tortfeasor whose percentage of fault is minimal and instead target only one defendant, increasing the plaintiffs' chances of there being a finding that one particular defendant was at least sixty percent at fault.²¹⁷

Defendants, on the other hand, face the opposite incentive. It may be in the defendants' interests to identify as many other defendants as possible in order to avoid a finding of sixty percent fault against any specific one, thereby defeating liability. Defendants may identify other potential defendants legally exempt or immune from liability, for example, a government agency that is granted governmental immunity.²¹⁸ A defendant may then prove that a nonparty is liable for a percentage of the plaintiff's injuries, even if that nonparty cannot be sued.²¹⁹ A jury could then apportion a large share of the damages to the immune entity and a far lesser share to another defendant. Thus, defendants who may not have been sued before because of minimal responsibility for the harm caused will be joined under the several-only liability regime.²²⁰ Defendants will be incentivized to pass blame onto others, which will likely lead to increased litigation costs.

Similarly, the new liability regime will likely lead to more contentious relationships amongst defendants. In cases in which one defendant truly believes its liability is marginal and another defendant is liable in excess of sixty percent, the defendant with marginal liability will likely be much less subtle in its criticism of the other defendant.²²¹ Because defendants face greater incentives to join additional defendants, manufacturers will be more likely to join all potentially responsible parties, even if they are uninsured or insolvent.²²² This will lead to even more disagreement and contention between defendants since they are more at odds than ever before.

On the other hand, defendants may instead collude to prove that they are all under the sixty percent threshold. Under this hypothesis, such a situation may be particularly likely in instances where the specific defendants are commonly sued together. In such cases, it will likely be in defendants' interests to join as many other defendants as

216. See Lee, *supra* note 208, at 298 (discussing one lawsuit initiated against seven parties for compensation of cleanup costs at a particular site, which eventually led to the addition of another 182 parties as defendants).

217. Cf. M.E. Occhialino, *Bartlett Revisited: The Impact of Several Liability on Pretrial Procedure in New Mexico—Part Two*, 35 N. M. L. REV. 37, 39 (2005) (noting that under a several liability regime in New Mexico, a "plaintiff might forego a claim against a potential tortfeasor . . . whose percentage of fault is likely to be very low").

218. See, e.g., 42 PA. STAT. ANN. § 8541 (West 2013) (granting immunity in Pennsylvania to "local agenc[ies]").

219. See Nancy A. Costello, Note, *Allocating Fault to the Empty Chair: Tort Reform or Deform?*, 76 U. DET. MERCY L. REV. 571, 578–79 (1999) (discussing trial lawyers' view that "defendants have incentive to shift the blame to nonparties at trial").

220. See *id.* (arguing that "[b]usinesses responsible for a small portion of fault in a tort claim, which would not have been sued in the past, will likely be named as parties, allowing wealthier defendants to spread the blame and reduce their own liability").

221. See Barbara Franklin, *Learning Curve: Lawyers Must Confront Impact of Changes on Litigation Strategies*, 81 A.B.A. J. 62, 64 (1995) ("At the same time, defense lawyers observe that, with joint and several liability largely gone, they feel more free to point the finger at other parties.").

222. Costello, *supra* note 219, at 578–79.

possible, and they may come together and coordinate their defenses to ensure that no party within the group is found sixty percent liable.²²³ However, in cases with only two defendants, such coordination would be less likely since a defendant who is only slightly at fault would prefer that the other defendant be found more than sixty percent liable. In that case, the plaintiff might instead elect to sue only the defendant who is primarily responsible for the harm (i.e., above sixty percent), resulting in that defendant being held liable for the full amount of damages under the remaining grant of joint and several liability in Pennsylvania's statute.

2. Comparative Negligence Principles in the New Liability Regime

Besides issues of the sixty percent threshold for joint and several liability, manufacturers will be motivated to prove the negligence of plaintiffs and other defendants. Previously, principles of comparative negligence were completely inapplicable to crashworthiness cases.²²⁴ Under the new Act and its acceptance of comparative negligence principles in strict liability, manufacturers will be encouraged to shift liability onto the plaintiff or other defendants in order to reduce their proportionate share of liability.

Take, for instance, the facts in *Green v. Ford Motor Co.*²²⁵ The plaintiff, Nicholas A. Green, sued Ford Motor Company, "asserting that, [his] 1999 Ford Explorer vehicle was defective and unreasonably dangerous and that Ford was negligent in its design of the vehicle's restraint system."²²⁶ As Green was driving his Explorer, it veered off the roadway.²²⁷ After hitting a guardrail, the vehicle overturned and ultimately landed on its roof in a ditch.²²⁸ Green suffered catastrophic injuries, including quadriplegia.²²⁹ In his lawsuit, Green argued that the defects in the Explorer's restraint system substantially enhanced his injuries.²³⁰

Under the previous liability regime in Pennsylvania, the jury would not be permitted to consider evidence of Green's comparative negligence. Any of Green's actions that caused the vehicle to leave the road and strike the guardrail would not be relevant to whether Ford's negligent design of the restraint system caused him to suffer injuries he would not have otherwise suffered.²³¹ Under the new Act, however, the lawsuit would be subject to comparative fault principles, which would require the jury to consider the fault of Green in causing or contributing to the physical harm he

223. Cf. Occhialino, *supra* note 217, at 39 n.21 (describing how a plaintiff might avoid joining multiple defendants under several liability if each defendant were granted separate peremptory challenges during the jury selection process).

224. See *supra* Part II.C.1 for a discussion of Pennsylvania's refusal to allow the introduction of comparative negligence principles into strict liability crashworthiness actions.

225. 942 N.E.2d 791 (Ind. 2011).

226. *Green*, 942 N.E.2d at 793.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. See *supra* Part II.C.1 for a discussion of Pennsylvania's refusal to allow the introduction of comparative negligence principles into strict liability crashworthiness actions.

suffered.²³² Thus, in the new regime, the manufacturer may choose to expend considerable resources on procuring expert testimony and other evidence to prove the extent of the plaintiff's negligence. Similarly, if another defendant were also involved in the accident, the manufacturer, in order to reduce its own liability, would also use its resources to prove the extent of that defendant's negligence.

C. *Impact on Plaintiffs' Recoveries*

The elimination of joint and several liability will likely impact the size of plaintiffs' recoveries. A manufacturer is often sued because the third-party tortfeasor has little or no insurance, and in catastrophic injury cases, there may be no other source of funding for the plaintiff's ongoing medical expenses and loss of income.²³³ Thus, under joint and several liability, the manufacturer bore the risk of an insolvent tortfeasor. Furthermore, under this regime, if the tortfeasor was initially judgment proof, a defendant would not find it cost effective to pursue a claim for contribution.²³⁴ Defendant manufacturers were obligated to pay the full judgment, and as a result, the manufacturers shouldered the loss anytime another defendant was judgment proof. Under a several-only liability regime, however, the risk of attempting to recover from an insolvent tortfeasor will now be borne by the plaintiffs.

Scholars have argued that apportionment of fault is especially problematic in crashworthiness cases involving intoxicated third-party tortfeasors.²³⁵ In crashworthiness cases, juries are typically tasked with determining the apportionment of fault among two or more tortfeasors. With the elimination of joint liability, juries will now have to determine and compare the relative responsibility of the manufacturer of an allegedly defective automobile, with the responsibility of an intoxicated driver whose conduct was a substantial (and "morally blameworthy") cause of the collision.²³⁶ Because a jury may find that driving while intoxicated is morally reprehensible, it will likely place the overwhelming blame, and thus the overwhelming apportionment for the plaintiff's injuries on the intoxicated driver.²³⁷ Thus, even if a jury decides that an automobile was defective, the manufacturer's liability may be overshadowed by the

232. See *supra* Part II.C for a discussion of apportionment of liability.

233. See, e.g., *Huddell v. Levin*, 537 F.2d 726, 731 (3d Cir. 1976) (describing the lower court result holding the automobile manufacturer liable for all damages, while the other defendants (including the driver who collided with the plaintiff) was not found liable in any amount); see also *Wright*, *supra* note 65, at 50 (stating that one of the criticisms of joint and several liability is that plaintiffs may sue less responsible, "deep pocket" defendants to ensure that they recover).

234. Pursuing a claim for contribution may be too risky for defendants, especially if there is little chance of any recovery. See Jonathan Cardi, *Apportioning Responsibility To Immune Nonparties: An Argument Based on Comparative Responsibility and the Proposed Restatement (Third) of Torts*, 82 IOWA L. REV. 1293, 1301-02 (1997) (stating that the defendant pursuing a claim for contribution must bear both the costs of recovering from the third party and the risk of the third party's insolvency).

235. E.g., Ellen M. Bublick, *The Tort-Proof Plaintiff: The Drunk in the Automobile, Crashworthiness Claims, and the Restatement (Third) of Torts*, 74 BROOK. L. REV. 707, 708 (2009).

236. *Id.* at 707-08.

237. *Id.* at 708 (stating that given "a comparative metric that uses fault as a central measure and requires zero-sum trade-offs of responsibility, the moral blame inherent" in drunk driving may overwhelm the apportionment process).

blame placed upon the intoxicated driver.²³⁸ Accordingly, with the elimination of joint liability, a plaintiff's recovery in a crashworthiness action involving an intoxicated tortfeasor may be significantly lower than what it may have been before.

With this in mind, the elimination of joint and several liability in crashworthiness cases may lead to significant difficulties for plaintiffs. This is true particularly in cases where there is a morally blameworthy third party, since a jury must examine each party's risk-creating conduct and assess the causal relationship between that conduct and the plaintiff's injuries.²³⁹ A jury asked to compare the risk-creating conduct of drunk driving with the risk-creating conduct of poor manufacture might assign a majority of the responsibility to the drunk driver based on a determination of moral blame. If juries attribute a greater percentage of harm to intoxicated (and other morally blameworthy) drivers, apportionment becomes a method of eliminating crashworthiness liability in a "significant percentage of cases."²⁴⁰ Thus, the victim of the drunk driver, by virtue of being the victim of both a reckless and a negligent actor, becomes "tort proof," whereas a plaintiff injured in a car accident caused by bad weather might recover in full from the manufacturer.

For this reason, the new several-only liability regime in Pennsylvania may lead to a considerable reduction in the size of plaintiffs' recoveries in crashworthiness cases, in particular, those involving morally blameworthy third-party tortfeasors. While this particular result is regrettable, the Pennsylvania legislature's decision to abolish joint and several liability commands the apportionment of liability. The plaintiff's only recourse in such a situation will be to prove that the automobile manufacturer is more than sixty percent liable for the harm, in which case the defendants will be jointly and severally liable. Such a solution, however, strongly implicates the fairness concerns discussed previously. Perhaps by fashioning a new approach to these cases based on apportionment of fault, over time juries will become better at evaluating culpability, even in cases involving morally culpable tortfeasors. Regardless, even if plaintiffs' recoveries are ultimately reduced, an approach based on apportionment of fault is entirely consistent with the legislative mandate to reconcile crashworthiness doctrine with comparative fault.

IV. CONCLUSION

Soon after adopting the crashworthiness doctrine, Pennsylvania courts had clearly delineated the requirements necessary for recovery—plaintiffs need only prove that the defect was a substantial factor in causing their harm, and the defendants were jointly and severally liable for the indivisible damage.²⁴¹ Because any crashworthiness cause of action necessarily implicates principles of strict liability, courts mandated that comparative negligence remain completely absent from any crashworthiness discussion.²⁴² With the adoption of the Fair Share Act, however, courts must merge

238. *Id.*

239. *See id.* at 712 (describing how a jury might consider weighing the acts of each tortfeasor).

240. *Id.*

241. *See supra* Parts II.A and II.B for a discussion of the law regarding crashworthiness cases prior to the adoption of the Fair Share Act.

242. *See supra* Part II.C.1 for a discussion of the absence of negligence principles from Pennsylvania

crashworthiness doctrine with comparative liability due to statutory prescription.

As this Comment has argued, courts should dispense with the *Fox-Mitchell* approach and fashion a new approach based on apportionment of fault.²⁴³ Requiring the factfinder to apportion fault in all cases will likely affect the way in which automobile manufacturers defend crashworthiness causes of action, and the shifting burdens of proof and causation will likely impact plaintiffs' recoveries. This approach will further the legislative goal behind the Act by placing manufacturers on notice that fault will be apportioned among all parties involved, which should alleviate their concern that they would be found liable for a disproportionate amount of the injury. Ultimately, apportionment of fault will encourage manufacturers to do business in Pennsylvania by ensuring them that each party will be held accountable for its own actions. The effect of the new Act on crashworthiness causes of action remains to be seen, but Pennsylvania courts will surely face a radically altered legal landscape that will allow for groundbreaking decisions within the Commonwealth of Pennsylvania.

crashworthiness cases.

243. See *supra* Part III.A.2 for a discussion of the burden of proof that should be adopted under the new liability regime.