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HIS AND HER TORT REFORM: GENDER INJUSTICE IN DISGUISE[1]

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Abstract: This Article is an inquiry into the gendered nature of tort remedies. Modern tort law provides increased protection for injuries suffered by women. Drawing upon a national study of punitive damages in products liability and medical malpractice, Professors Koenig and Rustad argue that tort remedies are bifurcated into "his" and "her" tort worlds based upon gender roles. Nearly half of the punitive damages verdicts awarded to women stemmed from injuries caused by household consumer products and dangerously defective drugs or medical devices. In contrast, the punitive damages awarded to males arose from accidents involving industrial and farm machinery, asbestos, chemicals, containers, and vehicles.

Two out of three plaintiffs receiving punitive damages awards in medical malpractice litigation are women. Women employ this remedy primarily to obtain redress for mismanaged child birth, cosmetic surgery, sexual abuse, and neglect in nursing homes—gender-based injuries. Women are also far more likely than men to be awarded non-economic damages in medical products liability litigation. Consequently, proposed restrictions on non-economic damages and the Food and Drug Administration defense to punitive damages will have a disparate impact on women's mass tort remedies. Similarly, limitations on medical malpractice remedies will disproportionately restrict pain and suffering awards as well as punitive damages to women. Without systematic analysis of the distinctive ways that tort law relates to gender, women's voices will not be heard in the tort reform debate.

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To understand the workings of power as a relationship one must also consider the situation of the weak, the other, second, member of the process by which society at once exists and changes. And women are the oldest, largest and most central group of human creatures in the wide category of the weak and the ruled. The adjustments that women have made to life over centuries spent as subordinate partners in a power relationship illuminate the whole range of power situations.

Elizabeth Janeway[4]

Statistics are human beings with the tears wiped away.

Thomas F. Lambert Jr.[5]

I. INTRODUCTION

Tort law does not descend disembodied from the thin, rarefied air of the legal heavens.[6] Modern tort law is not value-free; it is continually forged and remolded in a social and political context. Tort law mirrors ever-changing cultural, social, political, economic, and technological circumstances.[7] As William Prosser observed, tort law evolves constantly because it serves as a "battleground of social theory."[8] In the

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4. Elizabeth Janeway, *Powers of the Weak* 4 (1980).

5. Thomas F. Lambert, Jr., *The Case For Punitive Damages: A New Audit* 33 (1986).

6. The concept of the legal heavens was coined by Felix Cohen who viewed legal formalism as transcendental nonsense. He satirized the failure of formalists to consider social context and history:

> Some fifty years ago a great German jurist had a curious dream. He dreamed that he died and was taken to a special heaven reserved for the theoreticians of the law. In this heaven one met, face to face the many concepts of jurisprudence in their absolute purity, freed from all entangling alliances with human life . . . . How much of contemporary legal thought moves in the pure ether of . . . [the] heaven of legal concepts.

Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809, 809 (1935).

7. Peter Schuck notes that:

> [Social] change has always been a driving force in tort law. The great landmarks of American tort law—*Rylands v. Fletcher*, *MacPherson v. Buick Motor Company*, Justice Traynor's concurring opinion in *Escola v. Coca-Cola Bottling Company*, *Ybarra v. Spangard*, *Sindell v. Abbott Laboratories*—represented important breaks with the past . . . . Today, as in the past, new social conditions demand new legal solutions. Tort law, with great creativity and mixed success, struggles to devise them.

Tort Law and the Public Interest: Competition, Innovation, and Consumer Welfare 19 (Peter H. Schuck ed., 1991).

8. William Prosser, *Handbook of the Law of Torts* 14–15 (4th ed. 1971).

words of Harper and James, "the common law of torts . . . readily accommodate[s] itself to the changing thought and action of the times."[9]

This Article explores the neglected relationship between gender and tort law. The use and nonuse of tort remedies by women in both historical and contemporary America is examined in order to understand "gender as a form of power and power in its gendered forms."[10] Part I traces the gendered history of the remedy of punitive damages to illustrate the ways in which tort doctrine reflects changing power relations within American society. Part II provides an empirical analysis of the gendered pattern of punitive damages awards in contemporary products liability and medical malpractice litigation.

We have focused specifically on these two types of recovery because Congress has recently considered legislation to restrict them.[11] Struggles over these remedies are likely to continue because limitations on punitive damages and on the size of non-economic awards are at the top of corporate risk managers' list of desired tort reforms.[12] However, little is known about the potential gender impact of such reforms.[13] Based upon

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9. Fowler V. Harper & Fleming James, Jr., *The Law of Torts* xxvii (1956) (arguing that the law of torts as well as property and contract has historically proven very adaptable).

10. Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (1989). Joan Scott makes a similar point, arguing that "[g]ender is a constitutive element of social relationships based on perceived differences between the sexes, and gender is a primary way of signifying relationships of power." Joan W. Scott, *Gender and the Politics of History* 42 (1988).

11. It is not surprising that reform efforts focus upon products liability and medical malpractice, since these areas have witnessed dramatic doctrinal expansion over the past thirty years. The expansion of products liability is due in large part to the decline of privity. Prosser wrote that the erosion of the privity rule was "the most rapid and altogether spectacular overturn of an established rule in the entire history of the law of torts." Prosser, *supra* note 8, at 654. Similar trends can be observed in medical malpractice. *See* Joseph A. Mahoney, Note, *Senate Bill 640: Proposed Federal Product Liability Reform and Its Potential Effect On Pharmaceutical Cases and Punitive Damages Claims*, 36 St. Louis U. L.J. 475 (1991) (summarizing the debate over reform of punitive damages in products liability).

12. *Business Insurance* reports that "[i]n a year in which health care reform grabbed the headlines, tort reform has edged out spiraling health care costs in an annual survey of U.S. risk managers' biggest concerns. Caps on non-economic and/or punitive damages were cited as of high or above-average importance by eighty-five percent of the risk managers responding to the survey." Sara Marley, *Tort Reform Tops Concerns; Health Care Costs Slip in Ranking of Risk Managers' Major Worries*, Bus. Ins., April 18, 1994, at 1 (summarizing results of "survey . . conducted in January and February by Alexander & Alexander Services Inc.'s Government and Industry Affairs office and Radford Associates").

13. Leslie Bender calls for more research to unveil the patriarchal assumptions concealed in tort law. She notes that the feminist literature had yet to make tort law a central focus:

> Feminist legal scholarship primarily has focused on criminal laws of rape, sexual assault, battery, and defenses; statutory laws against discrimination in the workplace, education, or housing; reproductive freedom issues; combat exclusion policies in the military; family law

this nationwide empirical study, we contend that tort reformers are currently reshaping tort remedies in ways that will be contrary to women's interests.

Because women have been relatively excluded from the inner circles of legal power, their voices are rarely heard in the tort reform debate. As Lucinda Finley argues:

> Advocates for women's rights and women's health have been largely absent from the legislative debates over tort law reform. This silence is unfortunate, because legislative efforts to cut back on compensation for people injured by unsafe products can have a serious, but often overlooked, adverse impact on women.[14]

Women should know whether the legislation currently being debated in Congress will endanger their health and safety.[15]

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issues about divorce, custody, and property divisions; constitutional issues like equality, pornography, and hate speech; the development of feminist theories about identity, inclusion, difference, and community; and the relationships of feminist theories to other contemporary legal theories, like neo-pragmatism, post-modernism, critical race theories, critical legal studies, and lesbian and gay theories.

Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 Corn. L. Rev. 575, 575 (1993). After examining the impact of the tort reform movement on women's rights to recover for injuries due to mass or toxic torts, Professor Bender concludes that the real torts crisis lies in the lack of sufficient individual safety from corporate violence than in excessively large verdicts from runaway juries.

14. Lucinda M. Finley, *Tort Reform: An Important Issue for Women*, 11 Circles 10 (1993). Finley also notes that:

> Many modern product liability disasters have involved products used almost exclusively by women, often in connection with reproduction—the anti-nausea drug thalidomide, which produced horrifying birth defects; the drug DES, which causes cancer and infertility; the IUD Dalkon Shield, which was sometimes fatal and frequently caused sterilizing pelvic inflammatory disease; breast implant devices, which can cause serious auto-immune system diseases such as lupus or can permanently disfigure a woman; the acne-treatment drug accutane, which if taken during early stages of pregnancy produces serious birth defects.

Id. at 10.

15. Joan Steinman points out that empirical research needs to be done to determine whether women are in fact disparately harmed by medical products and, if so, why. Steinman states that:

> It would be interesting to know, through rigorous empirical study, whether there in fact has been a "disparate impact" on women from medical products ostensibly made for our benefit; whether corporate and scientific practices have unintentionally but disproportionately resulted in the marketing of products "for" women that injure women; whether there is even evidence of "disparate treatment," intentional, or more likely reckless, production and marketing of such products; whether and to what extent any disparate impacts upon or treatments of women derive from economic forces, from "bean counting" that predicts that the profits to be derived from the sale of a risk-bearing product will exceed the probable liabilities; and whether and to what extent any disparate impacts upon or treatments of women derive from other factors such as attitudes toward women that denigrate the importance of the injury, impairment or pain we would suffer.

Our statistical examination of national patterns of punitive damages verdicts shows that awards are subdivided into "his" and "her" tort worlds. This parallels Jesse Bernard's finding that every marital union contains two very distinct sets of experiences: "his" and "her" social worlds within marriage.[16] Professor Bernard found that husbands and wives perceived their marriages in dissimilar ways. The man, as the more powerful partner, was less likely than his spouse to be aware of marital problems. Some men learned that their marriage was in trouble only after their wives filed for divorce. Men and women bring their different social perceptions into lawmaking as well.[17] Gender differences in resources, power, and life experience may account for the fact that public policies do not sufficiently take into account the interests of women.

Karl Mannheim observed that the powerful selectively perceive and distort reality to support their self-interest.[18] Mannheim's sociology of knowledge was a method of inquiry in which the ideologies of the powerful were unmasked and demystified.[19] Similarly, Roscoe Pound's "sociological jurisprudence" emphasized the ways special interest groups shaped the law.[20] In this tradition of the sociology of knowledge, we will

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Joan E. Steinman, *A Legal Sampler: Women, Medical Care, and Mass Tort Litigation*, 68 Chi.-Kent L. Rev. 409, 413 (1992).

16. Jessie Bernard, *The Future of Marriage* (1972).

17. Robin West argues that the law is so pervaded by patriarchal assumptions that women's life experiences and values are not "reflected at any level whatsoever in contracts, torts, constitutional law, or any other field of legal doctrine." Robin West, *Jurisprudence and Gender*, 55 U. Chi. L. Rev. 1, 58 (1988) (arguing that women's troubles that are not shared by men, such as date rape, are not taken sufficiently seriously by the legal system). *See also* Herma Hill Kay, *Models of Equality*, 1985 U. Ill. L. Rev. 39 (reviewing debates among feminists about the gendered nature of the law); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955 (1984) (discussing gender bias embedded in legal assumptions).

18. Karl Mannheim, *Ideology and Utopia* 36 (1946) (originally published 1929–31 in German). Ross Cheit argues that a similar ideological one-sidedness supporting the interests of the powerful leads to a focus on personal injury cases whenever "lawsuit abuse" is discussed. The hegemonic power of the business community to define the term "abuse" leads to abusive legal strategies by corporate attorneys being ignored while individuals suing businesses are constantly denounced for seeking to exploit corporate "deep pockets." Cheit writes: "The underlying assumption seems to be that corporations do not abuse the legal system in the same way that individuals do .... [However] [b]usiness litigation involves its own forms of legal abuse." Ross E. Cheit, *Corporate Ambulance Chasers: The Charmed Life of Business Litigation*, in *Studies in Law, Politics, and Society* 119, 134 (Austin Sarat & Susan S. Silbey eds., 1991).

19. Mannheim, *supra* note 18.

20. Dean Pound believed that the soundest normative principle was to avoid special interest group arguments in order to promote laws which offer "the most complete security and effect to the whole scheme of human demands or desires ... with the least sacrifice to the scheme as a whole, the least friction, the least waste." Roscoe Pound, *Fifty Years of Jurisprudence*, 51 Harv. L. Rev. 777,

systematically examine the intersection of gender, remedies, and tort reform in order to demystify social interests which claim to represent the common good.

This Article utilizes the methodological stance that C. Wright Mills described as the "sociological imagination [which] enables us to grasp history and biography and the relations between the two within society."[21] Mills contended that social analysis must begin by differentiating between "the personal troubles of milieu" and "the public issues of social structure."[22] A public issue exists whenever a large number of individuals are experiencing the same private troubles, even though the victims may not perceive the societal roots of their troubles. He illustrated the distinction through the example of marital dissatisfaction:

> Consider marriage. Inside a marriage a man and a woman may experience personal troubles, but when the divorce rate during the first four years of marriage is 250 out of every 1,000 attempts, this is an indication of a structural issue having to do with the institutions of marriage and the family and other institutions that bear upon them.[23]

What appears on the surface to be merely personal incompatibility between two divorcing individuals is also deeply embedded in the social structure. Similarly, litigants are generally unable to perceive the societal aspects of their injury because the legal system requires that they focus almost exclusively on the facts of their individual injuries, not on the societal roots of their troubles.

Betty Friedan made a similar point in her articulation of "the problem that has no name."[24] She argued that 1950s housewives could not fully comprehend the social roots of their unhappiness because they lacked even the vocabulary necessary to identify and interpret their role strain. What women experienced as personal troubles were generally unrecognized as a product of larger social issues. Examining systematic data on the patterns of women's tort recovery against medical product

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810–11 (1938). *See also* E. K. Braybrooke, *The Sociological Jurisprudence of Roscoe Pound, in Studies in the Sociology of Law* 57 (Geoffrey Sawer ed., 1961) (discussing Pound's theory of interests).

21. C. Wright Mills, *The Sociological Imagination* 6 (1959).

22. *Id.* at 8.

23. *Id.* at 9.

24. Betty Friedan, *The Feminine Mystique* 15 (1963) (arguing that American women were suffering from an unnamed malaise due to their gender roles).

manufacturers and doctors is a first step toward linking women's "personal" troubles with their doctors to women's public health care issues.[25]

A. The Illusion of Gender-Neutrality in Tort Law

Social scientists have documented the ways that gender discrimination and sex role socialization track women and men into separate, although overlapping, social and occupational spheres.[26] An apparently biologically-based tendency for females to have superior spatial perception and fine motor control may lead women to employment in poorly paid sewing and electronics assembly jobs rather than into engineering, dentistry, or architecture.[27] The tracking of women into low-wage "pink collar" work has led to "comparable worth" laws which would require equal pay for women's work that requires equivalent skill and training to better paid jobs in male dominated fields.[28]

Many scholars argue that by not taking full account of the manifold differences between males and females, law and the courts are deeply biased against women.[29] As Supreme Court Justice Felix Frankfurter

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25. *See* Bender, *supra* note 13 (calling for research on gender impact of mass tort litigation).

26. *See generally* Judith Lorber, *Paradoxes of Gender* (1994); Margaret L. Andersen, *Thinking About Women: Sociological and Feminist Perspectives* (3d ed. 1993); Hilary M. Lips, *Women, Men and the Psychology of Power* (1981). The pervasiveness of gender inequities have been described as the result of a "non-conscious ideology" of female inferiority. Sandra L. Bem & Daryl J. Bem, *Training the Woman to Know Her Place: The Power of a Nonconscious Ideology*, in *Female Psychology: The Emerging Self* 180 (Sue Cox ed., 1976).

27. Eleanor E. Macoby & Carol N. Jacklin, *The Psychology of Sex Differences* (1974). In another example, Elaine Draper notes that "[w]omen have usually not been barred from all jobs that entail toxic risks, but only from the relatively high-paying production jobs traditionally held by men." Elaine Draper, *Fetal Exclusion Policies and Gendered Constructions of Suitable Work*, 40 Soc. Probs. 90, 94 (1993). The sexual division of labor exists not only between job categories but within a field. A "glass ceiling" blocks many women from reaching the highest rungs in a job category. Ann M. Morrison, *Working Women: Up Against a Glass Ceiling*, L.A. Times, Aug. 23, 1987, at section IV, 3. Women are the majority of school teachers but a small minority of school principals. Law schools that traditionally excluded females and other low status individuals tend to be at the top of the contemporary prestige hierarchy, and those which were women's law schools tend to track their students into the lower rungs of the profession. Michael Rustad & Thomas Koenig, *The Impact of History on Contemporary Prestige Images of Boston's Law Schools*, 24 Suffolk U. L. Rev. 621 (1990); Robert Granfield & Thomas Koenig, *Pathways into Elite Law Firms: Professional Stratification and Social Networks*, *in Research in Politics and Society* 325 (Gwen Moore & J. Allen Whitt eds., 1992).

28. *See generally* Carin Ann Clauss, *Comparable Worth—The Theory, Its Legal Foundation, and the Feasibility of Implementation*, 20 U. Mich. J.L. Ref. 7 (1986); Carol O'Donnell, *Major Theories of the Labour Market and Women's Place Within It*, 26 J. Indus. Rel. 147 (1984).

29. The Gender Bias Task Force of Texas found that:

stated: "It was a wise man who said that there is no greater inequality than the equal treatment of unequals."[30] Without consideration of the structural inequities arising out of gender roles,[31] reforms which seem neutral on their face may have unanticipated negative impacts on women.[32]

Women have been victimized in the past by "neutral" reform legislation which ignored gender differences. California's 1970 no fault divorce reform unexpectedly increased the feminization of poverty.[33]

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women experience bias through hostile or demeaning treatment from attorneys and judges, financial and logistical barriers that limit their access to courts, and self-perpetuating gender inequities within the family law system. . . . Other findings are that women face a loss of credibility through biased behaviors and attitudes at all levels of the judicial system, including in cases of sexual assault, where they are viewed as less credible than victims of other types of assault.

Bias in Judicial System Affects Both Genders, SW Newswire, Mar. 24, 1994, *available in* LEXIS, News Library, Wires File (summarizing final report, Gender Bias Task Force of Texas, 1994).

Similarly, a New York study of the courts found a pattern of "actions taken because of weight given to preconceived notions of sexual roles rather than upon a fair and unswayed appraisal of merit as to each person or situation." *New York Task Force on Women in the Courts Summary Report* 378–79 (1986) (documenting that women litigants are denied justice because of such factors as their lack of financial resources, their limited credibility, and the male perspective of the judiciary, *id.* at 384–405). Similarly, an analysis of wrongful death recoveries in the state of Washington found that women's deaths produced smaller compensatory awards than male fatalities. Jane Goodman, *Money, Sex and Death: Gender Bias in Wrongful Death Damage Awards*, 28 Law & Soc'y Rev. 263 (1991) (reporting that juries awarded males higher amounts in wrongful death actions).

30. Dennis v. United States, 339 U.S. 162, 184 (1950).

31. There is a long-standing debate in the social sciences over the degree to which gender is genetically or socially constructed. *Compare* Steven Goldberg, *Reaffirming the Obvious*, Soc'y, Sept.–Oct. 1986, at 4 *with* Eleanor E. Maccoby, *Social Development: Psychological Growth and the Parent-Child Relationship* (1980).

32. Leslie Bender states that, "in a context of gender bias, gender-neutrality just masks systematic oppressions." Leslie Bender, *Teaching Torts as if Gender Matters: Intentional Torts*, 2 Va. J. Soc. Pol'y & L. (forthcoming 1995). Another prominent feminist argues that "[t]o achieve substantive equality of outcome, it may be necessary for the law to take account of existing differences among people and consequently to deny formal legal equality." Frances Olsen, *The Sex of Law*, in *The Politics of Law: A Progressive Critique* 460 (David Kairys ed., 1990). *See also* Robin West, *supra* note 17 (contending that socially constructed injuries to women may be ignored by policy makers).

33. Because husbands are statistically more likely to be the primary family breadwinner and because women are generally awarded custody of the children, no-fault divorce hurt women and children. California's no-fault produced a 42 percent increase in the standard of living for divorced males in the first year after dissolution. Divorced women suffered a 73 percent decrease in their standard of living. Lenore J. Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* 323 (1985). Weitzman writes of California's no-fault divorce law:

[T]hese modern and enlightened reforms have had unanticipated, unintended, and unfortunate consequences. . . . [G]ender-neutral rules—rules designed to treat men and women "equally" have in practice served to deprive divorced women (especially older homemakers and mothers of young children) of the legal and financial protections that the old law provided. . . . Since a

Medical malpractice reform in Indiana also inadvertently damaged the interests of women.[34] Researchers found patterns which suggest that, although the reform was neutral on its face, women received smaller awards than men under the reform because "male work and lives are valued higher than female work and lives" by the physicians who staff the arbitration boards.[35] The failure of legislators to consider gender impacts of this legislation confirms that often, "the law fails to take seriously events which affect women's lives."[36]

B. The Historical Transformation of Women's Tort Rights

As Justice Oliver Wendell Holmes stated, "[i]n order to know what [the law] is, we must know what it has been, and what it tends to become."[37] An historical review of punitive damages verdicts awarded to women reveals a close correspondence between changing gender roles

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woman's ability to support herself is likely to be impaired during marriage, especially if she is a full-time homemaker and mother, she may not be "equal to" her former husband at the point of divorce. Rules that treat her as if she is equal simply serve to deprive her of the financial support she needs. . . . When the legal system treats men and women "equally" at divorce, it ignores the very real economic inequalities that marriage creates. It also ignores the economic inequalities between men and women in the larger society.

Id. at xi.

34. Eleanor D. Kinney et al., *Indiana's Medical Malpractice Act: Results of a Three-Year Study*, 24 Ind. L. Rev. 1275 (1991).

35. The evaluators of Indiana's medical malpractice reform reported that:

Men . . . tended to have larger awards than women, receiving nearly $105,909 on average for all closed claims compared to $78,887 for women. For paid claims, the mean payment for men was $157,709 and $114,188 for women, a highly significant difference. This difference suggests that, in practice, male work and lives are valued higher than female work and lives. Independent of malpractice, this is an extremely disturbing finding which strongly suggests that the legal system reinforces underlying social inequities.

Id. at 1288–89.

It is not surprising that women comprised sixty percent of the claimants in Indiana malpractice cases since women use health care services more than men, due to their reproductive and familial roles. Lu A. Aday et al., *Health Care in the United States: Equitable For Whom?* 104 (1980) (Table 3.4); U.S. General Accounting Office, *Medical Malpractice: Characteristics of Claims Closed in 1984* (1987) (reporting that 57% of all medical malpractice claims were filed by women).

36. Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 Harv. L. Rev. 517, 518 (1993) (arguing that tort law trivializes or simply ignores non-physical injuries to women). *See also* Heather Ruth Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 Berkeley Women's L.J. 64, 65 (1985) (urging more examination of how women's experience with the law affects their life circumstances).

37. O. W. Holmes, Jr., *The Common Law* 1 (1881).

and tort remedies.[38] Such an analysis provides insight into the complex interplay of gender, law, and society throughout American history.[39]

The history of punitive damages awarded to women illustrates the types of misconduct which create public outrage in each historical epoch.[40] By the late 1700s, exemplary damages verdicts for egregious harms were already firmly entrenched in the Anglo-American legal tradition.[41] However, during this period, the exemplary damages doctrine had little direct connection to the lives of English women.[42]

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38. But, as Leslie Bender reminds us, "[t]here is a lot of work to be done" in exploring the gendered nature of torts. Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. Legal Ed. 3, 37 (1988).

39. *See generally* Kai T. Erikson, *Wayward Puritans* (1966) (arguing in the tradition of Emile Durkheim that the stress points of a society can be identified by studying the types of acts that are considered extremely violative of the moral order).

40. Punitive damages are assessed against defendants above and beyond any compensatory damages to punish particularly egregious conduct. This remedy is designed to fulfill the social functions of punishment, deterrence of the defendant, and the general deterrence of other potential wrongdoers. *See* Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 Am. U. L. Rev. 1269, 1318–28 (1993) (surveying the functions of punitive damages); Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 Iowa L. Rev. 1, 2 n.7 (1992). Punitive damages expose and punish wrongdoing that has escaped detection by public authorities by encouraging victims and their lawyers to act as "private attorneys general." Richard A. Epstein, *Modern Products Liability Law* 177–90 (1980). *See generally* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 9 (5th ed. 1984) (discussing relationship between torts, crimes, and punitive damages).

41. Punitive damages were originally called exemplary damages. Eighteenth-century English cases required some form of malicious or intentional misconduct as the predicate for exemplary damages. The doctrine evolved into a mechanism to punish private and public oppression through "orderly legal retaliation" rather than through dueling, feuding, and other breaches of the public order. *See generally* Clarence Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1198 (1931) (describing use of remedy in punishing maliciously inflicted torts, done without just cause or excuse).

Many of these exemplary damages verdicts were to punish and deter governmental officials who misused their positions of power. For example, in Merest v. Harvey, 128 Eng. Rep. 761 (C.P. 1814), a highhanded member of the House of Lords was assessed exemplary damages for threatening to use his official powers to arrest members of a hunting party who "rebuffed" his suggestion that he join the hunt. *See also* Leith v. Pope, 96 Eng. Rep. 777, 777–78 (K.B. 1779) (awarding exemplary damages to victim of malicious prosecution); Sharpe v. Brice, 96 Eng. Rep. 557, 557 (K.B. 1774) (awarding exemplary damages to victim of malicious prosecution); Benson v. Frederick, 97 Eng. Rep. 1130, 1130 (K.B. 1766) (assessing exemplary damages against militia colonel for whipping common soldier out of personal dislike); Beardmore v. Carrington, 95 Eng. Rep. 790, 793–94 (K.B. 1764) (awarding exemplary damages for illegal search and false imprisonment); Wilkes v. Wood, 98 Eng. Rep. 489 (K.B. 1763); and Huckle v. Money, 95 Eng. Rep. 768 (K.B. 1763) (assessing exemplary damages arising out of government oppression of the publishers of a newspaper critical of the King).

42. No systematic investigation of gender impacts of the English common law is possible because the available court reports provide so little information. One legal historian notes the limitations of

Prosser writes that "the wife's legal identity merged with that of her husband . . . . [A]t common law the husband and wife were one, and the husband was that one."[43] Cases rarely involved female plaintiffs[44] because, as Nadine Taub and Elizabeth M. Schneider note, "[u]nder English common law, . . . once married, [women] were reduced to legal nonentities, unable to sell, sue, or contract without the approval of their husbands or other male relatives."[45]

The natural subordination of women to men was accepted doctrine in eighteenth century England. Tort verdicts awarded to redress women's injuries were generally vicarious because the primary injury was to the honor of the patriarchal family. Males were awarded exemplary damages for having suffered the mortification caused when rival males seduced their female servants, debauched their daughters, or formed sexual attachments with their wives.[46] A female had no standing to sue

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research into early English common law: "To ransack the Year Books for large statements of doctrine made in irrelevant circumstances by judges barely conscious of their significance is neither a pleasing nor a profitable task." C. H. S. Fifoot, *History and Sources of the Common Law: Tort and Contract* 189 (1949).

43. Keeton et al., *supra* note 40, at 901–02 (noting that the merged legal identity of husband and wife prohibited one spouse from filing a tort action against the other).

44. Only in rare instances were women the direct beneficiaries of English exemplary damages. In one unusual case, a court awarded exemplary damages to a female pauper whose head was maliciously shaved by the employee of a "poor house." Forde v. Skinner, 172 Eng. Rep. 687, 687 (1830).

45. Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law in The Politics of Law: A Progressive Critique* 151, 153 (David Kairys ed., 1990).

46. Alienation of affection was a cause of action generally filed by a married male to punish another male for willfully and maliciously depriving him of his marital relationship. Frequently, the defendants were wealthy males who committed adultery with the wives of poor men. The closely allied action of criminal conversation was to compensate for the "[d]efilment of the marriage bed, sexual intercourse of an outsider with husband or wife, or a breaking down of the covenant of fidelity." *Black's Law Dictionary* (5th ed. 1979). The California Supreme Court stated the policy behind recognizing the tort of criminal conversation:

> The foundation of the husband's right of action is the wrong done him by the defendant in violating his personal rights. . . . Any act of another by which he is deprived of this right constitutes a personal wrong . . . . Her sexual intercourse with another is an invasion of his rights, and it is immaterial whether this invasion is accomplished by force or by the consent of the wife. As the right belongs to the husband, it is no defense to his action for redress that its violation was by the consent or procurement of the wife, for she is not competent to give such consent.

Bedan v. Turney, 99 Cal. 649, 653 (1893).

Other examples of substantial awards for alienation of affection and/or criminal conversations include Audibert v. Michaud, 111 A. 305 (Me. 1920) (imposing $7000 award against a defendant with assets of $150,000 for criminal conversation); Jowett v. Wallace, 92 A. 321 (Me. 1914) (awarding $3500 in combined compensatory and punitive damages for criminal conversation and alienation of affection); Lewellen v. Haynie, 25 S.W.2d 499 (Mo. Ct. App. 1930) (assessing $1000

for her own seduction.[47] The tort of seduction of a female dependent did little to help women.[48] Seduction was viewed by common law courts as the functional equivalent of a trespass against family prerogatives.[49]

C. Punitive Damages in the United States

The United States acquired exemplary damages as part of its English common law heritage.[50] A nineteenth century commentator reported that these awards were:

> justified by the terms "exemplary damages," "vindictive damages," "smart-money," and the like, not infrequently used by judges, but seldom defined. But taken in the connection in which these terms have been used, they seem to be intended to designate in general those damages . . . for mental anguish, or personal indignity and disgrace . . . .[51]

Early American punitive damages cases were frequently premised upon extreme oppression, brutality, or insult during the infliction of a wrong.[52]

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punitive damages against wealthy landowner for criminal conversation with the plaintiff's wife), *abrogated by* Thomas v. Siddiqui, 869 S.W. 2d 740, 742 (1994) (abolishing common law tort of criminal conversation).

47. The court in Tullidge v. Wade, 95 Eng. Rep. 909 (K.B. 1769), went so far as to state that consent was irrelevant in a seduction case, just as the wife's consent was irrelevant in criminal conversation cases.

48. Charles T. McCormick, *Handbook of the Law of Damages* 405 (1935).

49. Thomas Street, 1 *Foundation of Legal Liability* 268, 269 (1906).

50. In the first reported American punitive damages case, Genay v. Norris, 1 S.C.L. (1 Bay) 6 (1784), the South Carolina Supreme Court upheld a punitive damages award against a physician. The plaintiff and defendant were both intoxicated and prepared to settle a quarrel with dueling pistols. After the defendant proposed that the disputants drink a reconciliation toast, he secretly spiked the plaintiff's wine glass with a large dose of cantharides causing him "extreme and excruciating pain." The court instructed the jury that "a very serious injury to the plaintiff entitled him to very exemplary damages, especially, from a professional character, who could not plead ignorance of the operation and powerful effects of this medicine." *Id.*

51. Editor, *The Rule of Damages in Actions in Action Ex Delicto*, 9 Law Rep. 529, 535 (1847).

52. *See, e.g.*, Wm. L. Murfree, Sr., *Exemplary Damages*, 12 The Cent. L.J. 529 (Wm. L. Murfree, Jr., Ed. 1881) (categorizing exemplary damages cases into malicious injuries affecting the plaintiff, his domestic relations, his reputational interest, his property interests, and his liberty interests). For example, the court in Western Union Tel. Co. v. Thompson, 144 F. 578 (1906), explained that

> Sometimes the jury, for the good of society, when some outrageous lawlessness is committed, may award not only compensation to a party, but may go further for the benefit of the public and say to the law-breakers: "I will sting you, and put a little more on you. I will chastise you and make you smart; and, although the injured party has not been damaged the whole amount, I will give you the additional sum."

Id. at 586–87.

The first recorded awarding of punitive damages to a female in the United States was in *Coryell v. Colobough*,[53] a breach of promise to marry case. The jury was instructed "not to estimate the damage by any particular proof of suffering or actual loss; but to give damage for example's sake, to prevent such offenses in the future."[54] Nineteenth century and early twentieth century U.S. juries awarded punitive damages to females who had been victimized by intentional torts such as assault[55] and battery,[56] and seduction.[57] Pregnant women received

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The remedy grew in importance with the increased concentration of wealth in industrializing America. An editor of an 1852 American Law Journal article opined:

> the great increase of wealth and its gradual accumulation in a few hands . . . [have] necessarily introduced a corresponding change in the effect of judicial proceedings . . . . [W]hile the amount of wrong caused by an unlawful act remains very much the same, the ease, at least among the richer classes, with which the compensation can be made, and the very trifling expense of a lawsuit, have deprived the latter of that vindictive character it once had, and rendered the former a mere question of profit and loss . . . . To seduce a man's wife . . . would then have [a] market value, and the only question to an offender as to how often the process should be repeated, would be how far he could afford it.

Comment, *Vindictive Damages*, 4 Am. L.J. 61, 74–76 (1852).

53. 1 N.J.L. 90 (1791).

54. *Id.* at 91.

55. *See, e.g.*, Campbell v. Crutcher, 224 S.W. 115, 116–18 (Mo. 1920) (upholding $1000 punitive damages against defendant whose assault on woman caused her to suffer a nervous breakdown); Flynn v. St. Louis S.W. Ry. Co., 190 S.W. 371, 371–72 (Mo. Ct. App. 1917) (upholding $1500 punitive damages award against conductor found guilty of fondling female passengers' breasts). Not all courts afforded women relief for sexual assault. Patriarchal moral judgments often kept women plaintiffs from collecting damages. In Palmer v. Brown, 123 Ill. App. 584, 585 (1905) the appellate court reversed an exemplary damages award in favor of a female observing:

> It may fairly be presumed that [the plaintiff] had acquired the knowledge, experience and moral training ordinarily possessed by women of her years, education and social position. She therefore must have well understood the gross impropriety and immorality of her conduct, as well as the natural propensities and inclinations of the opposite sex. She was not despoiled of her virtue by artifice or intimidation, nor by the promise or expectation of marriage.

Id. at 591.

56. The defendant in Campbell v. Crutcher, 224 S.W. 115 (Mo. App. 1920), entered the home of a woman and struck her with a hammer and choked her, causing severe bruising on her upper body. In Rogers v. Foote, 84 A. 643 (Me. 1902), a male defendant was assessed $385.25 in joint compensatory and punitive damages for severely injuring a woman by kicking her in the side. In Birmingham Macaroni Co. v. Tadrick, 88 So. 858 (Ala. 1921), a female plaintiff was awarded $3000 in punitive damages for the indignity of being brutalized by her employer.

57. Thomas M. Cooley, 1 *Cooley on Torts* 492 (3d ed. 1906). An Iowa court defined seduction as using an artifice or some other fraudulent means to induce a woman to "submit to unlawful sexual intercourse." Baird v. Biehner, 42 N.W. 454 (Iowa 1889).

Jane Larson examines the doctrinal and historical basis of early American seduction cases. She challenges the conventional view that these torts only protected and reinforced the patriarchal order, without advancing the women's interests. She writes:

punitive damages awards as redress for attacks resulting in reproductive injuries.[58] Females were also awarded punitive damages for abuse sustained in the intimate environment of the family.[59] Young women and children recovered punitive damages for what today would be considered child abuse.[60]

Class inequality was a common feature in breach of promise to marry verdicts.[61] In *Luther v. Shaw*,[62] a "factory girl" was awarded $500 in

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> An understanding of seduction in its shifting social and historical contexts should largely assuage such fears [that the tort of seduction was purely a product of Victorian repression] . . . of women's sexual passion and independence and the suffocating paternalist regime of sexual regulation that protected only those women who presented themselves as innocent, helpless victims.

Jane E. Larson, *Women Understand So Little, They Call My Good Nature 'Deceit': A Feminist Rethinking of Seduction*, 93 Colum. L. Rev. 374, 381 (1993).

Loss of services was often mentioned as the *sine qua non* of seduction. In Berghammer v. Mayer, 207 N.W. 289 (Wis. 1926), the father of a 15-year-old girl received a $3000 punitive damages award to compensate for her seduction. The court mentioned that the seducer had not only ravished the girl but also made her pregnant, thus denying her father her services. In Reutkemeier v. Nolte, 161 N.W. 290 (Iowa 1917), a $6000 punitive damages verdict was awarded to the father of a 14-year-old girl who was seduced and impregnated by the defendant. The father had the burden of proving loss of his daughter's services due to her pregnancy.

58. A defendant paid punitive damages to a woman who suffered a miscarriage due to a brutal beating in McGee v. Vanover, 147 S.W. 742 (Ky. 1912). A pregnant woman received punitive damages from a defendant who assaulted her by pulling her through a door in Thomson v. Portland Hotel Co., 239 S.W. 1090 (Mo. App. 1922). In Murphy v. Pettitt, 251 S.W. 179 (Ky. Ct. App. 1923), the wife of a farm tenant was awarded $700 in punitive damages when she suffered a miscarriage as a result of being struck repeatedly by a wealthy landowner in a personal property dispute.

59. *See, e.g.*, Redfield v. Redfield, 39 N.W. 688 (Iowa 1888) (assessing father-in-law punitive damages for beating and driving his daughter-in-law from the home into a raging snowstorm); Sturgeon v. Sturgeon, 30 N.E. 805 (Ind. Ct. App. 1892) (awarding $1000 punitive damages to woman choked by her father-in-law).

60. A father paid exemplary damages for abusing his infant daughter in Nyman v. Lynde, 101 N.W. 163 (Minn. 1904). *See also* August v. Finnerty, 30 Ohio C.C. 433 (1908) (awarding punitive damages to punish male who threw teenage girl down a flight of stairs); Dix v. Martin, 157 S.W. 133 (Mo. Ct. App. 1913) (awarding punitive damages to 7-year-old girl who was tied up and severely beaten).

61. Many of the seduction cases featured wealthy males who seduced young women. The relatively poor plaintiff in Drobnich v. Bach, 198 N.W. 669 (Minn. 1924) received a $9000 award for a rich defendant's breach of his promise to marry her. The court found that the defendant's promise to marry was a deception. His "evil motive" warranting punitive damages was the satisfaction of his sexual desires without paying the price of marriage. In Goodal v. Thurman, 38 Tenn. (1 Head) 209 (1858), a $5000 award composed of both compensatory and punitive damages was handed down against a wealthy male. The defendant in Owens v. Fanning, 205 S.W. 69 (Mo. Ct. App. 1918), was assessed $1416 in punitive damages for seducing a 17-year-old girl of previously "chaste" character. The court mentioned that the award was warranted because of the defendant's considerable wealth and social status. *Id.* at 72.

punitive damages against the son of the firm's owner who seduced her under the pretense of marriage.[63] Another Wisconsin court awarded $1500 in exemplary damages against a wealthy man for "darken[ing] [the female plaintiff's] life" by failing to honor his promise to marry her.[64]

D. Nineteenth Century Expansion to Corporate Wrongdoing

As the economic and structural base of nineteenth century America evolved,[65] so did tort remedies. Women continued to receive punitive damages as redress for intentionally inflicted injuries in the late 1800s. However, with the rise of large corporations, the defendant was increasingly likely to be a firm whose agents had caused harm rather than an arrogant individual. Sexual harassment and assaults of women by the employees of common carriers were a frequent source of punitive damages verdicts by the late 1800s.[66]

Occasionally, victims of racism were awarded punitive damages. For example, in Kohut v. Boguslavsky, 239 P. 876 (Colo. 1925), a black woman and her eleven-year-old daughter were physically evicted in mid-winter from a parish house. The townspeople disguised themselves, broke into the parish house, and dragged the females into the street while administering a severe beating. The daughter was bed-ridden three and a half weeks with bruises all over her body, temporary injuries to her spine, and nervous shock. The plaintiffs were awarded $10,000 exemplary damages and $5000 actual damages. However, the Colorado Supreme Court reversed the award citing "evidence of passion or prejudice" by the jury. *Id.* at 877.

62. 147 N.W. 17 (Wis. 1914).

63. *Id.*

64. Klitzke v. Davis, 179 N.W. 586, 588 (Wis. 1920).

65. The nineteenth century was a period of rapid industrial and economic expansion. W. W. Rostow, *The Stages of Economic Growth* (1960).

66. *See* R.E.H., *Annotation, Punitive or Exemplary Damages for Assault*, 16 A.L.R. 771, 843–56 (1922) (categorizing oppressive assault cases into seven categories including assaults on women or on feeble or invalid persons). The most frequently named defendants were railroads and streetcar companies. In Missouri Pac. Ry. Co. v. Martino, 18 S.W. 1066, 1066 (Tex 1892), a $2020 punitive damages award was handed down against a railway conductor who struck and threatened a female passenger. In Pine Bluff & A.R. Ry. Co. v. Washington, 172 S.W. 872 (Ark. 1915) a woman passenger received $2000 in punitive damages after a railroad brakeman deliberately shot her in the arm. The court observed that because it was the brakeman's duty to look after the comfort and safety of the passengers, the public trust had been breached, thus warranting exemplary damages. *Id.* at 874. *See also* Chicago Consol. Traction Co. v. Mahoney, 82 N.E. 868, 869–72 (Ill. 1907) (upholding $1250 punitive damages award against conductor for using unnecessary force in ejecting female passenger); Flynn v. St. Louis S.W. Ry. Co., 190 S.W. 371, 371–72 (Mo. Ct. App. 1916) (upholding $1500 punitive damages award against conductor for fondling female passengers' breasts and making other improper sexual advances); Craker v. Chicago & N.W. Ry. Co., 36 Wis. 657 (1875) (upholding punitive damages award against conductor for fondling a female passenger).

As America industrialized, men and women were exposed to new dangers created by the emergent forces of production such as national railroads, canals, public utilities, and assembly-line factories.[67] When mishandled, industrial technologies caused accidents of unprecedented proportions.[68] The negligence paradigm gradually evolved to provide remedies for the casualties of the new industrial technologies.[69] By century's end, the negligence standard had triumphed in every jurisdiction.[70] However, judges created and imported tort defenses and

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67. The popular mythology is that American women in the 1800s stayed home, while their husbands worked in the factories. In fact, the early American textile industry utilized women as 75% of their labor force. In Lowell, Massachusetts, women worked an average of 13 hours a day, including 8 hours on Saturday. Women textile workers were paid only half the salary of their male counterparts. Women workers were housed in boarding houses with strict rules to ensure their moral behavior. All supervisory positions were held by males. *The Lowell Offering* (Benita Eisler ed., 1977); Mary H. Blewett, *Men, Women and Work: Class, Gender, and Protest in the New England Shoe Industry, 1780–1910* (1988) (summarizing history of working class women in the New England shoe industry); *See generally* Thomas Dublin, *Women at Work* (1979). An unknown and perhaps unknowable number of women were injured or killed in workplace accidents. The most famous example is the Triangle Shirtwaist Company fire of March 25, 1911 in New York City in which hundreds of immigrant women workers were burned to death as fire swept the factory. They could not escape because the managers had locked the exit doors to keep them at their work stations. Chris Llewellyn, *Fragments From the Fire: The Triangle Shirtwaist Company Fire of March 25, 1911* (1987).

Alice Hamilton's classic study of industrial workplace hazards identified gender-linked risks. For example, women who handled radium for watch dials developed cancer of the mouth and throat many times more often than comparable populations. Alice Hamilton, *Exploring the Dangerous Trades: The Autobiography of Alice Hamilton, M.D.* (1943). *See also* Alice Hamilton, *Hamilton and Hardy's Industrial Toxicology* (1983) (employing industrial toxicology to study workplace injuries of both sexes).

68. For example, by the first decades of the nineteenth century, boiler explosions of high pressure steam engines were killing scores of people. As Robert Lauer wrote:

> When high-pressure engines began to be used, problems quickly developed. The engines were subject to boiler explosions, and that made them hazardous to the people using, and working around, the boats. By the middle of 1817, four explosions had taken five lives in the East and twenty-five more lives on the Ohio and Mississippi rivers. In 1824, a boiler burst in New York harbor, killing thirteen people, and injuring many more.

Robert Lauer, *Perspectives on Social Change* 174 (4th ed. 1991). Workers injured by the new technologies were unlikely to find redress in the courts.

69. The first judicial articulation of negligence law was the 1850 case of Brown v. Kendall, 60 Mass. (6 Cush.) 292, 295–96 (1850) in which a Massachusetts court held "that there was no liability in the absence of some wrongful intent or negligence." Keeton et al., *supra* note 40, at 163. As the paradigm of negligence matured, common law barriers to tort recovery were gradually displaced. Rabin describes the rise of negligence:

> [T]he no-liability principles—immunities, privileges and no-duty considerations imported from other conceptual systems (property, contract and such)—retreated like a melting glacier in a hostile environment, before the successive onslaughts of fault and, later, strict liability rules.

Robert Rabin, *Perspectives on Tort Law* 68 (2d ed. 1983).

immunities from England which served as a brake on expanded corporate liability.[71]

Punitive damages were virtually unknown outside of the field of intentional torts in nineteenth century America. The vast majority of jurisdictions required malice or some other misconduct which went beyond gross negligence to support punitive damages.[72] Punitive damages in medical malpractice did not develop because of the difficulty plaintiffs had in proving that they had been maliciously injured by their physician.[73]

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70. Keeton et al., *supra* note 40, at 163; *See also* Percy H. Winfield, *The History of Negligence in the Law of Torts*, 42 L.Q. Rev. 184, 185 (1926). Robert Keeton argues that appellate courts were the chief agents of the liberalization of tort law during this period. Robert Keeton, *Venturing to Do Justice* 3-53 (1969).

71. Lawrence M. Friedman, *A History of American Law* 409–27 (1973). *See also* Wex S. Malone, *The Formative Era of Contributory Negligence*, 41 Ill. L. Rev. 151 (1946) (tracing importation of doctrine of contributory negligence from England to bar recovery to plaintiffs partially at fault for injury). The fellow servant rule made the employer immune from workplace injuries when a worker was injured by a co-worker. Common law judges eroded the fellow servant rule with a series of exceptions. *See* Farwell v. Boston & Worcester R.R. Corp., 45 Mass (4 Met.) 49, 57 (1842); Friedman, *supra* at 412 (arguing that assumption of risk and fellow servant defenses protected industry); Morton J. Horwitz, *The Transformation of American Law: 1780–1860*, at 99–101 (1977) (maintaining that tort defenses were subsidies to industry). *But see* Gary Schwartz, *Tort Law and the Economics in Nineteenth-Century America: A Reinterpretation*, 90 Yale L.J. 1717 (1981) (finding no support for subsidy thesis through empirical study of 19th century personal injury cases in New Hampshire and California).

Friedman writes that the negligence defenses of nineteenth and early twentieth century America had a "sinister cast in cases of injured workmen; miners, railroad men, and factory operatives could be said to assume the ordinary risks of employment merely by accepting their jobs. Assumption of risk developed hand in hand with the fellow-servant rule." Friedman, *supra* at 413.

72. Early American cases rarely imposed punitive damages for gross negligence except in products liability or medical products cases where a defendant's lack of due care threatened the public safety or order. In Fleet v. Hollenkemp, 52 Ky. (13 B. Mon.) 219 (1852), a plaintiff became ill after ingesting a tea prescribed by the attending physician and concocted by a drug store. Cantharides had accidentally been mixed with the snake root and Peruvian bark. *Id.* at 221. The court found the drug store agent to be "guilty of inexcusable negligence in compounding and putting up the medicine." *Id.* at 222. The court permitted the award to stand because it fell within

> a class of personal injuries . . . including injuries to a person's health, business and property, caused by indirect means, unattended with force, and for redress of which the remedy is by an action upon the case, and not by the action of trespass, for which the jury may give exemplary damages . . . .

Id. at 225. The traditional standard for the imposition of punitive damages required "actual malice" in the sense of ill will or fraud or reckless indifference to the consequences. McCormick, *supra* note 48, at 431.

73. In early medical malpractice cases, punitive damages were unavailable unless the plaintiff could prove malice even if the care was grossly substandard. Hyatt v. Adams, 16 Mich. 180, 198–200 (1867) (superseded by statute). In Braunberger v. Cleis, 4 Am. L. Reg. 587, 594 (Pa. 1964), the court held that the punitive damages remedy was not proper unless a plaintiff could prove that his surgeon had maliciously set out to injure him. The court stated that if the physician "caused

E. The Twentieth Century Liberalization of Tort Law

Many traditional barriers to women's tort recovery have eroded since World War II.[74] By 1970, a dozen courts had rejected spousal immunity.[75] New torts such as wrongful life[76] and wrongful birth[77] have

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the death of the deceased, it was not intentional, but the result of ignorance and unskillfulness, and therefore the jury should be merciful while they do justice." *Id.* at 594. However, in the truly egregious case of Brooke v. Clark, 57 Tex. 105, 113–14 (1882), a Texas court found exemplary damages properly assessed for gross negligence where a physician carelessly tied off a newborn's penis, thinking it was the umbilical cord.

Punitive damages against physicians for gross negligence grew slowly. In Pratt v. Davis, 118 Ill. App. 161, *aff'd*, 79 N.E. 562 (Ill. 1905), for example, a doctor was sued for allegedly removing a patient's uterus without her consent. Exemplary damages were held to be appropriate despite the failure of the plaintiff to show that the doctor was motivated by malice or the desire to intentionally injure her. *See also* Rennewanz v. Dean, 229 P. 372, 375 (Or. 1924); Morrell v. Lalonde, 120 A. 435, 437 (R.I.) (assessing punitive damages against surgeons found guilty of malpractice), *appeal dismissed*, 264 U.S. 572 (1923). Our empirical study shows that the takeoff for punitive damages in medical malpractice began in the late 1960s and early 1970s.

74. Some defendants have classically possessed an immunity from tort lawsuits, even if they were at fault. For example, sovereign immunity was premised upon the legal principle that the "King could do no wrong." But, beginning in the 1950s, immunity after immunity was eroded or was eliminated. The Federal Torts Claim Act of 1946 waived the government's immunity from many, but not all tort actions. 28 U.S.C. §§ 1346, 2674–2680 (1988). Many state legislatures enacted parallel provisions making their states liable for a variety of injuries. By the early 1970s, a chorus of courts was further eroding governmental immunity. *See, e.g.*, Proffitt v. State, 482 P.2d 965 (Colo. 1971).

Spousal, parent-child, and charitable immunities significantly restricted women's tort remedies. At common law, intra-family immunities were formidable obstacles for recovery. In reversing the doctrine of parental immunity, the Ohio Supreme Court summarized the traditional justification for the doctrine as preserving domestic peace, parental control, preventing depletion of family funds, and preventing fraud and collusion. Kirchner v. Crystal, 474 N.E.2d 275 (Ohio 1984). These policy reasons have increasingly been viewed as rationalizations protecting abusive males. Beginning in the 1960s, the clear trend has been reversal or restriction of the family immunities. By 1970, "about a dozen courts had rejected any universal principle of immunity between spouses." Keeton et al., *supra* note 40, at 903. And by 1980, another dozen states had eliminated spousal immunity. *Id.* Similar but less dramatic reversals can be seen in the erosion of parent-child immunity. *Id.* at 904–07. *See also* Gibson v. Gibson, 479 P.2d 648 (Cal. 1971).

75. Keeton et al., *supra* note 40, at 902.

76. Wrongful life is a tort action brought by the child to compensate for its very existence. These actions arise from the failure of medical providers to save a lifetime of care and support by recognizing genetic disorders early enough to avoid birth. Courts have declined to recognize this action. *See, e.g.*, Becker v. Schwartz, 386 N.E.2d 807, 816–19 (N.Y. 1978) (finding no case permitting recovery for wrongful life).

77. Wrongful birth is an action brought by a parent on the grounds that a child's impairment was caused by a health care provider's failure to prevent birth. The physician's negligence lies in failing to diagnose a genetic defect, which places a significant strain on the family unit. A typical case of wrongful birth occurred when a woman became pregnant after a bilateral tubal cauterization in Smith v. Abramow, No. Soc. 86026 (Cal. Super. Ct., L.A. County April 29, 1991). *See also* Turpin v. Sortini, 643 P.2d 954 (Cal. 1982) (permitting recovery of special damages for extraordinary expenses for impaired life due to failure of physician to diagnose hereditary condition of deafness).

been conceived, as have preconception and prenatal remedies.[78] In nineteenth century America, emotional injury from insults, indignities, and degradation had gone largely uncompensated.[79] Increasingly, emotional injuries are viewed as legally protectable.[80] Relational torts compensate women for the distress they experience when a family member is hurt.[81] Social scientists have long suggested that mental distress is gender-linked, making expanded recovery rights for emotional harm arising from injuries to loved ones of particular importance to women.[82]

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78. Oliver Wendell Holmes, Jr. wrote the seminal opinion rejecting recovery for prenatal injuries in Dietrich v. Northampton, 138 Mass. 14 (1884). In *Dietrich*, Justice Holmes denied recovery because the fetus "was a part of the mother at the time of the injury, [and] any damage to it which was not too remote to be recovered for at all was recoverable by her . . . ." *Id.* at 17. Other courts have also denied recovery for injuries sustained by a fetus which was born alive. Stallman v. Youngquist, 531 N.E.2d 355 (Ill. 1988).

The path of the law has been to expand prenatal tort recovery. Beginning in the 1950s courts recognized causes of action under wrongful death statutes for the death of an infant who, while in a viable condition, was injured by a third party. *See, e.g.*, Rodriquez v. Patti, 114 N.E.2d 721 (Ill. 1953) (recognizing common law action for an infant injured during fetal development); Monusko v. Postle, 437 N.W.2d 367 (Mich. Ct. App. 1989) (holding that a child born with profound retardation as the result of exposure to rubella syndrome had cause of action against medical care provider who failed to test or immunize her mother).

79. Courts only gradually recognized torts protecting peace of mind. *See* Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L. Rev. 1033 (1936); *See generally* Keeton et al., *supra* note 40, at 54–66.

80. New tort remedies such as recovery for the fear of future damages have been developed in recent years. *See* D. Faulkner & K. Woods, *Fear of Future Disability: An Element of Damages in a Personal Injury Action*, 7 W. New Eng. L. Rev. 865 (1985); Joseph H. King, *Causation, Variation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 Yale L.J. 1355 (1981).

81. Although emotional pain is shared by both sexes, women's greater relational orientation may make them more vulnerable to this harm. Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (1982) (maintaining that females are more directed toward others' welfare). Gilligan finds that men tend to see moral dilemmas as conflicts between abstract rights while women analyze morality through "a mode of thinking that is contextual and narrative rather than formal and abstract." *Id.* at 19.

82. Studies show that women suffer more psychological strain than males and that their stress is more likely to be caused by undesirable incidents affecting "someone close to them than is the case among men." Charles E. Hurst, *Social Inequality: Forms, Causes and Consequences* 131 (1992) (positing that sex differences may be based in differing social roles); *See, e.g.*, Ronald C. Kessler & Jane D. McLeod, *Sex Differences in Vulnerability to Undesirable Life Events*, 49 Am. Soc. Rev. 620 (1984); Ronald C. Kessler & James A. McRae, Jr., *Trends in the Relationship Between Sex and Psychological Distress: 1957–1976*, 46 Am. Soc. Rev. 443 (1981); Ronald C. Kessler & James A. McRae, Jr., *Trends in the Relationship Between Sex and Attempted Suicide*, 94 J. Health & Soc. Behav. 98 (1983) (finding relationship between gender and psychological distress over time).

In the nineteenth century, courts denied recovery for harm from fright unless there was some physical impact. Martha Chamallas with Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 Mich. L. Rev. 814 (1990). This doctrinal restriction effectively barred recovery for

The market share liability doctrine was judicially created to enable a class of women to receive compensation for injuries from DES, an anti-nausea drug.[83] In *Sindell v. Abbott Laboratories*,[84] the plaintiff was unable to determine which defendant sold her mother DES. Traditional tort doctrine would bar the plaintiff's action because of the failure to show cause-in-fact. The *Sindell* court's novel solution was to apportion liability among DES manufacturers based upon each firm's share of the market.[85]

The punitive damages remedy has been extended to new categories of victimization arising out of violent assaults,[86] sexual harassment,[87] and sexual fraud.[88] Recently, punitive damages have been awarded to female victims of familial sexual abuse[89] and of acquaintance rape.[90]

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emotional injuries tied to women's life experience. *Id.* at 841–51. Chamallas and Kerber conclude that: "[e]motional harm has been distorted by gendering it female." *Id.* at 864.

Gradually the strictures on emotional injuries were expanded. Dillon v. Legg, 441 P.2d 912 (Cal. 1968). *Dillon* permitted a mother to collect for emotional damages suffered when she saw her child killed by an automobile even though she was outside the zone of danger. *Id.*

83. DES was a synthetic hormone marketed by about 300 companies from 1940 to 1971. The drug was prescribed to millions of pregnant women to counter nausea. The medication caused uterine cancer and other serious health problems in DES daughters. A lesser number of claims have been filed on behalf of DES sons and grandchildren. The FDA banned the drug in 1971. Cerisse Anderson, *Jurisdiction Extended to Calif. DES Firm: Court Affirms Using Long-Arm Statute Despite Absence of Sales in New York*, 212 N.Y. L.J. 1 (Aug. 19, 1994).

84. 607 P.2d 924 (Cal.), *cert. denied*, 449 U.S. 912 (1980).

85. *Id.* at 937.

86. An ex-wife obtained $110,000 in punitive damages from her ex-husband as the result of beatings which left her disabled in Caron v. Caron, 577 A.2d 1178 (Me. 1990). The plaintiff was so intimidated by her ex-husband's beatings that she was afraid to leave her house. She suffered flashbacks to the assault, nightmares, and physical symptoms of stress. The award was premised upon the theory of post-traumatic stress syndrome and upon brutality to her child.

87. In recent years, women employees have increasingly turned to punitive damages to redress job-related harassment. In Laughinghouse v. Risser, 786 F. Supp. 920 (D. Kan. 1992), a plaintiff received $10,000 for the tort of outrage for sexual advances, sexual harassment, and other abusive conduct at work. In Valdez v. Church's Fried Chicken, Inc., 683 F. Supp. 596 (W.D. Tex. 1988), an employee received a $25,000 punitive award from her employer for sexual assault. *See also* Pease v. Alford Photo Indus., Inc., 667 F. Supp. 1188 (W.D. Tenn. 1987) (assessing punitive damages based upon outrageous sexual harassment). A $50,000 punitive damages award was handed down against an employer arising out of her supervisor's 4-year campaign of sexual harassment in Shrout v. Black Clawson Co., 689 F. Supp. 774 (S.D. Ohio 1988).

88. See Larson, *supra* note 57 (advocating tort remedies for "sexual fraud").

89. Laurie Marie M. v. Jeffrey T. M., 559 N.Y.S.2d 336 (App. Div. 1990), *aff'd*, 575 N.E.2d 393 (1991) (reducing $275,000 punitive damages award to $100,000 in case where defendant was charged with sexually touching 11-year-old stepdaughter); Parsons v. McRoberts, 463 N.E.2d 1049 (Ill. Ct. App. 1984) (assessing $12,000 punitive damages award against stepfather for forcing stepdaughter to commit sexual acts with him). *See generally* Jocelyn B. Lamm, Note, *Easing Access to the Courts for Incest Victims: Toward an Equitable Application of the Delayed Discovery Rule*, 100 Yale L.J. 2189 (1991).

Increasingly, women are demanding further expansion of tort remedies for redress of injuries due to pornography,[91] sexual violence, abuse,[92] and harassment.[93]

Over the past thirty years, the punitive damages remedy has been expanded to punish and deter recklessly indifferent product manufacturers[94] and health care providers.[95] Previously, punitive damages awards were generally based on malicious malfeasance.[96]

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90. In Deborah S. v. Diorio, 583 N.Y.S.2d 872 (Civ. Ct., N.Y. City 1992), *aff'd as modified*, 612 N.Y.S.2d 542 (N.Y. App. Div. 1994), the victim of an acquaintance rape received $200,000 in punitive damages. The *Diorio* court found the defendant to have undergone a sudden "Dr. Jekyll-Mr. Hyde transformation" after being sexually rebuffed. This reckless behavior justified the large punitive damages award. *Id.* at 878–79.

91. Marianne Wesson, *Girls Should Bring Lawsuits Everywhere . . . Nothing Will be Corrupted: Pornography as Speech and Product*, 60 U. Chi. L. Rev. 845 (1993) (advocating civil remedy for harms causally connected to pornography); *See also* Catharine A. MacKinnon, *Feminism Unmodified* 175–95, 200–05 (1987) (urging damages for pornography).

92. For example, in Marlene F. v. Affiliated Psych. Med. Clinic, Inc., 770 P.2d 278, 285–88 (Cal. 1989), a psychotherapist was found liable to the mother of a child he molested for negligent infliction of emotional distress.

93. One commentator would extend the reach of tort remedies to punish males who harass females in street encounters. *See* Bowman, *supra* note 36.

94. A shift from negligence to strict liability in products liability has swept the nation since the mid-1960s. Justice Roger Traynor's concurring opinion in Escola v. Coca-Cola Bottling Co. of Fresno, 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring) was the first judicial recognition of strict products liability. Frank J. Vandall, *Strict Liability* 8–9 (1989). Section 402A of the Restatement (Second) of Torts (1965), which adopted Traynor's theory of strict liability, became accepted law in the majority of jurisdictions by the mid-1970s. The doctrine is still being hotly debated. *See generally Tort Law and the Public Interest*, *supra* note 7 (discussing different views on the desirability of strict liability).

95. Extended professional liability has empowered women, especially in informed consent cases. Informed consent requires the physician to provide information on the type of treatment and the risks involved. This doctrine is particularly important to women, because studies have shown that male doctors tend to communicate poorly with female patients. *See* Charlotte F. Muller, *Health Care and Gender* (1990); Diana Scully, *Men Who Control Women's Health* (1980); Alexandra D. Todd, *Intimate Adversaries: Cultural Conflict Between Doctors and Women Patients* (1989); Candace West, *Routine Complications: Trouble with Talk Between Doctors and Patients* (1984).

96. In Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960), the New Jersey Supreme Court held both the manufacturer and the dealer liable for selling an automobile with a dangerous steering mechanism, even though the injured party was not the actual purchaser. At common law, there could be no cognizable warranty claim between an injured person and a dealer or manufacturer since there was no "privity of contract." The privity bar began eroding with the case of Mazetti v. Armour & Co., 75 Wash. 622, 135 P. 633 (1913). In *Mazetti*, the Washington Supreme Court permitted a consumer to recover against a remote seller for injuries due to eating tainted tongue meat, despite lack of privity. The *Mazetti* court stated that the "[r]emedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales." *Id.* at 624, 135 P.2d at 635.

The strict liability theory of products liability has developed and expanded during the past thirty years. Keeton et al. write:

Women have benefited from this liberalization because the vast majority of mass torts involve products used exclusively by women. These products include DES, the Dalkon Shield and Copper-7 intrauterine devices (IUDs), high absorbency tampons linked to Toxic Shock Syndrome, oral contraceptives causing kidney failure, and silicone-gel breast implants.

Since the 1960s, obstacles to medical malpractice recovery have been breached with the liberalization of the doctrines of informed consent, *res ipsa loquitur*, and the abrogation of the locality rule and of charitable immunity.[97] A prime example is the extension of a hospital's liability to include negligence by its staff.[98] The doctrine of *respondeat superior* had previously shielded hospitals from liability for the acts of its non-employee physicians and other staff.[99] In recent years, punitive damages

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The first case to apply a tort theory of strict liability generally was *Greenman v. Yuba Power Products, Inc.*, in California in 1963. That decision and the final acceptance of Section 402A of the Second Restatement of Torts by the American Law Institute in 1964 were immediately relied upon for the adoption of strict liability in tort throughout the country. Section 402A liability in tort swept the country, just as the expansion of warranty liability under *Henningsen* had done until at the present writing nearly all states have adopted some version of it.

Keeton et al., *supra* note 40, at 694.

97. *See generally* Frank M. McClellan, *Medical Malpractice: Law, Tactics and Ethics* (1994).

In order to recover for negligent malpractice, the plaintiff must establish the following elements: (1) that a duty of care was owed by the physician to the patient; (2) that the physician violated the applicable standard of care; (3) that the plaintiff suffered a compensable injury; and, (4) that such injury was caused in fact and proximately caused by the substandard conduct.

Joseph H. King, Jr., *The Law of Medical Malpractice in a Nutshell* 9 (2d ed. 1986).

98. The rise of hospital corporate liability can be traced to Darling v. Charleston Community Mem. Hosp., 211 N.E.2d 253 (Ill. 1965), *cert. denied*, 383 U.S. 946 (1966). In *Darling*, a hospital was found negligent for violating accreditation standards as well as its own rules when it permitted an inexperienced physician to do specialized orthopedic work. After *Darling*, numerous courts have held that a hospital has a duty to supervise its independent staff. This case was one of the first to use practice parameters to establish hospital negligence. As one commentator explained:

The *Darling* case represents a significant turning point in hospital corporate liability for two reasons. First, it set precedent for greatly extending the liability of the hospital was owed by the physician to the patient. Second, holding that the standards of the Joint Commission on Accreditation of Hospitals (now the Joint Commission on Accreditation of Healthcare Organizations) along with the hospital's medical staff bylaws were admissible as evidence for determining negligence, *Darling* also expanded the means available to the plaintiff in establishing the hospital's duty.

Jams E. Orlikoff with Audrone M. Vanagunas, *Malpractice Prevention and Liability Control for Hospitals* (2d ed. 1987).

99. The doctrine of *respondeat superior* was explained by the court in Bing v. Thunig, 143 N.E.2d 3 (N.Y. 1957):

The conception that the hospital does not undertake to treat the patient, does not undertake to act through its doctors and nurses, but undertakes instead simply to procure them to act upon

awards have punished doctors who intentionally harm patients, perform unnecessary surgeries, sexually exploit or dangerously neglect their patients. Women have been primary beneficiaries of expanded medical malpractice liability, especially in cases involving the failure of informed consent, grossly substandard cosmetic surgeries, and egregious cases of sexual abuse by health care providers.

F. Counterrevolution Against Liberalized Tort Remedies

The expansion of tort law since World War II affords women recompense for their injuries with remedies almost unimaginable fifty years ago.[100] This progress is endangered by a tort reform campaign which has emerged over the past two decades.[101] Spearheaded by representatives of powerful corporations and the medical establishment, this movement has had considerable success in its efforts to reverse the liberalization of tort remedies.[102] Jury Verdict Research credits the tort

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their own responsibility, no longer reflects the fact. Present day hospitals . . . do far more than furnish facilities for treatment. They regularly employ on a salary basis a large staff of physicians, nurses, and interns, . . . and they charge patients for medical care and treatment, collecting for such services, if necessary, by legal action. Certainly, the person who avails himself of "hospital facilities" expects that the hospital will attempt to cure him, not that its nurses or other employees will act on their own responsibility. Hospitals should, in short, shoulder the responsibilities borne by everyone else. There is no reason to continue their exemption from the universal of *respondeat superior.*

Id. at 8.

100. As Thomas F. Lambert, Jr. wrote:

The . . . expansion of tort since 1955 has been powered by two drives: (1) to clarify and extend the negligence principle so as to eliminate from the expanding stream liability pockets or islands of immunity in existing law and (2) a fairly steady shift from fault to strict liability . . . . The resulting transformation in the rights of accident victims is more profound than any since the Industrial Revolution . . . .

Thomas F. Lambert, Jr., *The Trial Lawyer and . . . the Changing Law*, Trial, July/Aug. 1971, at 2–3. (documenting progress in restricting government immunity, charitable immunity, and intra-family immunity, and expanding recovery for psychic, prenatal damages and wife's right to recover for loss of consortium).

101. The tort reformers have had considerable success in halting and even reversing the post-World War II expansion of plaintiff's recovery rights. For example, sovereign immunity has been abolished by judicial decision, but re-instituted by some state legislatures. *See* Jerry J. Phillips et al., *Tort Law: Cases, Materials, Problems* 855 n.2 (1991) (reporting several states which reestablished sovereign immunity, but waived it for vehicle liability, medical-professional liability, and several other areas). Illinois and Kansas have modified their waiver of sovereign immunity by limiting the total amount that can be awarded. Ill. Rev. Stat. Ch. 37, para. 439.8 (1988); Kan. Stat. Ann. §46.901 (1988); Phillips et. al., *supra.*

102. The empirical work of Theodore Eisenberg and James Henderson shows a "quiet revolution" which has sharply reduced the success rates of plaintiffs in products liability litigation. They report that plaintiffs' "[s]uccess rates in published opinions fell from 56% in 1979 to 39% in 1989."

reformers for the fact that during the 1990s, "juries nationwide have become markedly tougher on people who sue doctors, insurance companies and other deep-pocket defendants."[103]

A team of sociologists argues that corporate political activism has created a social climate which blocks women's legislation that conflicts with corporate self-interest:

> Contrast the largely unopposed commitment of more than $500 billion for the bailout of savings and loan associations with the sharp debate, close votes, and defeats for the rights of men and women to take *unpaid* parental leave. Although the classic phrase for something noncontroversial that everyone must support is to call it a "motherhood" issue, and it would cost little to guarantee every woman the right to an unpaid parental leave, nonetheless this measure generated intense scrutiny and controversy, ultimately going down to defeat. Few people are prepared to publicly defend pollution or tax evasion, but business is routinely able to win pollution exemptions and tax loopholes.[104]

Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. Rev. 731, 793 (1992). Such findings led to Eisenberg and Henderson to:

> posit that a pro-defendant revolution began in the early to mid-1980s and continued through at least 1989. We base this assertion on declining plaintiffs' success in products litigation, on pro-defendant trends in explicit lawmaking in products cases at both trial and appellate levels, and on steadily declining products filings in federal courts.

Id. at 743–44. *See also* James Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability*, 37 UCLA L. Rev. 479 (1990); Thomas Koenig and Michael Rustad, *The Quiet Revolution Revisited: An Empirical Study of the Impact of State Tort Reform of Punitive Damages in Products Liability*, 16 Just. Sys. J. 21 (1993).

103. Richard Perez-Pena, *U.S. Juries Grow Tougher On Plaintiffs in Lawsuits*, N.Y. Times, June 17, 1994, at A1, B18 (reporting that "in 1992, plaintiffs won 52 percent of the personal injury cases decided by jury verdicts, down from 63 percent in 1989"). Brian Shenker, editorial director of Jury Verdict research believes that this phenomenon is the result of "a campaign by the insurance industry, by people like Dan Quayle, saying these big awards are killing our society." *Id.* at A1. *See also* Michael Rustad and Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 Am. U. L. Rev. 1269, 1277–82 (1993) (reviewing debate over the law of products liability); Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 Duke L.J. 217, 218 (1993) (reviewing debate over the law of medical malpractice).

104. Dan Clawson et al., *Money Talks* 21–22 (1992) (emphasis in original). Clawson et. al. argue that a coordinated business community has tremendous political power:

> business's vast resources, influence on the economy, and general legitimacy place it on a different footing from other so-called special interests. Business donors are often treated differently from other campaign contributors. When a member of Congress accepts a $1,000 donation from a corporate PAC, goes to a committee hearing, and proposes "minor" changes in a bill's wording, those changes are often accepted without discussion or examination.

Many social scientists have described the emergence of a strategic political alliance among leaders of the business community, designed to counter the victories of liberals during the 1960s and 1970s.[105] When a large number of firms, professional societies, and nonprofit organizations cooperate, as they have in the tort reform movement,[106] they can exercise tremendous political power.[107] Besides the obvious use of political

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Id. at 21.

105. David Vogel, for example, maintains that the corporate community organized politically because:

> During the second half of the 1960s, the political defeats experienced by business were confined to individual industries. But from 1969 through 1972, virtually the entire American business community experienced a series of political setbacks without parallel in the postwar period. In the space of only four years, Congress enacted a significant tax-reform bill, four major environmental laws, an occupational safety and health act, and a series of additional consumer-protection statutes. The government also created a number of important new regulatory agencies, including the Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), and the Consumer Product Safety Commission (CPSC), investing them with broad powers over a wide range of business decisions.

David Vogel, *Fluctuating Fortunes* 59 (1989). Similar arguments are made by Thomas B. Edsall, *The New Politics of Inequality* (1984) (observing that "the political stature of business rose steadily from the early 1970s . . . until, by the end of the decade, the business community had achieved virtual dominance of the legislative process in Congress"). *Id.* at 107–08.

Former Republican strategist Kevin Phillips contends that:

> The Reagan era reversed what late twentieth-century Americans had become used to. The liberal style that prevailed from 1932 to 1968 had left a legacy of angry conservatives indignant over two generations of downward income redistribution. A reorientation in the opposite direction was all but inevitable in the 1980s . . . .

Kevin Phillips, *The Politics of Rich and Poor: Wealth and the American Electorate in the Reagan Era Aftermath* at xix (1990).

106. The American Tort Reform Association's steering committee in 1989 included the American Association of Community & Junior Colleges, American Legislative Exchange Council, American Council of Independent Laboratories, American Consulting Engineers Council, American Hospital Association, American Institute of Architects, American Institute of Certified Public Accountants, American Medical Association, American Recreation Coalition, American Society of Association Executives, American Trucking Associations, Associated Builders & Contractors, Inc., Boy Scouts of America, Business Roundtable, Chemical Manufactures Association, Council of Community Blood Centers, Covington & Gurling, Food Marketing Institute, General Aviation Manufacturers Assocation, National Association of Home Builders, National Association of Manufacturers, National Association of Wholesaler Distributors, National Federation of Independent Business, National Paint and Coating Association, National School Boards Association, Pharmaceutical Manufacturers Association, Proprietary Association, Small Business Legislative Council, and Sporting Goods Manufacturing Association. American Tort Reform Association, *The American Tort Reform Association Membership List*, Jan. 1989, at 1.

107. The tort reform movement is composed of a strategic coalition rival groups to attain a common end. Pluralists argue that because different segments of the business community have opposing interests they cannot effectively coordinate their political activities in the long run. Robert A. Dahl, *Who Governs?* (1961) (employing classic pluralist analysis to deny the existence of an American power elite). J. Allen Whitt attacks this position by providing a case study showing that

action committees (PACs) to influence politicians, big business can exert political influence because the large firms:

> 1. Dominate the economy and [are] able to make hundreds of key decisions influencing people's lives (and therefore, their votes);
> 2. Fund think tanks to prepare analyses and reports advancing a business point of view;
> 3. Collect and provide information that the government doesn't have (often information that business fights to keep the government from getting);
> 4. [Are] able to hold out the prospect of lucrative future employment for the [Congressional] member or key staff aides;
> 5. Have large staffs of lobbyists;
> 6. Directly communicate with stockholders;
> 7. Control access to employees for political and other purposes;
> 8. Engage in advocacy advertising;
> 9. Frustrate policies by refusing to cooperate.[108]

The avowed purpose of the tort reform movement is to attack excessive jury awards, especially in the fields of products liability and medical malpractice.[109] Tort reformers use "every technique of modern media-shaping . . . to assure . . . the public . . . that products liability law [is] the cause of [a] threat to our way of life."[110] The business community used the so-called insurance crisis of the 1970s to gain popular support for limitations on remedies for injured persons.[111] The term "reform" has been redefined from the Watergate-era rallying cry of

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two business groups with diametrically opposed interests were able to reach an agreement behind the scenes so as not to expend political capital fighting each other. J. Allen Whitt, *Urban Elites and Mass Transportation* (1982); *See also* Michael Useem, *The Inner Circle* (1984) (demonstrating through extensive interviews with corporate leaders, the existence of a class conscious, politically active group of top business leaders).

108. Clawson et al., *supra* note 104, at 217–18.

109. All of these corporate resources are employed in the tort reform struggle. Consumers are often unsuccessful in countering special interest legislation because they are poorly informed and disorganized. *See generally* Alliance for Justice, *Justice For Sale: Shortchanging the Public Interest for Private Gain* (1993) (documenting a concerted campaign by conservative foundations, major corporations and business-funded "public interest" lobbies calling for the tort reform of products liability and medical malpractice); *See also* Michael Rustad and Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. Rev. 91 (1993) (showing the use of "junk social science" by tort reform lobbyists in *amicus curiae* briefs); Rustad & Koenig, *supra* note 103 (arguing that a number of powerful conservative political groups are unfairly attacking the doctrine of punitive damages).

110. Eisenberg & Henderson, *supra* note 102, at 793.

111. *See generally* J. Kent Richards, *Statutes Limiting Medical Malpractice Damages*, 1982 Fed'n Ins. Couns. Q. 247.

anti-establishment forces to a popular demand to protect American firms from injured plaintiffs and their attorneys. While federal product liability reform bills have stalled, state legislatures have significantly curtailed plaintiffs' remedies over the last decade and a half.[112] The tort reform movement finds allies among social conservatives wishing to restrict cultural rights won by feminists.[113]

The message of the tort reformers is that excessive products liability and medical malpractice litigation hurts all Americans. Women's interests are said to be damaged because useful medical products are being withheld from the market for fear of lawsuits.[114] Tort reformers

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112. The first bill to federalize punitive damages, The Uniform Product Liability Act, (S. 2631), was introduced in 1982 by Senator Robert Kasten (R.-Wis.). S. 44, 98th Cong., 1st Sess. (Jan. 26, 1983). This bill provided for compulsory bifurcation, clear and convincing evidence, judge-assessed punitive damages, and state-sharing of punitive awards. Similar legislation has been introduced, albeit unsuccessfully, in almost every succeeding year. In 1992, the Senate rejected S. 640 while its companion, HR. 3030, died in committee.

However, tort reform efforts continue to succeed at the state level. *See* Koenig & Rustad, *supra* note 102. Texas recently passed the "Medical Liability and Insurance Improvement Act." Tex. Rev. Civ. Stat. Ann. art. 4590i (West 1993). This law states its legislative purpose as addressing, "a serious public problem in availability of and affordability of adequate medical professional liability insurance" *Id.* at § 1.02(4). The legislature maintained that Texas's medical malpractice, insurance availability "crisis has had a material adverse effect on the delivery of medical and health care in Texas, including significant reductions of availability of medical and health care services to the people of Texas and a likelihood of further reductions in the future." *Id.* at § 1.02(6).

The legislature's response to this perceived health care crisis was to limit civil liability for physicians or other health care providers. The act provides:

> In an action on a health care liability claim where final judgment is rendered against a physician or health care provider, the limit of civil liability of the physician or health care provider for all past and future non-economic losses recoverable by or on behalf of any injured person and/or the estate of such person, including without limitation as applicable past and future physical pain and suffering, mental anguish and suffering, consortium, disfigurement, and any other nonpecuniary damage, shall be limited to an amount not to exceed $150,000.

Id. at § 11.03.

113. *See* Jerome L. Himmelstein, *To The Right* (1990) (arguing that right wing corporations and cultural groups have combined in a powerful coordinated movement which is rolling back social, economic, and legal liberalization). *See also* G. William Domhoff, *The Power Elite and the State: How Policy is Made in America* (1990) (maintaining that "[t]he return of conservatism was facilitated by the concurrent rise of a New Right that was a reaction to the civil rights and social freedoms that had been won by minorities, women, gays, and liberals," *id.* at 263). *See generally* Marilyn French, *The War Against Women* (1992) (asserting "[t]his war is aimed at reasserting or tightening men's control over female bodies, especially sexuality and reproductive capacities, and women's labor," *id.* at 13).

114. Tort reformers frequently charge that women's pharmaceutical and medical devices are unavailable due to excessive litigation. Richard Kingham testified in favor of the 1990 Products Liability Reform Act (S. 1400) which would impose a defense to firms complying with FDA regulations:

claim that obstetricians and gynecologists are being channeled into other specialties by exorbitant malpractice premiums.[115] A tort reform group recently distributed a poster to thousands of obstetricians and gynecologists which depicts a pregnant woman at the door of a doctor who no longer accepts obstetric patients because of the fear of lawsuits.[116] Feminists, in contrast, argue that cultural biases rather than the litigation crisis account for the failure to produce satisfactory contraceptives.[117] Part II of this Article presents empirical findings that suggest that proposed reforms may have unanticipated negative consequences for women due to the gendered use of tort remedies.

II. AN EMPIRICAL STUDY OF "HER" AND "HIS" TORTS

A. Punitive Damages in Products Liability

The tort reform movement has been quite successful in restricting punitive damages. Forty states either do not permit punitive damages or have adopted tort reforms during the last two decades to reduce the

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> [L]iability concerns, particularly concerns about punitive damages, have caused manufacturers to withdraw beneficial products from the market and to reduce research and development activities that could yield important new drugs. Concerns are greatest in litigation prone areas, such as vaccines and contraceptives.

Testimony Urges Senate Consumer Subcommittee to Keep FDA-Defense Provisions in Product Liability Reform Act, PR Newswire, May 11, 1990, *available in* LEXIS, News Library, Wires File.

Tort reformers argue that the U.S. has become a backwater in contraceptive research due to the products liability crisis. Shawn Pogatchnik, *Contraceptive Studies at Standstill, Study Finds: Lawsuits Deter U.S. Firms, Which Have Not Developed a New Product Since the 1960s. Europeans Have Produced a Number of Effective Devices*, L. A. Times. February 15, 1990, at 24 (reviewing study of impact of products liability on contraceptives); Carl Djerassi, *The Bitter Pill; Birth Control Innovations*, 245 Sci. 356 (July 28, 1989) (maintaining U.S. industry's withdrawal from contraceptive research is caused by the liability crisis). *See generally The Liability Maze: The Liability Law on Safety and Innovation* (Peter W. Huber and Robert E. Litan eds., 1991).

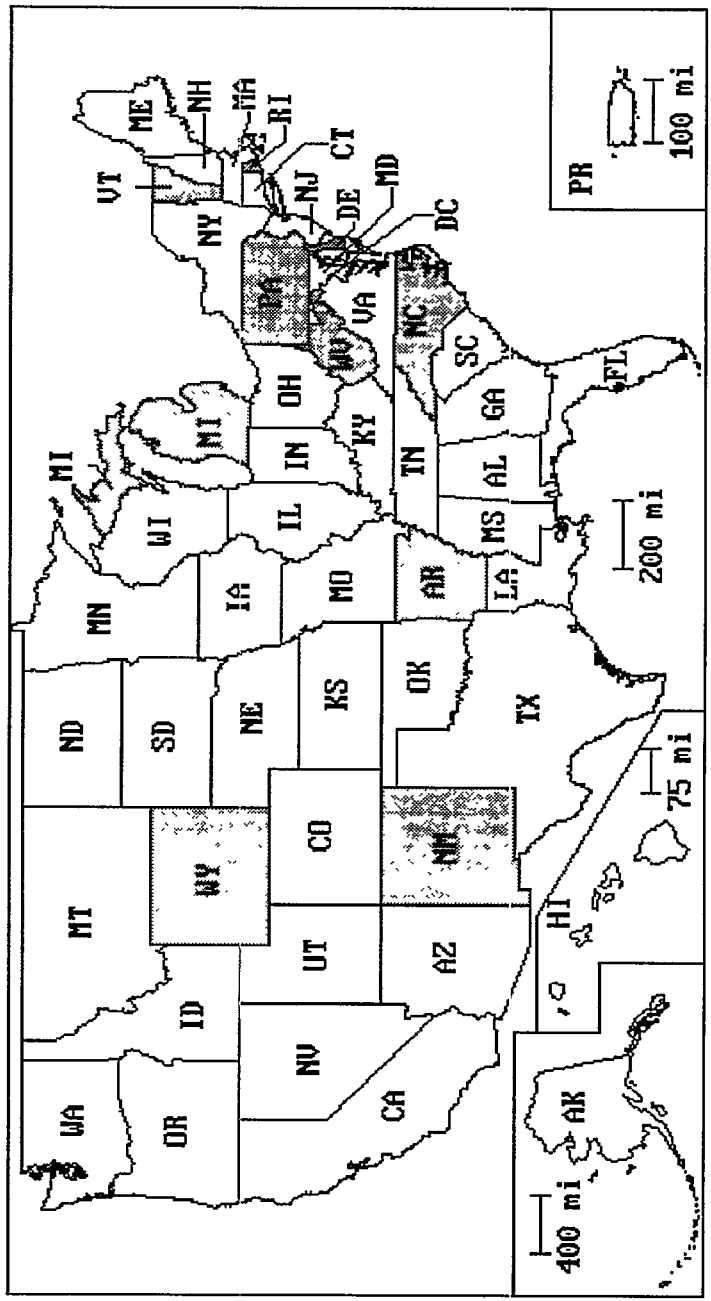
115. Walter L. Larimore, *Attitude of Florida Family Practice Residents Concerning Obstetrics*, 36 J. Fam. Prac. 534 (May 1993) (reporting that of 320 residents completing family practice residencies in Florida, only nine (2.8%) delivered babies after the first year because of fear of being sued and the cost of malpractice insurance).

116. Nancy E. Roman, *Verdict in on Political Giving: Spending in State Elections Dominated by Trial Lawyers*, Wash. Times, Sept. 13, 1994, at A10.

117. Betsy Hartmann concludes the key factors impeding contraceptive development are the sexism of the predominately male medical research community, a medical preference for surgical sterilization rather than contraception, and a greater concern for efficiency than safety. Betsy Hartmann, *Reproductive Rights and Wrongs: The Global Politics of Population Control and Contraceptive Choice* (1987).

Map One

STATE PERMITS PUNITIVES IN PRODUCTS AND HAS NOT LIMITED THEM THROUGH TORT REFORM



frequency and size of punitive damages awards.[118] Map One depicts the states which permit punitive damages to be awarded in products liability actions but have not enacted tort reform limitations. Appendix A summarizes the major reforms affecting punitive damages which have been enacted since 1970. The business community continues to lobby for further restrictions on punitive damages.[119] The calls for punitive damages reform are largely predicated upon anecdotes,[120] rather than systematic investigation of the social impacts of tort law.[121] This section will present a gendered examination of punitive damages verdicts in products liability and medical malpractice litigation.

B. Gender in Products Liability Punitive Damages

Courts award punitive damages in products liability actions in order to punish and deter manufacturers who knowingly endanger the consuming public.[122] Five recurrent patterns of corporate misconduct underlie the

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118. Only Arkansas, Delaware, Michigan, New Mexico, North Carolina, Pennsylvania, Rhode Island, Vermont, West Virginia, and Wyoming historically permit punitive damages and have not enacted tort reforms limiting punitive damages in products liability. In the wake of Pac. Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (1991), in which the Supreme Court held that a state's procedure for awarding punitive damages satisfies due process as long as it provides "reasonable constraints" on the discretion of factfinders, even some of these states have tightened their standards for review of these awards. *See* Garnes v. Fleming Landfill, 413 S.E.2d 897 (W. Va. 1991). *See also* Koenig & Rustad, *supra* note 102.

119. Rustad, *supra* note 40, at 10 (reporting perennial federal bills to restrict punitive damages in products liability).

120. An American Bar Association section complained of the tendency of reform groups to substitute rhetorical argument for hard evidence: "A number of reports have come out [on tort reform] . . . which are of the 'dogmatic type without empirical data.'" A.B.A. Sec. on Litig., *Punitive Damages: A Constructive Examination* 17 (1986) (report of the Special Committee on Punitive Damages Section of Litigation, American Bar Association); *See also* Kenneth J. Chesebro, *Galileo's Retort: Peter Huber's Junk Scholarship*, 42 Am. U. L. Rev. 1637, 1686–96 (1993) (criticizing tort reformer Peter Huber's rhetoric about "junk science" in the courtroom and the liability crisis); Rustad, *supra* note 40, at 15 (noting that "[m]uch of the criticism of punitive damages in products cases is theoretical and of the 'school of tort reform by anecdote' or 'isolated fact.'").

121. President's Council on Competitiveness, *Agenda for Civil Justice Reform in America* (Aug. 1991) (recommending 50 reforms to the civil justice system); *See* Dan Quayle, *Civil Justice Reform*, 41 Am. U. L. Rev. 559, 559–61 (1992) (asserting that tort reforms would increase American competitiveness but not providing underlying data); Marc Galanter, *Pick a Number, Any Number*, Am. Law., Apr. 1992, at 81, 84 (arguing that tort reformers support their case for change with anecdotes, made-up numbers, and quarter-truths); Rustad & Koenig, *supra* note 40, at 1283–84 (criticizing Council on Competitiveness for advocating radical reform of tort remedies without examining their historic functions).

122. The policy reasons for the rise of modern products liability over the past three decades were clearly articulated by Justice Robert Jackson:

vast majority of punitive damages awards in products cases handed down in the period 1965–1990: "(1) fraudulent-type misconduct; (2) knowing violations of safety standards; (3) inadequate testing and manufacturing procedures; (4) failures to warn of known dangers before marketing; and (5) post-marketing failures to remedy known dangers."[123] Data on the gendered pattern of awards is drawn from our national data base of 25 years of punitive damages verdicts in products liability litigation.[124] The gendered configuration of punitive damages awards reflects the different social roles played by men and women.[125]

This is a day of synthetic living, when to an ever-increasing extent our population is dependent upon mass producers for its food and drink, its cures and complexions, its apparel and gadgets. These no longer are natural or simple products but complex ones whose compositions and qualities are often secret. Such a dependent society must exact greater care than in more simple days and must require from manufacturers or producers increased integrity and caution as the only protection of its safety and well being. Purchasers cannot try out drugs to determine whether they kill or cure. Consumers cannot test the youngster's cowboy suit or the wife's sweater to see if they are apt to burst into fatal flames.

Dalehite v. United States, 346 U.S. 15, 51–52 (1953) (Jackson, J., dissenting).

123. These profiles of developing or known dangers were first identified in David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1258, 1329 (1976). The central issue in three out of every four punitive damages awards in our empirical study of punitive damages in products liability was the failure to warn of known dangers and post-marketing failures to remedy known dangers. The first three categories of corporate malfeasance or nonfeasance were much rarer. Rustad, *supra* note 40, at 66.

Scholars rarely agree as to the level of culpability which amounts to reckless indifference to public safety, but do agree that corporate misconduct needs to greatly exceed ordinary negligence. A leading torts treatise states:

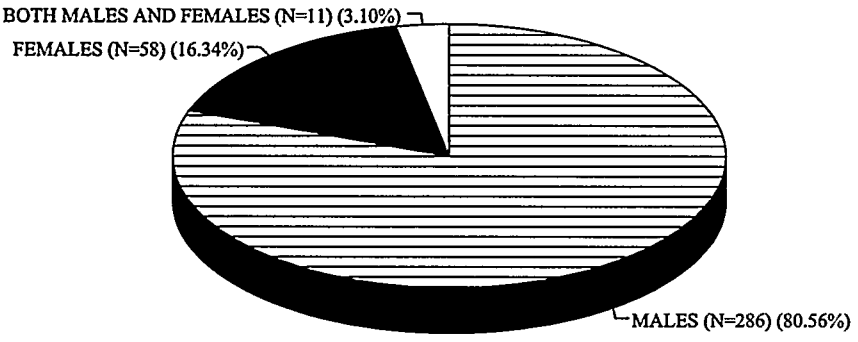
> Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or "malice", or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton . . . . [M]ere negligence is not enough.

Keeton et al., *supra* note 40, at 9–10.

124. To locate the maximum number of U.S. punitive damages awards resulting from personal injury litigation, we searched all available computer-based statistical sources, jury verdict reporters, law reviews and other scholarly sources, state products liability practice guides, products liability reporting services, court records, asbestos litigation reporters, and media reports on all products liability litigation involving punitive damages covering the period 1965 through 1990. In addition, we interviewed at least one attorney in ninety percent of the non-asbestos products liability cases. The research methods are described in more depth in Rustad, *supra* note 40, at 26–36, Koenig & Rustad, *supra* note 102, at 26–27.

125. We have previously reported on the overall pattern of punitive damages awards in products liability. These verdicts are rare and, "with the exception of asbestos cases, punitive damages [in products liability] are actually in decline rather than skyrocketing." Rustad, *supra* note 40, at 37. Punitive damages awards in products liability are not only infrequent, but smaller in size than generally believed. Median awards of punitive damages in products liability exceeded awards of actual damages in 208 cases (fifty-nine percent) of the sample. In nearly forty percent of the cases,

GRAPH ONE
NUMBER OF PUNITIVE DAMAGE AWARDS IN
PRODUCTS CASES BY GENDER OF PLAINTIFF



Specific injuries vary significantly by sex. Males are 29 times more likely than females to be injured by a fall from a scaffold or ladder.[126] Males are six and a half times more likely than females to die from firearms accidents.[127] Five times as many males as females drown.[128] Females are only one-fourteenth as likely as males to drown in boating

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punitive damages were more than twice the amount of compensatory damages. However, compensatory damages exceeded punitive damages in thirty-five percent of the cases and were more than twice the size of the punitive damages in twenty-three percent of the cases. The median compensatory damages award was half a million dollars, slightly less than the median punitive damages award of $625,000. Punitive damages awards were generally proportionate to the plaintiff's injury. *Id.* at 45–51.

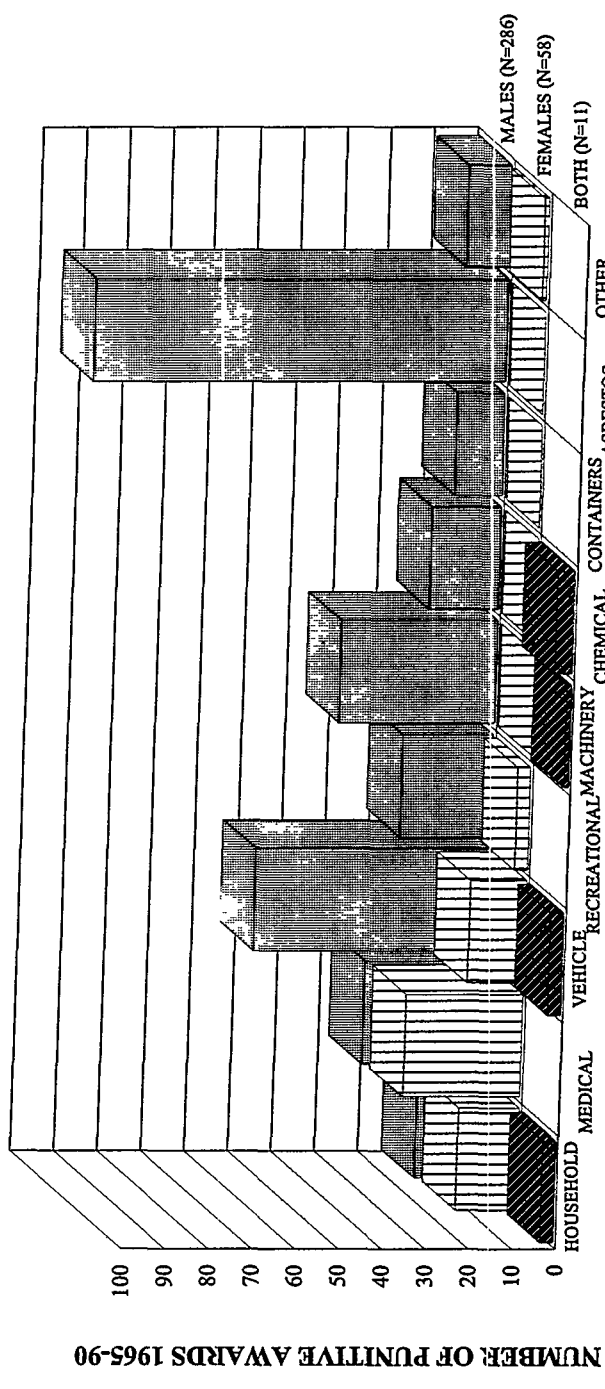
These findings are consistent with other empirical studies on more restricted samples. *See* U.S. Gen. Accntg. Office, *Report to the Chairman, Subcomm. on Commerce, Consumer Protection, and Competitiveness, Comm. on Energy and Commerce, House of Representatives, Product Liability Verdicts and Case Resolution in Five States*, GAO/HRD-89-99, at 2 (Sept. 1989) (finding twenty-three punitive awards in products cases in Ariz., Mass., Mo., N.D., and S.C. between 1982 and 1985); William M. Landes and Richard A. Posner, *The Economic Structure of Tort Law* 302, 305–06 (1987) (reporting "[t]he insignificance of punitive damages [in product liability actions] is evidence that they are not being routinely awarded. Out of a total of 359 cases in all of our samples [federal courts of appeals decisions, 1982–84] punitive damages were allowed in only seven [cases]—2 percent.") Mark Petersen et al., *Punitive Damages: Empirical Findings* at v–vi (1987) (uncovering only four cases in San Francisco and two in Cook County from 1960 to 1984 and concluding that" punitive damages were rarely awarded in personal injury litigation and when awarded were usually small."); Stephen Daniels and Joanne Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 1, at 38 tbl. 5 (1990) (finding 34 punitive damages verdicts in 967 products liability cases evaluated; sample from 25,627 jury verdicts handed down in 47 counties in 11 states in state trial courts from 1981 to 1985).

126. Susan P. Baker et al., *The Injury Fact Book* 20 (1992).

127. *Id.* at 150.

128. *Id.* at 176.

GRAPH TWO
PUNITIVE DAMAGE AWARDS IN PRODUCT CASES
BY TYPE OF PRODUCT AND GENDER (N=355)



accidents.[129] The ratio of male to female deaths due to motor vehicle crashes is 2.8 to 1 for all ages. Four times as many males as females between the ages twenty and thirty die in motor vehicle accidents.[130]

Punitive damages awards in products liability cases reflect the gendered nature of social roles. Graph One shows that punitive damages in products liability is overwhelmingly "his" tort remedy. More than four out of five of these verdicts were awarded to male plaintiffs. Table One shows that the percentage of punitive damages awarded to men is increasing over time.

TABLE ONE

PUNITIVE AWARDS IN PRODUCTS LIABILITY BY GENDER OVER TIME[131]

Years	Number of Cases in Which Males Received Punitive Damages Awards in Products Cases.	Number Cases in Which Females Received Punitive Damages Awards in Products Cases.	Percentage of Punitive Damages Verdicts Awarded to Males.
1965–75	15	8	63%
1976–80	30	10	75%
1981–85	110	29	79%
1986–90	131	11	93%

A partial explanation for this finding can be seen in Graph Two. Much of the increase in products liability litigation in the 1980s can be attributed to asbestos litigation.[132] The number of asbestos-related product liability cases is now in the hundreds of thousands and growing daily. Men were disproportionately victimized, being exposed to asbestos in the military, in shipyards, in mines and in other male-oriented occupations.[133]

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129. *Id.*

130. *Id.* at 217.

131. Table One excludes the eleven awards in which there were both male and female plaintiffs. For purposes of simplicity these cases have been removed from this portion of the analysis.

132. W. Kip Viscusi, *Reforming Product Liability* 20 (1991) (documenting that recent increase in product liability is attributed to the unique mass tort of asbestos).

133. Asbestosis is a pulmonary disease caused by the inhalation of asbestos dust. The Saranac Laboratory, Saranac Lake, New York, *Report to the Johns-Manville Corporation*, (Sept. 30, 1984). Males suffered from asbestosis and other asbestos-related diseases from exposure in insulation plants. The basis of punitive liability was the failure of the asbestos firms to communicate warnings

Males predominated in non-asbestos products liability cases leading to punitive damages as well. Males are far more likely than females to be exposed to dangerous equipment at work.[134] Only six percent of all people killed at work are females.[135] Industrial containers,[136] exploding multi-piece tire rims,[137] industrial and farm vehicles[138] produced virtually

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of the known danger of unprotected asbestos exposure. In Hansen v. Johns-Manville Prods. Corp., 734 F.2d 1036 (5th Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985), the court affirmed a jury award of punitive damages to a widow of a shipyard worker at the Allied Signal plant. One of the smoking gun documents was a 1956 letter to an asbestos firm discussing the relative health hazards of various types of asbestos fibers. The failure of the firm to convey this information to the workers was the basis of punitive damages.

A number of males were exposed to asbestos in the military or as pipe fitters or insulation workers in defense plants, occupations from which women were largely excluded. Women were also unlikely to be miners or in plants where raw asbestos was used. *See, e.g.*, Wammock v. Celotex Corp., 835 F.2d 818 (11th Cir. 1988) (affirming $40,000 compensatory and $250,000 punitive damages award to male plaintiff against asbestos manufacturer for failing to label product used in carpentry until ordered to by the government).

134. Males were far more likely than females to be injured by dangerously defective vehicles in the course of employment. *See, e.g.*, Kempa v. Clark Equip. Co., No. 152-5 (Minn. Dist. Ct. 1982) (awarding punitive damages when forklift flipped over on operator); John Deere Co. v. May, 773 S.W.2d 369 (Tex. Ct. App. 1989) (awarding punitive damages after self-shifting bulldozer crushed worker); Heil Co. v. Grant, 534 S.W.2d 916 (Tex. Ct. App. 1976) (awarding punitive damages when decedent crushed to death by descending truck bed).

135. Baker, et al., *supra* note 126.

136. Cases leading to punitive damages in workplace products liability actions include: exploding chemical drums, Achord v. Momar, No. CV 87-D-824N (M.D. Ala. 1986) and fires in fiberglass tanks, Indus. Chem. & Fiberglass Corp. v. Chandler, 547 So. 2d 812 (Ala. 1988).

137. All of the punitive damages due to exploding tire rims involved male workers. *See, e.g.*, Hale v. Firestone Tire & Rubber Co., 820 F.2d 928 (8th Cir. 1987) (remitting punitive damages when multi-piece truck tire rim exploded and struck worker); Klawes v. Firestone Tire & Rubber Co., 572 F. Supp. 116 (E.D. Wis. 1983) (affirming punitive damages in exploding tire rim cases); Calmes v. Goodyear Tire & Rubber Co., 575 N.E.2d 416 (Ohio 1991) (reversing punitive damages in a rimless tire case); Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d 826 (Minn. 1988) (remitting punitive damages where male gas station worker suffered brain damage from exploding tire rim), *cert. denied*, 492 U.S. 926 (1989); Kuiper v. Goodyear Tire and Rubber Co., 673 P.2d 1208 (Mont. 1983) (assessing punitive damages arising out of exploding tire rim).

138. Males were far more likely than females to be injured by defective assembly-line machinery. For example, in Rush v. Minster Machine Co., No. 81-CV-191 (Ohio C.P., Mahoning County 1984), the manufacturer was assessed punitive damages because it sold a palm control button designed specifically to bypass a standard safety device on a power press. A 27-year-old male punch press operator's hand was crushed by a forty-five ton press after he inadvertently triggered the dangerous bypass button. In King v. Kawaguchi, Ltd., No. 81-126332 (Ill. Cir. Ct. 1987), punitive damages were awarded to a worker who suffered amputation of three fingers while attempting to free material from assembly-line machinery which was not in compliance with industry safety standards.

It was invariably male plaintiffs who were injured in defective farm machinery cases leading to punitive damages. In Braatz v. Rockwell-Standard Corp., No. 23033 (Minn. Dist. Ct., Wright County 1982), a 14-year old boy received a $3,880,000 jury verdict for amputations after he was pulled into an unguarded shaft of a grain auger. Testimony suggested that the full cost of guarding the auger would have been a mere $2.38 per machine. The company's failure to implement this low-

exclusively male punitive damages awards. Men also were far more likely than women to have been awarded punitive damages for injuries caused by recreational products.[139] Harms involving pleasure vehicles such as all-terrain vehicles,[140] motorcycles,[141] and boats[142] generally involved male drivers.[143] Punitive damages awards based on product injuries to children are also gender-linked.[144]

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cost safety feature, combined with knowledge of many prior injuries, elicited punitive damages. *See also* Gruntmeir v. Mayrath Indus., 841 F.2d 1037 (10th Cir. 1988) (affirming punitive damages in case where farmer was injured by unguarded bottom drive grain auger); *But see* Juarez v. United Farm Tools, Inc., 798 F.2d 1341 (10th Cir. 1986) (affirming district court's overturning of punitive damages in cases involving unguarded grain auger).

139. Males were over-represented as a plaintiff category for injuries caused by dangerously defective recreational products, especially firearms. For example, in Lewy v. Remington Arms Co., 836 F.2d 1104 (8th Cir. 1988) (applying Missouri law), a rifle manufacturer was assessed punitive damages for failure to recall guns with defective safeties. *See also* Gregg v. Colt Indus. Operating Corp., No. 5317 (Tex. Dist Ct., Ragutio County 1980) (awarding punitive damages for marketing firearms with known drop-fire hazard).

140. *See, e.g.*, Sabich v. Outboard Marine Corp., 131 Cal. Rptr. 703 (Ct. App. 1976) (awarding punitive damages for accident resulting from inadequate testing of all-terrain vehicle).

141. *See, e.g.*, Fagerstrom v. Honda Motor, No. 79-14794 CB (Fla. Cir. Ct., Broward County 1986) *reprinted in* 5 PLLR (Aug. 1986).

142. *See, e.g.*, Mulhern v. Outboard Marine Corp., 432 N.W.2d 130 (Wis. 1988) (awarding punitive damages based on company's knowledge of dangerously defective interlock device causing boat to start in gear).

143. When women were injured by these vehicles, it was often as passengers or bystanders. In Leichtamer v. American Motors Corp., 424 N.E.2d 568 (Ohio 1981), the court found that the manufacturer intentionally merchandised a jeep for use on steep and rugged terrain without testing it and with knowledge that a roll bar, which appeared to be a safety device, provided no protection in roll-overs. Television advertisements encouraged off-the-road use. Viewers were taunted with the question of whether they were "man" enough to drive this jeep up steep hills. A young male driver injured his wife and two other occupants when his jeep "pitched over." The roll-bar collapsed rather than protecting the occupants.

144. The same gendered pattern in punitive damages product accidents can be seen in cases involving children and young adults. A young boy suffered amputations from a weed-eater in Karns v. Emerson Elec. Co., 817 F.2d 1452 (10th Cir. 1987). Another was crushed by an unstable trash compactor in Johnson v. Kenai Peninsula Borough Sch., No. 76-15176-I (Alaska Super. Ct. 1979). A third young male was electrocuted by an electric grass clipper in Hudson v. Indus., CV84 593-K (Ala. Cir. Ct., Montgomery County 1985). In Brogdan v. MTD Prods., Inc., No.82-21989 (Fla. Cir. Ct., Dade County 1984), customized brake handles failed, causing a young male to suffer paralysis. In contrast, a young girl was hurt when her highly flammable pajamas ignited while cooking. Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727 (Minn. 1980), *cert. denied*, 449 U.S. 921 (1980).

C. *Medical Products, Punitive Damages, and Women*

The product injuries sustained by women plaintiffs in punitive damages cases occurred in traditionally female spheres.[145] Women are more likely than men to be injured by home appliances, exploding bottles, flammable clothing, household chemicals, beauty and medical products. Household products[146] and vehicles[147] harmed members of both sexes, but in gender stereotypical ways. Medical products were responsible for nearly half of the punitive damages awards to women. Most of these cases redressed injuries to women's reproductive functions[148] or damages suffered during cosmetic surgical procedures. Dalkon Shield, Copper-7, Bendectin,[149] Varidase,[150] super-absorbent

145. *See, e.g.*, Smith v. Ron Rico Rum Co., No. 114-463 (Tex. Dist. Ct., Galveston County 1976) (awarding punitive damages after explosion of rum from flaming hurricane glass burns waitress).

146. Females were awarded punitive damages for having been injured at home by such products as Esoteria, a skin cream containing mercury, Dean v. Mitchum Thayer, Inc., 450 F. Supp. 1 (E.D. Tenn. 1978); electric blankets, Comisky v. Gen. Elec. Co., No. 539631 (Cal. Super. Ct., S.F. 1966); and artificial fingernail glue, Kicklighter v. Nails By Jannee, Inc., 616 F.2d 734 (5th Cir. 1980).

When males were hurt by household products, these products tended to correspond to traditional male tasks. Examples include: Elser v. E.I. Dupont De Nemours & Co., No. 12397 (Pa. C.P., Delaware County 1984) (awarding punitive damages for failure to warn of industrial glue used in home maintenance); Gergel v. Chem. Lawn Servs. Corp., No. 87-1138 (E.D. Pa. 1989) (awarding punitive damages to male injured by lawn chemical); Salmon v. Sears Roebuck & Co., No. DC-83-286-LS (N.D. Miss. 1987) (awarding punitive damages when unguarded radial arm saw injured male in the home).

147. In Elliott v. Brunswick Corp., 903 F.2d 505 (11th Cir. 1990) (reversing punitive damages against the manufacturer of a boat with an unguarded propeller), *cert. denied*, 498 U.S. 1048 (1991), an accident was caused by teenaged boy who drove too close to a female swimmer in order to impress her. Another gender stereotypical punitive damages fact pattern was found in Leichtamer v. American Motors, Inc., 424 N.E.2d 568 (Ohio 1981), in which mixed-sex passengers were killed when a male driver overturned a jeep while driving off the road.

148. Examples include: Dalkon Shield, A.H. Robins Co. v. Ford, 468 So. 2d 318 (Fla. Dist. Ct. App. 1985); Carley v. A.H. Robins Co., No. 84C-2775 (D. Ill. 1985); Husbands v. A.H. Robins Co., No. 82J-2763JK (S.D. Fla. 1984) (awarding punitive damages for reproductive injury from bacteria-carrying tail of intrauterine device); Deemer v. A.H. Robins Co., No. C-30649 (D. Kan. 1975); anti-nausea remedies for pregnant women, Glass v. Phillips Roxanne, No. 270-762 (Cal. Super. Ct., L.A. County 1983) (awarding punitive damages to child born with limb reduction from anti-nausea drug taken by mother); Ealy v. Richardson-Merrell, Inc., 897 F.2d 1159 (D.C. Cir.) (assessing punitive damages against firm which marketed anti-nausea drug), *cert. denied*, 498 U.S. 950 (1990); and tampons, Friley v. Int'l Playtex, 604 F. Supp. 126 (W.D. Mo. 1984) (awarding punitive damages arising out of toxic shock injury from over-absorbent tampons).

149. Bendectin was an FDA-approved anti-nausea drug marketed between 1957 and 1983. The drug was voluntarily taken off the market after a series of products liability lawsuits. The lawsuits contended that Bendectin caused deformities in the limbs of developing fetuses. *See, e.g.*, Brock v. Merrell-Dow Pharmaceuticals, Inc., 874 F.2d 307, *modified*, 884 F.2d 165 (5th Cir. 1989), *cert. denied*, 494 U.S. 1046 (1990). For a valuable study of the Bendectin litigation, see Joseph Sanders, *The Bendectin Litigation: A Case Study in the Life Cycle of Mass Torts*, 43 Hastings L.J. 301 (1992).

tampons, and now breast implants, are examples of dangerously defective products affecting women.[151]

1. Dalkon Shield Litigation

When A.H. Robins marketed the Dalkon Shield, its intrauterine device, as a "modern, superior and safe" birth control method, the company advertised that the IUD had the "lowest pregnancy rate . . . 1.1%," was "safe," and "would prevent pregnancy without producing any general effects on the body."[152] The firm knew otherwise. The company's own tests revealed that the true pregnancy rate was over five percent and that the Dalkon Shield posed serious risks to the user.[153]

Relying on A.H. Robins's assertions of safety, doctors implanted the Dalkon Shield in some 2.2 million American women.[154] A plaintiff's attorney told us that the company's lack of testing was motivated by "A.H. Robins' desire to beat the competition in the IUD market."[155] The company continued to aggressively market its birth control device, even after receiving reports that the IUD's tail permitted bacteria to wick up the string into the uterus causing life-threatening complications. A. H. Robins's former quality control director testified that the company knew of the dangers of infection but issued no warning.[156]

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150. Varidase was drug administered during child birth to break up blood clots. Punitive damages were based upon the firm's failure to warn the FDA or the consuming public of the adverse effects of the drug. A typical case was Mulligan v. Lederle Labs., 786 F.2d 859 (8th Cir. 1986). The plaintiff in *Mulligan* developed chronic health problems as a result of taking Varidase following the episiotomy performed at the birth of her first child in 1960.

151. Women are also likely to be disparately affected by prenatal injuries to their children caused by FDA approved drugs and medical devices. *See, e.g.*, Keenan v. Parke-Davis Co., No. 84-1667 (R.I. Super. Ct. 1990) (awarding punitive damages for birth defects caused by the mother ingesting anti-epilepsy drug); and Glass v. Phillips Roxanne, Inc., No. C-270-762 (Cal. Super Ct., L.A. County 1983) (awarding punitive damages to child suffering birth defects from mother using anti-nausea drug, Duphaston, during pregnancy).

152. Palmer v. A.H. Robins Co., 684 P.2d 187, 207 (Colo. 1984).

153. *Id.* at 196.

154. Ronald J. Bacigal, *The Limits of Litigation: The Dalkon Shield Controversy* (1990); Morton Mintz, *The Selling of an IUD*, Wash. Post, Aug. 9, 1988, at 12 (reviewing history of marketing of Dalkon Shield); *See generally* Karen M. Hicks, *Surviving the Dalkon Shield IUD: Women v. the Pharmaceutical Industry* (1994); Morton Mintz, *At Any Cost: Corporate Greed, Women and the Dalkon Shield* (1985); Marshall Clinard, *Corporate Corruption: The Abuse of Power* 103 (1990); John M. Van Dyke, *The Dalkon Shield: A "Primer" in IUD Liability*, 6 W. St. U. L. Rev. 1 (1978); Susan Perry & Jim Dawson, *Nightmare: Women and the Dalkon Shield* (1985).

155. Telephone interview with Douglas Bragg, Bragg & Dubofsky, P.C., plaintiff's counsel in Palmer v. A.H. Robins Co., 684 P.2d 187 (Colo. 1984) (June 1990).

156. Tetuan v. A.H. Robins Co., 738 P.2d 1210, 1222 (1987).

The court in *Tetuan v. A.H. Robins Co.* summarized the misconduct justifying punitive damages in the Dalkon Shield litigation:

> [T]here [was] substantial evidence to conclude that Robins fully comprehended, by 1974 at the latest, the enormity of the dangers it had created, but that it deliberately and intentionally concealed those dangers; that it put money into "favorable" studies; that it tried to neutralize any critics of the Dalkon Shield; . . . that it consistently denied the dangers of the Dalkon Shield for nearly fifteen years after its original marketing of the Dalkon Shield; that it commissioned studies on the Dalkon Shield which it dropped or concealed when the results were unfavorable; . . . [and] consigned hundreds of documents to the furnace. . . .[157]

In *Palmer v. A.H. Robins*,[158] a woman was awarded punitive damages for having suffered a life-threatening septic abortion necessitating a complete hysterectomy as the result of using the Dalkon Shield. The threat of more punitive damages awards led to bankruptcy and a resultant victim trust fund.[159] Twenty percent of the medical product cases leading to punitive damages awards involved the Dalkon Shield intrauterine device.[160]

2. *Copper-7 Intrauterine Device*

Thousands of women sought redress against G.D. Searle Co., the manufacturer of the Copper-7 intrauterine device. The only punitive damages award was a $7 million dollar verdict in *Kociemba v. G.D. Searle & Co.*,[161] which was predicated upon the firm's intentional

157. *Id.* at 1240.

158. 684 P.2d 187 (Colo. 1984).

159. A.H. Robins Co., Inc. sought Chapter 11 bankruptcy by filing a petition in the city of its corporate headquarters, Richmond, Virginia. At the time, Robins was facing more than 16,000 claims from women injured by its Dalkon Shield intrauterine device. Plaintiffs had already won 33 verdicts. Eleven awards included punitive damages. Frances E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. Rev. 659, 675–80 (1989). Critics argue that A.H. Robins was financially solvent and quite able to satisfy these claims, but filed a strategic bankruptcy. Ronald J. Bacigal, *The Limits of Litigation* (1990) (arguing that A.H. Robins filed in order to free itself of the costs of thousands of potential compensatory and punitive damages lawsuits); *See* Note, *Strategic Bankruptcies: Class Actions, Classification & The Dalkon Shield Cases*, 7 Cardozo L. Rev. 817 (1986). In the wake of the bankruptcy, A.H. Robins reorganized, establishing a plaintiff's compensation fund. The Robins Plan of Reorganization was funded with a cash payment of $2.225 billion. Robins was then discharged of any further liability to injured victims.

160. Rustad, *supra* note 40.

161. 707 F. Supp. 1517 (D. Minn. 1989).

misrepresentation of its birth control device. The threat of further punitive damages awards led to thousands of out of court settlements.[162]

The Copper-7 was inappropriate for women who had not borne children, yet the firm targeted its advertisements toward young single women. G.D. Searle promoted the contraceptive by marketing a pendant in the shape of the Copper-7 IUD. An advertisement in *Playgirl* magazine read: "The 'In' Necklace Shows Your Independence NOW!" Presumably, the necklace was to be worn by young women to indicate their sexual availability. Readers were advised that the pendant was not "to be used for birth control."[163]

3. *Super-Absorbent Tampons*

Toxic shock syndrome (TSS) was first identified in 1980 as an infection which largely affects menstruating women. TSS begins with flu-like symptoms and may escalate into a life threatening disease. The Center for Disease Control (CDC) identified 55 new cases of the syndrome by May of 1980.[164] In June of 1980, the CDC asked tampon manufacturers to provide them with any data on vaginal physiology and microbiology which might throw light on the outbreak. The manufacturers had little research information to offer.[165]

Female plaintiffs won several punitive damages verdicts as the result of contracting TSS from using super-absorbent tampons.[166] In *West v. Johnson & Johnson Products*,[167] a young college student suffered abnormalities in the functioning of her liver and kidney, low blood pressure, and other life-threatening symptoms from using a super-

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162. *Fairness in Product Liability Act of 1993: Hearings Before the Subcomm. on Commerce, Consumer Protection and Competitiveness of the House Comm. on Energy and Commerce*, 103d Cong., 2d Sess. (1994) (testimony of Bruce Finzen, Partner, Robins, Kaplan, Miller & Ciresi, Minneapolis, Minnesota, reporting that his firm settled 135 Copper-7 cases after winning punitive damages award).

163. *See Advertisement*, Playgirl, July 1978, at 121.

164. West v. Johnson & Johnson Prods., Inc., 220 Cal. Rptr. 437, 442 (Ct. App. 1985), *cert. denied*, 479 U.S. 824 (1986).

165. *Id.* at 443.

166. *Id.* (linking toxic shock syndrome to Johnson & Johnson o.b. tampon); O'Gilvie v. Int'l Playtex, Inc., 821 F.2d 1438 (10th Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988); Friley v. Int'l Playtex, Inc., 604 F. Supp. 126 (W.D. Mo. 1984) and Wooten v. Int'l Playtex, Inc., No. 81-926-3 (D. S.C. 1982) (awarding punitive damages for injuries caused by the use of Rely, a high absorbency tampon linked to toxic shock syndrome).

167. 220 Cal. Rptr. 437 (Ct. App. 1985).

absorbent tampon. Evidence at trial revealed that Johnson and Johnson Products had received complaints about TSS as early as 1975.[168] Despite mounting evidence of medical complications, "the company did no additional testing of o.b. tampons."[169] Punitive damages were based upon the company's knowledge that:

> (1). . . during menstruation, a vagina is potentially a breeding ground for pathogenic bacteria, but (2) despite such knowledge, [it] did not conduct adequate testing of the o.b. tampon . . . [and] (3) having received continuing complaints from consumers about infections . . . did no further studies to determine whether use of the tampon could promote such infections.[170]

In *O'Gilvie v. International Playtex, Inc.*,[171] the Tenth Circuit found that International Playtex willfully and wantonly injured the plaintiff:

> [in] disregard[ing] studies and medical reports linking high-absorbency tampon fibers with increased risk of toxic shock at a time when other tampon manufacturers were responding to this information by modifying or withdrawing their high-absorbency products. Moreover, there is evidence that Playtex deliberately sought to profit from this situation by advertising the effectiveness of its high absorbency tampons when it knew other manufacturers were reducing the absorbency of their products due to the evidence of a causal connection between high absorbency and toxic shock. This occurred in the face of Playtex' awareness that its product was far more absorbent than necessary for its intended effectiveness.[172]

The TSS litigation shows that a firm can comply with Food and Drug Administration (FDA) labeling requirements and still be recklessly indifferent to the welfare of the consuming public.

4. Silicone and Saline Breast Implants

An estimated one to two million women underwent breast implant surgery between 1964 and 1992.[173] An estimated eighty percent of the

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168. *Id.* at 445.

169. *Id.*

170. *Id.* at 459.

171. 821 F.2d 1438 (10th Cir. 1987).

172. *Id.* at 1446.

173. The FDA lacked the authority to regulate implants until 1976 when Congress passed the Medical Devices Amendment to the Food, Drug and Cosmetic Act. *See Is the FDA Protecting*

breast implant surgeries were performed to enlarge healthy breasts.[174] The other twenty percent were performed to correct congenital defects or as part of post-mastectomy reconstruction surgery.[175] In recent years, an increasing number of women have filed product liability lawsuits against the designers, manufacturers, and distributors of these breast implants.[176] To date, an estimated 13,000 breast implant product cases are pending in state and federal courts nationwide.[177] The vast majority of these cases involve virtually identical claims for punitive damages based upon evidence that firms marketed the implants with advance knowledge of design, manufacturing, and warning defects.[178] On September 1, 1994, a federal district judge approved a settlement providing for a $4.25 billion fund to satisfy thousands of breast implant claims.[179]

A total of 17 product liability verdicts in silicone and saline breast implant cases were awarded between January, 1970 and March, 1994.[180]

Patients From the Dangers of Silicone Breast Implants?: Hearing Before the Human Resources and Intergovernmental Relations Subcomm. of the House Comm. on Gov't Operations, 101st Cong., 2d Sess. 30–38 (1992) (asserting need for more regulatory power to prevent serious injury from use of medical devices). The FDA requires no national registry of medical devices which it regulates. Their best estimate is that somewhere between one and two million women have been surgically fitted with breast implants since they were introduced to the market in the early 1960s. *Staff of Human Resources and Intergovernmental Relations Subcomm. of the House Comm. on Gov't Operations*, 102nd Cong., 2d Sess., Rep. on the FDA's Regulation of Silicone Breast Implants (Comm. Print 1992) [hereinafter Report on FDA's Regulation of Silicone Breast Implants].

174. *Body Work*, U.S. News & World Rep., Oct. 17, 1994, at 15.

175. *Id.*

176. The decided breast implant products cases have involved much of the breast implant industry: Dow Corning Corp.; Dow Corning Wright, Inc.; Dow Chemical Company; Corning, Inc.; Bristol Myers-Squibb Co.; Medical Engineering Corp.; Surgitek, Inc.; Bioplasty, Inc.; McGhan Medical Corp.; Baxter Healthcare Corp.; Mentor Corp.; Cox Uphoff Corp.; CUI Corp. *See* Law Subcommittee, 1 Multidistrict Breast Implant Lit. Rptr. , Dec. 1992 [hereinafter *Multidistrict Breast Implant Litigation*].

177. Linda Bean, *Implant Makers to Fund Settlement*, N.J. L.J., Feb. 21, 1994, at 8.

178. *See Multidistrict Breast Implant Litigation, supra* note 176 (citing plaintiffs' claims for "all persons who have had silicone breast implants surgically implanted in their bodies; causes of action listed as negligence, strict liability, failure to warn, negligent misrepresentation, fraudulent misrepresentation, breach of implied warranty, breach of express warranty, intentional infliction of emotional distress, negligent infliction of emotional distress, fear of future product failure, equitable relief including medical monitoring and punitive damages").

179. The global settlement is described in In re Silicone Gel Breast Implant Products Liability Litigation, 1994 WL 578353 (N.D. Ala., 1994). *See generally Foreign Women Plan Appeal of U.S. Implant Settlement*, Reuters, Ltd., Sept. 16, 1994, *available in*, LEXIS, News Library, Wires File (reporting that foreign claimants are appealing compensation schedule which allocated them only 40 and 90 percent of the amount given to U.S. claimants).

180. This section examines the overall patterns of product liability litigation involving silicone or saline breast implants. The universe of case law is based upon all trial verdicts against designers, manufacturers, or distributors of finished breast implants or component parts, including silica,

Plaintiffs prevailed in 11 of these cases, for an overall success rate of 65 percent. Twelve of the seventeen decided cases were brought by plaintiffs who used the implants for cosmetic breast augmentation. Of these, only six (fifty-five percent) of the cases resulted in plaintiff victories.[181] In contrast, plaintiffs prevailed in four out of the five (eighty percent) cases filed by women whose implants were inserted as part of breast reconstruction surgery. This suggests that gender stereotypes of the "good" and "bad" woman play a role in the outcome of the cases.[182]

In nearly two-thirds of the cases where plaintiffs prevailed, punitive damages were awarded.[183] In contrast, the thousands of Dalkon Shield cases yielded only eleven punitive damages awards. The median punitive damages award in breast implant verdicts is the largest in the history of mass torts.[184]

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silicone, and polyurethane foam. The information was drawn from a search of all appellate state and federal decisions and of all trial verdict reporters available on the LEXIS system. Searches were conducted of the following LEXIS, Verdict files: Association of Trial Lawyers of America; Shephards/McGraw-Hill, Inc.; Jury Verdict Research, Inc.; Northern California Verdicts; O'Brien's Evaluator, Verdictum Juris, Tri-Services; Confidential Report for Attorneys; Metro Verdicts Monthly; Florida Jury Verdict Reporter; Georgia Trial Reporter; Massachusetts, Connecticut and Rhode Island Verdict Reporter; Michigan Trial Reporter; and Ohio Trial Reporter. We also conducted searches of special purpose breast implant litigation reporters such as the Multi-District Breast Implant Litigation Reporter. Finally, we interviewed members of the Plaintiffs' Steering Committee in Multi-District Litigation to locate unreported cases.

181. An early punitive damages award was the California case of Stern v. Dow Corning Corp., No. C 83-2348 (N.D. Cal. Nov. 15, 1984). *See also* Marks v. Minnesota Mining and Mfg. Co., 232 Cal. Rptr. 594 (Ct. App. 1987) (affirming punitive damages against successor of company whose predecessor concealed information on breast implant complaints from the FDA); Toole v. McClintock, 778 F. Supp. 1543 (M.D. Ala. 1991), *vacated*, 999 F.2d 1430 (11th Cir. 1993) (vacating punitive damages which jury based on company's failure to warn of known danger of implant rupture); Hopkins v. Dow Corning Corp., 33 F.3d 1116 (9th Cir. 1993) (awarding punitive damages predicated upon Dow's false and fraudulent representations of the safety of breast implants); Johnson v. Bristol Myers Squibb Co., No. 91-021770 (S.D. Tex. 1992) (awarding $20 million punitive damages based upon evidence defendant aggressively marketed device without adequate testing and with knowledge of its tendency to leak).

182. In Denver, for example, the jury decided in favor of Dow Corning Corp. in a product liability action brought by a former exotic dancer who claimed that leaking silicone gel implants caused her to suffer permanent disability. *Colorado Jury Decides for Dow in Breast Implant Case*, 24 Liability Wk., June 14, 1993, at 1.

183. No reported medical malpractice cases involving silicone or saline breast implants have resulted in punitive damages awards. We found two medical care cases where punitive damages were assessed against physicians who unlawfully injected raw silicone into patients' breasts. Nelson v. Gaunt, 178 Cal. Rptr. 167 (Ct. App. 1981); Short v. Downs, 537 P.2d 754 (Colo. App. 1975). In *Nelson* and *Short*, the plaintiffs developed lumps throughout their bodies and other serious side-effects from direct silicone injections. The silicone used in the treatment was unapproved for use in augmentation and in *Short* was even marked "not for human use."

184. Punitive damages awards in breast implant products cases range from $75,000 to $25 million. The mean punitive award [average] for the seven breast implant cases was $9,010,714. The

The Ninth Circuit recently affirmed a $6.5 million award in *Hopkins v. Dow Corning Corp.*[185] The plaintiff in *Hopkins* developed mixed connective tissue disease from silicone which escaped from ruptured Dow Corning breast implants. The firm allegedly concealed clinical studies on the deleterious effects of silicone on the immune system.[186] A key "smoking gun" document was a 1975 memo suggesting a "high rate of rupture—several devices had ruptured as a surgeon was trying to put them in."[187] Another internal memo "noted that after the mammaries had been handled for a while, the surface became oily; [indeed] some were bleeding on the velvet in the showcase,"[188] because of leakage even before they were implanted. As a result, salesmen were instructed to "be sure samples are clean and dry before customer dealing: *wash with soap and water* in nearest washroom, *dry with hand towels.*"[189] The Ninth Circuit found ample evidence to support punitive damages:

> The evidence presented at trial established that a large number of Dow silicone gel breast implants had been implanted in thousands of women. Each of these women was at risk of encountering the

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median punitive award [most typical] in these cases was $6,500,000, which is 10.4 times greater than the median punitive award in previously decided products liability cases in which punitive damages were awarded.

The mean compensatory award for the seven breast implant cases resulting in punitive damages awards was $2,929,642. The median compensatory award in these cases was $840,000, which is considerably greater than the $500,100 median found in general products liability cases decided between 1965 and 1990. Rustad, *supra* note 40, at 46, tbl. 6 (finding that the median size of punitive damages verdicts in non-asbestos products liability cases during 1965–90 was $625,000).

Punitive damages were awarded in amounts greater than compensatory damages in all of the breast implant cases which resulted in punitive verdicts. In contrast, compensatory damages were greater than punitive damages in 36 % of the general products liability cases decided between 1965 and 1990. One possible explanation for this is that in 81 % of the general products liability cases, there was some permanent disability and in 60 % of the cases, the primary plaintiff was either totally disabled or killed. In contrast, there were no deaths in the breast implant cases in which punitive damages were awarded.

Punitive damages were two or more times greater than compensatory damages in 86 % of the breast implant cases and five or more times greater than compensatory damages in 71 % of the cases. The ratio of punitive damages to compensatory damages in breast implant cases ranged from 1.2 times compensatory damages to 16 to 1. The median ratio of punitive damages to actual damages in breast implant cases was 7.1 to 1. This is a much higher ratio than the median ratio of punitive damages to compensatory damages in general products liability cases handed down between 1965 and 1990 which was only 1.67 to 1.

185. Hopkins v. Dow Corning Corp., 33 F.3d 1116 (9th Cir. 1994).

186. *Hopkins*, 33 F. 3d at 119.

187. Brief for Plaintiff-Appellee at 5, Hopkins v. Dow Corning Corp., No. 92-16132, (N.D. Cal.), *aff'd*, 33 F.3d 1116 (9th Cir. 1994).

188. *Id.* at 6.

189. *Id.*

> same fate from which Hopkins suffered. Therefore, Dow's conduct in exposing thousands of women to a painful and debilitating disease, and the evidence that Dow gained financially from its conduct, may properly be considered in imposing an award of punitive damages. Moreover, given the facts that Dow was aware of possible defects in its implants, that Dow knew long-term studies of the implants' safety were needed, that Dow concealed this information as well as the negative results of the few short-term laboratory tests performed, and that Dow continued for several years to market its implants as safe despite this knowledge, a substantial punitive damages award is justified. Coupled with the fact that Dow is a wealthy corporation and that Dow made a considerable amount of money from the sale of its implants, the jury's award of $6.5 million is reasonable in light of *TXO* and *Haslip*.[190]

The potential for future punitive damages awards by thousands of other claimants was undoubtedly a key motivator for firms to join the global settlement of breast implant claims.

D. The FDA Defense and "Her" Mass Torts

An FDA defense was included in a 1993 product liability reform bill H.R. 1910.[191] The FDA defense contained in its companion bill, S. 687,

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190. *Hopkins*, 33 F.3d at 1120.

191. *A Bill To Establish Uniform Product Liability Standards*, H.R. 1910, 103d Cong., 2d Sess. (1993). Section (1)(A) of the Bill provides:

> (1)(A) Punitive damages shall not be awarded against a manufacturer or product seller of a drug . . . or medical device . . . which caused the claimants harm where—
>
> (I) Such drug or device was subject to premarket approval by the Food and Drug Administration with respect to the safety of the formulation or performance of the aspect of such drug or device which caused the claimant's harm or the adequacy of the packaging or labeling of such drug or device and such drug was approved by the Food and Drug Administration; or
>
> (II) The drug is generally recognized as safe and effective pursuant to conditions established by the Food and Drug administration and applicable regulations, including packaging and labeling regulations.
>
> (B) Subparagraph (A) shall not apply in any case in which the defendant before or after premarket approval of a drug or device—
>
> (I) Intentionally and wrongfully withheld from or misrepresented to the Food and Drug Administration information concerning such drug or device required to be submitted under the Federal Food, Drug and Cosmetic Act . . . [or]
>
> (II) made an illegal payment to an official or employee of the Food and Drug Administration for the purpose of securing or maintaining approval of such drug or device.

would bar punitive damages in any case where a drug or medical device has received pre-market approval from the FDA, unless the injured party can prove that the manufacturer withheld from, or misrepresented to, the agency, required information that was "material" and "relevant."[192] The FDA defense is touted as an antidote to inefficient pharmaceutical products litigation.[193] The bill's supporters argue that an FDA "safe harbor" from punitive damages would reduce product liability exposure, thus lowering the cost of insurance.[194] The reformers also maintain that the FDA defense would "improve the climate for innovation in medical technology."[195]

Consumer groups oppose the FDA defense because it provides no safe harbor for consumers. Defective medical products have seriously harmed consumers, despite FDA approval. An attorney for Consumer's Union recently testified that:

> This provision [FDA defense] would bar recovery of punitive damages in a case involving a drug or medical device approved by the FDA, unless there was fraud perpetrated on the agency. Our organizations are adamantly opposed to this comprehensive protection for medical devices from liability for punitive damages. History clearly demonstrates that despite the appearance of a thorough and extensive regulatory regime, the FDA has not been able to adequately protect the public from manufacturers who knowingly or recklessly market dangerous medical devices. There are far too many examples of instances where the FDA could not by itself adequately protect the public from dangerous, defective medical devices.[196]

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192. *A Bill to Regulate Interstate Commerce by Providing for a Uniform Product Liability Law, and for Other Purposes* S. 687, 103d Cong., 2d Sess. § 203 (1993).

193. W. Kip Viscusi et al., *Deterring Inefficient Pharmaceutical Litigation: An Economic Rationale for the FDA Regulatory Compliance Defense*, 24 Seton Hall L. Rev. 1437, 1457 (1994).

194. "The FDA defense would certainly sharply curtail the amount of exposure, and that would probably bring the insurance companies back into the picture." The MacNeil/Lehrer News Hour, Transcript #3823 (July 25, 1990) (statement by George Frazza, counsel for Johnson and Johnson).

195. *Lack of Life Saving Medical Devices, Hearings Before the Subcomm. on Reg. and Gov't Info. of the Senate Comm. on Gov't Affairs*, 103d Cong., 2d Sess. (1993) (statement of James S. Benson, Senior Vice President Health Industry Manufacturers Association); Bruce N. Kuhlik & Richard F. Kingham, *The Adverse Effects of Standardless Punitive Damage Awards on Pharmaceutical Development and Availability*, 45 Food Drug Cosm. L.J. 693, 695 (1990).

196. *Lack of Life Saving Medical Devices, Hearing on S. 687 Before the Subcomm. on Reg. and Gov't Info. Comm. of the Senate Comm. on Gov't Affairs*, 103d Cong., 2d Sess. (testimony of Kristen Rand, counsel on behalf of Consumer's Union).

As with many proposed tort reforms, there has been no empirical study of the potential social impacts of this defense. This is surprising since the five states which have already adopted the FDA defense could serve as a natural research laboratory.[197] These states are: Arizona (1989),[198] New Jersey (1987),[199] Ohio (1987),[200] Oregon (1987),[201] and Utah (1989).[202] Our empirical analysis of a quarter century of products liability cases suggests that the FDA compliance defense may have negative effects on women. We found that "her" punitive damages tort world centers around harms from medical products which are now regulated by the FDA: drugs, contraceptives, breast implants, pharmaceutical products, and medical devices. Most mass torts affecting women feature injuries from defective products placed inside their bodies; whereas men are seldom injured in this fashion.

The FDA defense only makes sense if the agency vigilantly polices clinical trials of drugs and medical devices. However, the FDA does not have a staff of independent scientists to conduct its own tests or even the ability to oversee corporate clinical trials.[203] The FDA is overworked and understaffed.[204] In the 1980s, the Reagan Administration stripped the

197. Several courts have held that FDA approval should insulate a firm from actual damages as well as punitive damages. *See, e.g.*, Stamps v. Collagen Corp., 984 F.2d 1416, 121–22 (5th Cir. 1993); King v. Collagen Corp., 983 F.2d 1130, 1132–37 (1st Cir. 1993) (holding that pre-market FDA approval of collagen preempts all tort remedies).

198. Ariz. Rev. Stat. Ann. § 12-701 (1992) (precluding punitive damages for approved drug, except if manufacturer or seller knowingly withholds or misrepresents information to the FDA).

199. New Jersey provides that compliance with FDA-approved warnings is presumptively adequate. Punitive damages are not available if pharmaceutical products are approved by the FDA. N.J. Stat. Ann. § 2A: 58C-5 (West 1987).

200. Ohio Rev. Code Ann. § 2307.80(C) (Baldwin 1987).

201. Under Oregon's statute, punitive damages may not be assessed against pharmaceutical manufacturers if the drug was manufactured or labeled in conformity with the Federal Food and Drug Administration regulations, or generally is recognized as safe and effective pursuant to FDA regulations. Or. Rev. Stat. § 30.927 (1993).

202. Utah Code Ann. § 78-18-2 (1992).

203. Teresa Schwartz argues that banning punitive damages in drug and medical cases if the manufacturers comply with FDA regulations cannot be justified, because the case for public safety has not been made "through empirical studies or through data supplied by industry." Teresa Moran Schwartz, *Punitive Damages and Regulated Products*, 42 Am. U. L. Rev. 1335, 1363 (1993).

204. Teresa Schwartz writes about the dependence of federal regulatory agencies on information provided by the firms they regulate:

> Even those agencies with the most pervasive regulatory role over industry such as the Federal Aviation Administration (FAA) and the Food and Drug Administration (FDA) (two agencies that arguably deserve more judicial deference in tort actions because they regulate so comprehensively), must rely heavily on the information and data supplied by the regulated industries. Indeed, when the regulatory scheme is more comprehensive, the regulatory job for the agency is larger and it may have to depend more on industry. For example, the FAA, in

FDA's budget, forcing the agency to reduce its staff by over 1,000 employees between 1979 and 1989.[205] As with many regulatory agencies, high-level FDA officials circulate between government service and employment with pharmaceutical or drug companies, potentially undermining their loyalty to the public.[206] A public interest attorney contends that, "[n]o regulatory agency can be expected to protect consumers from all manufacturer misbehavior. The FDA should be the first line of defense for consumers, not the only line of defense."[207] Government regulation should set the floor not the ceiling of protection.

The FDA's hands are tied when it comes to protecting women from unsafe medical products that have been on the market more than two

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certifying the design, manufacture, and airworthiness of an aircraft, requires the applicant to conduct the tests to assure compliance with FAA, often calls upon industry advisory committees, which have substantial influence on the agency. Similarly, the FDA must rely on the regulated industry for data. In the past few years, the failure of companies to provide crucial data to the FDA for a series of drugs—Merital, Oraflex, Zomax, and Selacyn—has been disastrous for consumers.

Teresa Moran Schwartz, *The Role of Federal Safety Regulations in Products Liability Actions*, 12 J. Prod. Liab. 305, 331 (1989).

205. 140 Cong. Rec. S7949 (daily ed. June 26, 1994) (statement of Senator Bill Bradley). *See generally* Herbert Burkholz, *The FDA Follies* (1993) (documenting the decline of the FDA since the Reagan administration); Joel Makower, *Who Will Watch the Watchdogs?*, Wash. Post, Aug. 14, 1994, at X6.

206. Newspapers report that three FDA employees who reviewed Monsanto's new bovine growth hormone drug had previously been working with the firm. The Government Accounting Office (GAO) investigated the issue of conflict of interest. Although the GAO concluded there was a technical conflict of interest, it cleared the FDA employees. Ellyn Ferguson, *Monsanto Employees Cleared in Ethics Case*, Burlington Free Press, Oct. 29, 1994, at 1. Dr. Sidney Wolfe proposed that FDA employees be barred from writing on topics they had worked on while in industry. Sidney Wolfe, *Letter to the Editor: My Remarks in Context*, Wash. Post, May 5, 1994, at A22.

There is a circulation of emplyees from the regulators to the regulated. Richard Cooper, who represents the Pharmaceutical Manufacturers Association, was once an FDA employee. Cooper's recent testimony in favor of the FDA defense legislation illustrates this:

> I am Richard M. Cooper; I am a partner in the law firm of Williams & Connolly in Washington, D.C., where I specialize in food and drug law and litigation. For a little over two years during the Administration of President Jimmy Carter, I was Chief Counsel to the Food and Drug Administration. Among my current clients are manufacturers of drugs and medical devices. Thank you for inviting me to testify here today on behalf of the Pharmaceutical Manufacturers Association concerning the so-called "FDA defense" to punitive damages claims . . . .

Hearing on S. 687 Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary, 103d Cong., 2d Sess. (Mar. 15, 1994) (testimony of Richard M. Cooper, Partner of Williams and Connolly Law Firm on Behalf of Pharmaceutical Manufacturers Association).

207. *Product Liability, Senate Commerce Committee Approves S. 1400; Groups Disagree on Need for Bill*, Daily Rep. for Execs., May 23, 1990, at A-5 (quoting Lucinda Sikes, Staff Attorney for U.S. Public Interest Research Group); *See also id.* (quoting Pamela Gilbert, legislative director of Public Citizen's Congress Watch, in opposition to 1990 products liability bill incorporating FDA Defense).

decades. Congress passed the Food, Drug and Cosmetic Act[208] in 1938 in order to monitor the safety of food and drugs, but devices such as breast implants were not regulated by the FDA until 1976, when the Medical Device Amendment was passed.[209] The Dalkon Shield, breast implants, and other medical devices on the market before this legislation are beyond the FDA's jurisdiction.

Consumer groups have identified a number of cases in which pharmaceutical companies knowingly marketed dangerous drugs and medical devices without violating any FDA rules.[210] A GAO study found that over 50 percent of the drugs approved by the FDA between 1976 and 1985 had serious post-approval risks leading to hospitalization or worse.[211] In many cases, the FDA had knowledge of serious problems but took no remedial action.

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208. 21 U.S.C. § 301 (1988).

209. The FDA's authority to regulate medical devices is based on the 1976 Medical Device Amendments (Pub. L. No. 94-295) to the Food, Drug and Cosmetic Act, 21 U.S.C. § 360(c) (1976). Prior to 1976, medical devices were not covered by the FDA. Dalkon Shields and breast implants were "grandfathered in" by the Medical Devices Amendments of 1976. If these devices were newly developed today, they would be subject to FDA approval. The FDA defense would apply to an ever widening array of drugs and medical devices.

210. Public Citizen's Congress Watch, Consumer's Union, U.S. Public Interest Research Group & Consumer Federation of America, *S. 640 "The Product Liability Fairness Act" Is Uniformly Unfair to Consumers* (1992) (briefing book on product liability legislation). The consumer coalition argues that punitive damages awards are the "hammers" that force companies to behave properly:

> The FDA defense would let unscrupulous manufacturers off the hook because: (1) The costs, resources, and time required to uncover the documentation to prove fraud is prohibitive for most victims (e.g., Copper-7). (2) The FDA often has in its possession all of the necessary safety information but fails to review the data or recognize its significance (e.g., Versed, Zomax). (3) Evidence that a drug or device may pose a health threat may not surface until after a product has been marketed and adverse health effects have been reported. Because of the inherent delays in the regulatory process, lack of resources, and industry pressure, it can take several months or even years for the FDA to react. Manufacturers who take advantage of this delay by aggressively marketing their products to sell as many as possible before the FDA orders the products off of the market (e.g., Bjork-Shiley heart valve, Zomax) should be subjected to punitive damages. (4) Although manufacturers are required to submit information to the FDA that suggests a "significant hazard," manufacturers who fail to submit data claim that the information is not "significant" and that all legally-required documentation was submitted (e.g. Suprol, Merital).

Id. at § 2. As of July 1994, the FDA still had not required Shiley to notify all patients who use their valve implants of potential problems. John Fielder, *New Research on Bjork-Shiley C/C Artificial Heart Valves*, 24 Hastings Ctr. Rep., July 1994, at 2 (noting that Dr. Sidney Wolfe of Public Citizen's Health Research Group wrote to the FDA urging them to require Shiley to notify all patients with valves of potential problems).

211. Product Liability Fairness Act, 140 Cong. Rec. S7723 (daily ed. June 28, 1994) (statement of Senator Barbara Boxer). Examples of dangerous devices marketed with FDA approval include: injectable bovine collagen, theratronics radiation equipment, Bjork-Shiley heart valves, silicone breast implants, and Copper-7 IUDs. *Lack of Life Saving Medical Devices: Hearing on S. 687 Before the Regulation and Government Information Subcomm. of the Senate Governmental Affairs*

The FDA has been an inadequate protector of women's health.[212] Feminist groups have long been critical of the FDA's lack of concern with women's health issues. One women's health care advocate charges:

> The power and the inclination of the FDA to protect women is still very limited. The FDA still defines "safe" as a relative term, based on . . . what the FDA considers to be the acceptable potential risks and benefits of the particular drug . . . . FDA approval of a drug as safe does not automatically mean that the drug has been subjected to properly controlled scientific evaluation and follow-up of individuals exposed to the direct and indirect effects of the drug.[213]

FDA inaction directly damaged the health of large numbers of women on more than one occasion. G. D. Searle's Copper-7 IUD caused serious pelvic infections, loss of fertility, and required remedial surgery in thousands of women. High estrogen contraceptives manufactured by Ortho Pharmaceutical Company caused renal failure because of their unnecessarily high estrogen content. Ortho continued to promote the use of high estrogen contraceptives, not even warning doctors of the growing evidence of risk. Estrogen levels were lowered after a jury awarded $2.75 million in punitive damages for failing to warn of the danger.[214]

The FDA's failure to withdraw the Dalkon Shield, once it gained jurisdiction, is a case study of delay and inaction. The FDA's reluctance to act in the silicone gel breast implant debacle provides another

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Comm., 103d Cong., 2d Sess. 1 (1994) (testimony of M. Kristen Rand, counsel on behalf of Consumer's Union).

212. Rebecca Weisman, *Reforms in Medical Device Regulation: An Examination of the Silicone Gel Breast Implant Debacle*, 23 Golden Gate U. L. Rev. 973, 987 (1993) (arguing FDA has displayed "lax regulation of women's medical devices in the past decades, especially with medical devices which were on the market prior to the Medical Device Amendments" in 1976). Teresa Schwartz also cites many examples of drugs and devices that "passed muster under the FDA's comprehensive regulatory schemes and were marketed to the public" including breast implants, the Copper-7 IUD, and tampon labeling. Schwartz, *supra* note 205, at 1348–52 .

213. Doris Haire, *How the FDA Determines the 'Safety' of Drugs—Just How Safe is 'Safe'? A Report Related to the Congress of the United States* (1984).

214. In Wooderson v. Ortho Pharm. Corp., 681 P.2d 1038 (Kan.), *cert. denied*, 469 U.S. 965 (1984), the Kansas Supreme Court upheld the $2.75 million punitive damages award to a woman who suffered acute renal failure as the result of using the Ortho-Novum 1/80 contraceptive. The court ruled that the defendant's failure to warn women in the face of an accumulating body of medical and scientific evidence of blood-vessel wall damage, acute renal failure, malignant hypertension, and hemolytic uremic syndrome (HUS) warranted punitive damages. There were 21 other cases of HUS in women using oral contraceptives and yet the company took no steps to warn women using oral contraceptives.

illustration of laxity in protecting women's health.[215] Between 1977 and June 1992, reports of approximately 14,250 problems associated with silicone breast implants were filed with the FDA.[216] The FDA failed to monitor breast implants, even after many scientists and physicians had expressed serious concerns about their safety.[217]

Lucinda Finley argues that "[i]t is neither accidental nor coincidental that several of the instances of regulatory failure and flagrant corporate disregard for health and safety . . . [have concerned] products intended to be used in women's bodies."[218] Finley contends that punitive damages in mass torts affecting women would be precluded by the FDA defense "in several instances of recognized flagrant disregard for health and safety, such as failure to investigate mounting reports of harm and failure to

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215. Mounting scientific evidence of problems with the implants was ignored by the FDA. In 1982, the FDA finally classified silicone breast implants as Class III. A Class III device is one which requires a manufacturer to prove safety and effectiveness. *See Is the FDA Protecting Patients from the Dangers of Silicone Breast Implants: Hearing Before the Human Resources and Intergovernmental Relations Subcomm. of the House Comm. on Government Operations*, 101st Cong. 2nd Sess. 1–2 (1990). As Representative Weiss complained:

> By law, after a device has been classified as Class III, FDA must wait 30 months before companies can be required to submit safety data for FDA review. During that period, FDA is supposed to advise manufacturers of the research they will be required to submit to FDA. And yet, with this 30-month deadline now upon us, FDA has still not prepared a final rule about what research needs to be done. Meanwhile, implant surgery continues on hundreds of thousands of women, many of whom are not warned about the potential dangers.

Id. at 2.

In January of 1992, the Food and Drug Administration requested a voluntary 45 day moratorium on silicone gel breast implants. *See Breast Implants, Ramifications of the FDA Ruling on Consumers: Hearings Before the Subcomm. on Housing and Consumer Interests of the House Select Comm. on Aging*, 102d Cong., 2d Sess. 8 (1992) (statement of Dr. David Kessler, Commissioner of the Food and Drug Administration). In April of 1992, the FDA made silicone gel implants available only to women in an urgent need category and women needing breast reconstruction after cancer surgery or due to severe deformity. *Id.* at 13–14. *See also* George Dunea, *Breast Implants: Silicone Cash Cow; Soundings*, 304 Brit. Med. J. 1448 (1992) (discussing the FDA's actions and subsequent media reaction).

216. Editors, *Weighing the Risks*, Albuquerque J., Dec. 15, 1992, at 1.

217. *The FDA's Regulation of Silicone Breast Implants, A Staff Report Prepared by the Human Resources and Intergovernmental Relations Subcomm. of the Comm. on Government Operations*, 102d Cong. 2d Sess. (1992) (documenting the FDA's benign neglect of breast implants for more than 12 years).

218. *Hearing on the Product Liability Fairness Act Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary*, 103d Cong., 2d Sess. 1 (1994) (testimony of Lucinda M. Finley, Professor of Law, State University of New York at Buffalo School of Law). *See also* Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 Yale J. L. & Feminism 41, 45–48 (1989).

warn subsequent to FDA approval and initial marketing of newly revealed dangers."[219]

Almost half of all women receiving punitive damages in products liability litigation were injured by medical devices or drugs which would now be under the jurisdiction of the Food and Drug Administration. The vast majority of mass torts leading to punitive damages awards affected products used exclusively by women. These products include the Dalkon Shield and Copper-7 IUDs, oral contraceptives causing kidney failure, and silicone-gel breast implants associated with connective tissue disease and systemic disease. In each of these mass torts, punitive damages awards helped to make women safer by leading to the removal or restriction of the product from the market, product redesign and improved warnings.

A host of new products designed to be inserted into women's bodies would be immunized by the proposed FDA defense.[220] Breast implants filled with soya bean oil are currently being tested in the United States.[221] Firms marketing these implants may be immunized by a FDA defense. The newly approved female condoms may also receive immunity from punitive damages, even though the FDA sped up review and approved the product despite tests showing a high pregnancy rate.[222] The FDA defense would likely apply to the firm which produced an approved lactation drug which has been associated with the deaths of at least 19 women.[223]

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219. *Hearings on the Product Liability Fairness Act Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary*, 103d Cong., 2d Sess. 1 (1994) (testimony of Professor Lucinda Finley).

220. For example, a firm may have actual knowledge of the dangerous characteristics of a product and still have FDA approval. Actual knowledge of the dangerous propensities of a medical product is presently a basis for punitive damages. Wooderson v. Ortho Pharm. Corp., 681 P.2d 1038 (Kan.), *cert. denied*, 469 U.S. 965 (1984). Even if fraud can not be shown, knowingly placing thousands of patients at risk is sufficient basis for punitive damages. In Kociemba v. G.D. Searle & Co., 707 F. Supp. 1517 (D. Minn. 1989), the manufacturer's knowledge that women who had never given birth and were using a CU-7 IUD were at high risk for pelvic inflammatory disease resulted in a punitive damages award.

221. *Trials of Triglyceride-filled Breast Implant to be Conducted: Trilucent Adjustable Breast Implant*, Cancer Res. Wkly., August 15, 1994, at 5.

222. *Female Condom Approved*, FDA Med. Bull., June 1993, at 1 (noting high pregnancy rate among users).

223. At least 19 women have suffered strokes or heart attacks after taking Parlodel, a milk inhibitor. *F.D.A. is Sued on Drug to Dry Mothers' Milk*, N. Y. Times, Aug. 17, 1994, at 15; Lauran Neergaard, *FDA Sued Over Milk Inhibitor: 19 Deaths Connected*, Legal Intelligencer, Aug. 17, 1994, at 9. The FDA declared lactation suppressants dangerous, but did not require all makers to withdraw them from the market. *Lactation Drug Dropped for Postpartum Use*, Chi. Trib., Aug. 19, 1994, at 8.

The gender impact of the FDA Defense became a critical issue in the debate over the 1994 product liability reform bill.[224] Senator Moseley-Braun argued that: "Many of the drugs that have received inadequate testing and oversight, or have been the subject of misleading advertising campaigns, have been products for use in women's bodies."[225] S. 687 narrowly failed on a second motion for cloture on June 29, 1994.[226] The FDA Defense is a perennial and will almost certainly be proposed again in the next Congress.

The FDA defense does not define fraud or the level of wrongdoing necessary to strip the medical product manufacturer of the FDA defense.[227] Would an initial failure to test, such as A. H. Robins's inadequate examination of the safety of the Dalkon Shield, be immunized by the defense? The contours of this legislation are so ill-defined that they are likely to be litigated at length. Proving fraud or that a company withheld or misrepresented material and relevant information from the FDA is a difficult evidentiary burden.

Open questions about the FDA defense include: Will defendants be able to assert the FDA defense in the face of agency silence about a developing profile of danger, such as in the Toxic Shock Syndrome cases? At what point is a company fraudulently withholding information from the FDA when growing epidemiological evidence or consumer complaints indicate a developing profile of danger, such as in the Dalkon Shield cases?

The bottom line is that FDA approval does not provide adequate consumer protection, particularly for women. At a minimum, the FDA defense would be yet another barrier making it more difficult for women to find redress for mass product liability injuries affecting their bodies. The likely result will be more delay in ridding the marketplace of dangerous drugs and medical devices that injure women and reduced deterrence of manufacturers who place unsafe drugs and medical devices

224. After Professor Rustad presented preliminary findings from this law review article at a Capitol Hill news conference sponsored by a consumer group, Public Citizen, the gender issue became important in the debate over the Product Liability Fairness Act. *See, e.g., Liability Bill Called 'Gender Unjust,' Product Liability Fairness Act*, Chem. Mktg. Rep., June 27, 1994, at 7 (reporting Public Citizen's Congress Watch press release where Professor Rustad and Senators Boxer, Moseley-Braun, and Wellstone spoke on the gender impact of S. 687)

225. *Liability Bill Called 'Gender Unjust,' Product Liability Fairness Act, supra* note 228, at 7 (quoting Senator Moseley-Braun, D.-Ill. on gender impact of S. 687).

226. 40 Cong. Rec. S7951 (daily ed. June 29, 1994).

227. Firms might argue that the FDA's inaction in the face of a developing profile of danger is "approval by silence."

on the market. Punitive damages awards provide a key incentive for drug companies to take early unilateral action to protect this nation's women.

E. Punitive Damages in Medical Malpractice

Medical malpractice is broadly defined to "embrace all liability-producing conduct arising from . . . professional medical services."[228] Medical malpractice lawsuits are filed in response to only a small fraction of the instances of actionable medical negligence.[229] Punitive damages awards in medical malpractice are extremely rare.[230]

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228. King, *supra* note 97, at 3; *See also* McClellan, *supra* note 97. Professional medical malpractice liability may hinge upon contractual, negligence, and even fiduciary principles. In addition, intentional torts have been assessed as the basis for liability-producing conduct.

Medical malpractice has evolved from a backwater specialty to prominence over the past few decades. Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972), greatly expanded the informed consent wing of medical malpractice. The plaintiff in *Canterbury* was a 19- year-old male paralyzed by an unsuccessful laminectomy operation. He had not been informed of the risk of paralysis. The *Canterbury* court held that a physician had a duty to explain the material risk, benefits, and alternatives to medical treatment. In the wake of this case, many courts "have held the risk required to be disclosed are those that doctors customarily disclose in similar circumstances." McClellan, *supra* note 97, at 8.

Informed consent is an especially important doctrine for women, since many medical procedures regarding reproductive functions require extensive explanation so that the patient can make an informed choice. The court in Cobbs v. Grant, 502 P.2d 1 (Cal. 1972) explained that when a physician fails to make information available, the case may be tried as an intentional tort or as negligence:

> The battery theory should be reserved for those circumstances when a doctor performs an operation to which the patient has not consented. When the patient gives permission to perform one type of treatment and the doctor performs another, the requisite element of deliberate intent to deviate from the consent given is present. However, when the patient consents to certain treatment and the doctor performs that treatment but an undisclosed inherent complication with a low probability occurs, no intentional deviation from the consent given appears; rather, the doctor in obtaining consent may have failed to meet his due care duty to disclose pertinent information. In that situation the action should be pleaded in negligence.

Id. at 8.

229. A study of New York state hospital and legal records concluded that "the underlying assumption that too many groundless malpractice suits are initiated is unfounded." Paul C. Weiler et al., *A Measure of Malpractice: Medical Injury, Malpractice Litigation, and Patient Compensation* 137 (1993). Few victims of hospital negligence ever file a lawsuit. The investigators found that only eight claims were brought by the 280 negligent injury victims in their sample. *Id.* at 73. They argue that hospital malpractice is a very serious problem:

> If New York's adverse-event-related death total can be extrapolated to the U.S. population as a whole, one would estimate over 150,000 iatrogenic fatalities annually, more than half of which are due to negligence. Medical injury, then, accounts for more deaths than all other types of accidents combined....

To investigate the patterns of punitive damages awards in medical malpractice, we compiled the largest existing sample of punitive damages awards arising out of substandard health care. A national data base covering thirty years of verdicts was required to study gender

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Id. at 55. *See also* A. Russell Localio, et al., *Relation Between Malpractice Claims and Adverse Events Due to Negligence*, 325 New Eng. J. Med. 245 (1991) (summarizing relationship between medical negligence and filed malpractice lawsuits).

A recent medical negligence study by the Duke University Law School Medical Malpractice Project concentrated on the role of the jury in medical negligence cases. Weiler, et al., *supra*. The Duke researchers analyzed more than 1000 medical malpractice cases filed in North Carolina courts during a three-year period; essentially every malpractice case filed in the state. Plaintiffs won compensation through settlements in 50 percent of the cases and prevailed at trial in another 2 percent. Only 117 cases went to trial. *See also* Dana Beyerle, *Civil Liability Law Reform Urged*, UPI, Apr. 7, 1987, *available in* LEXIS, News Library, UPI file (reporting only 33 medical malpractice plaintiff verdicts in Alabama history).

230. The American Bar Foundation (ABF) examined 25,627 jury verdicts handed down from 1981 to 1985 drawn from 47 counties in eleven states. The ABF researchers uncovered only 18 punitive damages awards in 1,917 jury verdicts for a punitive award rate of 2.9 percent. Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 1, 38 tbl. V (1990).

Rand Corporation's Institute for Civil Justice found punitive damages to be extremely rare in an exhaustive study of civil verdicts during the 1960s and 1970s in Cook County and San Francisco. Mark Peterson et al., *Punitive Damages: Empirical Findings* (1987) (sponsored by Rand's Institute for Civil Justice); *See also* Thomas A. Moore, *Punitive Damages*, 209 N.Y. L.J., Jan. 5, 1993, at 5 (reporting inability to locate a single medical malpractice punitive award ever upheld on appeal in New York); Walter A. Costello, Jr., *Presidential Message: Massachusetts Academy of Trial Lawyers*, Mass. Law. Wkly., June 8, 1992, at 37 (citing Minnesota malpractice claims study finding no punitive damages in Minnesota, North Dakota and South Dakota between 1982 and 1987). Table Two below summarizes the major studies.

TABLE TWO: PUNITIVE DAMAGES IN MEDICAL MALPRACTICE

RESEARCH SPONSOR	TIME FRAME/GEOGRAPHY	TOTAL PUNITIVES
Rand Corporation: Institute of Civil Justice.	1980–86, Cook County, Illinois & San Francisco County, California.	4
American Bar Foundation	1981–84, 47 counties in eleven states.	18
TOTALS		22

Tort reformers often ignore the empirical evidence that punitive damages awards are very unusual in medical malpractice. For example, Forbes asserted that "[t]he most outrageous punitive damages awards typically result from product liability, medical malpractice and fraud cases." Leslie Spencer, *Troubling Days for Trial Lawyers*, Forbes, June 11, 1990, at 108 (charging that "[i]ndeed, such awards have become one of the most effective get-rich-quick methods in the U.S."). One news magazine reported that, "[s]weeping reform of the medical-malpractice system—coupling such measures as limits on punitive damages in malpractice cases with an all-out attack on medical negligence—could also hold down costs." Susan Dentzer & Dorian Friedman, *America's Scandalous Health Care*, U.S. News & World Rep., Mar. 12, 1990, at 24.

impacts because there are so few of these awards in any jurisdiction. The sample was drawn from a search of all appellate state and federal decisions,[231] all available verdicts data bases,[232] trial verdict reporters available on LEXIS[233] and WESTLAW,[234] and all available jury verdict reporters.[235] Special purpose medical malpractice litigation reporters and treatises,[236] legislative hearings,[237] discovery documents, court records,[238]

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231. The following LEXIS libraries and files were searched systematically: American Bar Association (ABA), American Law Reports (ALR), Bureau of National Affairs (BNA), General Medical, (GENMED), health related (HEALTH), medical malpractice (MEDMAL), media and magazines (NEXIS, now CURRNT & ARCHIVE). These searches were augmented with WESTLAW searches of MEDLINE, Westlaw verdict reporters, and newspaper data bases.

232. For example, the American Trial Lawyers Association Exchange provided us with case reports on all medical malpractice cases in its data base 1963–93.

233. Searches were conducted of each of the on-line data bases in the VERDCT library of LEXIS.

234. WESTLAW searches were completed on the LRP-JV data base.

235. The following jury verdict reporters and services were searched: ATLA Law Reporter and Exchange; Association of Trial Lawyers of America (coverage: 1963–93); Confidential Report for Attorneys (coverage: Southern California, Jan. 1980–present); Cook County Jury Verdict Reporter (coverage: 1959–93); Cook County Medical Malpractice Suit Filing List (coverage: 1959–93); Illinois Jury Verdict Reporter (coverage: 1959–93); Florida Jury Verdict Reporter (coverage: Aug. 1987–present); Florida Jury Verdict Review and Analysis (coverage: 1988–present); The Georgia Trial Reporter (coverage: 1987–present); Jury Verdict Reporter of Colorado (coverage: 1987–present); Jury Verdicts Weekly (coverage: 1974–present); LRP-JV Database (Verdict Reviews on WESTLAW) (coverage: nationwide, 1987–present); The Massachusetts, Connecticut, & Rhode Island Verdict Reporter (coverage: May 1989–present); Medical Malpractice Verdicts, Settlements & Experts (coverage: nationwide, June 1985–Dec. 1993); Metro Verdict Monthly (coverage: D.C. Metro Area, Jan. 1989–present); The Michigan Trial Reporter (coverage: Apr. 1988–present); National Jury Verdict Review and Analysis (coverage: 1970–present); National Products Liability Database Report (coverage: nationwide, June 1985–Dec. 1993); New England Jury Verdict Review and Analysis (coverage: 1989–present); New Jersey Jury Verdict Review and Analysis (coverage: 1984–present); New York Judicial Review of Damages (coverage: 1981–present); The New York Jury Verdict Reporter (coverage: 1981–present); New York State Jury Verdict Review and Analysis (coverage: 1984–present); Northern California Verdicts (CAJURY in LEXIS) (coverage: Jan. 1981–present); Northwest Personal Injury Litigation Reports (coverage: 1984–present); O'Brien Evaluator (coverage: Southern California, Jan. 1981–present); The Ohio Trial Reporter (coverage: Sept. 1987–present); Shepard's McGraw-Hill Verdicts, Settlements & Tactics (coverage: nationwide, Jan. 1987–present); Tennessee Litigation Reporter (coverage: June 1985–Dec. 1993); Texas Verdicts Reporter (coverage: 1992–present).

236. We examined Marily Minzer et al., *Damages in Tort Actions* (1982); David Louisell et al., *Medical Malpractice* (1960).

237. On December 18, 1990, the Human Resources and Intergovernmental Relations Subcommittee of the House Committee on Government Operations conducted a hearing on the Food and Drug Administration's regulation of silicone breast implants. On December 31, 1992, the Human Resources and Intergovernmental Relations Subcommittee released a staff report on its three year investigation of the FDA's regulation of silicone breast implants. *See, e.g.*, Staff of Human Resources & Intergovernmental Relations Subcomm. of the House Comm. on Government Operations, 102nd Cong., 2d Sess., *Report of the FDA's Regulation of Silicone Breast Implants* (1992) (reporting Congressional hearing on silicone breast implants).

and media reports were also reviewed.[239] Finally, we conducted interviews or received questionnaires from at least one attorney in forty percent of our sample.[240] Unstructured and structured interviews with trial counsel provided details about the factual circumstances leading to the punitive damages awards.[241] The sample was broadly defined to include health care providers of all kinds.[242]

F. Gender and Medical Malpractice Remedies

Graph Three reveals that, in marked contrast to products liability, medical malpractice cases are located primarily in "her" tort world. The medical profession is male-dominated[243] and some of its worst excesses

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238. Alabama Judicial Information System, *Caseload Statistics on The Disposition of Civil Cases in Alabama* (1993) (reported cases from Alabama Administrative Office of Courts).

239. We searched the NEXIS-OMNI data base as well as Westlaw's Newspaper data base for all references to breast implant litigation.

240. Interviews are continuing and we hope to survey at least one lawyer from each side in all cases. However, it is unlikely that we will be able to obtain any further information on older cases. For example, one respondent wrote: "Please excuse my delay in responding to your information from my file on *Greenberg v. McCabe.* As you know, this was a 1976 trial and all the records are long gone." Letter from James E. Beasley, Plaintiff's Counsel in Greenberg v. McCabe to Michael Rustad (Jan. 6, 1994) (on file with author).

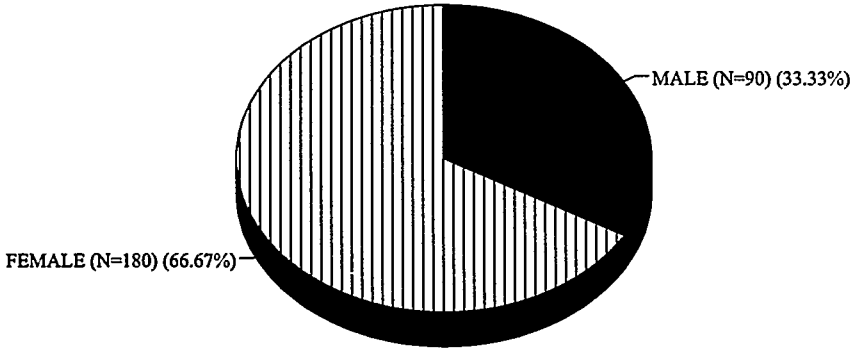
241. Interviews were also a cross-check on the accuracy of the jury verdict reporters. For example, a jury verdict reporter stated that the case of Johnson, Estate v. EMS; NYCHHC; City of New York, No. 14764-88 (N.Y Sup. Ct., Kings County) resulted in punitive damages. However, attorney Norma Giffords wrote us that the verdict reporter was incorrect. In fact there were no punitive damages in the wrongful death action, only non-economic damages. Letter from Norma Giffords, Esquire, Plaintiff's Counsel in Johnson, Estate v. EMS; NYCHHC; City of New York, to Michael Rustad (Apr. 4, 1994) (on file with author). Interviews led to the identification of cases unreported in any jury verdict reporter. Given these comprehensive methods, it is all but certain that the sample represents the vast majority of all decided punitive damages awards in medical malpractice, 1963–93.

242. The universe of cases is based upon all trial verdicts against hospitals, nursing homes, mental hospitals, primary physicians, psychologists, social workers, dentists, optometrists, pharmacists, podiatrists, medical administrators, and even Christian Science nurse practitioners.

243. Kathryn Ratcliff notes that:

> The feminist critique of health care has been wide ranging but two broad areas of criticism are particularly relevant. First, feminist scholars have documented the male-dominated character of western medicine and argued that male domination means that technology used in the medical system is used to reinforce the subordinate role of women. These analyses trace the evolution of a system of health care in which the high-ranking health care providers are male, . . . they document these men's contributions to the medicalization of natural processes occurring in women, . . . and they argue that both are linked to a patriarchal system. . . .
>
> They suggest that western science and technology embody stereotypical male values such as control, distance, power, objectivity, and domination and that these values promote invasive solutions to problems. Analyses of influential early writings in science and technology, for example, note how these writings incorporated sexual metaphors endowing science and

GRAPH THREE
NUMBER OF MEDICAL MALPRACTICE PUNITIVE DAMAGE AWARDS BY GENDER 1963-93 (N=270)



are perpetuated against females.[244] The American Medical Association Counsel on Ethical and Judicial Affairs reviewed forty-eight studies on gender discrimination in dealing with patients and concluded:

> These studies have documented gender disparities in treatment in a number of areas, including kidney transplantation, cardiac catheterization and the diagnosis of lung cancer. While biological factors account for some differences between the sexes in the delivery of medical care, the studies indicate that there may be non-biological and non-clinical factors which affect clinical decision-making . . . . [M]ore research in women's health issues and women's health problems should be pursued. Finally, awareness of and responsiveness to socio-cultural factors which could lead to gender disparities may be enhanced by increasing the number of

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technology with typical male traits while portraying the objects of science and technology as female.

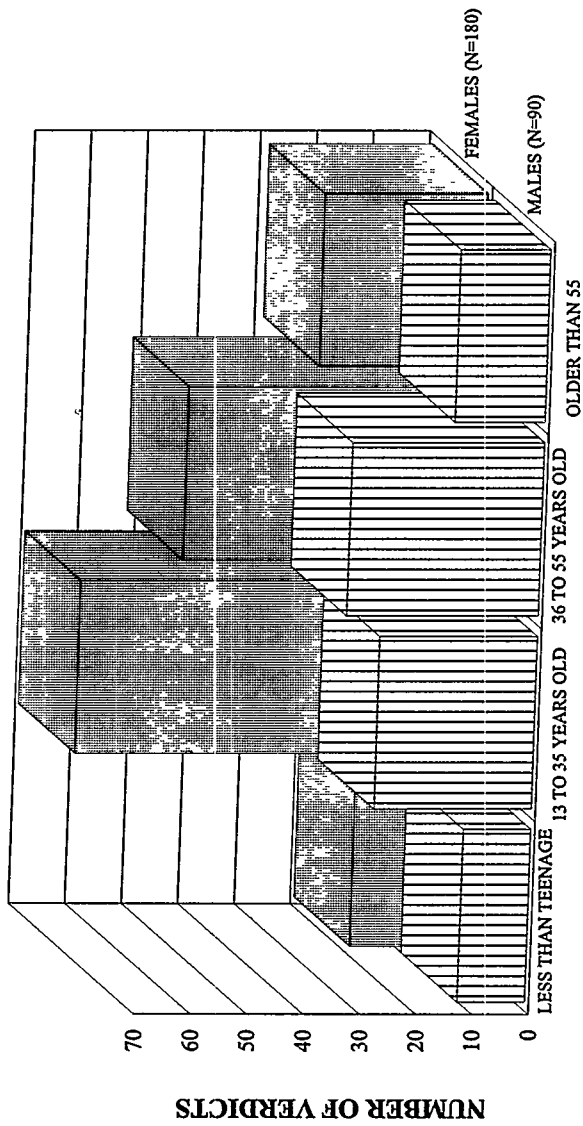
Kathryn Strother Ratcliff, *Health Technologies for Women: Whose Health? Whose Technology? in Healing Technologies: Feminist Perspectives* 173, 174 (Kathryn Strother Ratcliff et al. eds., 1989).

Feminists argue that medical personnel have a negative view of women resulting from "the traditions of Western thought [in which] man represents wholeness, strength, and health. Woman is a 'misbegotten male,' weak and incomplete." Barbara Ehrenreich & Deirdre English, *Complaints and Disorders: The Sexual Politics of Sickness* 6 (1973). Feminists charge that relatively little research has been done on women's health problems because the profession views the female reproductive system as a complication interfering with systematic study instead of as an important part of human health to be investigated.

244. *See generally* Eileen Nechas & Denise Foley, *Unequal Treatment: What You Don't Know About How Women Are Mistreated by the Medical Community* (1994).

GRAPH FOUR

AGE OF PLAINTIFF BY GENDER IN MEDICAL MALPRACTICE DAMAGE AWARD CASES (N=270)



female physicians in leadership roles and other positions of authority in teaching, research, and the practice of medicine.[245]

Stereotypes of the medical profession are so powerful that doctors are automatically perceived to be male and nurses to be female. A substantial majority of children shown a film with a woman doctor and a male nurse remembered the genders as being reversed.[246] Disparaging comments about the female body were quite common in medical school as recently as fifteen years ago.[247]

Two-thirds of punitive damages verdicts in medical malpractice cases arose out of bad medicine rendered to women. As in products liability, punitive damages awards in medical malpractice mirror traditional gender roles. The verdicts cluster around specialties related to women's distinctive biological, demographic, and social characteristics.[248] Sixteen punitive damages awards were against gynecologists or obstetricians. Twenty of the thirty-one punitive damages verdicts against nursing homes were in favor of female plaintiffs. Thirteen women, as opposed to only five men, received awards for injuries caused by psychiatrists. Two-thirds of the thirty-four punitive damages awards against hospitals were in favor of female patients.

Graph Four reveals that female plaintiffs predominate in every age category. Sex differentials were particularly pronounced among plaintiffs between 13 and 35 years of age. This is due in part to the fact that in this age group women are victimized through grossly substandard acid peels, tummy tucks, breast implants, and other cosmetic procedures.[249] This age group is also the prime target for abuses of

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245. American Medical Association Council on Ethical and Judicial Affairs, *Gender Disparities in Clinical Decision-Making* (1990).

246. Aletha C. Huston, *Sex Typing, in Handbook of Child Psychology* (Paul H. Mussen & E. M. Hetherington eds., 1983).

247. Judith Lorber, *Women Physicians: Careers, Status and Power* (1984) (describing the problems of women physicians because their medical role is gender inconsistent).

248. For example, elderly women are disproportionately affected by neglect and abandonment in nursing homes. Erving Goffman described institutions like nursing homes as "total institutions." Patients cannot communicate freely with the outside world and may not be permitted to leave. Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (1961). Some powerful legal check is needed to prevent the abuse of such tremendous private power.

249. Naomi Wolf argues that widespread cosmetic surgery is an indication that women have accepted the myth that their bodies need to be cured. Naomi Wolf, *The Beauty Myth: How Images of Beauty Are Used Against Women* 232–39 (1991). Thousands of women are maimed each year by unqualified doctors performing cosmetic surgical procedures. *See generally Unqualified Doctors Performing Cosmetic Surgery: Policies and Enforcement Activities of the Federal Trade Commission—Part I, Hearing Before the Subcomm. on Regulation, Business Opportunities and*

transference and sexual assault. Due to their greater longevity, women are disproportionately victimized in old age.[250] Elderly women constitute the majority of patients neglected or mistreated in nursing homes.[251]

G. *Medical Malpractice & Profiles of Wrongdoing*

As illustrated in Graph Five, the 270 punitive damages awards coalesce into five recurring patterns of wrongdoing:[252] (1) Sexual Misconduct; (2) Fraud, Malicious Behavior, and Cover-ups; (3) Extreme Failure of Informed Consent; (4) Gross Incompetence; and (5) Neglect or Abandonment. Women predominated as plaintiffs in each of these categories. However, there are clear sex differences in the patterns of medical victimization. An elaboration of the factual foundations

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Energy of the House Comm. on Small Business, 101st Cong., 1st Sess. (1990) (documenting injuries and deaths sustained by American women at the hands of unqualified cosmetic surgeons). Representative Ron Wyden has stated in Congressional hearings on cosmetic surgery procedures: "[u]ntold numbers of patients seeking the fountain of youth through a facelift, a tummy tuck or an acid peel sometimes get more than they bargain for, suffering infection, stroke, and occasionally, death." *Id.* at 1.

250. One study finds that women are not at greater risk in New York hospitals than men. However, age was found to be an important risk factor so that the greater longevity of women should logically place them in greater danger. The researchers concluded that there was

> no difference in injury rate or negligence rate in the care given to men or to women. However, age was an important risk factor. Although individuals over the age of 65 constituted only 27 percent of the total number of hospitalized patients, they suffered 43 percent of the adverse events and 52 percent of the negligent adverse events. This additional risk to the elderly persisted even after we standardized for the severity of the illness.

Weiler et al., *supra* note 229, at 45.

251. Elderly women were also the victims of grossly substandard surgical practices as in Morales v. Webb, 409 S.E.2d 572 (Ga. Ct. App. 1991). In *Morales*, the plaintiff brought an action against her anesthesiologist, his professional corporation, and the registered nurse anesthetician for permitting her to "become anesthetically light" during surgery. *Id.* The plaintiff suffered swelling of the nerve fiber in back of her eye, which led to a loss of vision. The plaintiff alleged her condition was due to the depletion of oxygen during surgery. The *Morales* court permitted punitive damages stating that it would "[d]eter the wrongdoer from repeating his wrongful acts." *Id.*

252. Some cases involved more than one profile of misconduct. Sexual assault might occur during substandard cosmetic surgery. In Nethery v. Unterthiner, No. 40095 (Cal. Super. Ct., Riverside County. 1986), a 48-year-old registered nurse, consulted the defendant for a facelift. She was placed under anesthesia and the surgery was performed. Following surgery, the plaintiff was left with a large scar on the left side of her face. The plaintiff alleged that her cosmetic surgeon failed to properly advise her of the possible risks of the surgery and that he performed negligent surgery by removing too much skin. The plaintiff's attorney characterized the punitive damages award as stemming from the plaintiff's allegation "that the doctor put his hand in her vagina as she was coming out of anesthesia. There was nothing to the claim of punitive damages other than that.... The doctor denied the incident." Letter from Jim Pagliuso, Plaintiff's Attorney in Nethery v. Unterthiner, to Professor Rustad (Mar. 1, 1994).

GRAPH FIVE

MISCONDUCT LEADING TO MEDMAL PUNITIVE DAMAGES BY GENDER 1963-93 (N=270)

underlying each of these types of extreme medical misbehavior will demonstrate the deeply gendered nature of this remedy.

1. Sexual Misconduct

The sexual abuse of patients by health care providers is almost exclusively a female injury.[253] Thirty of the thirty-four abuse of transference or sexual assault cases involved female plaintiffs.[254] Sexual misconduct that resulted in punitive damages falls into two categories: the abuse of transference by those working with the psychologically vulnerable[255] and conduct which amounted to sexual assault. Power imbalances,[256] breaches of fiduciary duty,[257] and predatory sexual behavior are frequently intertwined in these cases.[258]

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253. *See, e.g.*, Dugger v. Ali, No. 13242 (Tenn. Cir. Ct., Wash. County May 1991) (contending that her physician sedated and then sexually assaulted her during a physical examination); Marston v. Minneapolis Clinic of Psych. and Neurology, Ltd., 329 N.W.2d 306 (Minn. 1982) (affirming award of punitive damages where a psychologist committed sexual assaults on a female patient).

254. *See, e.g.*, Callison v. St. Anthony Hosp. Sys., No. 86-CV-10753 (Colo. Dist. Ct., Denver County 1987) (assessing punitive damages against hospital for rape of female patient by respiratory therapist).

255. The discovery of the transference phenomenon "is perhaps regarded as the most significant concept in psychoanalytical therapy, and one of the most important discoveries of Freud." Zipkin v. Freeman, 436 S.W.2d 753, 755 n.1 (Mo. 1968). The abuse of transference is almost universally regarded as malpractice or gross negligence. *See, e.g.*, Vigilant Ins. Co. v. Employers Ins. of Wausau, 626 F. Supp. 262 (S.D.N.Y. 1986); Aetna Life & Casualty Co. v. McCabe, 556 F. Supp. 1342 (E.D. Pa. 1983); Waters v. Bourhis, 709 P.2d 469 (Cal. 1985); Horak v. Biris, 474 N.E.2d 13, (Ill. App. Ct. 1985); L.L. v. Med. Protective Co., 362 N.W.2d 174, 176–78 (Wis. Ct. App. 1984); St. Paul Fire & Marine Ins. Co. v. Mitchell, 296 S.E.2d 126 (Ga. Ct. App. 1982); Cotton v. Kambly, 300 N.W.2d 627 (Mich. Ct. App. 1980); Roy v. Hartogs, 381 N.Y.S.2d 587 (App. Div. 1976); Seymour v. Lofgreen, 495 P.2d 969 (Kan. 1972).

256. Eliot Friedson writes that "[m]edicine's position today is akin to that of state religions yesterday—it has an officially approved monopoly of the right to define health and illness and to treat illness." Eliot Friedson, *Profession of Medicine: A Study of the Sociology of Applied Knowledge* 5 (1988).

257. Some courts hold that sex is not part of medical treatment and therefore cannot be the basis for an insurance claim. *See, e.g.*, Smith v. St. Paul Fire & Marine Ins. Co., 353 N.W.2d 130 (Minn. 1984) (holding that physician's sexual abuse of three boys is not covered by insurance policy); Hirst v. St. Paul Fire & Marine Ins. Co., 683 P.2d 440 (Idaho Ct. App. 1984) (showing that physician who drugged and raped patient is not covered under liability policy); and Standard Fire Ins. Co. v. Blakeslee, 54 Wash. App. 1, 771 P.2d 1172 (1989) (noting that dentist's sexual misconduct was not covered by insurance policy).

258. Physician John Smith argues that male medical personnel often mistreat women and that this is extremely serious because:

> The relationship between a woman and her physician implies a great deal of trust. She exposes her body, her emotions, her sexuality, because she needs the skills that the doctor has to offer. To treat this woman with anything less than complete respect, to reveal her confidences, to reduce her dignity, or to abuse the privileged access to her body is a totally unacceptable

a. Breach of Transference

Transference describes a patient's "projection of feelings, thoughts and wishes onto the analyst, who has come to represent some person from the patient's past."[259] Transference is deemed critical to the therapeutic process because the patient "unconsciously attributes to the psychiatrist or analyst those feelings which he may have repressed towards his own parents . . . It is through the creation, experiencing and resolution of these feelings that [the patient] becomes well."[260] A psychiatric patient has a diminished ability to control sexual emotions because of the trust the patient feels for the therapist.[261] Sexual activity between therapist and patient is always presumed to be a misuse of transference.

Juries often awarded punitive damages when psychotherapists had violated their position of trust by having sex with their patients. A typical breach of transference leading to punitive damages occurred in *Hinkle v. Petroske,* in which a psychiatrist had sex with his female patient every week for 12 to 13 years.[262] The plaintiff contended that her psychiatrist's actions led to her suicide attempt. Evidence at trial revealed that the defendant continued to prescribe Nembutal long after he knew that the plaintiff was emotionally addicted to it. The award of $1.9 million included $1 million in punitive damages. In *Dawson v. Fink,*[263] an arbitrator awarded punitive damages to a 39-year-old woman who had a three-year sexual relationship with the defendant psychiatrist under the

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betrayal, a violation of trust. Few women would accept this kind of abusive behavior from a friend or lover, but many apparently feel that they have no choice by to accept it from a physician.

John M. Smith, *Women and Doctors* 22 (1992).

259. *Stedman's Medical Dictionary* 1473 (5th Lawyers' Ed. 1982).

260. L.L. v. Med. Protective Co., 362 N.W.2d 174, 177 (Wis. Ct. App. 1984) (quoting D. Dawidoff, *The Malpractice of Psychiatrists* 6 (1973)).

261. In MacClements v. Lafone, No. 88-CVS-4095 (N.C. Super. Ct., Mecklenburg County 1990), a 35-year-old female secretary suffered post-traumatic stress disorder and a distrust of men after she was sexually abused by the defendant psychologist. The plaintiff originally sought help from the defendant to treat her inability to establish normal relationships with men. Following one therapy session, the plaintiff engaged in sexual intercourse with the defendant. The plaintiff alleged that the defendant then stated that he could no longer provide the plaintiff with treatment and that she should keep their experiences a secret. The plaintiff's sexual relationship continued with the defendant as she sought therapy from his colleague. During the trial, the defendant admitted that he had sex with four other patients and/or ex-patients.

262. *See Woman Wins Damages From Psychiatrists,* UPI, February 11, 1989, *available in* LEXIS, News Library, Wires File. Petroske was also held liable for $1.87 million in damages and lost wages in favor of another ex-patient with whom Petroske had engaged in a lengthy sexual affair.

263. No. 83,283 (1984) (Md. Health Claims Arb. Panel).

guise of therapy.[264] In *Combs v. Silverman*,[265] a psychiatrist admitted to engaging in 60 incidents of sex with a 19-year-old schizophrenic but argued that there was no resulting harm, since her condition had not worsened.

The abuse of transference cases mirrors the gendered power differentials in American society. All of the victims were women and all the perpetuators were men.[266] The great majority of these cases involved older, high-status males exploiting their fiduciary position of trust for sexual advantage.

b. Sexual Assaults by Medical Providers

Unconsented sexual contact with patients is a crime as well as an intentional tort.[267] The victimized patient in these cases was likely to be drugged, unconscious, or in some other vulnerable position. In *Sciola v. Shernow*,[268] the plaintiff visited her dentist's office to have a molar filled. The dentist administered nitrous oxide. Upon awakening, the plaintiff felt the defendant's tongue in her mouth and experienced pain in her breasts. In *Chanley v. Praska*,[269] a physician drugged the plaintiff with Quaaludes before making sexual advances. An osteopath plied his female patient with a number of illegal drugs in the course of seducing her.[270] Few of these cases resulted in criminal prosecution. No defendant served a day in jail for such egregious misconduct.

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264. Victoria Churchville, *Md. Psychiatrist's Affair with Patient Aired to Jury*, Wash. Post, May 23, 1985, at Metro C1.

265. 25 ATLA L. Rep. 98, No. LE 596 (Va. Cir. Ct., Richmond 1982).

266. Phyllis Chesler interviewed female patients to describe how they were coerced into entering into sexual relationships with their therapists. Phyllis Chesler, *Women and Madness* (1972).

267. There are few rape convictions for the sexual abuse of patients. The prestige of physicians in the community and the difficulty of prosecuting rape may account for the lack of criminal prosecution. However, there have been exceptions. *See, e.g.*, People v. Minkowski, 23 Cal. Rptr. 92 (Ct. App. 1962) (convicting physician of rape which occurred during a medical examination); People v. Ogunmola, 238 Cal. Rptr. 300 (Ct. App. 1987) (affirming conviction of gynecologist who raped two patients while their feet were in stirrups).

268. 577 A.2d 1081 (Conn. App. Ct. 1990).

269. No. 33-31-88 (Cal. Dist. Ct., Orange County July 23, 1980).

270. In Greenberg v. McCabe, 453 F. Supp. 765 (E.D. Pa. 1978), *aff'd*, 594 F.2d 854 (3d Cir.), *cert. denied*, 444 U.S. 840 (1979), a thirty-five-year-old woman suffered from an acute organic brain syndrome caused by six years of psychiatric therapy with an osteopath who treated her with a variety of hallucinogens, amphetamines and tranquilizers. The defendant osteopath had no formal psychiatric training. The osteopath injected the plaintiff with Ritalin (an amphetamine) and DMT (a hallucinogen similar to LSD), and Sodium Amytal (a practically obsolete drug, mostly used for shell-shocked veterans), and over 20 other drugs. The defendant gave her pill samples and injections so that she was almost always under the influence of one drug or another.

2. *Fraud, Malicious Behavior, and Cover-ups*

Female patients were also injured by health care providers who committed non-sexual intentional torts. Fifty-eight of the punitive damages awards in the study involved some intentional tort other than sexual abuse.[271] Sixteen of the cases stemmed from aggravating circumstances in the course of committing intentional torts. These torts included intentional infliction of emotional distress, false imprisonment, and assault and battery. Fraud was the basis for another 22 verdicts. Spoliation or alteration of medical records to conceal negligence accounted for an additional 20 punitive damages awards. Thirty-seven of the non-sexual intentional tort awards were made to women.[272]

The plaintiff began having nightmares and hallucinations, and within 6 months defendant was having sexual relations with her during office sessions, in order "to fill her emptiness." After 2 years she left her husband for a year and repeatedly slashed her wrists. Defendant stitched her wounds, once without anesthesia. After four years of being involved sexually with her therapist, the plaintiff attempted to leave the defendant's care. She found a psychiatrist and was admitted to a hospital for detoxification. However, defendant refused to send her records to the new doctor and visited plaintiff in the hospital, persuading her to run away. After these events, the plaintiff's marriage permanently dissolved and she moved in with the defendant. She continued her intimate therapy and "treatment" for two more years. Finally, when she refused his sexual advances, her therapist beat her. She required hospitalization for a fractured skull. No criminal prosecution resulted because she left the state and was afraid to return to testify for three years. The court had little difficulty under these aggravating circumstances warranting punitive damages.

271. *See, e.g.*, Canterbury v. Spence, 464 F.2d 772, 782 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972) (illustrating breach of fiduciary duty of doctor to patient as basis of medical malpractice action).

272. Prior to the 1960s, intentional misconduct was often required as a predicate for punitive damages in medical malpractice cases. Allan H. McCoid, *A Reappraisal of Liability for Unauthorized Medical Treatment*, 41 Minn. L. Rev. 381, 384 (1957). Scholars are rarely in agreement as to what level of culpability amounts to "wanton" or "flagrant misconduct," but are agreed that the misconduct leading to punitive damages must far exceed ordinary negligence. A leading torts treatise states:

> Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or "malice," or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton . . . mere negligence is not enough.

Keeton et al., *supra* note 40, at 9–10.

A variety of terminology describes the requisite state-of-mind requirement for punitive damages. The American Bar Association Section on Litigation categorized punitive damages standards into four clusters:

> 1. The intent or scienter nucleus: intentional, willful, deliberate, knowing, conscious design, plan or purpose or consequences;
> 2. The bad motive or state of mind nucleus: malice (real), hatred, ill will, spite, anger, revenge, evil intent, moral turpitude, fraud, oppression, vexatious annoyance, and insulting behavior;

Johnson v. Woman's Hospital[273] provides an example of outrageous misbehavior occurring in a medical setting. In *Johnson*, the plaintiff miscarried, giving birth to a 6 1/2 month infant who lived for only an hour. In a subsequent visit to the hospital, the plaintiff asked about the burial of her baby's remains. She "was led to a section of the hospital where a freezer was opened and she was handed a gallon jar of formaldehyde with the discolored and shriveled body of her child floating inside."[274] The plaintiff's punitive damages award was based upon her severe emotional distress.[275]

Unnecessary surgeries, fraudulently performed for profit, accounted for many of the cases in this category.[276] Several women were awarded punitive damages as the result of unnecessary hysterectomies. The healthy reproductive organs of a mother and her daughter were removed by the defendant physician in *Buford v. Howe*.[277] In *Champion v. Duke Univ. Med. Ctr.*,[278] the plaintiff underwent an unnecessary hysterectomy after a false diagnosis of cancer. In *Bright v. Simsen*,[279] an obstetrician

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3. A test based upon conduct seen objectively as warranting punitive damages: outrageous misconduct or conduct beyond the bounds of decency, flagrant misconduct; and

4. The nucleus of more than negligence but less than intent: wanton, reckless (indifference) to consequences, implied malice, gross negligence, heedless and an entire want of care (or used no care).

A.B.A. Sec. on Litig., *Punitive Damages: A Constructive Examination* 34 tbl. 1 (1986).

273. 527 S.W.2d 133 (Tenn. Ct. App. 1975).

274. *Id.* at 136.

275. The smoking gun was a note of the pathologist that the baby's "body could not be disposed of as a surgical specimen." *Id.* at 139. The jury's award of $100,000 compensatory and $50,000 punitive damages to the mother was held not to be excessive because the mother suffered from nightmares, insomnia and depression. In addition, she had a pseudo-pregnancy resulting in exploratory surgery and eventual psychiatric therapy.

276. Plaintiffs of both sexes were injured by fraud in Hendrick v. Nork, No. 200777 (Cal. Super. Ct., Sacramento County 1972), *reported in* 16 ATLA News L. 25 (1973) and Gonzales v. Nork, No. 228566 (Cal. Super. Ct., Sacramento County 1974). In *Gonzales*, an unnecessary surgery caused a male plaintiff to suffer partial loss of bowel and bladder control. Evidence disclosed that defendant-surgeon was deeply in debt and that, because of his economic distress, subjected the plaintiff to unnecessary surgery through fraudulent misrepresentations and concealment as to the nature of the surgery. The court allowed testimony of a neurosurgeon and an orthopedist who, after reviewing approximately 17 cases in which defendant had performed various types of surgery, concluded that, in the majority of the cases, surgery was unnecessary and negligently performed. *See also*, Simonetta v. Cleveland Clinic Found., No. 998120 (Ohio C.P., Cuyahoga County June 16, 1981) (awarding punitive damages for fraudulent concealment of illegal experiment with radioactive contrast medium).

277. 10 F.3rd 1184 (5th Cir. 1994).

278. No. 05-93-17-1, (N.C. Cir. Ct., Durham County 1993).

279. No. 87-CI-258 (Tex. Cir. Ct., Bell County Sept. 1988).

left a 10-inch Penrose drain in a patient undergoing an unnecessary hysterectomy.

Females were more likely than males to be victimized by extreme breaches of fiduciary duty in medical malpractice actions. In *Austin v. Methodist Hospital, Inc.*[280] a hospital released confidential medical records showing that the plaintiff had given birth out-of-wedlock. This outrageous invasion of her privacy caused the plaintiff to suffer gastritis, intestinal difficulties, humiliation, and psychological pain. A 21-year-old female suffered severe emotional pain when her name and photograph appeared in an advertising brochure for a hospital's substance abuse treatment unit *in Banks v. Charter Hosp. of Long Beach.*[281]

3. *Extreme Failure of Informed Consent*

The abject failure of informed consent was another source of punitive liability.[282] Twenty-one of the twenty-six punitive damages verdicts based on the extreme failure of informed consent went to female plaintiffs. The fact that medical professionals felt that they could invade the autonomy rights of women patients without fear of the consequences

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280. No. 86-8910 (Fla. Cir. Ct., Duval County 1987).

281. 1992 WL 52109 (Cal. Super. Ct., L.A. County 1992).

282. The doctrine of informed consent is a doctrinally rich portion of the law of medical liability. Jon R. Waltz & Thomas W. Scheuneman, *Informed Consent to Therapy*, 64 Nw. U. L. Rev. 628 (1970). The legally protected interest behind informed consent is a patient's right to autonomy and self-determination. The earliest statement of informed consent was Justice Cardozo's opinion in Schloendorff v. Soc'y of N.Y. Hosp., 105 N.E. 92 (N.Y. 1914) (superseded by statute). Justice Cardozo stated that the legally protected interest was the patient's right "to determine what shall be done with his own body." *Id.* at 93. Justice Cardozo stated that "a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages." *Id.*

Further development of the informed consent doctrine occurred in Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees, 317 P.2d 170 (Cal. Ct. App. 1957). The court stated that "[a] physician violates his duty to his patient and subjects himself to liability if he withholds any facts which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment." *Id.* at 181. Unauthorized medical treatment is a form of medical malpractice which can result in punitive damages especially where the claim involves a gross disregard of a patient's rights of information or surgeries performed without consent.

The doctrine of informed consent further advanced in the 1960 case of Natanson v. Kline, 350 P.2d 1093, *clarified*, 354 P.2d 670 (Kan. 1960). The *Nathanson* court held that a physician's failure to provide a patient with a reasonable calibration of possible risks, subjects him to a claim of unauthorized treatment. In Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972), a surgeon performed a laminectomy on a 19-year-old man without disclosing the one percent risk of paralysis. After *Canterbury*, a doctor cannot properly undertake surgery or critical procedures without the prior consent of his patient. The patient must have the information to compare risks of undergoing treatment with dangers of foregoing it.

reflects gendered power inequalities. In *Stanton v. Nessim*,[283] the 36-year-old plaintiff agreed to sterilization if a tubal pregnancy was discovered. The defendant physician found no tubal pregnancy, but nevertheless sterilized the woman. In *Crandall-Millar v. Sierra Vista Hospital*,[284] the 31-year-old plaintiff was estranged from her 65-year-old husband, an obstetrician and gynecologist. The plaintiff checked into the hospital for a hysterectomy. Her husband secretly participated in the operation, thus violating her right to informed consent. During the surgery, her husband allegedly sewed her vagina shut and nicked a hole in her bladder. Medical malpractice claims based upon unauthorized treatments may also be tried as intentional torts such as assault, battery, and false imprisonment.

Americans spent more than $1.7 billion on cosmetic procedures in 1993.[285] Not surprisingly, these "sunrise profit centers of the medical profession" were a major contributor to punitive damages litigation.[286] The vast majority of grossly substandard cosmetic surgeries were performed on women.[287] Hundreds of cosmetic surgery advertisements are directed toward women: "Hi, I'm Carol. If you'd like to know how cosmetic surgery changed my life, call me."[288]

Many substandard facelifts, liposuctions, and acid peels were done in non-hospital settings where health care providers were unlicensed and unobserved.[289] A surgeon was assessed punitive damages for performing

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283. 467 Verdictum Juris No. 83-41B (Cal. Super. Ct., L.A. County 1983).

284. No. 59975 (Cal. Super Ct., San Luis Obispo County 1987). During the trial, the defendant's former medical assistant testified that on the morning of his wife's surgery, Dr. Millar said he would "sew her up so tight if anyone tries to have sex with her, he'll rip her to shreds . . . . My client's vagina was closed with sutures; testimony by an attending nurse was that the defendants boasted about the damage they caused; the Board of Medical Quality Control suspended the licenses of the practitioners." Questionnaire of James McKiernan, Plaintiff's Attorney in *Crandall-Millar v. Sierra Vista Hospital* (Apr. 29, 1994)(on file with authors).

285. *Outlook*, U.S. News & World Rep., Oct. 17, 1994, at 15.

286. *Unqualified Doctors Performing Cosmetic Surgery Hearing*, supra *note* 250, at 1. *See* McAllister v. Irvine, No. A8205-02840 (Cr. Cir. Ct., Multnomah County 1984) (awarding punitive damages to a 36-year-old housewife who sustained multiple injuries as a result of defective surgery and post-operative care in a "tummy tuck" operation).

287. *See, e.g.*, Ravens v. Maschek, No. 89-36245 CA 13 (Fla. Cir. Ct., Dade County 1990) (awarding punitive damages for grossly substandard chemical face peel performed on 62-year-old woman); McAllister v. Irvine, A8205-02840, (Or. Cir. Ct., Multnomah County 1984) (awarding punitive damages for defective surgery and post-operative care in tummy tuck operation).

288. *Unqualified Doctors Performing Cosmetic Surgery Hearing*, *supra* note 250, at 282.

289. When practicing as individuals, physicians have substantial freedom to misbehave without punishment because they have the social and financial resources to conceal their "backstage behavior" with effective impression management. Erving Goffman, *The Presentation of Self in Everyday Life* (1959). A Congressional Committee report concluded:

maxillofacial surgery without medical authorization or proper training, in one typical verdict.[290] In another case, a clinic was assessed punitive damages arising out of injuries suffered during an ineffectual chemical face peel. The procedure was performed by unlicensed personnel who did not employ the normal safeguards against adverse reactions.[291]

Only five men in the sample were injured through an unconsented medical procedure.[292] In *Pound v. Medney*,[293] a male suffered infections and scarring as the result of the injection of synthetic fiber hair implants into his scalp. The defendant had failed to obtain FDA approval before using the experimental cosmetic procedure on humans. Punitive damages stemmed from the unauthorized practice of medicine and fraud. All of these extreme violation of informed consent cases recognize a patient's dignitary interest in undertaking medical procedures with an understanding of the risks.

4. Gross Incompetence

Medical personnel are expected to exercise the superior knowledge, skill, and care ordinarily possessed and employed by members of the medical profession in good standing.[294] Negligence may consist of either

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> Traditional peer review of cosmetic surgery is virtually nonexistent, since an estimated 95 percent of these procedures are done in doctors' offices outside of hospitals and the protective eye of surgical review boards.
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> . . .
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> Coast to coast, these office practices are touted as institutes, or centers, or clinics of cosmetic surgery in the most expansive ads. But in too many cases, we see one doctor in a Spartan surgical setting with a skeleton crew. Too often they lack the most basic life-support systems found in the smallest hospital emergency rooms . . . . Even normal Government and private audit systems are absent since in most instances these surgeries are covered neither by Medicare nor private health insurance.

Unqualified Doctors Performing Cosmetic Surgery Hearing, supra note 250, at 2–3.

290. Wong v. Garcia-Levin, No. 86-44136 CA 28 (Fla. Cir. Ct., Dade County 1988).

291. Ravens v. Maschek, No. 89-362456 CA 13 (Fla. Cir. Ct., Dade County 1990).

292. Males were sometimes plaintiffs in intentional tort cases against medical providers. A hospital medical director was assessed punitive damages after he struck a patient in the mouth in Magma Copper Co. v. Shuster, 575 P.2d 350 (Ariz. Ct. App. 1977). The director justified his behavior on the grounds that the patient uttered an obscenity in the presence of a nurse. The Arizona appeals court upheld the hospital's liability for its director's actions but reversed the one dollar compensatory damages and $30,000 punitive damages award. The court ruled that the high ratio (30,000 to 1) indicated that the award was excessive and reversed for a new trial on punitive damages only.

293. 337 S.E.2d 772 (Ga. Ct. App. 1985).

294. Keeton, *supra* note 40, at 185.

an act or a failure to act with standard professional skill or knowledge.[295] The doctrine of medical malpractice:

> embraces all liability-producing conduct arising from the rendition of professional medical services. . . . [N]egligent medical care does not exhaust all potential sources of professional liability. Liability may also result, for example, from intentional misconduct, breaches of contracts guaranteeing a specific therapeutic result, defamation, divulgence of confidential information, unauthorized postmortem procedures and failures to prevent injuries to certain non-patients.[296]

The wrongful or improper practice of medicine resulting in injury to the plaintiff can be the basis of punitive damages when there is an extreme departure from accepted professional standards.[297] Sixty-four of the one hundred and eight punitive damages verdicts predicated upon extreme violation of professional care arose from the mistreatment of females.[298] Many of these cases involved injuries to a woman's reproductive system[299] or impairments suffered at the hands of cosmetic surgeons,[300] although women were injured in non-gendered ways as

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295. At a broad level, the most important point to underscore is that acts of negligence taken alone are not a sufficient basis for awarding of punitive damages. *Id.* at 9–10.

296. King, *supra* note 97, at 3.

297. For example in Sapp v. Gottschalk, 16 ATLA News L. 247 (Cir. Super. Ct. 1974), a physician was charged with punitive liability for carelessly operating on the wrong patient.

298. Medical negligence takes place when the defendant's conduct falls below the standard of skill and knowledge which is commonly possessed by members in good standing of that profession. *See* Restatement (Second) of Torts § 299A (1965). A physician who holds herself out as a cosmetic surgeon "will be held to the standard of other specialists in that type of practice." *Id.* Medical education and certification are becoming "nationalized" rather than judged on local standards of care. However, in the cases in our sample, this is unimportant because the gross misconduct leading to punitive damages verdicts violates any standard of medical care, local or national.

299. Reproductive injuries accounted for many cases of extreme deviation from accepted medical standards. *See, e.g.*, Adams v. Golden, No. CV-87-T-026-N (M.D. Ala. 1987) (awarding punitive damages in wrongful death action brought against the treating physician, nurse, and hospital, alleging failure to recognize and treat obvious signs of fetal distress). For related cases, see *Medical Malpractice: Negligent or Untimely Performance of Cesarean Section*, (1986). *See also*, Hernandez v. Smith, 552 F.2d 142 (5th Cir. 1977) (awarding punitive damages based upon the grossly inadequate facilities of an obstetrical clinic leading to death of baby). In Ruckman v. Barrett, (Mo. Cir. Ct., Greene County 1991), a punitive liability suit was based upon the death of a 23-year-old female from a lidocaine overdose after she was given large doses of the anesthetic during an abortion.

300. Given the unregulated nature of much of cosmetic surgery, it is not surprising that this specialty produced a disproportionate number of extreme deviation from accepted practice verdicts. *See generally Cosmetic Surgery Procedures: Standards, Quality and Certification of Non-Hospital Operating Rooms—Part III: Hearing Before the Subcomm. on Regulation, Business Opportunities, and Energy of the House Comm. on Small Business*, 101st Cong., 1st Sess. (documenting that cosmetic surgery is often performed in unregulated, unsafe non-hospital settings). *See, e.g.*, Stone v.

well.[301] Punitive damages in *Vitali v. Bartell*,[302] stemmed from a botched breast reduction surgery. Unsuccessful "tummy tuck" surgery led to punitive damages in several cases.[303]

Obstetrical malpractice amounting to reckless indifference to patient safety was demonstrated by the plaintiff in *Olsen v. Humana Hosp., Inc.*[304] In *Olsen*, a hospital's gross failure to monitor a fetus and improper administration of a drug during delivery caused an infant to suffer severe brain damage. The hospital's failure to perform a Caesarean section on a woman experiencing fetal distress led to a $1 million punitive damages verdict in *Adams v. Golden*.[305] In *Hernandez v.*

Foster, 164 Cal. Rptr. 901 (Ct. App. 1980) (reversing award of punitive damages to female scarred from botched "tummy tuck"); Mauga v. Rundles, No. 718261 (Cal. Super. Ct., S.F. 1983) (awarding punitive damages for death of female patient from staphylococcus infection after tummy tuck operation).

In Baker v. Sadick, 208 Cal. Rptr. 676 (Ct. App. 1984) the plaintiff suffered serious post-surgery infections after breast reduction. The ineffectual post-operative treatment required extensive corrective plastic surgery. *Id.* at 678. The arbitrator awarded punitive damages based upon the fraudulent inducement to surgery, falsification of medical records, and uninformed post-operative treatment of an infection. *Id.* at 680.

301. A number of "extreme deviation from accepted practice" punitive awards were unrelated to the plaintiff's gender. *See, e.g.*, Scribner v. Hillcrest Med. Ctr., JVR No. 0063121, 1990 WL 461701 (LRP Jury) (awarding punitive damages to plaintiff injured by orderly who mistook her for another patient); Greene v. Averi, No. CV-87-1534-PH (Ala. County Ct., Montgomery County. 1988) (assessing punitive damages for severe foot damage from botched operations); Huelsmann v. Berkowitz, 568 N.E.2d 1373 (Ill. App. Ct. 1991) (awarding punitive damages for failure to arrest the bleeding during tonsillectomy); Schaefer v. Miller, 587 A.2d 491 (Md. 1991) (awarding punitive damages against defendant ophthalmologist who performed unnecessary surgery without informed consent and rendered negligent preoperative and postoperative care); Larrumbide v. Doctors Hosp., No. 81-5216-J (Tex. Dist. Ct., Dallas County Nov. 28, 1984) (assessing punitive damages for grossly inadequate dental surgery). Some of the "gender-neutral" cases involved relational injuries that affected mothers through their children. *See, e.g.*, Portlock v. Duncanville Diagnostic Ctr., Inc., No. 91-11849-H (Tex. Dist. Ct., Dallas County 1993) (awarding punitive damages after 4-year-old girl died from overdose given by doctor).

302. Case No. 35-32-06 (Cal. Super. Ct., Orange County 1984).

303. The "tummy tuck" operation is a procedure wherein a large patch of skin is removed from the area below the patient's navel; the skin above the navel is detached from the underlying tissue; the muscles are tightened; the skin from above the navel is stretched and pulled down to cover the portion of the abdomen that is exposed; the flaps of skin are sewn together; and a new navel is cut into the skin to which the umbilicus is attached. *See* Stone v. Foster, 164 Cal. Rptr. 901 (Ct. App. 1980) (reversing punitive damages due to "contamination" of verdict by inclusion of instruction on fraud claim and attorney's comments on the insurance crisis); Mauga v. Rundles, No. 718261 (Cal. Super. Ct., S.F. 1983) (awarding punitive damages after obese, asthmatic woman died from substandard care during and after "tummy tuck" surgery).

304. No. 107480 (Kan. Dist. Ct., Johnson County 1984).

305. No. CV-87-7-026-N (M.D. Ala. 1987); *See also* Grimes v. Halifax Mem. Hosp., No. 90-CVS-937 (N.C. Super. Ct., Halifax County 1992) (assessing punitive damages against a hospital which delayed resuscitation of an infant and administered a drug overdose during delivery).

Smith,[306] punitive damages were assessed against an obstetrical clinic for failing to warn maternity patients that the birthing clinic lacked facilities for performance of Caesarean surgery. In *Boyd v. Bulala*,[307] an obstetrician delegated fetal monitoring to unqualified personnel so that he would not be disturbed at home. All of these examples of playing Russian roulette with childbirth safety were clearly gender-linked.

Forty-four of the ninety male plaintiffs obtained awards after being subjected to procedures which violated accepted medical practices (forty-nine percent of male plaintiffs).[308] Unlike women, male patients were seldom injured by providers in a manner specific to their gender.[309] Few reproductive injuries were sustained by males.[310] The anesthesia error

306. 552 F.2d 142 (5th Cir. 1977).

307. 877 F.2d 1191 (4th Cir. 1989).

308. Harvey v. Stanley, 803 S.W.2d 721 (Tex. Ct. App. 1990) was a typical case of extreme deviation from accepted medical procedures leading to an award for a male. In *Harvey*, a patient died while undergoing a stress test. The physician's "failure to diagnose, to properly monitor patient's condition, and to treat/manage the patient's heart condition and high blood pressure" was the basis of punitive damages, as was the physician's "use of contraindicated medications and stress testing." Plaintiff's Questionnaire completed by R. Jack Ayres, Law Offices of Jack Ayres, Jr., P.C. (Jan. 12, 1994) (Attorney for plaintiff in *Harvey*)(on file with authors).

The plaintiff's attorney described obstructed discovery in the defendant physician's failure to disclose his complete medical records on a deceased patient:

> [The physician] then attempted to cast doubt on the plaintiff's expert for not reviewing the complete record. Defendant's own expert was not provided the complete record, and when given copy, changed portions of his opinion.

Id.

Another example of gross incompetence is Rich v. Wilson, No. CV-84-1847 JB (N.M. County Ct, Bernalillo County May 1987) where doctors left a needle in the patient's heart during open-heart surgery. The plaintiff also suffered emotional trauma from fear of future injury.

309. A typical injury was sustained by a male in Sanders v. Kauffman, No. 86-447 (Tex. Dist. Ct., Smith County 1987). In *Sanders*, a male dental patient received extensive "reconstructive" dentistry, including the capping and crowning of twenty teeth, to correct his bite and missing dentition. The $292,000 jury verdict, including $250,000 exemplary damages, was for grossly substandard dental treatment and for pain and suffering due to the unnecessary root canals performed prior to crowning and capping the teeth. In Rose v. Chouteau, No. C-86-39 (Okla. Dist. Ct., Garfield County 1989), a 25-year-old male field worker suffered chronic pain in his back and lower extremities after the defendant doctor treated the plaintiff's back condition. The defendant diagnosed a ruptured disc and performed two unsuccessful discectomies. A second doctor then advised the plaintiff that he had sustained permanent nerve damage. *See also* Manning v. Twin Falls Clinic and Hosp., Inc., 830 P.2d 1185 (Idaho 1992) (awarding punitive damages for 67-year-old retired male who died during a room transfer in which the defendant hospital's nurses removed his oxygen).

310. *But see* Florida Patient's Compensation Fund v. Mercy Hosp., 419 So. 2d 348 (Fla. Dist. Ct. 1982) (awarding punitive damages to a 45-year-old man who suffered sexual dysfunction and leg problems after a re-sterilized disposable arterial catheter broke off during an angiography).

leading to permanent brain damage in *Traylor v. Providence Hospital*[311] is typical of the lack of gender-linkage in male injuries. A staff anesthesiologist had argued for two years that the hospital's anesthesia unit was substandard. The deficiencies of this anesthesia department could have injured a victim of either sex.

5. *Neglect or Abandonment*

The unjustified abandonment of patients or their neglect in total care institutions was the principal cause of punitive damages for twenty-eight females and sixteen males. Nursing home neglect led to numerous punitive damages awards in favor of female plaintiffs. Absent the punitive damages remedy, plaintiffs' attorneys have little incentive to prosecute cases on behalf of nursing home residents since these persons have little economic value under American tort law. Plaintiffs in these cases will typically have no medical bills or lost earnings. The punitive damages remedy permits elderly persons to act as private attorney generals to correct abhorrent conditions in nursing homes. The awards are the functional equivalent of deputizing nursing home residents and their attorneys to prosecute misdeeds when government enforcement is lax.

Men have higher rates of life-threatening diseases that can lead to serious disability and/or premature death, while women suffer from higher rates of acute and non-fatal chronic conditions such as arthritis.[312] This results in a substantial female majority among nursing home

311. A Maryland state arbitrator awarded $200,000 in punitive damages to the decedent's estate for anesthesia error in Traylor v. Providence Hospital, Baltimore, Md. Arbitr. (Jan. 2, 1988), *reported in* Biomed. Safety and Standards, Apr. 5, 1988, at 60. The punitive damages award was predicated upon testimony of an anesthesiologist who had complained of the institution's inadequate preoperative evaluations, faulty equipment and overall poor anesthetic care of critically ill patients. He had raised these concerns regularly for two years before decedent's operation, but the hospital had taken no steps to improve patient care. This "don't care" attitude reflected a pattern of reckless indifference to patient safety amounting to malice under Maryland's punitive damages standard.

312. A medical sociologist described gender differences as: "One sex is 'sicker' in the short run [women], and the other [men] in the long run." Lois M. Verbugge, *Gender and Health: An Update on Hypothesis and Evidence*, 26 J. of Health & Soc. Beh. 156, 162–63 (1985). The work life or life expectancy tables provide little incentive for attorneys to sue nursing homes on behalf of their clients. Chronically-ill or terminal patients are in a poor position to finance lawsuits against their care-takers. Punitive damages are an important incentive in pursuing nursing home cases which are often difficult because they are costly to research, complicated to argue, and plaintiffs often die or become confused before the case gets to trial.

residents.[313] Nursing home mistreatment may be more serious for women than men because of their greater vulnerability to fractures.

Grossly inadequate staffing of a nursing home led to punitive damages in *Darblay v. Medical Enterprises, Inc.*[314] In that case, an 81-year-old woman fractured her hip and suffered other injuries caused by extreme neglect. Punitive damages were premised upon numerous health and safety violations in the nursing home:

> Citations issued to Western as far back as 1977 include references to exactly the same type of conduct which caused plaintiff's injuries in this case: inadequate nursing staff, failure to answer call buttons, failure to maintain an audible call button system at the nurses' stations, failure to attend to patients in a timely manner, and failure to maintain safe premises.[315]

A nursing home failed to turn and position a 69-year-old woman in a diabetic coma who suffered a fractured hip in *Clark v. Clearwater*

313. The life expectancy for American women is approximately 79 years, versus 72 years for men. Three-quarters of white males survive to the age of 65 compared to 86% of white females. U.S. Dept. of Health and Hum. Servs., *Health United States 1988* 53 tbl. 13 (1989). Gender differences in mortality rates may be declining as women increasingly smoke and enter high stress careers. Verbrugge, *supra* note 313, at 175 (documenting declining gender differences in American life spans).

314. No. 129413 (Cal. Super. Ct., Sonoma County 1984). The most common type of abandonment was extreme neglect of elderly women in nursing homes *See, e.g.*, Jones v. Clearwater Convalescent Center, Inc., No. 91-7612-15, *reported in* 93 Fla. Jury Verd. Rep. 4-88 (Apr. 1993) (awarding punitive damages for negligence in failing to prevent bedsores resulting in amputation of leg); Zetterbaum v. Seven Acres Jewish Home for the Aged, *reported in 40 Million Dollar Verdict Awarded in Nursing Home—Jury Action Mandates National Reform Movement*, PR Newswire, Mar. 23, 1990, *available in* LEXIS, News Library, Wires File (describing $39.4 million award to family of 84-year-old woman strangled in vest restraint); Stogsdill v. Manor Convalescent Home, Inc., 343 N.E.2d 589 (Ill. App. 1976) (setting aside punitive award against nursing home for amputations resulting from deficient medical and convalescent care).

315. Plaintiff's Settlement Demand Letter in Darblay v. Western Medical Enterprises, Inc., No. 129413 (Cal. Sup. Ct., Sonoma County 1994) *reported in* Cal. Ver. Rptr., No. 11-5 provided by Plaintiff's attorney Patrick G. Gratton to Michael Rustad (June 1985). The plaintiff's demand letter contended that there were numerous violations of California state regulations in the nursing home:

> Patients left lying in feces and urine for hours; Flies on patients' faces and bodies; Incontinent patients left lying with catheters exposed; Patients left sitting in cold air, partially undressed, Patients left lying on torn, wrinkled plastic sheets because there was insufficient linen; Patients not being turned as often as required, with decubiti occurring as a result; Patients allowed to have dirty hair, long fingernails, long facial hair and dirty teeth; Patients left unattended for hours at a time.

Id. at 4 (on file with author).

Convalescent Center, Inc.[316] This neglect caused infected bedsores, necessitating the amputation of her leg.

Many of the abandonment cases involved patients disadvantaged by class as well as gender. The non-treatment of an indigent female patient[317] led to punitive damages in *Jones v. Hospital for Joint Diseases*.[318] The plaintiff in *Jones* was a 41-year-old black woman from Harlem with an infected knee. She remained untreated in a hospital for seven days and was then discharged because she did not have a medical payment card. Her infected knee worsened and finally had to be amputated at the mid-femur level.

H. Women, Medical Malpractice, and Caps on Pain and Suffering

Juries in medical malpractice cases generally have the discretion to award three types of damages: nominal, compensatory, and punitive.[319] Nominal damages are symbolic, usually a trivial amount such as one dollar.[320] Compensatory damages are awarded in order to compensate for the plaintiff's losses. Punitive damages are awarded to punish and deter and as an incentive for plaintiffs to expose wrongdoing. Punitive damages are not available unless a medical provider's misconduct is intentional, malicious, recklessly indifferent to patient safety, or at least grossly negligent.

Compensatory damages are typically sub-divided into economic and non-economic losses. Economic damages include such direct costs as loss of income, medical expenses, rehabilitation, and custodial care of

316. No. 91-7612-5 (Fla. Cir. Ct., Pinellas County 1991).

317. The nursing home cases resemble product liability verdicts in that the private attorney general is prosecuting the case on behalf of other similarly situated patients. As in products liability cases, nursing home awards raise the specter of multiple punitive damages awards based upon a single managerial decision.

318. No. 22306/75 (N.Y. Sup. Ct. 1982).

319. Four states do not recognize common law punitive damages: Louisiana, Nebraska, New Hampshire, and Washington. Lind L. Schuster & Kenneth R. Redden, *Punitive Damages* 24 (2d ed. 1989). Massachusetts does not permit litigants to recover common law punitive damages, except in wrongful death actions. Section 2-1115 of the Illinois Code of Civil Procedure provides that "[i]n all cases, whether in tort, or otherwise, in which plaintiff seeks damages by reason of legal, medical, hospital or other healing art malpractice, no punitive, exemplary or vindictive damages shall be allowed." Ill. Rev. Stat. ch. 10, para. 2-1115 (1987).

320. The plaintiff was awarded the nominal sum of one dollar for being slapped across the face by a medical director in Magma Copper Co. v. Shuster, 575 P.2d 350 (Ariz. Ct. App. 1978) (holding that the discrepancy between compensatory and punitive damages was so great as to render the total award "excessive"). A slap across the mouth does not result in lost earnings or medical expenses.

the injured.[321] Past medical bills and lost earnings are easy to measure. Future medical bills and earnings are more difficult to determine. The court in *Kaczkowski v. Bolubasz*,[322] summarized three approaches to computing future wages:

> The traditional approach ignores altogether the effects of future productivity and future inflation as being "too speculative".... The middle ground approach is anomalous in that it permits the factfinder to consider the effects of productivity and inflation on future earning capacity, but prohibits expert testimony on either of these issues. . . . [The third method] is the total offset method [where] a court does not discount the award to present value but assumes that the effect of the future inflation rate will completely offset the interest rate, thereby eliminating any need to discount the award to its present value.[323]

Non-economic compensatory damages are sometimes referred to as pain and suffering or non-pecuniary damages. A non-pecuniary award is designed to compensate the plaintiff for past and future "pain and suffering" and for the lost ability to perform certain activities. Pain and suffering awards are controversial since it is difficult to calibrate the monetary worth of a non-physical injury.[324] Should the patient who suffers a miscarriage due to a provider's misconduct receive $10,000 or $100,000?

Women are usually awarded smaller economic verdicts for equivalent injuries because of their lower overall wages.[325] In general, women will have lower earnings over their life cycle and spend fewer years in the

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321. David W. Barnes & Lynn A. Stout, *The Economic Analysis of Tort Law* 144 (1992).

322. 421 A.2d 1027 (Pa. 1980).

323. *Id.* at 1034–36.

324. Tort reformers "argue that allowing the jury unlimited discretion in awarding damages for pain and suffering guarantees unevenness and unpredictability in the recovery system, and forces insurers to counter the uncertainty of awards by charging higher insurance premiums." Brown & McGuire, *Damages for Pain and Suffering—What Are the Courts Really Doing?*, Case & Comment, Nov.–Dec. 1978, at 20; Randall R. Bovbjeg, *Valuing Life and Limb in Tort: Scheduling 'Pain and Suffering,'* 83 Nw. U. L. Rev. 908 (1989) (arguing that present system of non-economic losses are "ad hoc and unpredictable"); Frederick S. Levin, *Pain and Suffering Guidelines: A Cure for Damages Measurement 'Anomie,'* 22 U. Mich. J. L. Ref. 303 (1989) (suggesting guidelines for structuring pain and suffering awards).

325. Women's salaries are catching up with those of males but females still earned only 71 % of men's salaries as of 1992. Unfortunately part of the decrease in gender inequality is due to declining earnings of many males during the 1980s. Alan Otten, *Gender Pay Gap Eased Over Last Decade*, Wall St. J., April 15, 1994, at B1.

labor force than men. One opponent of a bill capping non-economic damages testified:

> Two people suffer exactly the same injury. Both find themselves unable to perform life's normal activities. One is a man and one is a woman. The man is a plumber. He receives economic damages that are not effected [*sic*] by this bill. The woman is a homemaker and has suffered little "economic loss," and so the compensation she receives for an injury which has shattered her life could be severely limited by this bill. No one could argue that is fair.[326]

The 1994 Products Liability Fairness Act proposed eliminating joint liability for non-economic damages such as pain and suffering.[327] The House Ways and Means Health Sub-Committee recently approved a reform package which includes a nationwide $350,000 cap on pain and suffering awards.[328] This legislation would also provide grants to the states to develop non-jury alternatives to malpractice litigation, a policy Indiana researchers found discriminates against women.[329]

Twenty-one states have enacted some reform measure limiting non-economic damages in health care litigation.[330] No state has eliminated pain and suffering awards, but tort reformers have succeeded in capping non-economic damages in medical malpractice cases in several states.[331]

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326. *Hearing on H.R. 1910, the Fairness in Products Liability Act, Before the Subcomm. on Commerce, Consumer Protection and Competitiveness of the House Comm. on Energy and Commerce*, 103d Cong., 2d Sess. 1 (1994) (testimony of Robert Creamer, representing Citizen Action and Illinois Public Action).

327. Under the doctrine of joint liability, if more than one defendant is responsible for a victim's injuries, but one or more of the defendants cannot pay its share of the damages due to bankruptcy or being otherwise judgment-proof, then the other culpable defendants make up the shortfall in order to fully compensate the injured persons. The effect of the reform is to reallocate the risk of a co-tortfeasor's insolvency to the victim.

328. *Health Reform Insight: Ways & Means Health Panel Moves Reform Debate Forward*, Med. & Health, Mar. 28, 1994, at 1 (outlining non-economic damages cap and other reform provisions included in bill which meets the requirements of President Clinton's health plan). The U.S. Senate's "Mainstream Coalition" proposed to limit non-economic damages to $250,000, indexed for inflation. The Coalition also advocated requiring that "[s]eventy-five percent of punitive damages awards will be paid to the state in which the action is brought and such funds will be used for provider licensing, disciplinary activities and quality assurance programs." Senate Mainstream Coalition, *'Proposed Agreement' on Health Care Reform*, Aug. 22, 1994, *reported in*, Daily Rep. for Execs. (BNA) 1994 DER 162 D57 (Aug. 24, 1994).

329. See *supra* note 35 for a discussion of the gender inequities created by this reform in Indiana.

330. Sen. Mitch McConnell, *'Incremental' Health Reform Must Include Changes to Liability System*, Roll Call, Sept. 26, 1994 (reporting 21 states have adopted caps on non-economic damages).

331. Some states have passed statutes directed specifically at pain and suffering or non-economic damages in medical malpractice actions. A $280,000 cap on non-economic damages in medical malpractice went into effect in Michigan on April 1, 1994. The cap is raised to $500,000 if the

Many academics advocate additional capping[332] or the structuring of non-economic damages.[333] Our findings suggest that capping of these awards harms women plaintiffs disproportionately.

TABLE THREE

SEVERITY OF INJURY BY GENDER

INJURY SEVERITY	MALES	FEMALES
Emotional Injury	14	51
Partial Disability	11	47
Total Disability	25	32
Death	40	50
Totals.....	90	180

As illustrated in Graph Six and Table Three, women receiving punitive damages in medical malpractice litigation suffer less severe physical impairment than their male counterparts. Over seventy percent of the male plaintiffs suffered total disability (at least temporarily) or death from bad medicine, while a majority of the females suffered no

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plaintiff is hemiplegic, paraplegic, or quadriplegic as a result of an injury to the brain or spinal cord, has suffered permanent impaired cognitive capacity, or has sustained permanent injury to reproductive organs that creates infertility. Marcia M. McBrien, *New MedMal Law Goes Into Effect April*, Mich. Law. Wkly., Mar. 28, 1994, at 1.

Wisconsin limits non-economic damages defined as "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" in any proceeding against health care providers to $1,000,000 for actions filed on or after June 14, 1986. Wis. Stat. § 893.55(4) (a)–(d) (1991–1992); *See also* Utah Code Ann § 78-14-7.1 (1983) ($250,000 non-economic damage cap in medical malpractice actions).

332. *See, e.g.*, Peter Huber et al., *The Legal System Assault on the Economy, The Insurance Crisis, Tort Reform, and Alternative Solutions* 15 (1986) (proposing caps on non-economic damages). The Reagan administration also favored capping tort damages for punitive damages. Mark Geistfeld, *The Political Economy of Neo-Contractual Proposals for Products Liability Reform*, 72 Tex. L. Rev. 803 (1994); Jeffrey O'Connell, *A Proposal to Abolish Defendants' Payment for Pain and Suffering in Return for Payment of Claimants' Attorneys' Fees*, 1981 U. Ill. L. Rev. 333.

333. *See, e.g.*, Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 Cal. L. Rev. 772, 809–10 (1985); Frederick S. Levin, *Pain and Suffering Guidelines: A Cure for Damages Measurement 'Anomiem,'* 22 U. Mich. J. L. Ref. 303 (1989) (proposing scheduled damages to create more uniformity in jury awards and better serve the goals of tort law); James F. Blumstein et al., *Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury*, 8 Yale J. on Reg. 171, 177–86 (1991); and Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling 'Pain and Suffering,'* 83 Nw. U. L. Rev. 908 (1988–89) (proposing scheduled damages to provide more equity in pain and suffering awards).

GRAPH SIX
SEVERITY OF INJURY LEADING TO PUNITIVE DAMAGES BY GENDER 1963-93 (N=270)

severe physical injury. More than three in four medical malpractice punitive damages verdicts based upon purely psychological injuries were awarded to female plaintiffs. Emotional injuries are the most likely to be remedied through non-economic damages, since there are often few direct economic losses.

TABLE FOUR
SAMPLE NON-ECONOMIC AWARDS THAT WOULD BE CUT BACK BY $350,000 CAP

AGGRAVATED MISCONDUCT	AMOUNT OF NON-ECONOMIC DAMAGES
Surgeon intentionally sewed wife's vagina shut.	$1,000,000
Mental hospital covered up rape of mental patient and failed to provide her with crisis counseling.	$400,000
Gastroenterologist committed sexual battery on numerous women during rectal examinations.	$428,560
Physician sedated and raped patient.	$1,000,000
Physician prescribed drugs to patient and induced her to commit oral copulation.	$750,000

Graph Seven shows that women in punitive damages cases are significantly more likely to be awarded compensation for "pain and suffering" in every time period studied.[334] Medical malpractice awards to the women in our sample were almost three times more likely to include a pain and suffering component as those given to men. This finding is consistent with past research showing the male victims receive less in non-economic damages than female victims.[335] The typical pain and suffering verdict awarded to a female in our sample was twice as large as

334. Complete data is not available because the verdict reports of some courts do not separately report non-economic damages.

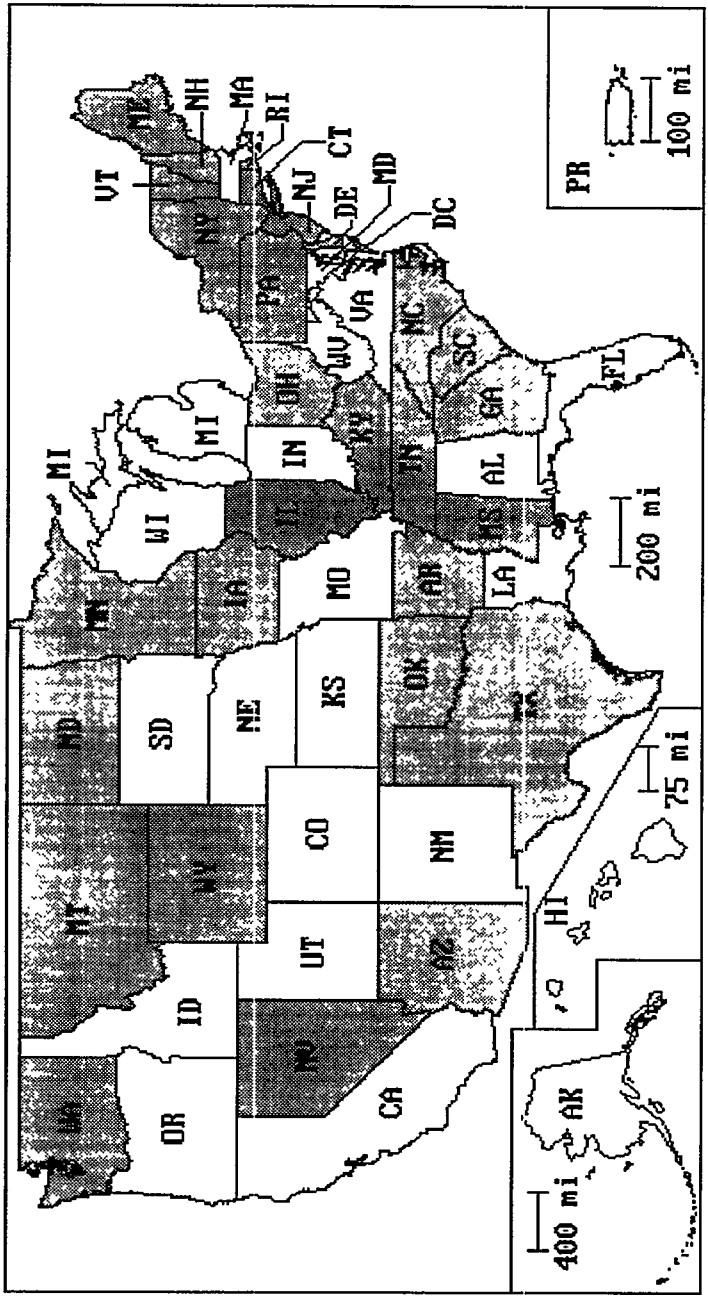
335. David W. Leebron, *Final Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. Rev. 256, 306 n.202 (1990) (finding the "variable MALE had a significantly negative coefficient in every log regression").

GRAPH SEVEN

PAIN AND SUFFERING AWARDS IN PUNITIVE DAMAGES MEDMAL CASES OVER TIME (N=129)

Map Two

STATES WITHOUT STATUTORY LIMITS IN MEDICAL MALPRACTICE -- SOURCE: OTA REPORT



that given to a male. The median pain and suffering award for the ninety-six women who received this form of redress was exactly $100,000, while the median for the thirty-three men was $50,000. This suggests that reforms limiting non-economic damages will affect more women than men. Map Two depicts the twenty-nine jurisdictions which have not enacted statutory limits on the size of medical malpractice awards.

The explanation for the disproportionate number of non-economic damages awards for women lies in the gendered nature of injuries.[336] Nearly nine out of every ten victims of sexual abuse by medical providers were female. The only compensable injury in most of these sexual abuse cases was emotional "pain and suffering."[337] Elderly women in nursing home cases generally receive only non-economic damages because they have no present or future earnings to lose. Most housewife victims of incompetent cosmetic surgery have few direct economic losses.

Pain and suffering, mental anguish, and loss of consortium are disparately awarded to women in order to reimburse for reproductive injuries.[338] Verdicts compensating for the emotional distress caused by the fear of possible future disability from breast implants or permanent disfigurement from the removal of implants typically include little in economic damages. In *Short v. Downs*,[339] a woman suffered emotional injury from the prospect of future catastrophic health complications resulting from silicone injected directly into her breasts. The physician performed the injection despite the fact that the Food and Drug Administration had banned this dangerous practice by the early 1960s.[340]

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336. Women are often the beneficiaries of non-economic damages for reproductive injuries including unwanted pregnancy, loss of fertility, failed sterilization, or the pain and suffering from an unnecessary cesarean section or improperly performed tubal ligations. In Schneider v. Cohen, No. 12013/91, (N.Y. Sup. Ct., Nassau County Jan. 1993), a 32-year-old female suffered infertility when her obstetrician inadvertently removed her ovary during a cesarean section. The sole award was $125,000 for pain and suffering caused by her sterility. In Rodriguez v. New York City Health and Hosp. Corp., No. 18955/86 (N.Y. Sup. Ct. July 11, 1991), a female plaintiff received $1 million pain and suffering for a subsequent pregnancy, cesarean section, and tubal ligation. See also Naugle v. Katavolos, No. 727/89 (N.Y. Sup. Ct., Rockland County Sept. 1989) *reported in* LRP Publication 57501 (awarding $2,500 pain and suffering for failure to diagnose an ectopic pregnancy).

337. *See generally* Denise LeBoeuf, *Psychiatric Malpractice: Exploitation of Women Patients*, 11 Harv. Women's L.J. 83 (1988) (analyzing cases of psychotherapist/patient sexual involvement with emphasis on remedies).

338. Leebron, *supra* note 336.

339. 537 P. 2d 754 (Colo. App. 1975).

340. *Breast Implant Cases May Be Easier Than You Think*, Laws. Alert, Sept. 1992.

The award included redress for pain and suffering because, as the court stated:

> The prognosis was that she would continue to develop lumping and breast inflammation, requiring continued supervision. Recommended future treatment included semi-annual checkups, regular mammographies, and, if the condition worsened, biopsies and possible removal of her breasts.[341]

Uncapped non-economic damages awards, like punitive damages, encourage lawyers to act as private attorney generals. Non-economic damages are a critically important incentive in nursing home lawsuits because "life expectancy" and "work life" tables[342] minimize the economic value of elderly residents' lives and happiness.[343] Because they are elderly, "nursing home residents have little value in cold monetary terms."[344] Florida's resident's rights law was passed as a response to nursing home industry's failure to adequately police itself.[345]

The plaintiff's attorney in one psychiatric sexual exploitation case stated that his client suffered post-traumatic stress disorder from the therapist having sexual relations with her. [346] It was projected that she would need several additional years of therapy. However, the severity of her economic injury was hard to judge since, at the time of trial, she had not suffered any loss of income and, in fact, had achieved much greater professional success since the incident in question.

It was only the prospect of non-economic and punitive damages which provided sufficient incentive to bring suit in "the first case of a patient

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341. *Id.*

342. "Statute may prescribe the use of certain work life or life expectancy tables. Courts usually take judicial notice of mortality tables in general use in the insurance industry." Jerry J. Phillips et al., *Tort Law: Cases, Materials, Problems* 1059 n.3 (1991) (citing Annot., 50 A.L.R.2d 419 (1986)).

343. *See generally* Stephen Nohlgren, *Rights Law Under Attack*, St. Petersburg Times, Nov. 22, 1992, at 1B.

344. *Id.*

345. The St. Petersburg Times reported:

> Lawsuits were exactly what the Legislature had in mind 11 years ago when it passed the resident rights law, said Tampa lawyer Kevin McLean. Horrible conditions persisted in some nursing homes despite state and federal regulations. "The industry wasn't policing itself," McLean said, "And the purpose was to make residents private attorney generals, so they could do what the government is incapable of doing."

Id.

346. Questionnaire of Seth H. Langson, Charlotte, N.C., plaintiff's counsel in MacClements v. Lafone, No. 88-CVS-4095 (N.C. Super. Ct. Mecklenberg County Feb. 1990), *reported in* Jury Verd. Rptr. No. 60442, 1990 WL 459723 (LRP Jury), (Mar. 31, 1993).

against a therapist tried in North Carolina."[347] Such landmark cases are important to vindicate the rights of women and to send a message to those who are tempted to abuse their authority.

III. CONCLUSION

Punitive damages are awarded differentially to males and females in both products liability and medical malpractice litigation. Most jurisdictions have already restricted "his" tort remedies in products liability. Tort reformers are now turning their attention to "her" torts. Without a clear understanding of the gendered nature of tort remedies, women's voices are unlikely to be heard above the corporate sponsored clamor for cut backs.

The FDA defense is potentially debilitating to mass medical products litigation, a category almost exclusively in "her" tort world. Restricting punitive damages and caps on non-economic damages in medical malpractice cases will likely have a negative impact on women. When damages awards are based primarily on out-of-pocket costs and loss of earnings, women are placed at a significant disadvantage. Without the prospect of non-economic and punitive damages, many grievously injured women will be unable to convince an attorney to take their case. The proposed limitations on punitive damages are gender injustice in disguise.

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347. *Id.* In *Lafone*, the plaintiff was the victim of an abuse of transference by a counselor. *Lafone* illustrates the difficulty women victims of sexual abuse would face in obtaining a lawyer without the potential availability of non-economic damages and punitive damages. The plaintiff was not hurt in economic terms, since she actually improved her social position in the wake of the injury. The plaintiff's attorney writes of the case:

> Defendants wanted to try this case since they viewed it as a "no damages" case. It was extraordinarily difficult to show any damages. She had not sought additional therapy until after she had retained lawyers only two years before. She was a secretary at the time of the abuse and by the time of trial, she was an instructor at the university working on a Ph.D.

Id.

APPENDIX A: SELECTED PUNITIVE DAMAGES REFORMS[348] AND DATES ENACTED

States	None	Caps	Proof	FDA	State Fund	Bi-furcate	Plead-ing
Ala.			1987				
Alaska			1986				
Ariz.			1986*	1989			
Ark.							
Cal.			1987			1987	
Colo.		1986	1986		1986–91		
Conn.		1979				1979	
Del.							
D.C.							
Fla.		1986	1986		1986		
Ga.			1987		1986	1987	
Haw.			1989*				
Idaho							1987
Ill.					1986		1986
Ind.			1984				
Iowa			1987		1986		
Kan.		1988	1987			1987	

348. The definition of the tort reforms in Appendix A are as follows: *None*: State does not allow punitive damages in products liability actions; *Caps*: Absolute limit on punitive damages or ratios of punitive award to compensatory damages; *Proof*: Clear & Convincing Evidence or Beyond a Reasonable Doubt; *FDA*: Food and Drug Administration approved products are immunized from punitive awards; *State Fund*: The state shares in any punitive damages recovered; *Bifurcate*: The compensatory and punitive phases of the trial are separated; *Pleading*: There are limits as to when punitive damages may be claimed in a proceeding. Clear and convincing evidentiary standards set by caselaw are designated by *.

Ky.			1988				
La.	X						
Me.			1985*				
Md.			1992*			1986	
Mass.	X						
Mich.							
Minn.			1986			1990	1986
Miss.			1993			1993	
Mo.					1987	1987	
Mont.			1987			1987	
Neb.	X						
Nev.				1989		1989	
N.H.	X						
N.M.							
N.J.			1987	1987		1987	
N.Y.					1992		
N.C.							
N.D.		1993	1987	1993		1993	1987
Ohio			1987	1987		1987	
Okla.		1986					
Or.			1987	1987	1987		
Pa.							
R.I.							
S.C.			1988				
S.D.			1986				
Tenn.						1992*	

Tex.		1987					
Utah			1989	1989	1989	1989	
Vt.							
Va.		1987					
Wash.	X						
W. Va.							
Wis.			1979*				
Wyo.							

X: denotes no punitive damages allowed by common law.