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CAPS ON NONECONOMIC DAMAGES AND THE FEMALE PLAINTIFF: HEEDING THE WARNING SIGNS

I. INTRODUCTION

Tort law currently faces the challenge of solving what many believe is a liability crisis.[1] While many solutions have been proposed, the possibility of placing caps on awards for noneconomic damages has remained particularly enticing.[2] Nevertheless, the effects of this proposal must be examined. Because of the potentially negative impact of such caps on female plaintiffs, a group historically burdened by the tort system,[3] proponents of damage caps should examine the potential effects of this reform prior to its implementation.

Emotional injuries have long been disfavored by the courts.[4] As a result, women, who have traditionally been associated with these injuries,[5] often have their claims marginalized by the tort system. By marginalizing women's claims, courts have disregarded the merits of the claims and, instead, have emphasized such extrinsic factors as the purported character of the victim in order to portray the claim as undeserving of compensation.[6] As caps on noneconomic damages are part of a current tort reform movement that continues to disfavor emotional injuries, women suffer. Finally, noneconomic caps deserve serious scrutiny because women already receive much lower jury awards than men.[7]

This Note is divided into three sections. The first examines the movement for tort reform, particularly current support for and

1. *See infra* notes 8-15 and accompanying text.
2. *See infra* notes 28-56 and accompanying text.
3. *See infra* part III.
4. *See infra* part III.
5. *See infra* part IV.A.
6. *See infra* part IV.A.
7. *See infra* notes 257-59 and accompanying text.

opposition to caps on noneconomic damages. The second section discusses ways in which the tort system operates to marginalize emotional injury claims. The third section analyzes proposals for tort reform that include caps for noneconomic damages. This analysis demonstrates that the current movement merely echoes past theories used by courts to deny compensation for emotional injury. The last section concludes that caps on noneconomic damages have the potential to create a disproportionately negative effect on women.

II. CURRENT MOVEMENT FOR TORT REFORM

The tort crisis has inspired the current movement for tort reform.[8] The crisis may be described as the difficulty faced by public and private businesses in obtaining liability insurance due to increasing insurance rates and the decreasing availability of coverage.[9] This difficulty stems from increases in both the number of tort claims and the amount of damage awards.[10]

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8. The premise that a tort crisis exists is itself controverted. *See* Elliot M. Blake, Comment, *Rumors of Crisis: Considering the Insurance Crisis and Tort Reform in an Information Vacuum,* 37 EMORY L.J. 401, 402 (1988) (finding evidence to support the notion that a tort crisis exists is severely limited by the fact that no "effective, neutral and publicly accessible method for systematic collection and analysis of data" exists). One commentator notes that "[i]nsurers have the advantage of easy access to data which, as a practical matter, is impossible for industry outsiders to meaningfully evaluate." Teresa M. Schwartz, *Product Liability Reform by the Judiciary,* 27 GONZ. L. REV. 303, 309 n.30 (1991) (quoting Blake, *supra,* at 426). Some publicized data misrepresents facts by focusing only on the most outrageous jury verdicts and extreme consequences. Blake, *supra,* at 405; *see also* Richard L. Abel, *The Real Tort Crises—Too Few Claims,* 48 OHIO ST. L.J. 443, 445 (1987) ("Astronomic jury awards constantly are publicized by the media . . . ."). As a result, there may in fact be great problems with the tort system, but "there is no evidence on which to base an evaluation of these claims, and what attempts lawmakers *are* making to address the problem are being made in the dark." Blake, *supra,* at 403.

Most recently, Michael Saks called into question the concern over a tort crisis. Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not,* 140 U. PA. L. REV. 1147, 1156 (1992) ("Much discussion of the tort litigation system consists of conclusory assertions, unsupported by evidence."). Specifically, addressing the issue of damages, Saks found that available data is insufficient to support general conclusions about award patterns. *Id.* at 1245. Finally, he concluded: "But at the end of the day, these assertions [of tort crisis and runaway damages] are hollow conclusions, offered without evidence to sustain them." *Id.* at 1158-59.

9. *See* Kathryn L. Vezina, Comment, *Constitutional Challenges to Caps on Tort Damages: Is Tort Reform the Dragon Slayer or Is It the Dragon,* 42 ME. L. REV. 219, 220 (1990) (describing the difficulty reported by these businesses in obtaining liability insurance).

10. *Id.*

The tort crisis emerged in two phases. During the mid-1970's, reformers focused on the problems associated with medical malpractice insurance.[11] This first phase of the crisis arose as a result of the dramatic increase in physicians' insurance rates between 1960 and 1970.[12] Research indicates that rates for non-surgical physicians increased 540.8%, while rates for surgical physicians increased 949.2%.[13] Furthermore, accompanying hospital premiums increased 262.7%.[14] The second wave in the tort crisis came in the mid-1980's, when other business professionals, such as day care centers and architects, found liability insurance difficult to obtain.[15]

State legislatures have proposed various solutions to the tort crisis.[16] Proposals include eliminating joint and several liability, allowing periodic payments of future economic losses, reducing awards by deducting collateral sources of compensation received for the same injury and scheduling contingency fees.[17] Frequently, the proposed solution has been a statutory limit on tort damages.[18]

Damages for personal injury claims can be divided into two broad categories. The first category is composed of economic damages, which compensate the party for out-of-pocket costs like medical expenses, as well as for lost earning capacity and lost time at

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11. *Id.*

12. Martin H. Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759, 759 (1977).

13. *Id.*

14. *Id.* at 760.

15. Marco de Sa e Silva, Comment, *Constitutional Challenges to Washington's Limit on Noneconomic Damages in Cases of Personal Injury and Death*, 63 WASH. L. REV. 653, 655 (1988); *see also* Jay Cohen, *State Debate on Capping Non-Economic Damages is Far from Resolution*, NAT'L L.J., June 1, 1992, at 41, 41 (discussing state legislatures' concern with the broader aspects of tort liability as evidenced by the fact that by 1986, 21 states had enacted damage caps that often went beyond the medical malpractice arena).

16. Some commentators, however, claim that the tort crisis is not necessarily a bad thing. *See, e.g.*, Abel, *supra* note 8, at 446 ("[T]ort claims do not create liability costs, they merely shift them from victims to tortfeasors. It is the tortfeasors who create liability costs by injuring victims. . . . If liability costs are high, it is because injuries are frequent and serious.") (emphasis and footnote omitted).

17. Janai M. Powell, Casenote, *Challenging the Constitutionality of Non-economic Damage Caps:* Boyd v. Bulala *and the Right to a Trial by Jury*, 24 WILLAMETTE L. REV. 821, 821 (1988).

18. David J. Wiggins & Robert S. Caldwell, *Liability-Limiting Legislation: An Impermissible Intrusion into the Jury's Right to Decide*, 36 DRAKE L. REV. 723, 723 (1986); *see also* Cohen, *supra* note 15, at 41 (citing damage caps as a central component of the tort reform battle); Redish, *supra* note 12, at 761 (viewing the placement of caps on damages as one of "[t]he most common legislative proposals" to deal with the medical malpractice problem).

work.[19] The second category can be classified as noneconomic damages.[20] This category includes damages for pain and physical, mental, or emotional suffering,[21] as well as punitive damages.[22]

While some noneconomic damages may be considered a recent phenomenon, all American jurisdictions have upheld damages that are designed to compensate for nonpecuniary losses.[23] Commentators find that "[p]hysical pain and attendant suffering have for centuries been recognized as legitimate elements of damages"[24] and, as such, have clearly won a place in legal theory and practice.[25] Moreover, "[i]t cannot be doubted that damages for pain and suffering are among the very real damages suffered by a tort victim."[26] As a result, courts have been willing to expand the scope of noneconomic losses.[27]

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19. Kyle R. Crowe, Note, *The Semantical Bifurcation of Noneconomic Loss: Should Hedonic Damage Be Recognized Independently of Pain and Suffering Damage?*, 75 IOWA L. REV. 1275, 1276 (1990).

20. For a representative statutory definition, *see, e.g.*, WIS. STAT. ANN. § 893.55 (West Supp. 1992) ("'[N]oneconomic damages' means moneys intended to compensate for pain and suffering; humiliation; embarrassment; worry; mental distress; noneconomic effects of disability including loss of enjoyment of the normal activities, benefits and pleasures of life and loss of mental or physical health, well-being or bodily functions; loss of consortium, society and companionship; or loss of love and affection.").

21. Edward C. Martin, *Limiting Damages for Pain and Suffering: Arguments Pro and Con*, 10 AM. J. TRIAL ADVOC. 317, 318 (1986). Mental and emotional suffering includes "factors, such as fear, anxiety, worry, embarrassment, and humilitation." *Id.* at 319 (footnotes omitted). Other related types of mental or emotional suffering include cancerphobia, *id.* at 320, and loss of enjoyment of life. Crowe, *supra* note 19, at 1276-77. Damages for loss of enjoyment of life are called hedonic damages. *Id.* at 1278-79. For an example of hedonic damages, *see, e.g.*, Martel v. Duffy-Mott Corp., 166 N.W.2d 541, 545-46 (Mich. 1968) (allowing recovery for loss of enjoyment for eating applesauce when "a plaintiff . . . can convince a jury that the food product he consumed was inedible and in consequence he no longer enjoys eating it"). Courts have varied in treating these hedonic damages as a component of pain and suffering or as a separate entity. Crowe, *supra* note 19, at 1277. Total estimates of hedonic damages have ranged from $450,000 to $13,400,000 in 1989 dollars. WALTER OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT 171 (1991).

22. The Tort Working Group includes punitive damages in the category of noneconomic damages. TORT POLICY WORKING GROUP, AN UPDATE ON THE LIABILITY CRISIS 81 (1987). The rationale is that punitive damages do not compensate a plaintiff for out-of-pocket costs, but rather that such damages originated as a means to punish wrongdoers and appease their victims. PETER W. HUBER, LIABILITY 132 (1988) (quoting Judge Traynor).

23. Martin, *supra* note 21, at 317-18.

24. Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling Pain and Suffering*, 83 NW. U. L. REV. 908, 911 (1989).

25. *Id.* at 935.

26. Jerry J. Phillips, *To Be or Not to Be: Reflections on Changing Our Tort System*, 46 MD. L. REV. 55, 60 (1986).

27. Martin, *supra* note 21, at 320 (discussing compensation for loss of enjoyment of

Generally, proposals for statutory limits on tort damages operate generally in two ways. The first type of cap limits the total amount of economic and noneconomic damages that a plaintiff may receive,[28] while the second type merely limits the amount of noneconomic damages that may be recovered.[29] This second type of cap may be used in all types of actions[30] or may be limited to certain specified types of personal injury actions.[31]

Legislative caps on noneconomic damages have been inspired in part by the actions of neighboring countries, primarily in areas like Ontario, Canada.[32] According to Galanter, the most "objectionable features of the United States tort system" have been eliminated in Ontario.[33] While recognizing noneconomic harm as a compensable injury, the Canadian courts have routinely awarded smaller damage awards.[34] Canada has achieved strict controls on claims for nonpecuniary loss by placing a ceiling on all claims for pain and suffering.[35] As reformers focus on measurements of damages in the tort system, the Canadian system provides hope to the United States,[36] where there were 735 million-dollar verdicts

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life as an indication of this expansion).

28. *See, e.g.*, S.D. CODIFIED LAWS ANN. § 21-3-11 (1987) (limiting the "total damages which may be awarded" in a medical malpractice action to $1,000,000).

29. *See, e.g.*, ALASKA STAT. § 09.17.010 (Supp. 1992) (limiting recovery of noneconomic damages in a personal injury action to $500,000).

30. *See, e.g.*, *id.*; COLO. REV. STAT. § 13-21-102.5(3)(a) (1987) (limiting noneconomic damages in civil actions to $250,000 unless clear and convincing evidence establishes that an award up to $500,000 is warranted); MD. CODE ANN., CTS. & JUD. PROC. § 11-108 (1989 & Supp. 1992) (imposing a $350,000 limit on noneconomic damages in personal injury actions); MASS. GEN. LAWS ANN. ch. 231, § 60H (West Supp. 1993) (imposing a $500,000 limit on noneconomic damages in most actions).

31. *See, e.g.*, MICH. COMP. LAWS ANN. § 600.1483 (West 1993) (limiting noneconomic damages in certain medical malpractice actions to $225,000); UTAH CODE ANN. § 78-14-7.1 (1992) (placing a $250,000 limit on noneconomic damages in medical malpractice actions).

32. *See* Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 37 (1986) (commenting on the system in Ontario).

33. *Id.*

34. Martin, *supra* note 21, at 326 (noting that the Canadian courts have only awarded "a half dozen or so million dollar verdicts in the entire history" of Canada's judicial system).

35. *Id.* (discussing the famous trilogy of personal injury cases that were decided by the Canadian Supreme Court in the 1970's and that imposed a limit of $100,000 on nonpecuniary damages).

36. Various commentators have asserted, however, that Canada has not solved all of its problems with the use of damage caps on noneconomic injuries. *See, e.g.*, Phillips, *supra* note 26, at 55 (noting that "Ontario, Canada is experiencing a liability insurance availability and affordability crisis even though that jurisdiction already has in place many of the tort changes currently advocated by the insurance industry").

awarded in 1990, and 750 million-dollar verdicts awarded in 1991.[37]

Currently, state courts have not resolved the issue of capping noneconomic damages.[38] Proponents of noneconomic damage caps argue that damage measurements are completely arbitrary.[39] This lack of predictability is the result of three factors. First, juries are not provided adequate guidance to determine or measure damag-

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37. JURY VERDICT RESEARCH, INC., PERSONAL INJURY VALUATION HANDBOOK: CURRENT AWARD TRENDS 18-19 (1992).

38. Seven states have upheld the constitutionality of damage caps. *See* Fein v. Permanente Medical Group, 695 P.2d 665, 684 (Cal.) (upholding the constitutionality of a state statute capping recovery for noneconomic damages in medical malpractice actions at $250,000), *appeal dismissed,* 474 U.S. 892 (1985); Colorado State Claims Bd. v. DeFoor, 824 P.2d. 783, 790-92 (Colo.) (upholding a statute limiting recovery for a single tortious act by a public entity or employee to $150,000 for one individual and $400,000 for two or more individuals, with no one person recovering more than $150,000), *cert. denied,* 113 S. Ct. 483 (1992); Johnson v. St. Vincent Charity Hosp., 404 N.E.2d 585, 598-601 (Ind. 1980) (upholding a $500,000 cap on total recovery for injury or death in medical malpractice actions); Samsel v. Wheeler Transp. Services, 789 P.2d 541, 558 (Kan. 1990) (upholding $250,000 cap on noneconomic damages in personal injury actions), *overruled on other grounds by* 811 P.2d 1176 (Kan. 1991) ; Murphy v. Edmonds, 601 A.2d 102, 114-18 (Md. 1992) (upholding the constitutionality of a state statute capping recovery for noneconomic damages in personal injury actions at $350,000); Etheridge v. Medical Ctr. Hosp., 376 S.E.2d 525, 536 (Va. 1989) (upholding a $750,000 cap on damage awards in actions for medical malpractice resulting in injury or death); Robinson v. Charleston Area Medical Ctr., 414 S.E.2d 877, 888 (W. Va. 1991) (upholding a million-dollar cap on noneconomic damage awards in medical malpractice actions).

Nine states have rejected these caps. *See* Moore v. Mobile Infirmary Assoc., 592 So. 2d 156, 171 (Ala. 1991) (striking down a statute limiting damages in a medical malpractice action); Smith v. Department of Ins., 507 So. 2d 1080, 1095 (Fla. 1987) (striking down a state statute limiting noneconomic damages); Wright v. Central Du Page Hosp. Ass'n, 347 N.E.2d 736, 743 (Ill. 1976) (medical malpractice); Arneson v. Olson, 270 N.W.2d 125, 136 (N.D. 1978) (medical negligence); Carson v. Maurer, 424 A.2d 825, 838 (N.H. 1980) (same); Morris v. Savoy, 576 N.E.2d 765, 771 (Ohio 1991) (same); Lucas v. United States, 757 S.W.2d 687, 692 (Tex. 1988) (same); Condemarin v. University Hosp., 775 P.2d 348, 366 (Utah 1989) (damage awards against state university hospitals in negligence actions); Sofie v. Fibreboard Corp., 771 P.2d 711, 728 (Wash. 1989) (noneconomic damages recoverable in a personal injury or wrongful death action).

39. Martin, *supra* note 21, at 329; *see also* James F. Blumstein et al., *Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury,* 8 YALE J. ON REG. 171, 176 (1991) (citing JEFFERY O'CONNELL, THE LAWSUIT LOTTERY 8-9 (1979), which notes that plaintiffs are generally under or over compensated because "[t]he operation of the tort system is akin to a lottery"). Punitive damages have also received considerable attention as one author defined these awards as "essentially the inscrutable emissions of mysterious black boxes of punishment." OLSON, *supra* note 21, at 283. *But see* PHILIP J. HERMANN, INJURED? HOW TO GET EVERY DOLLAR YOU DESERVE, 116-25 (1990) (asserting that jury awards are predictable because juries award damages in accordance with previous awards for similar claims and follow predictable patterns, and because valid tables for injury values and verdict outcomes are available).

es.[40] Standards for measurement are either too broad or nonexistent.[41]

> Whatever the categories of non-economic damages allowed in a given jurisdiction, the law provides no objective benchmarks for valuing them. As one commentator notes, "Courts have usually been content to say that pain and suffering damages should amount to 'fair compensation' or a 'reasonable amount,' without any more definite guide."[42]

As a result, proponents believe that "the ultimate determination of . . . non-pecuniary damage amount[s] remains largely a matter of arbitrary speculation."[43]

Moreover, proponents assert that procedural discretion contributes to this arbitrariness.[44] The use of general verdicts[45] has meant that decisionmakers "need not explain their rationale or methods for arriving at a particular award figure, and their findings are difficult to review."[46]

Third, proponents also assert that awards are arbitrary because they are often a function of extrinsic factors such as jury passions or sympathies, rather than the merit of the claim itself.[47] The arbi-

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40. Blumstein et al., *supra* note 39, at 912.

41. *Id.*

42. Bovbjerg et al., *supra* note 24, at 912 (quoting DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 8.1, at 545 (1973)); *see also* Botta v. Brunner, 138 A.2d. 713, 718 (N.J. 1958):

> There is and there can be no fixed basis, table, standard, or mathematical rule which will serve as an accurate index and guide to the establishment of damage awards for personal injuries. And it is equally plain that there is no measure by which the amount of pain and suffering endured by a particular human can be calculated.

(superseded by N.J. CT. R. 1.7-1(b) authorizing the use of time-unit arguments in summations regarding unliquidated damages); Blumstein et al., *supra* note 39, at 172 (indicating the need for a common law system of damages that utilizes the doctrines of precedent and stare decisis because "[t]oday's system for assessing tort damages lacks standards for uniform assessment, gives its inexperienced juries too little information and too much discretion, and hence yields extremely variable results . . . . Such inconsistency results in systemic unfairness and operational inefficiencies.").

43. Martin, *supra* note 21, at 322.

44. Bovbjerg et al., *supra* note 24, at 915.

45. General verdicts are "single findings of liability with an associated award of all damages." *Id.*

46. *Id.* (noting further that the judiciary does not alter jury verdicts because judges are not provided with objective standards for assessing damage awards).

47. Martin, *supra* note 21, at 329.

trariness of the damage calculations is "exacerbated by a sort of sympathetic moral hazard that juries face when making awards on an ad hoc basis and spending money that is not their own."[48] Finally, a jury is susceptible to theories of how losses should be computed.[49] As a result, attorney's presentation of a theory of how losses should be computed becomes increasingly important.[50]

The arbitrariness of this system leaves "no appropriate methods of fairly and quantitatively measuring losses for pain and suffering."[51] This system undercuts tort law's deterrent effect[52] and produces large awards[53] which generate high insurance rates.[54] Such large awards become punitive in nature and ultimately provide a windfall to plaintiffs.[55] Arbitrary awards violate fundamental fairness because like cases are not treated alike, and as a result, such awards "erode general confidence in justice and the integrity of what has become a very large system for personal injury compensation."[56]

Opponents of damage caps have focused primarily on the constitutionality and arbitrariness of damage caps. They raise constitutional challenges pursuant to the Seventh Amendment's right to a jury trial by arguing that caps on damages interfere with the jury's power to determine the extent of damages.[57] Opponents also

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48. Bovbjerg et al., *supra* note 24, at 936.

49. *See id.* at 914 (discussing the per diem method of damage calculation where "seemingly inconsequential differences in values per unit of time lead to very large differences in awards").

50. *See id.* (indicating that attorneys may present many subjective approaches to noneconomic damage calculations).

51. Martin, *supra* note 21, at 329 (citing a common belief of those in support of tort reform).

52. Bovbjerg et al., *supra* note 24, at 925 (asserting that efficient and effective deterrence will be accomplished if awards are consistent and predictable). *But see* Amelia J. Toy, Comment, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 EMORY L.J. 303, 324-25 (1991) (asserting in the context of punitive damages that the unpredictability of awards is actually productive in that it functions as a better deterrent since tortfeasors are unable to calculate accurately the cost of an activity).

53. Bovbjerg et al., *supra* note 24, at 908. Furthermore, "[o]ne result of broad jury discretion and the absence of clear standards is freedom to make very large awards . . . . A particular focus of complaint is tort law's ever-increasing willingness to countenance 'pain and suffering' and other such 'intangible' or 'non-economic' damages on an open-ended basis." *Id.* at 917.

54. *Id.* at 918.

55. *But see* Martin, *supra* note 21, at 331-33.

56. Bovbjerg et al., *supra* note 24, at 924 (emphasis omitted).

57. *See* Wiggins & Caldwell, *supra* note 18, at 732 (concluding that limits on liability impermissibly intrude upon the jury's right to determine damages). *But see* James F. Tiu,

assert that caps violate the right to equal protection under the law because the caps discriminate based upon the nature of the injury (i.e., economic or noneconomic).[58] Finally, they have challenged caps based on right of access to the courts under state law and have, at times, been successful.[59]

While proponents of damage caps cite the arbitrariness of awards as the primary justification for placing caps on noneconomic damage awards, opponents of the limits argue that these limits are just as arbitrary as the damage awards that they seek to control.[60] Opponents point to the wide range of damage caps that have been proposed. Proposed caps on noneconomic damages have ranged from $150,000 in Texas,[61] to $1,000,000 in Wisconsin.[62] These arbitrary caps are particularly unsettling "because the arbitrary limits come into play only in the most severe cases."[63] In the view of opponents to damage caps these arbitrary limits result in unfairness and a lack of deterrence.[64]

Comment, *Challenging Medical Malpractice Damage Award Caps on Seventh Amendment Grounds: Attacks in Search of a Rationale*, 59 U. CIN. L. REV. 213, 217 (1990) (concluding that capping medical malpractice awards does not violate the Seventh Amendment's preservation of the right to a civil jury trial).

For court discussions, *see, e.g.*, Sofie v. Fibreboard Corp., 771 P.2d 711, 728 (Wash. 1989) (holding that a statutory cap limiting noneconomic damages in personal injury or wrongful death actions is violative of the constitutional right to a jury trial); Boyd v. Bulala, 647 F. Supp. 781, 789 (W.D. Va. 1986) (discussing a constitutional challenge to statutory damage caps), *rev'd*, 877 F.2d 1191 (4th Cir. 1989).

58. Wiggins & Caldwell, *supra* note 18, at 726-27 (noting that caps may unconstitutionally discriminate against the class of plaintiffs who have been sincerely injured and, therefore, are deprived of the amount of jury verdicts that exceed the statutory limit). *But see* Fein v. Permanente Medical Group, 695 P.2d 665, 682 (Cal. 1984) (indicating that capping the amount of noneconomic damages available in medical malpractice cases does not violate the equal protection clause because the caps achieve the legitimate state goal of saving money for doctors, insurance companies and consumers), *appeal dismissed*, 474 U.S. 892 (1985).

59. *See, e.g.*, Smith v. Department of Ins., 507 So. 2d 1080, 1089 (Fla. 1987) (finding that a $450,000 cap violated the state constitutional right of access to courts); Lucas v. United States, 757 S.W.2d 687, 692 (Tex. 1988) (finding that a $500,000 cap violated the state constitutional right of access to courts).

60. Phillips, *supra* note 26, at 60 (noting that "[a] fixed damage figure . . . is as arbitrary as the uncertainty in amount of recovery it seeks to cure").

61. TEX. REV. CIV. STAT. ANN. art. 4590i, § 11.03 (West Supp. 1993) (currently imposing a limit of $500,000 on total awards in an action on a health care liability claim [§ 11.02(a)] with a proposed alternative of $150,000 on noneconomic damages only).

62. WIS. STAT. ANN. § 893.55 (West Supp. 1992).

63. Bovbjerg et al., *supra* note 24, at 957-58.

64. Sylvia M. Demarest & David E. Jones, *Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest?*, 18 ST. MARY'S L.J. 797, 825 (1987).

Finally, opponents argue that damage caps sacrifice some of the fundamental principles of tort law. Most notably, "[s]tatutory caps compromise the traditional principle of full compensation for both economic and noneconomic loss suffered by a successful tort claimant."[65] In addition, mandatory damage caps remove the individuality of each claim.[66]

> Without question, the rules governing recovery of damages in tort cases most clearly reflect the traditional conception of the uniqueness of every tort claim . . . . Evidence of awards made to others who have suffered similar injuries not only is not binding—it is not even admissible; the jury does not hear of other awards and cannot consider them in assessing damages. The principle of individualization is so strong, in fact, that a "thin-skull" rule prevails, under which a plaintiff who is especially susceptible to injury may recover in full.[67]

Damage caps have rendered the particular circumstances of the plaintiff less influential in determining the outcome of the case and, as a result, have made a strong departure from the traditional notion of the uniqueness of every tort claim.[68] As evidenced by recent court decisions,[69] states have not resolved this dispute uniformly.

Although the tort reform controversy continues, this Note is not an attempt to provide an answer to this controversy. It does, however, attempt to inspire consideration of another factor, namely the effect of noneconomic damage caps on women, in order to determine if these caps are an appropriate solution to what many per-

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65. Kenneth S. Abraham, *What is a Tort Claim? An Interpretation of Contemporary Tort Reform*, 51 MD. L. REV. 172, 187 (1992); *see also* Blake, *supra* note 8, at 404 (asserting that "[t]he idea behind a tort compensation system is compensation of the wrongfully injured by the responsible party"); Bovbjerg et al., *supra* note 24, at 909-10 (commenting that "[t]here is universal agreement that the compensatory goal of tort law requires making the successful plaintiff 'whole'").

66. Abraham, *supra* note 65, at 180-81.

67. *Id.* at 177-78.

68. *Id.* at 180.

69. *Compare* Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 171 (Ala. 1991) (rejecting a statute limiting noneconomic damages at $400,000 in medical malpractice actions as violative of the state's trial by jury and equal protection guarantees) *with* Murphy v. Edmonds, 601 A.2d 102, 111-12 (Md. 1992) (upholding the constitutionality of a state statute capping recovery for noneconomic damages in a personal injury action at $350,000).

ceive is a tort crisis.

III. THE TORT SYSTEM AND WOMEN

While the "relevant tort rules have never been explicitly gender-based,"[70] the tort system has traditionally burdened women and correspondingly benefitted men.[71] This burden has been the result of the marginalization of claims brought by female plaintiffs. This process is evidenced by the use of apparently neutral rules that have burdened women,[72] and in the treatment traditionally accorded to emotional injuries, such as fright,[73] and loss of consortium.[74] As a result, gender is an important factor in the operation of the tort system and, thus, must be considered when analyzing proposals to change the system.

The apparently neutral rules of the tort system have burdened women in three ways. First, apparently neutral rules are "gender-biased in their origins or effects,"[75] thereby marginalizing women's claims. The most common example is the "reasonable person" standard that finds its roots in a "reasonable man" standard.[76] Even with the change of terminology to reasonable person, the roots are still evident.[77] This standard burdens female plaintiffs

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70. Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814, 815 (1990). *But see infra* notes 93-98 and accompanying text (discussing the tort of loss of consortium).

71. Chamallas & Kerber, *supra* note 70, at 814 (indicating that the tort system values property more than emotional security and, therefore, favors men, traditional owners of property, over women, traditional assignees of emotional work).

72. *See infra* notes 75-90 and accompanying text.

73. *See infra* notes 99-148 and accompanying text.

74. *See infra* notes 93-98 and accompanying text.

75. *See* Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 57 (1989) (examining the relationship between gender and the law).

76. *Id.* at 57-58 (noting that the reasonable man has been defined as "'the good father of the family'" and "'the man who takes the magazines at home and in the evening pushes the lawn mower in his shirtsleeves'" and discussing a case in which the court refused to apply a reasonable man standard to female plaintiffs) (footnotes omitted); *see also* A.W. Phinney III, *Feminism, Epistemology, and the Rhetoric of Law: Reading* Bowen v. Gillard, 12 HARV. WOMEN'S L.J. 151, 176 (1989) ("As long as we live in a society where men dominate women, objectivity will be by definition male.").

Another area in which neutral rules operate to burden women is in the valuation of a homemaker's services, which are traditionally undervalued because of the priority the tort law gives to wage-earners. Finley, *supra* note 75, at 53-54.

It is important to note that this undervaluation, ironically, produces a bias against males who wish to recover for the wrongful death or incapacity of a wife. *See id.* at 52.

77. *See* Finley, *supra* note 75, at 59 (arguing that, despite the use of 'reasonable

because the reasonable person standard ignores the experiences and capabilities of women.[78] This result is important because "the perspective from which both the circumstances and the reasonableness of the actions are evaluated can be important to the outcome of the evaluation itself."[79] This unfair effect is evident in sexual harassment cases in which standards that are permeated with male myths of what is mere jest can influence the ultimate conclusion of whether an offensive work environment exists.[80]

In *Rabidue v. Osceola Refining Co.*,[81] Vivienne Rabidue charged her employer with sexual harassment because of comments made by co-employee Douglas Henry.[82] The majority opinion described Henry as "an extremely vulgar and crude individual who customarily made obscene comments about women generally, and, on occasion, directed such obscenities to the plaintiff."[83] More specifically, the dissent noted that "Henry routinely referred to women as 'whores,' 'cunt,' 'pussy,' and 'tits.' Of plaintiff, Henry specifically remarked, 'All that bitch needs is a good lay' and called her 'fat ass.'"[84] Other male employees in the work environment "displayed pictures of nude or scantily clad women in their offices and/or work areas, to which the plaintiff and other women employees were exposed."[85] The dissent went on to describe these pictures: "[O]ne poster, which remained on the wall for eight years, showed a prone woman who had a golf ball on her breasts with a man standing over her, golf club in hand, yelling 'Fore.' And one desk plaque declared 'Even male chauvinist pigs need love.'"[86]

Nevertheless, the majority adopted a reasonable person standard,[87] to conclude that this workplace was not an offensive envi-

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person' language, courts measure women's conduct by a standard designed for men).

78. *See id.* at 58 (arguing that the standard is based on male stereotypes and is not designed with women's experiences in mind).

79. *Id.* at 59.

80. *See* Rabidue v. Osceola Refining Co., 805 F.2d 611, 626 (6th Cir. 1986) (explaining that a 'reasonable woman' standard is necessary to prevent courts and defendants from perpetuating male-defined notions of reasonable behavior), *cert. denied*, 481 U.S. 1041 (1987).

81. 805 F.2d 611 (6th Cir. 1986), *cert denied*, 481 U.S. 1041 (1987).

82. *Id.* at 615.

83. *Id.*

84. *Id.* at 624 (Keith, J., concurring in part and dissenting in part) (citation omitted).

85. *Id.* at 615.

86. *Id.* at 624 (Keith, J., concurring in part and dissenting in part).

87. *Id.* at 620.

ronment and, thus, did not violate Title VII provisions.[88] The dissent criticized the use of the reasonable person standard because this standard presumably includes traditional males myths about harassment.

> Nor do I agree with the majority holding that a court considering hostile environment claims should adopt the perspective of the reasonable person's reaction to a similar environment. In my view, the reasonable person perspective fails to account for the wide divergence between most women's views of appropriate sexual conduct and those of men . . . . I would have courts adopt the perspective of the reasonable victim which simultaneously allows courts to consider salient sociological differences as well as shield employers from the neurotic complainant. Moreover, unless the outlook of the reasonable woman is adopted, the defendants as well as the courts are permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders, in this case, men.[89]

As a result, women suffer through the application of a seemingly neutral rule that becomes "subjective due to its failure to include a variety of perspectives and experiences."[90]

Second, women's claims were marginalized because courts often judged the severity of an injury based upon the gender of the person who suffered the injury.[91] Courts have characterized women's complaints of injury as emotional complaints and men's complaints about the same injury as legitimate complaints of physi-

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88. *Id.* at 622.

89. *Id.* at 626 (Keith, J., concurring in part and dissenting in part) (citations omitted).

90. Finley, *supra* note 75, at 63. DES cases are another area in which the reasonable person standard may harm a female plaintiff. In O'Brien v. Eli Lilly & Co., 668 F.2d 704, 709 (3d Cir. 1981), a young woman brought an action against the manufacturer of the DES that was given to her mother during pregnancy. *Id.* The court held that the statute of limitations tolled when the action was brought since a reasonable person would have known of the possible injury three years before the plaintiff brought this action. *Id.* at 711. The dissent criticized the majority for failing to consider the "torture of the mind" that this young woman had sustained upon learning that she had cancer. *Id.* at 718. The plaintiff's intense fear emerged from her enduring a radical hysterectomy, lymph node dissection and partial vaginectomy at age 14, *id.* at 709, and her reading an article that described another girl's "moaning in pain with the cancer that was continuing its lethal spread through her arms, legs, spine and brain." *Id.* at 707 n.3. The majority ignored these considerations when applying the reasonable person standard, thus ignoring the mindset of the young female and dismissing her cause of action. *Id.* at 709-11.

91. Chamallas and Kerber, *supra* note 70, at 816.

cal harm.[92] This social construction of emotional harm is most apparent in the history of the tort of loss of consortium, where the compensation awards were dependent upon the gender of the surviving spouse. When a wife died, a husband was deprived of various services,[93] although these services were valued at a lower rate than a male's services.[94] This construction allowed a husband to be compensated for his loss because a monetary value could be easily affixed to the lost services. Thus, the law afforded protection to this "material" harm.[95] In contrast, when the husband died, the wife was not deprived of her husband's services, but rather of what was called "'society and affectionate attention.'"[96] This mental pain could not be given a monetary value. "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes [only that mental suffering] . . . ."[97] Thus, the law did not compensate this "mental or emotional" loss, making this cause of action unavailable to women.[98]

The dichotomy between protected physical injury and the unprotected emotional injury is also demonstrated by the history of fright claims where physical injury has often provided the benchmark for recovery. Through the late 19th century, emotional injury

92. Finley, *supra* note 75, at 65 ("[H]istorically, women's complaints of pain or injury have often been dismissed as emotional or hysterical complaints, while men's complaints about the same ailment were more likely to be treated as serious physical harm.").

93. Nancy C. Osborne, Note, *Loss of Consortium: Paradise Lost, Paradise Regained*, 15 CUMB. L. REV. 179, 179 (1984) (discussing the husband's legal right to the wife's performance of the duties and obligations which she assumed when she entered the marriage).

94. *See infra* text accompanying note 268.

95. Chamallas & Kerber, *supra* note 70, at 818.

96. *Id.* at 817 (quoting Lynch v. Knight, 11 Eng. Rep. 854, 863 (1861)); *see also* Hodges v. Johnson, 417 S.W.2d 685, 691 (Mo. Ct. App. 1967) (finding that a wife lost her husband's society, love and affection, but not his services); Osborne, *supra* note 93, at 187 (noting that, prior to emancipation statutes, women were not entitled to the services of their husbands).

97. Chamallas & Kerber, *supra* note 70, at 817 (quoting *Lynch*, 11 Eng. Rep. at 863).

98. The service rationale was initially rejected as the justification for recovery in a minority of cases in the 1950's. *See, e.g.*, Hitaffer v. Argonne Co., 183 F.2d 811, 819 (D.C. Cir.) (holding that a wife has a cause of action for loss of consortium since a husband does not render services to the family and household of such a nature that the law cannot estimate its value), *cert. denied*, 340 U.S. 852 (1950), *overruled on other grounds by* Smithers & Co. v. Coles, 242 F.2d 220 (D.C. Cir.), *cert. denied*, 354 U.S. 914 (1957). The holding of *Hitaffer* was not widely accepted until the late 1960's. *See* Osborne, *supra* note 93, at 190. By 1970, however, most states allowed the wife to maintain a cause of action because the spouses shared equal rights "in the undisturbed continuation of the marital relationship," rather than in any entitlement to services. *Id.* at 193.

could be compensated only if the "fright-based harm were coupled with a direct physical impact."[99] This physical impact rule hinged on the physical versus emotional distinction and was designed to avoid fraudulent claims.[100] As a result, a fright-induced miscarriage without physical impact resulted in no recovery for a plaintiff.[101] Eventually, the physical impact rule was replaced by its modern equivalent, the physical injury rule.[102] Under the physical injury rule a plaintiff was required to "demonstrate that her fright resulted in physical injury, rather than only mental distress."[103] Because the focus was the injury and not the cause of the injury, the physical versus emotional distinction continued to be critical. This rule, which most states adopted, was designed to protect against fraud, allow recovery only for the most serious injuries and discourage plaintiffs from bringing claims for transient injury.[104]

A third doctrine that sought to limit liability was the bystander recovery rule, which "require[d] a plaintiff to prove that her injury [was] traceable to fear for her own personal safety, rather than fear or concern for the safety of another."[105] These stringent limitations produced cases such as *Amaya v. Home Ice, Fuel & Supply.*[106] In *Amaya*, Lillian Amaya watched as her infant son was killed by a negligent truck driver.[107] Because Amaya was not in fear for her own personal safety, the California Supreme Court ultimately denied recovery.[108]

Nevertheless, the California court overruled *Amaya* when it

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99. Chamallas & Kerber, *supra* note 70, at 814.

100. *Id.* at 819-20 (recognizing the protection against fraudulent claims emerged subsequent to the "general legal principle that limited recovery to material, as opposed to emotional, harms" and prolonged the survival of the impact rule).

101. Mitchell v. Rochester Ry. Co., 45 N.E. 354, 354 (N.Y. 1896).

102. Chamallas and Kerber, *supra* note 70, at 820.

103. *Id.*

104. *Id.*

105. *Id.* at 821 (indicating that many jurisdictions disagreed with the effect of this rule, which was to prevent witnesses of accidents from recovering for fright-induced injury and, as a result, adopted a zone-of-danger rule through which the determining factor became "the physical location of the plaintiff rather than . . . the source of the mental distress").

106. 379 P.2d 513 (Cal. 1963), *overruled by* Dillon v. Legg, 441 P.2d 912 (Cal. 1968); *see also* Jelley v. LaFlame, 238 A.2d 728, 730 (N.H. 1968) (denying recovery to a plaintiff who witnessed her child's being crushed by a truck since she was not in danger of being hit), *overruled by* Corso v. Merrill, 406 A.2d 300 (N.H. 1979).

107. *Amaya*, 379 P.2d at 514; *see also* Recent Developments, *California Rejects Tort Action for Fear of Another*, 15 STAN. L. REV. 740, 740 (1963) (providing a summary of the facts of the case).

108. *Amaya*, 379 P.2d at 517.

allowed recovery in *Dillon v. Legg.*[109] In *Dillon,* a mother and sister witnessed their son/brother run down by a negligently driven truck.[110] While the argument could be made that only the sister was within the zone of danger, the court allowed recovery to the mother who was safely seated on the porch and, thus, was not in fear for her own safety.[111] The court rejected the limitations of the bystander rule and used a foreseeability test that weighed a number of factors other than physical proximity.[112] An important factor was the closeness of the relationship between the plaintiff and the victim.[113] This emphasis was apparent in the court's characterization of the case as "the most egregious case of them all: the mother's emotional trauma at the witnessed death of her child."[114] While *Dillon* allowed recovery, this recovery should have materialized prior to *Dillon,*[115] and was, unfortunately, an aberration in light of other cases at the time that sought to limit recovery based on the physical versus emotional distinction.[116]

Finally, courts have marginalized claims for emotional injury by focusing on the person suffering the injury, rather than the actual injury itself.[117] Skepticism in the medical community allowed courts to deny recovery for emotional injury.[118] One of the most extensive studies on emotional injury, conducted by Dr. Hubert W. Smith,[119] noted the assumption of the court in *Victori-*

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109. 441 P.2d 912 (Cal. 1968).

110. *Id.* at 914.

111. *Id.* at 915.

112. *Id.* at 920.

113. *Id.*

114. *Id.* at 925. *Dillon* has been followed in other jurisdictions. *See, e.g.,* Villamil v. Elmhurst Memorial Hosp., 529 N.E.2d 1181, 1183 (Ill. App. Ct. 1988) (allowing parents to recover for emotional distress for the loss of their daughter shortly after her birth even though the plaintiffs did not allege physical danger or injuries).

115. *See* Chamallas & Kerber, *supra* note 70, at 858 ("Why . . . did it take so long for the courts to produce Dillon?").

116. *See supra* notes 99-104 and accompanying text (discussing the view that physical injury should provide the benchmark for recovery). The historical limitations to emotional distress and bystander recovery often remain. *See, e.g.,* Sceusa v. Mastor, 525 N.Y.S.2d 101, 103 (N.Y. App. Div. 1988) (denying recovery to a plaintiff mother for psychic distress arising from the death of her child shortly after birth because the mother did not suffer a physical injury and was not within the zone of danger and because the risk of injury to the child was unforeseeable).

117. *See infra* notes 118-44 and accompanying text.

118. Chamallas & Kerber, *supra* note 70, at 826.

119. *Id.* at 846 (describing the Smith study as "[t]he longest and one of the most frequently cited law review articles on fright-based injury").

an Railways Commissioners v. Coultas,[120] "that normal persons do not suffer injury from fright."[121] While Smith believed that psychic upset could cause injury, he concluded that normal people experienced only "temporary upset, or fleeting illness."[122] While Smith did not use the word "male" as synonymous with normal, he did conclude that pregnancy was a "temporary idiosyncrasy"[123] and urged courts to follow the proposition that "[a]n actor should not be required to assume that every female in his path is about to become a mother."[124] Moreover, Smith found that emotional injuries "usually involve[d] aggravation of a pre-existing impairment with the factor of individual idiosyncrasy or susceptibility playing the dominant role."[125] Smith supported this conclusion with a study in which he examined 301 cases of fright-based injury.[126] In 216 of the cases studied, Smith found that the plaintiff possessed a "preexisting vulnerability."[127] Even while resolving doubts in favor of claimants, Smith found that "in 175 of the 301 cases . . . the described stimulus was medically inadequate to produce injurious psychic reactions in an average person; in 125 cases only could it be regarded as probably adequate."[128] As a result, the abnormal or idiosyncratic person suffered an emotional injury[129] that was found to be more a result of the person than the actual injury sustained.

Courts have often adopted a Smith-type rationale and treated emotional injuries as a function of the individual's abnormal response to danger.[130] The rationale that normal people do not suffer emotional injury is apparent in concepts such as remoteness,[131] unforeseeability,[132] and unreasonableness.[133] In their article on

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120. 13 App. Cas. 222 (P.C. 1888).

121. Hubert W. Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193, 210 (1944).

122. *Id.* at 225.

123. *Id.* at 296.

124. *Id.*

125. *Id.* at 225-26.

126. Smith, *supra* note 121, at 282.

127. *Id.*

128. *Id.* at 281-82.

129. *Id.* at 282 (finding that a "majority of persons claiming injury from psychic causes possessed sub-normal resistance").

130. Chamallas & Kerber, *supra* note 70, at 827.

131. *Id.* at 826-27.

132. *Id.* at 839.

133. *Id.* at 816; Smith, *supra* note 121, at 210 (asserting that courts could deny liability because of the plaintiff's particular reaction by using these concepts).

fright-based injuries, Chamallas and Kerber list the "first notable case involving a claim of fright-based injury"[134] as *Victorian Railways Commissioners v. Coultas.*[135] The case denied recovery to the plaintiff, Mary Coultas, who was frightened when the defendant negligently gave a signal, thus creating an impression that she would be killed by a moving train.[136] The rationale provided by the court was that the damages sustained were too remote.[137] To Chamallas and Kerber, this rationale was "somewhat difficult to understand . . . [and] did not reflect temporal or spatial distance between the defendant's negligence and Mary Coultas' injuries. Rather, it classified her injury as remote because of its judgment that a normal person would not suffer physical injuries as a result of such an incident."[138]

Other concerns have led courts to believe that the plaintiff's abnormalities caused the harm. These concerns include the possibility a flood of litigation, potentially fraudulent claims[139] and problems of causation.[140] For example, in *Mitchell v. Rochester Railway Co.*,[141] the plaintiff sustained a miscarriage when she was almost hit by a negligently driven horse cart. However, the court denied recovery for "mere fright" because the miscarriage sustained was "the result of an accidental or unusual combination of circumstances which could not have been reasonably anticipated."[142] Moreover, the court feared that recovery "would naturally result in a flood of litigation."[143] Many courts believe that these types of claims are likely to be fraudulent; therefore, the trustworthiness of the plaintiff becomes an issue.[144]

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134. Chamallas & Kerber, *supra* note 70, at 826.

135. 13 App. Cas. 222 (P.C. 1888).

136. *Id.* at 223.

137. *Id.* at 226.

138. Chamallas & Kerber, *supra* note 70, at 826-27 (also noting the defense counsel's argument that "'[a] mere nervous shock caused by fright of an impending event which never happens results from the constitution and circumstances of the individual'").

139. A recent example of this concern with fraudulent claims can be seen in requirements such as expert medical testimony or "medically significant" injuries. *See, e.g.*, Tallarico v. Trans World Airlines, 693 F. Supp. 785, 781 (E.D. Mo. 1988) (requiring medical diagnosis of emotional distress so severe as to be deemed medically significant in order to recover for negligent infliction of emotional distress).

140. Chamallas and Keber, *supra* note 70, at 827.

141. 45 N.E. 354 (N.Y. 1896).

142. *Id.* at 355.

143. *Id.* at 354.

144. *See, e.g.*, Waube v. Warrington, 258 N.W. 497, 501 (Wis. 1935) (asserting recovery for emotional harm would "open the way to fraudulent claims and enter a field that

Instead of relying on concepts like foreseeability to deny recovery, some courts have been more explicit in noting that emotional injury is suffered only by abnormal or overly sensitive people.[145] In *Spade v. Lynn & Boston Railroad*,[146] the second major case acknowledging that "mere fright" was not a legally cognizable injury, Margaret Spade alleged that she suffered hysterical paralysis and other ailments when she was frightened by railroad employees who were forcing two drunken passengers off the train.[147] In denying her recovery, the court did not use terms such as remoteness and foreseeability. Rather, the court focused squarely on the qualities of the parties and stated that only "a timid or sensitive person" would suffer a physical injury because of fright.[148] Using such a focus, the court sought to protect defendants from liability based on claims brought by ultrasensitive plaintiffs.[149]

In sum, the tort law has established a strong distaste for emotional or noneconomic injuries and marginalized these claims. Caps on noneconomic damages reinforce this distaste. As will be discussed, these injuries are most frequently suffered by and associated with women;[150] thus, caps on noneconomic damages perpetuate the idea that female plaintiffs alleging emotional injury are undeserving of compensation. Moreover, noneconomic damages are especially devastating to women because certain causes of action are unique to women.[151] Because caps on emotional injuries

has no sensible or just stopping point").

145. *See, e.g.*, Falwell v. Flynt, 805 F.2d 484, 486 (4th Cir. 1986) (en banc) (Wilkinson, J., dissenting) (criticizing the majority's decision to deny a rehearing of the previous decision to allow a public figure to recover for the tort of emotional distress without reputational damage sufficient to sustain a libel count because this extension would protect "the very persons whose calling requires emotional strength and resiliency . . . [and] . . . reject[s] the rough-and-tumble that defines political life"), *denying reh'g of* 797 F.2d 1270 (4th Cir. 1986), *rev'd*, Hustler Magazine v. Falwell, 485 U.S. 46 (1988); Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936) (where Judge Magruder claims that protection against the irritations of daily life could be better achieved through a "certain toughening of the mental hide . . . [rather] than the law").

146. 47 N.E. 88 (Mass. 1897).

147. *Id.* at 88.

148. *Id.*; *see also, e.g.*, Amaya v. Home Ice Fuel & Supply Co., 379 P.2d 513, 523 (Cal. 1963) (citing the work of Hubert Smith and the conclusion that most people who suffer emotional injury have a preexisting disposition to these types of injury).

149. *Spade*, 47 N.E. at 89 (noting recovery for the fright-based injury would be detrimental to business operation).

150. *See infra* part IV.A.

151. *See infra* notes 155-63, 225-60 and accompanying text (discussing pregnancy and miscarriage in fright-based claims, as well as products liability cases involving the Dalkon

would exist in a tort system that has not welcomed emotional injury and in a society that has undervalued the economic contribution of women, the impact of these caps on female plaintiffs should be scrutinized prior to their implementation.

IV. CAPS ON NONECONOMIC DAMAGES: AN OBSTACLE FOR THE FEMALE PLAINTIFF

Caps on noneconomic damages deny recovery for otherwise meritorious claims. As discussed earlier, all American jurisdictions have awarded noneconomic damages specifically designed to compensate an injured plaintiff for nonpecuniary losses.[152] Caps on noneconomic damages would deny recovery for these very real injuries. More importantly, when these caps operate, female plaintiffs may be the plaintiffs who suffer most.

This section will focus on the following four topics: A) the association between female plaintiffs and emotional injury claims and the frequency with which female plaintiffs bring these claims; B) the way the proposals for caps echo past concerns that have discounted women's claims; C) the types of cases that have historically been unique to women, and their relationship to noneconomic damages; and D) the disproportionate burden that caps will have on women.

A. *Association and Frequency*

Emotional injuries are likely to be brought by and associated with women. As a result, caps primarily affect female plaintiffs. Moreover, because women are associated with emotional injuries that are perceived as undeserving of compensation, caps perpetuate stereotypical views of female plaintiffs as overly sensitive and, in some instances, abnormal. "Historically . . . women have tended to bring claims for fright-based injuries far more often than for [sic] men."[153] An early study, involving forty fright-based negligence claims, found that thirty-five of the cases involved women.[154] In his study concluding that normal people do not suffer compensable injury from mere fright, Hubert Smith noted that "women predominated as plaintiffs and that the injuries complained of were often

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Shield, Bendictin, and breast implants).

152. Martin, *supra* note 21, at 318.

153. Chamallas & Kerber, *supra* note 70, at 815.

154. Leon Green, *"Fright" Cases*, 27 U. ILL. L. REV. 761, 761 (1933).

sex-based, especially in that so many cases involved pregnancy and miscarriage."[155] Smith's study also found that the ratio of women to men bringing fright claims was 5:1.[156] Chamallas and Kerber note that such studies have "created the impression that women not only dominated the tort [of fright], but that "mere" men might have a harder time recovering."[157]

Even if women do not suffer emotional injury more often than men, emotional injury is more often associated with women and traditionally feminine traits. The most direct association is made between fright and child bearing and rearing.[158] As Prosser notes in each of the first three editions of his tort treatise, fright-based physical injury cases involve miscarriages so frequently that miscarriage has come to typify fright-based physical injury.[159] This view is not surprising in light of the early perception that hysteria was a disorder traceable to the uterus, and therefore, unique to women.[160] Moreover, the mother-child bond eventually justified compensation for fright-based bystander claims.[161] As a result, the paradigmatic fright claims involve pregnant women who miscarry[162] or mothers who watch as their child is killed.[163]

Tort casebooks also present the association between emotional injury and undesirable qualities. In his analysis of gender issues as they relate to tort of intentional infliction of mental distress, Carl Tobias notes that "the mental distress materials generally and in specific areas, such as organization, case selection, tone, and emphasis, leave the impression that this cause of action implicates traits traditionally associated with women that have a been consid-

155. Chamallas & Kerber, *supra* note 70, at 846-47.

156. Smith, *supra* note 121, at 280 (finding 248 plaintiffs were female out of the 301 cases studied).

157. Chamallas & Kerber, *supra* note 70, at 845.

158. *See id.* at 824 (discussing the early historical connection between women and fright-based claims, focusing on the pregnant plaintiff).

159. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 34, at 213-14 (1941); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 37, at 178 & n.4 (2d ed. 1955); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 55, at 350 & n.80 (3d ed. 1964).

160. Chamallas & Kerber, *supra* note 70, at 825.

161. *See supra* notes 109-16 and accompanying text (discussing Dillon v. Legg, 441 P.2d 912 (Cal. 1968), which allowed recovery for fright-induced injury where the victim was not an ordinary bystander, but rather, a mother who witnessed the negligent killing of her child).

162. *See* Chamallas & Kerber, *supra* note 70, at 824-34 (discussing the established connection between women and fright in tort law, focusing on the pregnant women).

163. *See, e.g.*, Dillon v. Legg, 441 P.2d 912 (Cal. 1968).

ered less admirable, such as being weak, emotional or impressionable."[164] Casebooks contain cases that portray the plaintiff, who claims emotional distress, as "stupid or overly sensitive."[165] The selection of lead cases perpetuates this stereotype. Tobias notes that the principal case selected in Prosser's *Cases and Materials on Torts*,[166] is *Slocum v. Food Fair Stores of Florida*.[167] In that case, the female plaintiff alleged emotional distress as a result of a grocery store clerk's comment that "you stink to me."[168] This case creates an impression that a hypersensitive plaintiff is pursuing frivolous[169] or vindictive litigation.[170] Tobias concluded that, while "mental distress and the other intentional tort causes of action might be viewed as mechanisms that could contribute to the empowerment of women, [case opinions] discredit[] the mental distress cause of action."[171] As a result, the treatment of mental distress in the tort casebook creates the impression that "mental distress litigation is disfavored: you sissy girls just need a tougher mental hide or tough guys do not bring mental distress suits."[172]

Traditional society further connects women to fright-induced injuries by creating a strong disassociation between emotional injuries and masculinity. Smith, in his famous research on fright, clearly represents this view.

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164. Carl Tobias, *Gender Issues and the Prosser, Wade, and Schwartz Torts Casebook*, 18 GOLDEN GATE U. L. REV. 495, 516 (1988).

165. *Id.*

166. WILLIAM L. PROSSER ET AL., CASES AND MATERIALS ON TORTS (7th ed. 1982). Tobias notes that Prosser's casebook is "the most widely used series of tort casebooks in American law schools." *Id.* at 495.

167. 100 So. 2d 396 (Fla. 1958), *reprinted in* PROSSER et al., *supra* note 166, at 54.

168. 100 So. 2d at 397.

169. Tobias, *supra* note 164, at 517.

170. On occasion, courts have described the female plaintiff in a way that questions her motives for bringing a cause of action.

> The plaintiff [a female bringing a claim for sexual harassment under Title VII against a male co-worker] was a capable, independent, ambitious, aggressive, intractable, and opinionated individual. The plaintiff's supervisors and co-employees with whom plaintiff interacted almost uniformly found her to be an abrasive, rude, antagonistic, extremely willful, uncooperative, and irascible personality. She consistently argued with co-workers and company customers in defiance of supervisory direction and jeopardized [her employer's] business relationships with major oil companies. She disregarded supervisory instruction and company policy whenever such direction conflicted with her personal reasoning and conclusions. In sum, the plaintiff was a troublesome employee.

Rabidue v. Osceola Refining Co., 805 F.2d 611, 615 (6th Cir. 1986).

171. Tobias, *supra* note 164, at 518-19.

172. *Id.* at 518.

> Males venture into places of peril as much as females and so are as frequently exposed to [trivial impacts or psychic stimuli]. But the male is usually the breadwinner; his thoughts are distracted from his experience by the tasks of his job, and further, he has much to lose and little to gain by developing a neurosis. The female is usually at home, has more time to ponder upon the experience, and more to gain and less to lose from developing symptoms. The independent post-accident psychological forces conducing to neurosis are apt to be more potent in her case.[173]

Thus, it is unwise for a man to pursue an emotional injury claim.

> It well may be that the male ego is too compromised by claiming injury through fright, this deterrent to suit being bolstered by social taboos. After all, one has to face a jury, and he does not like to become an ass before his fellow man. A woman's "femininity" is not hurt by such a claim. A certain amount of fragility is expected and esteemed.[174]

This strong disassociation has worked against the male plaintiff who seeks compensation for emotional injury.

> [I]t has often been easier for women than for men to recover for nervous shock or the intentional infliction of emotional distress . . . . Thus, men are not extended the same right to peace of mind as are women in this regard, even though that right is something that most people would regard as generally worthy of protecting.[175]

In sum, because emotional injury claims are more likely to be brought by women than men, caps on noneconomic damage have a disproportionate impact on female plaintiffs. This impact is magnified because women are closely associated with emotional injury.

B. Echoes of the Past

Proposals for caps on noneconomic damage echo past concerns and practices that have traditionally marginalized claims for emotional injury. While those concerned about consortium claims and

173. Hubert W. Smith & Harry C. Solomon, *Traumatic Neuroses in Court*, 30 VA. L. REV. 87, 112 (1944).

174. Smith, *supra* note 121, at 280.

175. Finley, *supra* note 75, at 65.

fright injuries initiated the traditional physical versus emotional dichotomy that determined what injuries were compensable,[176] caps on noneconomic damages continue to support this dichotomy. By focusing only on noneconomic damages as a solution to the tort crisis, reformers have given new force to this dichotomy.[177] Commentators perceive the liability crisis to be the result of large and unpredictable damage awards.[178] Because an award is composed of both economic and noneconomic damages,[179] a cap on total awards reduces the large verdict and provides predictability since a potential defendant is assured that the maximum award will not exceed the statutorily created figure.[180]

Nevertheless, total caps are not the platform of current reform.[181] Viewing pain and suffering as an inducement to litigate,[182] current reformers urge the adoption of caps on noneconomic damages alone. The President of the Alliance of American Insurers, Franklin W. Nutter, has candidly noted this lack of concern with controlling a plaintiff's economic recovery.[183] Defending the tort reform movement, Nutter acknowledges that the proposed reforms do not seek to limit or cap economic recovery, but instead are "designed to balance victims' rights to compensation for *true* economic loss or injury and to provide a predictable legal system that those who develop products and those who provide services can count on for being the standard."[184] The implication is that intangible losses are not real. An American Law Institute study on tort liability, signaled by the American Tort Reform Association as "open[ing] the door to tort reform," also recommends only limiting awards for pain and suffering.[185] Fur-

176. *See supra* notes 92-116 and accompanying text.
177. *See supra* notes 92-116 and accompanying text.
178. *See supra* notes 38-56 and accompanying text.
179. *See supra* notes 19-22 and accompanying text.
180. Redish, *supra* note 12, at 761.
181. Charles Wasilewski, *Tort Reform: Courting Public Opinion*, BEST'S REV.—PROP.-CASUALTY INS. EDITION, June 1986, at 14, *available in* LEXIS, Nexis Library, Brprop File.
182. *See* Kevin Gudridge, *Washington Court Lifts Tort Cap*, NAT'L UNDERWRITER, PROP. & CASUALTY/RISK & BENEFIT MGMT. EDITION, May 15, 1989, at 4, *available in* LEXIS, Nexis library, Nuprop File (quoting one attorney who states that "[w]e are going to return to a time when many litigants are going to run right past the settlement table and into the courtroom, where it's a high stakes dice game on pain and suffering).
183. Walsilewski, *supra* note 181, at 14.
184. *Id.* (emphasis added).
185. Brian Cox, *Tort Study May Open Door to Reform, Observers Think*, NAT'L UNDERWRITER, PROP. & CASUALTY/RISK & BENEFIT MGMT. EDITION, June 3, 1991, at 2,

thermore, President Bush, in his comprehensive health care reform program and his Health Care Liability and Quality of Care Improvement Act of 1991 proposal, encouraged states to adopt heath care reforms that would place a cap, only on noneconomic damages.[186] These proposals do not completely solve the perceived tort crisis since the total cost to society of our civil justice system is listed at $132 billion; however, payments for economic and noneconomic losses only create around half of the cost.[187] In fact, payments for economic losses were actually slightly higher than those for noneconomic losses.[188] Nevertheless, many states have followed the proposals of reformers and have adopted measures to limit awards for emotional injury, while leaving claims for economic harm untouched.[189]

The distinction between physical and emotional injuries remains important. As discussed earlier, society's view of emotional injuries resulted in denial of recovery for such harms.[190] This denial minimized the importance of the injury sustained. As reformers advocate limiting only noneconomic damages, and as states adopt these proposals, the marginalization of injuries traditionally associated with and suffered by women remains.[191]

Caps on noneconomic damages indirectly reinforce traditional notions that have burdened the female plaintiff. The medical profession has provided courts with a justification for denying recovery for emotional injuries.[192] Currently, reformers are providing

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available in LEXIS, Insure Library, Nuprop File.

186. *President Offers Congress a Medical Malpractice Reform Bill*, LIABILITY WEEK, July 6, 1992, *available in* LEXIS, Nexis Library, Nwlrts File (Bush's proposal places a $250,000 cap on such awards); *Administration Malpractice Proposal Would Encourage State Action, Increase Care*, BNA PENSIONS AND PROFITS DAILY, May 16, 1991, *available in* LEXIS, BNA Library, Bnapen File.

187. Ruth Gastel, *The Liability System*, INS. INFO. INST. REP., Jan. 1993, at 1, *available in* LEXIS, Insure Library, Iirpts File.

188. *Id.* (economic losses are 24% of costs, whereas noneconomic losses are 22% of costs).

189. *See, e.g.*, MICH. COMP. LAWS ANN. § 600.1483 (West Supp. 1992) (imposing a limit of $225,000 on noneconomic damages in most medical malpractice actions while not limiting the total award); WIS. STAT. ANN. § 893.55 (West Supp. 1992) (imposing a limit on noneconomic damages of $1,000,000, but not providing an overall limit on the total award received).

190. *See supra* notes 92-116 and accompanying text (discussing how social construction impacted the loss of consortium cause of action and led to the development of the physical impact and bystander recovery rules).

191. *See supra* part IV.A (discussing the correlation between emotional injury and uniquely female claims, especially pregnancy related injuries, as well as the disassociation of emotional injury and masculinity).

192. *See supra* notes 118-44 and accompanying text (noting that the focus on peculiari-

additional justification for this same conclusion. By focusing on the abnormalities or peculiarities of the particular individual, the insurance industry supports the notion that normal persons do not suffer emotional injury.[193] Emotional injury is perceived to be the result of the individual's inability to cope with the stresses of daily life.[194] In a case involving a woman's claim for emotional distress resulting from remarks about her race and inability to bear children,[195] the defense attorney believed such occurrences to be "very common . . . [n]ot something out of the ordinary." Furthermore, the defense "didn't think it gave rise to an injury or workers' compensation [sic] because everyone feels upset after an argument with a co-worker . . . . In all work life there are some disagreements."[196] In fact, the court gave this rationale legitimacy by recognizing that the plaintiff was particularly sensitive and that the taunting had "aggravated a preexisting emotional instability."[197]

Likewise, in his critique at the tort system, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit,* Walter Olsen discusses Judith Haimes, a plaintiff who charged a hospital with malpractice.[198] The plaintiff sought damages for pain and suffering, as well as for loss of earnings. However, Olson does not classify the injury as an economic injury. Rather, he states that

> [p]ain and suffering were only part of the claim. Formerly Ms. Haimes had conducted séances at which such eminences as the poet Milton had spoken through her. Now she said the dye [the source of the malpractice claim] had

ties of individual plaintiffs was a result of the medical community's skepticism of emotional injuries).

193. *Cf.* Mitchell v. Rochester Ry. Co., 45 N.E. 354, 355 (N.Y. 1896) (classifying an injury as remote since a normal person would not suffer physical injury from "mere" fright).

194. *See supra* notes 118-44 and accompanying text; *see also infra* notes 195-205 and accompanying text (discussing how the focus of non-economic claims is on the individual plaintiff's abnormalities rather than the action that caused the harm).

195. Kaliski v. Fairchild Republic Co., 542 N.Y.S.2d 841, 842 (N.Y. App. Div. 1989), *aff'd*, 564 N.Y.S.2d 714 (N.Y. 1990).

196. Evelyn Gilbert, *NY Upholds Workers' Compensation Stress Claim Over Taunting,* NAT'L UNDERWRITER, PROP. & CASUALTY/RISK & BENEFIT MGMT. EDITION, Feb. 18, 1991, at 2, *available in* LEXIS, Insure Library, Nuprop File; *see also Kalinski,* 542 N.Y.S.2d at 842 (defendant employer asserting that "the stress the claimant was subjected to was not more than that normally encountered in a work environment").

197. *Kalinski,* 542 N.Y.S.2d at 843 (citation omitted)(affirming the Board's decision).

198. OLSON, *supra* note 21, at 152.

> interfered with the psychic powers that had enabled her to divine persons' past and future.[199]

Olson noted that the jury award of $986,000 did not withstand the trial court's scrutiny because it was ultimately overruled as "grossly excessive."[200] Olson begins a chapter discussing jury awards with what could be considered an extreme case, thereby focusing the reader on the perceived abnormalities of the plaintiff, rather than on the serious injury that occurred.

The concern regarding the abnormal plaintiff is also evidenced in remedies through which reformers seek to limit the number of claims for emotional injury. Insurers will acknowledge that claims for certain emotional injuries may come from legitimate sources.[201] However, they still believe that emotional injuries can and should be controlled by focusing on the individual, rather than preventing the trauma or event that produced the emotional injury. This strategy has been asserted in the area of work-induced stress claims. Insurers are quick to assert that the work place's "relation to the resulting disability may be no more than marginal."[202] As a result, insurance companies urge employers to adopt programs to assess employee abnormalities or predispositions to emotional injury.[203] Upon first notice of an employee's allegation of a stress-induced injury, employers are told to:

> Investigate immediately. Once an allegation is made or a problem surfaces, the employer should launch an immediate investigation conducted by an expert in this type of claim. The investigation should contain interviews and statements from supervisors and co-workers, and even neighbors when appropriate. Civil and criminal index searches should be performed to obtain information on possible non-industrial problems and stressors. Copies of all personnel documents should be obtained . . . . This also

199. *Id.*
200. *Id.* at 152-53 (ordering a new trial on these grounds).
201. David O. Weber, *Shrinking the Head Cases; Minimizing Unworthy Mental-Injury Claims*, INS. INFO. INST. REP., July, 1991, at 35, *available in* LEXIS, Insure Library, Iirpts File.
202. Joseph F. Mangan, *Stress-Related Claims: Causes and Controls*, BEST'S REVIEW—PROP.-CASUALTY INS. EDITION, March, 1991, at 68, *available in* LEXIS, Insure Library, Nuprop File.
203. John W. Jones, *Breaking the Vicious Stress Cycle: Accident Susceptibility Factors*, BEST'S REV.—PROP.-CASUALTY INS. EDITION, March 1988, at 74, *available in* LEXIS, Insure Library, Noprop File.

> means the employer should investigate tell-tale signs of pending trouble: mood swings, altercations with other employees, reports of family or personal problems, and reports of alcohol or drug problems.[204]

While the goal of eliminating claims for vague and uncertain emotional injuries can be achieved by focusing on the injury itself, this option is not routinely adopted.[205] By focusing on the individual's character, the emotional trauma is dismissed as idiosyncratic. As a result, the plaintiff that brings the suit for an emotional injury is burdened because the injury is not given the attention it deserves.

By attempting to discredit claims for emotional injury, tort reformers indirectly blame the individual. Because insurers fear fraudulent claims for emotional injury, they continue to deny recovery for these claims much as the courts had done earlier in tort history.[206] Insurance companies claim that it is extremely difficult to separate false from legitimate claims.[207] Reformers request that emotional injury recovery be denied because its vague symptoms "provide[] the opportunities for malingering and outright fraud."[208] In the context of stress-related injuries, reformers consider the problem to be particularly prevalent when there is no physical corroboration for either the stress or the injury.[209] As a result, they support standards for the determination of compensation for only mental/mental stress claims.[210] In further support of using

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204. Howard J. Stevens, *Stress in California*, RISK MGMT., July 1992, at 38, *available in* LEXIS, Market Library, Prompt File; *see also, e.g.*, Weber, *supra* note 201, at 35 (recognizing while many claims for emotional injuries are legitimate, "many people are carrying around a lot of psychological baggage. It's really critical to discover the events from their past that might have sent them over the edge.").

205. *See* Weber, *supra* note 201, at 35 (discussing attempts to establish standards that evaluate certain factors which may give rise to psychological injury).

206. *See infra* note 139 and accompanying text.

207. Rhona L. Ferling, *The Link Between Economic Security and Stress*, BEST'S REV.—PROP.-CASUALTY INS. EDITION, Jan. 1989, at 56, *available in* LEXIS, Insure Library, Brprop File.

208. Mangan, *supra* note 202, at 68.

209. Ruth G. Kastrud, *Stress Claims: The New Frontier*, BEST'S REV.—PROP.-CASUALTY INS. EDITION, Dec. 1986, at 72, *available in* LEXIS, Insure Library, Brprop File.

210. *Report Urges Review of State WC Plans*, NAT'L UNDERWRITER, PROP. & CASUALTY/RISK & BENEFIT MGMT. EDITION, Oct. 2, 1989, at 34, *available in* LEXIS, Insure Library, Nuprop File.

Stress claims, similar to early claims for fright injury, are divided into several categories depending on the source of the injury and the other injuries that accompany the stress-related injury. The first category of stress injuries, physical/mental injury, occurs where the emotional or mental disorder is the result of a physical injury or trauma. A

potential fraud as a basis for denying recovery, reformers focus on facts demonstrating the prevalence of fraudulent claims. For example, one study found that in "workers' compensation [claims,] judge[s] dismiss[] nearly twice as many stress claims as all other types of claims."[211] Another survey found that Americans believed that only 15% of civil liability suits were justified, with 36% of those surveyed saying that frivolous lawsuits were responsible for many of the problems that face the insurance industry.[212] Therefore, perceptions of fraud perpetuate the view that emotional injury claims are less legitimate than physical injury claims.

Modern tort reform focuses on concepts of foreseeability and causation, thereby continuing to support the notion that the particular plaintiff caused the emotional injury.[213] When the New York Court of Appeals required comprehensive general liability insurance policies to cover emotional injuries, even where a physical injury was not present, the American Insurance Association asserted that "'these are damages that insurers never envisioned would be covered and never charged a premium for.'"[214] Furthermore, these damages "'could vastly increase the number of unanticipated claims made against []insurers.'"[215] By focusing on the concept of unforeseeability,[216] the claim is again marginalized and recovery

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representative example would be the individual who suffers psychological trauma as a result of the unexpected amputation of a leg. The second category is mental/physical injuries where "psychiatric injury is a physical manifestation of mental stress, such as ulcers, heart attacks or high blood pressure." Stevens, *supra* note 204, at 38. This category is physical injury that results from a psychological cause. The final category of stress-related injuries is where mental disorders are "caused by emotional or psychological factors—the so called mental/mental injuries." Mangan, *supra* note 202, at 68.

While the physical/mental and mental/physical categories rarely provide problems for insurers, the final stress category, akin to earlier tort claims involving bystanders outside the zone of danger or claimants suffering emotional injury unaccompanied by physical injury or impact, has received considerable attention. Mental/mental injuries have been viewed by "more than one expert . . . as an epidemic," even though these claims account for only a small portion of all worker's compensation claims. *Id.* Unlike physical injuries, with "well defined symptoms clearly traceable to a single cause," mental/mental injuries raise concerns due to vague symptoms, multiple causes, and greater opportunities for fraud. *Id.*

211. Alfred G. Haggerty, *California Workers' Compensation Stress Claims Soar*, NAT'L UNDERWRITER, PROP. & CASUALTY/RISKS & BENEFITS MGMT. EDITION, May 16, 1988, at 6, *available in* LEXIS, Insure Library, Nuprop File.

212. Gastel, *supra* note 187, at 1.

213. *See supra* notes 118-44, 195-205 and accompanying text (discussing the focus placed on plaintiffs in emotional injury claims).

214. Stacy Gordon, *N.Y. Upholds CGL Cover for Emotional Distress*, BUS. INS., June 15, 1992, at 3, *available in* LEXIS, Estate Library, Busins File.

215. *Id.*

216. *See supra* note 132 and accompanying text (discussing the unforeseeability of emo-

becomes easier to deny.[217]

Current tort reformers echo the same rationales used by earlier courts to deny recovery for emotional injuries. The focus on noneconomic damage caps is not only part of this overall movement but it also bolsters the physical versus emotional dichotomy that has historically burdened women. These continuing practices are very important since women are traditionally the plaintiffs associated with emotional injuries.[218] When tort law adopts the physical versus mental dichotomy, women suffer. When tort law continues to discredit particular plaintiffs by focusing on unforeseeability or fraud, women suffer. Thus, if current tort reformers continue to merely echo past tort practices, women will inevitably suffer.

C. *Lessons from History*

As has been discussed, certain injuries that consist of large noneconomic components are traditionally suffered by women. The effect of noneconomic damages caps on female plaintiffs has not been addressed in the current tort controversy because there is a lack of direct evidence on the impact of these caps. One reason for this lack of evidence is that jury verdicts are often analyzed in very broad terms, controlling for few, if any, variables. For instance, it is not difficult to find data regarding average awards[219] or support for the conclusion that overall jury verdicts increased in

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tional injury).

217. Other reasons have been asserted by tort reformers to deny recovery for emotional injury claims. Often psychological injuries themselves are attacked as being faddish and are not universally recognized by doctors, and, as a result, appear unworthy of compensation. Paul R. Lees-Haley, *Stress Claims Can Be Deceiving*, BEST'S REV.—PROP.-CASUALTY INS. EDITION, Nov. 1987, at 80, *available in* LEXIS, Insure Library, Brprop File. These disorders are characterized as being subject to change by lobbying of certain group. *Id.* Thus, the merit of the claim quickly becomes questionable. Also, the judicial system itself with its sympathy for the plaintiffs, whether that sympathy comes from a judge or a jury, is seen as a cause of recovery. Gastel, *supra* note 187, at 1. Both justifications support the notion that recovery is based on something besides the merit of the claim. As a result, these rationales have the potential to serve as a proxy for the commonly held belief that normal people do not suffer emotional injury.

218. *See supra* part IV.A (discussing the association between female plaintiffs and emotional injury claims, as well as the frequency with which women bring such claims).

219. MARK A. PETERSON & GEORGE L. PRIEST, THE CIVIL JURY TRENDS IN TRIALS AND VERDICT IN COOK COUNTY, ILLINOIS, 1960-1974, at 20 (1982); *see also* REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSE, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 36 (1986) (noting the number of millon dollar verdicts has increased by 1200%) [hereinafter WORKING GROUP].

tort cases.[220] Studies that analyze the factors affecting awards commonly consider race, age, and occupation, but usually ignore the role of gender.[221] However, when researchers do focus on gender, awards are not broken down into economic and noneconomic components.[222]

Empirical evidence describing the effects of caps on noneconomic awards is lacking. Therefore, the tort system is best analyzed not through generalized data and extreme cases,[223] but through the differences in case types.[224] Cases involving child bearing and rearing have appeared consistently throughout the history of the tort system. Claims relating to pregnancy are predominant in products liability and medical malpractice cases. Of the products liability cases litigated in federal district court from 1974 to 1986, an estimated 11,292 claims were directed at the pharmaceutical and health products industries.[225] More significantly, most of the increase in this litigation stemmed from the use of three products. Two of these products were the Dalkon Shield[226] and Bendectin,[227] products only used by women.[228] These two

220. Margaret C. Fisk, *Verdicts Increased; So Did Settlements*, NAT'L L.J., Jan. 25, 1993 at S12.

221. *See, e.g.*, RANDALL P. BENSON ET AL., THE COST OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS 23 (Everette E. Dennis & Eli M. Noam eds., 1989).

222. JURY VERDICT RESEARCH, INC., VALUATION HANDBOOK: ADULTS AS PLAINTIFFS 4 (1987) [hereinafter VALUATION HANDBOOK] (handbooks on personal injury note the relative value of an injury brought by female or male within a certain age group without discussing the injury suffered).

223. PETERSON & PRIEST, *supra* note 219, at 20; *see also* Saks, *supra* note 8, at 1159 (discussing the role of antedoctal evidence in the torts crisis).

224. At times analyzing specific causes of action does not provide a background to examine gender and claims for nonemotional harms. For instance, libel awards are composed predominantly of noneconomic harm such as injured reputations rather than out-of-pockets costs such as earning capacity or medical bills. HENRY R. KAUFMAN, THE COST OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS, 6 (Everette E. Dennis & Eli M. Noam eds., 1989). However, research does not tell us what plaintiffs suffer these injuries. *Id.* Nevertheless, the injuries to be discussed in the next section have clearly defined plaintiffs because only women bring products liability or medical malpractice claims for breast implants or injuries associated with child bearing. *See infra* notes 225-60 and accompanying text (examining uniquely female products liability cases).

225. TERENCE DUNGWORTH, PRODUCT LIABILITY AND THE BUSINESS SECTOR: LITIGATION TRENDS IN FEDERAL COURTS 38-39 (1988).

226. The Dalkon Shield is an intrauterine contraceptive device found to cause an increase in the incidence of pelvic inflammatory disease and sterility in the women who used it. Gregory C. Jackson, Comment, *Pharmaceutical Products Liability May Be Hazardous to Your Health: A No-Fault Alternative to Concurrent Regulation*, 42 AM. U. L. REV. 199, 208 (1992).

227. Bendectin is an anti-nausea drug that was used to combat morning sickness and that was later found to cause birth defects among children whose mothers had used it.

products accounted for 7000 of the 11,000 suits filed against members of the pharmaceutical and health products industries.[229] Use of the Dalkon Shield resulted in 13,000 lawsuits brought by 300,000 plaintiffs[230] against manufacturer A.H. Robins and is considered to be the primary cause of the increase in products liability litigation.[231] At the time the manufacturer went bankrupt, a claim cutoff was instituted, and the manufacturer paid $3 billion in damages.[232] One author noted that "[i]n all likelihood, further district court filings relating to the Dalkon Shield will be minimal because of these constraints."[233] Nevertheless, by 1986, 325,000 claims against A.H. Robins were submitted to the bankruptcy court.[234]

Likewise, Bendectin produced similar detriment to its manufacturer Merrell Dow. Bendectin was "the only prescription drug ever approved in the United States for the treatment of the nausea and vomiting of pregnancy."[235] At the time of its withdrawal, it was sold in 22 countries and prescribed for 25% of pregnant women.[236] Of the remaining 4000 suits against the pharmaceutical industry, 1300 were against Merrell Dow for the product Bendectin.[237]

While direct evidence on the impact of caps on noneconomic damages is lacking, tort reformers cannot ignore the possible impact that these caps will have on female plaintiffs in light of the history of pregnancy-related claims in tort law and in recent products liability and medical malpractice cases. Products liability and medical malpractice litigation is primarily responsible for the overall explosion in tort litigation.[238] The large awards are prevalent

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Joseph Sanders, *The Bendectin Litigation: A Case Study in the Life Cycle of Mass Torts*, 43 HASTINGS L.J. 301, 317-18 (1992).

228. PETER W. HUBER & ROBERT E. LITAN, THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION 295 (1991) (noting the third product leading to the increase was asbestos litigation).

229. DUNGWORTH, *supra* note 225, at 39-40.

230. *Id.*; *see also* DEBORAH R. HENSLER, ET AL., TRENDS IN TORT LITIGATION: THE STORY BEHIND THE STATISTICS 10 (1987) (estimating 7500 lawsuits resulted from use of the Dalkon Shield).

231. DUNGWORTH, *supra* note 225, at 40.

232. Jackson, *supra* note 226, at 208 n.62.

233. DUNGWORTH, *supra* note 225, at 40.

234. HENSLER ET AL., *supra* note 230, at 10.

235. HUBER & LITAN, *supra* note 228, at 337.

236. *Id.* at 338.

237. DUNGWORTH, *supra* note 225, at 39-40.

238. PETERSON & PRIEST, *supra* note 219, at 24.

in both products liability and medical malpractice cases.[239] Calculation of the average products liability verdict has ranged from $275,000[240] to $1,850,452.[241] These estimates account for increases in verdicts of over 400% to 900%[242] in 10 years, with the number of millon-dollar verdicts increasing by over 1200%.[243] The medical malpractice industry has seen similar results, with average verdicts rising from $280,000[244] to $1,017,716,[245] an increase of over 360%. Particularly important is the large percentage of noneconomic damages that are included in these awards. In the medical malpractice area, noneconomic damages comprise anywhere from 27% to 54% of total awards.[246] While this data is too aggregated to provide specific conclusions, arguments can be made that males are affected by similar causes of action. For example, drugs like Bendectin also affect children who are both male and female.

Even though most of the litigation involving the Dalkon Shield and Bendectin has ceased, tort law reformers have the opportunity to have a significant effect on noneconomic damages in a new area of products liability problems involving breast implants. The impact of one product cannot be discounted. Authors have noted that "there is great[] potential for a substantial volume of litigation to arise around one product in [the pharmaceutical] industr[y]."[247] Moreover,

> [T]he pharmaceutical industry group as a whole is also likely to experience low filing levels unless other products such as the Dalkon Shield or Bendectin comes along. This possibility cannot, of course, be ruled out . . . . If only a small percentage of these consumers experience injuries that they believe, rightly or wrongly, to be associated with use of the product, an "epidemic" of lawsuits can rapidly ensue.[248]

239. *Id.*
240. *Id.*
241. WORKING GROUP, *supra* note 219, at 35-36.
242. *Id.*; HENSLER ET AL., *supra* note 230, at 19.
243. WORKING GROUP, *supra* note 219, at 39.
244. MICHAEL G. SHANLEY & MARK A. PETERSON, COMPARATIVE JUSTICE: CIVIL JURY VERDICTS IN SAN FRANCISCO AND COOK COUNTIES, 1959-1980, xiii (1983).
245. WORKING GROUP, *supra* note 219, at 35-36.
246. *Id.* at 39 n.38.
247. DUNGWORTH, *supra* note 225, at 51.
248. *Id.* at 41.

Problems resulting from the use of breast implants have triggered this new epidemic. On December 23, 1992, a jury awarded $25 million against a subsidiary of Bristol-Myers Squibb Co. in Texas' first civil lawsuit against the manufacturer of silicone breast implants.[249] The plaintiff, 45-year old Pamela Johnson, received two sets of implants in 1976 and 1989.[250] As a result, Ms. Johnson suffered from auto-immune disease.[251] The award consisted of $20 million in punitive damages.[252] As a result, the clerk's office in the county that awarded the verdict was "swamped with a flood of breast implant lawsuits."[253] In the last week of 1992, the clerk's office received over 150 breast implant complaints and was "[a]nticipating a torrent of litigation."[254] With the precedent set in *Johnson*, large and numerous awards are inevitable.[255] In light of past tort practices, reformers must examine proposals to implement damage caps from the perspective of a female plaintiff.[256]

Causes of action relating to the child bearing process itself also deserve special attention since child bearing is traditionally associated with emotional injury claims that are exclusive to the female plaintiff.[257] Recent reports of the five largest awards for medical

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249. Johnson v. Bristol-Myers Squibb Co., No. 91-21770 (Tex. Dist. Ct. Dec. 23, 1992).

250. Gary Taylor, *Breast Implant Suits Pouring In*, NAT'L L.J., Jan. 18, 1993, at 3, 30.

251. *Id.*

252. *Id.*

253. *Id.* at 3.

254. *Id.*

255. Taylor, *supra* note 250, at 30 (quoting a Texas attorney as saying "This verdict should make the manufacturers look at their whole cards. They will get their butts kicked.").

256. Sexual harassment is another area that should encourage proponents of damage caps to examine the impact of these caps on female plaintiffs. Sexual harassment is predominated by female plaintiffs. For an excellent discussion of the sexual harassment of women see generally CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979). Reports indicate between 42% to 84% of female federal employees experience sexual harassment. Janice Goodman, *Sexual Harassment Laws Face Lax Enforcement*, NAT'L L.J., Jan. 11, 1993, at 17. Over 60 percent of female associates and partners in the country's top 250 law firms have reported job-related sexual harassment. *Id.* at 17-18. Likewise, an ABA Survey of 3,000 female lawyers surveyed by the Young Lawyers Division indicated that 85% have faced sexual harassment. *Id.* at 17. Caps continue to be an obstacle in sexual harassment cases. "[L]imitations on recovery of damages for emotional distress absent physical injury prevent[] sexually harassed women from recovering even though the barrage of offensive remarks and conduct they [have] to endure [is] obviously damaging to their mental health." Finley, *supra* note 75, at 55. While sexual harassment may produce economic injury, a woman is "still . . . emotionally and physically damaged." *Id.* at 56. Nevertheless, caps continue to place restrictions on recovery for emotional harms, and thus, impact female plaintiffs.

257. *See supra* notes 155-63 and accompanying text (discussing the association between

malpractice included four claims associated with child bearing or rearing, and all four are comprised of large noneconomic damage awards.[258] For example, one case involved three-month old Brandan Briggs, who was admitted to a hospital for a catherization that revealed a congenital heart défect.[259] The child was placed in an oxygen device and was negligently removed, thus causing him to sustain severe brain damage from oxygen deprivation.[260] While the child received damages, his mother also received noneconomic damages in the amount of $1.25 million for "damage to the parent-child relationship."[261]

D. *Existing Burdens*

The impact of caps on noneconomic damages will impact women disproportionately since women currently are awarded lower overall damages in comparison to their male counterparts. Caps on noneconomic damages, therefore, have a harsher effect on a female plaintiff who brings a claim that is already economically undervalued. Damages awarded to females are consistently lower than those awarded to males in the same age group.[262] This disparity is greatest when the plaintiffs are between the ages of fifty and fifty-nine.[263] In this group, the average verdict for a male is $423,338, while the average for a female is $58,074.[264] This disparity can be attributed in part to the valuation of economic damages. Because noneconomic damages are often undervalued, the valuation of economic damages becomes increasingly important to a female plaintiff who is incapacitated and requests compensation for services.

Theoretically, "[t]here are no formal differences in appraising economic losses for men and women insofar as the losses arise because of the destruction of wage and salary income."[265] Nevertheless, economic valuations separate future earning into five categories, two of which are earnings of the business*man* and the

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emotional injury and pregnancy).

258. Fisk, *supra* note 220, at S10-12.

259. *Id.* at S12.

260. *Id.*

261. *Id.*

262. VALUATION HANDBOOK, *supra* note 222, at 4.

263. *Id.*

264. *Id.*

265. STUART M. SPEISER, RECOVERY FOR WRONGFUL DEATH: ECONOMIC HANDBOOK 225 (1979).

housewife.[266] Moreover, differences in valuations result from sex discrimination in wages. Women working out of the home earn approximately 59-63¢ for every dollar earned by a male in a comparable position.[267] The economic valuation of services of a female working within the home is even more alarming.

> Even though the caretaking services rendered by the woman may be extremely specialized and time-consuming, and may deprive her of independence, economic opportunity, and leisure time, she is not regarded as suffering an injury. The idea that a woman renders caretaking services out of love and devotion as part of her natural role precludes recognition of the woman's economic and personal sacrifice. Moreover, the labor and sacrifice involved in "women's work" is frequently unappreciated because much of it does not involve wage loss for the person doing the work.[268]

Undervaluation and sexual stereotyping "can affect projections of future income [and] basing damages on future income can disadvantage women in an economy where they are on the whole paid significantly less than men."[269] As the tort system favors "pecuniary injuries over lasting emotional scars,"[270] the undervaluation of women's economic services increases the differential in verdicts awarded to female and male plaintiffs.[271] Caps on noneconomic damages will further contribute to this disparity.[272]

In sum, noneconomic damages have the potential to affect women significantly since claims for noneconomic damages are often brought by and associated with women. Echoes of past tort practices reinforce concepts that traditionally burdened female plaintiffs. Moreover, many prevalent product liability and medical malpractice cases are unique to women. Finally, the impact of

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266. *Id.* at 53.

267. THE UNITED STATES COMMISSION ON CIVIL RIGHTS, COMPARABLE WORTH: AN ANALYSIS AND RECOMMENDATIONS 13-14 (1985).

268. Finley, *supra* note 75, at 53-54.

269. *Id.* at 51.

270. *Id.*

271. *Id.*

272. It must be noted that noneconomic caps and the undervaluation of economic services of women will prove to be detrimental to male plaintiffs in one area: a husband's claim for the wrongful death of his wife. Lower economic awards will reduce the future earning potential of the women, and thus, reduce recovery to a widower. *See* Finley, *supra* note 75, at 52.

these caps is magnified since women receive significantly lower damage awards than men.

V. CONCLUSION

Tort law faces the challenge of solving the so-called tort crisis. Through the use of damage caps on awards for emotional injury, the insurance industry hopes to provide an answer. Nevertheless, proponents of damage caps cannot ignore the history of the tort system as it relates to the female claimant. As empirical evidence of the impact of these caps on noneconomic damages on women is lacking, the treatment accorded to certain subcategories of noneconomic harm, such as those causes of action relating to pregnancy, must be examined closely before implementing this reform. Because caps on noneconomic damages are supported by the same reasoning responsible for past denials of compensation for noneconomic injuries, they will perpetuate the marginalization of women's claims. Therefore, reformers must examine the impact of caps on noneconomic damage awards before this "solution" becomes yet another problem for the female plaintiff.

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