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# ARTICLE

## MARYLAND TORT DAMAGES: A FORM OF SEX-BASED DISCRIMINATION

**By: Rebecca Korzec***

## I. INTRODUCTION

Maryland law provides that "compensatory damages are not to be awarded in negligence or strict liability actions absent evidence that the plaintiff suffered a loss or detriment."[1] At the same time, Maryland imposes a statutory cap on noneconomic damages in tort claims for personal injury.[2] First enacted in 1986, the statutory cap imposed a $350,000 limit on recovery of noneconomic damages.[3] Following a Court of Appeals of Maryland decision that the cap did not apply to wrongful death actions,[4] the Maryland General Assembly explicitly modified the statute to include wrongful death actions.[5] At the same time, the cap was increased to $500,000 for causes of action arising after October 1, 1994.[6] In 1996, the Maryland General Assembly increased the cap by an additional $15,000 for causes of action arising after October 1, 1995.[7] A single cap applies to the action of an injured spouse and includes the award for loss of consortium.[8]

In this essay, I argue that the statutory cap on noneconomic damages in Maryland disproportionately disadvantages women. For this reason, the cap, although facially neutral, is in fact discriminatory

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*Professor, University of Baltimore School of Law

1. Owens-Illinois v. Armstrong, 87 Md. App. 699, 735, 591 A.2d 544, 561 (1991).
2. MD. CODE ANN., CTS. & JUD. PROC. § 11-108(b) (West 1986).
3. *Id.*, *see also* Gooslin v. State, 132 Md. App. 290, 298, 752 A.2d 642, 646 (2000) (holding cap does not violate equal protection claims); Edmonds v. Murphy, 83 Md. App. 133, 573 A.2d 853 (1990), *aff'd* 325 Md. 342, 370, 601 A.2d 102, 116 (1992) (holding a cap on noneconomic damages is constitutional).
4. United States v. Streidel, 329 Md. 533, 552, 620 A.2d 905, 915 (1993).
5. MD. CODE ANN., CTS. & JUD. PROC. § 11-108(a)(1)(ii) (West Supp. 1994) [hereinafter CTS. & JUD. PROC.].
6. CTS. & JUD. PROC. § 11-108(b)(2)(i).
7. CTS. & JUD. PROC. § 11-108 (West Supp. 1995). The $15,000 increase will take effect on October 1 of each year.
8. Oaks v. Connors, 339 Md. 24, 37-38, 660 A.2d 423, 430 (1995); *see also* Klein v. Sears, Roebuck & Co., 92 Md. App. 477, 492-94, 608 A.2d 1276, 1283-84 (1992) (holding spouse entitled to damages for loss of services, affection, society and sexual relationship deceased spouse would have contributed if spouse had lived).

in its impact on female litigants.[9] In addition, the cap may have the unintended effect of limiting the quality of the legal representation available to female tort litigants in Maryland.[10] Moreover, several other issues in Maryland tort law may inadvertently contribute to discrimination against women litigants. These include the Maryland adherence to contributory negligence as a complete bar to negligence claims and the Maryland approach to punitive damages. Ultimately, Maryland tort law, although facially neutral, disadvantages women.

## II. DEVALUATION OF WOMEN'S WORK

Scholars have suggested that both the method of calculating tort damages and tort reform legislation,[11] such as statutory limits on noneconomic damages, harm women.[12] For example, Martha Chamallas argues that courts rely on gender-based generalizations in calculating damages for future earnings.[13] Employing gender-based tables founded on economic patterns for women results in lower awards for individual female plaintiffs because the tables project the fact that women earn less than men.[14] Such damage awards perpetuate inaccurate gender stereotypes of women, devalue the employment contributions of individual women and deprive those women of just compensation for their tort injuries.[15]

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9. Stephen Daniels & Joanne Martin, *The Texas Two-Step: Evidence on the Link Between Damage Caps and Access to the Civil Justice System*, 55 DEPAUL L. REV. 635, 643-47 (2006); *see generally*, Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988) [hereinafter *A Lawyer's Primer*].
10. Daniels, *supra* note 9; *see also* Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1313 (2004) [hereinafter *Hidden Victims*].
11. *See, e.g.*, Finley, *Hidden Victims*, *supra* note 10; *see generally* Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575 (1993); *see, e.g.*, Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 465, 503-04, (1998) [hereinafter *Architecture of Bias*].
12. *See* Finley, *Hidden Victims*, *supra* note 10, at 1267-80, 1313; *see generally* Michael L. Rustad, *Nationalizing Tort Law: The Republican Attack on Women, Blue Collar Workers and Consumers*, 48 RUTGERS L. REV. 673, 733, 744 (1996); Thomas Koenig & Michael Rustad, *His & Her Tort Reform: Gender Injustice in Disguise*, 70 WASH. L. REV. 1, 1, 5 (1995).
13. Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73, 75 (1994) [hereinafter *Questioning the Use*].
14. *Id.*
15. *Id.*

The devaluation of women's work results in lower tort damage awards which fail to adequately compensate them for their losses.[16] In the aggregate, women's tort damage awards are lower than their male counterparts.[17] Since the goal of tort damages is to make the tort victim whole, it is not surprising that tort damage awards reflect and reinforce gender disparities.[18] In particular, feminist scholars argue that "tort law devalues the lives, activities, and potential of women, and that one can see this at work both in substantive rules governing liability and in common methods for calculating damages."[19] Women earn less than their male counterparts in all work environments;[20] therefore, their economic damages are lower than awards for male plaintiffs.[21] Martha Chamallas has demonstrated that in a 1995 guide for personal injury lawyers, awards to male plaintiffs were twenty-seven percent higher than for women.[22] Significantly, a nationwide study of personal injury awards by juries indicated that women received lower median and mean awards for compensatory damages.[23]

These studies demonstrate that tort damages reinforce gender-based stereotypes about women. Contemporary tort law elevates some types of injuries, giving them more legal protection and awarding greater damages. Claims and injuries associated with women often receive less legal protection in the societal hierarchy which tort doctrine reflects. For example, tort doctrine places a higher value on physical injury and property loss than emotional harm. Moreover, tort reform legislation stresses the importance of economic losses, such as lost income and medical expenses over noneconomic damages, such as

16. *Id.*
17. *Id.*
18. *See generally* John C. Coughenour, *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force*, 67 S. CAL. L. REV. 745 (1994).
19. MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 198 (1999).
20. In 2005, women were paid seventy-seven cents for each dollar paid to men. *See* America's Union Movement, EQUAL PAY (Mar. 1, 2007), http://www.aflcio.org/issues/jobseconomy/women/equalpay.html. Much of the reason for this is that women perform unpaid childcare, household work and care of elderly relatives in more significant numbers than men. Scholars have argued that such unpaid work should be compensated and recognized. *See, e.g.*, JOAN WILLIAMS, UNBENDING GENDER 125-27 (2000) (proposing that the non-wage earning spouse receive a joint property right in the income of the wage earning spouse); Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 3-6 (1996).
21. *See* Chamallas, *Architecture of Bias*, *supra* note 11, at 464-65.
22. CHAMALLAS, *supra* note 19.
23. *Id.*

pain and suffering, emotional distress, hedonic damages, loss of companionship and punitive damages.[24]

Maryland substantive tort law, like tort law in general, does not recognize a cause of action for caretakers of children when those children are injured. As the child's primary caretaker, women usually have greater responsibility for a child's safety and happiness. Women caretakers tend to place an extremely high value on their relational ties to their children.[25] When a child is seriously injured, the child's caretaker also suffers. For example, the caretaker must deal with the child's injury and disability. The caretaker may feel intense grief and anxiety, even guilt. The effects of an accident can be life-altering for the caretaker as well as the child.[26] Yet, tort law largely dismisses the caretaker's loss, assigning it mere derivative status. It denies a claim for "filial consortium" for the loss of the child's companionship.[27] These losses fall more heavily on women as primary caretakers of children in our society. Today, most child caretakers are women -- mothers, grandmothers, paid nannies, babysitters and day care providers.[28] Although popular culture praises "stay at home" mothers, such as the "soccer mom" who abandons the workplace to raise her children, tort law provides her no separate claim for the devastating impact of her child's injury on her daily life. The most dramatic, painful and devastating event in the mother's life, as primary caregiver of her child, is likely not compensable in tort law.

## III. GENDERED TORT REFORM

Added to this problem of undercompensation is the "tort reform" [29] movement, leading to limits on damage recovery, such as statutory

24. *Id.* at 199.

25. Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 135, 153, 157-58 (1992).

26. *See, e.g.*, Regina Graycar, *Before the High Court: Women's Work: Who Cares?*, 14 SYDNEY L. REV. 86, 87 (1992) (describing hardships suffered by a mother caring for her disabled daughter).

27. Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 50 (1989) [hereinafter *A Break in the Silence*]. In 1997, Maryland changed wrongful death actions to permit parents to recover noneconomic damages for the wrongful death of an adult child. MD. CODE ANN., CTS. & JUD. PROC. § 3-904(e) (LexisNexis 2006).

28. *See, e.g.*, Becker, *supra* note 25 at 137, 213, 219. Most caretakers and maids in the United States today are immigrant women of color. BARBARA EHRENREICH & ARLIE RUSSELL HOCHSCHILD, GLOBAL WOMEN: NANNIES, MAIDS AND SEX WORKERS IN THE NEW ECONOMY 6-7 (Barbara Ehrenreich & Arlie Russell Hochschild eds., 2003).

29. *See generally supra* note 12.

caps. This reform is fueled by what business and insurance interests consider a litigation explosion, defined by excessive jury awards, increased class action litigation and frivolous suits. As in Maryland, the tort reform movement often saw the enactment of legislative limits or caps on noneconomic damages, often extending beyond medical malpractice and products liability claims, to include all personal injury claims.

As previously argued, these caps may have a negative impact on women. For example, an empirical study by Thomas Koenig and Michael Rustad indicates that women litigants are detrimentally affected when noneconomic damages are limited.[30] The study demonstrates that women comprise two-thirds of plaintiffs recovering punitive damages in medical malpractice cases, particularly in gender-linked cases involving sexual abuse, cosmetic surgery, childbirth and nursing home abuse.[31] Moreover, significant mass products liability litigation has focused on women's reproductive health and gender-linked injuries. These include the Dalkon Shield, Norplant, breast implants and super absorbent tampons. Clearly, limiting noneconomic damages in these products liability cases harms female plaintiffs. Although this gendered result may be completely inadvertent or unintended, its effect is devastating.

Koenig and Rustad demonstrate that limiting noneconomic damages disproportionately affects female litigants.[32] Women earn lower incomes, largely because they spend more time on unpaid child care, housekeeping and other relational care. As a result, female litigants tend to have lesser economic losses than their male counterparts.[33] Moreover, physical injuries to women may not result in significant damages awards since no current medical treatments may exist.[34] For example, a "soccer mom" who suffers injury by having to undergo a hysterectomy caused by a Dalkon Shield or other intrauterine device suffers little economic harm. Restricting or limiting her noneconomic damages may result in an insignificant award of damages. For those reasons, Martha Chamallas argues that: "For feminists who maintain that the market reflects and reinforces

30. Koenig & Rustad, *supra* note 12, at 85.
31. *Id.* at 61-62.
32. *Id.* at 80.
33. *Id.* at 78-79.
34. *See* Lucinda M. Finley, *Female Trouble: The Implications of Tort Reform for Women*, 64 TENN. L. REV. 847, 847-57, 861-66, 870 (1997); *see also* Koenig & Rustad, *supra* note 12, at 64-77.

cultural biases and systems of privilege, changing tort law to curtail noneconomic damages seems misguided. They argue that such reform solidifies the tendency to privilege economic losses over noneconomic ones, and intensifies implicit gender bias in tort law."[35]

Medical malpractice litigation has been a source of substantial reform efforts. Generally, advocates of caps on noneconomic damages argue for practical results rather than doctrinal purity. The argument goes that caps will lead to lower malpractice premiums for physicians preventing them from deserting certain medical specialties or geographical areas. Similarly, in the products liability arena, caps are viewed as an instrument for preventing manufacturer abandonment of significant innovation and product development or from engaging in a "race to the bottom" offering the least possible protection for the victims of defective products.

However, the nexus between damages caps and these legitimate policy issues remain attenuated. For example, in addressing the medical malpractice issue, a 2003 General Accounting Office study found:

> Interested parties debate the impact these various measures may have had on premium rates. However, a lack of comprehensive data on losses at the insurance company level makes measuring the precise impact of the measures impossible. As noted earlier, in the vast majority of cases, existing data do not categorize losses on claims as economic or noneconomic, so it is not possible to quantify the impact of a cap on noneconomic damages on insurers' losses. Similarly, it is not possible to show exactly how much a cap would affect claim frequency or claims-handling costs. In addition, while most claims are settled and caps apply only to trial verdicts, some insurers and actuaries told us that limits on damages would still have an indirect impact on settlements by limiting potential damages should the claims go to trial. But given the limitations on measuring the impact of caps on trial verdicts, an

35. CHAMALLAS, *supra* note 19, at 202.

> indirect impact would be even more difficult to measure.[36]

Moreover, Lucinda Finley's 2004 review of the efficacy of statutory limitations on noneconomic damages reached similar results.[37] She argues that women will be among the "hidden victims of tort reform" who will be less likely to obtain lawyers willing to represent them.[38] Professor Finley's empirical study included analysis of jury verdicts in Maryland, Florida and California. She concludes that women, children and the elderly will be most affected by damage caps, arguing: "[T]hese disparate negative effects will be especially pronounced for elderly women. . . . [C]ap laws will also place an effective ceiling on recovery for certain types of injuries disproportionately experienced by women, including sexual assault and gynecological injury, that impair childbearing or sexual functioning."[39]

Lucinda Finley concludes that decreasing the recovery value of these injuries for women will mean that lawyers will be unwilling to take meritorious claims which are not cost-efficient.[40] She argues that the effect of statutory damage caps will be "[T]he message that women, the elderly, and the parents of dead children should not bother to apply."[41]

## IV. PUNITIVE DAMAGES

The Maryland approach to punitive damages aggravates the statutory cap problem by making it extremely difficult to recover punitive damages. For the plaintiff to recover punitive damages, the defendant must be characterized by "evil motive, intent to injure, or fraud,"[42] i.e., actual malice. Essentially a two–prong test has evolved. First, the plaintiff must demonstrate that the defendant had actual

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36. U.S. GEN. ACCOUNTING OFFICE, MEDICAL MALPRACTICE INSURANCE: MULTIPLE FACTORS HAVE CONTRIBUTED TO INCREASED PREMIUM RATES 42-43 (2003).
37. Finley, *Hidden Victims*, *supra* note 10, at 1267-80.
38. *Id.* at 1313.
39. *Id.*
40. *Id.*
41. *Id.; see generally* Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393 (1993) (arguing that tort reform makes contingency fee-based law practices less profitable, forcing plaintiff's lawyers to represent fewer litigants or abandon the market altogether).
42. Owens Corning v. Bauman, 125 Md. App. 454, 533, 726 A.2d 745, 784 (1999); Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 460, 601 A.2d 633, 652 (1992).

knowledge of the defect. Second, the plaintiff must prove that the defendant exhibited deliberate disregard of the consequences of that defect.[43] Moreover, punitive damages must be proven by clear and convincing evidence.[44]

Noneconomic damage recovery, such as the award of punitive damages, is extremely important to women litigants because they help counteract the low value placed on women's economic claims.[45] Punitive damages, pain and suffering and other noneconomic damage awards help correct the bias in tort damage awards. Preferring economic losses over noneconomic claims reinforces implicit gender bias.

## V. COMPARATIVE FAULT AND CONTRIBUTORY NEGLIGENCE

Although the doctrine of comparative fault[46] is accepted in almost every jurisdiction, Maryland has not adopted it.[47] Comparative fault's widespread acceptance stems from the harshness of the contributory negligence rule which bars a plaintiff from any recovery against a tortfeasor, if the plaintiff was at fault in any respect in connection with the accident.[48] The harshness and potential unfairness of the contributory negligence approach is that it "[P]laces upon one party the entire burden of a loss for which two are, by hypothesis, responsible."[49] By contrast, the doctrine of comparative fault does not take this all-or-nothing approach to accident liability. Rather the doctrine proportionately reduces the accident victim's damages according to the victim's fault.[50] The doctrine can significantly alter the results in products liability and other litigation.[51]

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43. *Zenobia*, 325 Md. at 462, 601 A.2d at 653.
44. *Id.* at 469, 601 A.2d at 657.
45. Finley, *supra* note 34 (arguing that tort reform proposals have a "possible adverse impact on women and women's health.").
46. *See* DAVID G. OWEN, PRODUCTS LIABILITY LAW (2005) 811 n.1 [hereinafter OWEN, PRODUCTS LAW]; W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 67, at 468-69 (5th ed. 1984).
47. The only other jurisdictions are Alabama, The District of Columbia, North Carolina and Virginia. *See* OWEN, PRODUCTS LAW, *supra* note 46.
48. *Id.* at 811.
49. W. PAGE KEETON ET AL., *supra* note 46.
50. OWEN, PRODUCTS LAW, *supra* note 46, at 811-12.
51. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 1 cmt. a (2000); UNIF. APPORTIONMENT OF TORT RESPONSIBILITY ACT § 3 (amended 2003), 12 U.L.A. 12 (Supp. 2006).

Maryland's contributory negligence doctrine may be especially problematic for women litigants. Feminist scholars argue that negligence's "reasonable person" standard may not reflect women's experiences and sensibilities.[52] The "reasonable person" standard is a mainstay of the view that law is objective in viewpoint. The objective, "reasonable person" standard is intended to encourage the trier of fact to reach an unbiased result, which avoids the perspective of either litigant.[53] However, this "objectivity" has been criticized as an example of "point-of-viewlessness,"[54] which actually ignores women's experiences by adopting the viewpoint of the dominant, male group.[55]

Maryland's view of the sole proximate harm issue complicates the contributory negligence problem. *Anthony Pools v. Sheehan*[56] is an example of these issues in current Maryland products liability law. In Maryland, plaintiff's contributory negligence defeats a negligence claim. However, simple contributory negligence cannot bar a strict liability in tort claim.[57] To bar the strict liability claim, the plaintiff must assume the risk.[58] Nevertheless, in Maryland, the doctrine of "sole proximate cause" may bring ordinary contributory negligence back into a products liability case.[59] In a strict products liability claim, the plaintiff must still demonstrate that the product defect is the proximate cause of the plaintiff's harm.[60] In effect, the same actions which might be considered plaintiff's contributory negligence may

52. *A Lawyer's Primer*, *supra* note 9, at 31 (stating that "Negligence law could begin with . . . the feminine voice's ethic of care -- a premise that no one should be hurt. We could convert the present standard of 'care of a reasonable person under the same or similar circumstances' to a standard of 'conscious care and concern of a responsible neighbor or social acquaintance for another under the same or similar circumstances.'"). *But cf.* Richard A. Posner, *Conservative Feminism*, 1989 U. CHI. LEGAL F. 191, 214 (arguing "most neighbors are not caring, and most accident victims are not neighbors. Human nature will not be altered by holding injurers liable for having failed to take the care that a caring neighbor would have taken.").
53. CHAMALLAS, *supra* note 19, at 57.
54. CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 162 (1989).
55. *Id.*
56. 295 Md. 285, 455 A.2d 434 (1983) (holding that plaintiff's claim was not barred by his contributory negligence when he was injured as he fell off the side of the diving board of his new swimming pool onto the concrete coping at the edge of the pool).
57. Sheehan v. Anthony Pools, 50 Md. App. 614, 626, 440 A.2d 1085, 1092 (1982). The Court of Appeals of Maryland adopted Part III of the Court of Special Appeals' decision. *Anthony Pools v. Sheehan*, 295 Md. at 299, 455 A.2d at 441.
58. *See generally* Dix W. Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93 (1972).
59. *See, e.g., Anthony Pools*, 50 Md. App. at 622, 440 A.2d at 1090.
60. *See id.* at 621-23, 440 A.2d at 1090.

reappear in the defendant's argument as also constituting the sole proximate cause of the harm.[61] In other words, the plaintiff's risk-taking behavior, rather than any alleged product defect, is the "sole proximate cause" of the product user's harm.[62]

In *Anthony Pools*, in his strict liability tort action, the plaintiff asserted that the fact that non-skid material on the diving board did not extend to and over the edges of the diving board constituted a design defect.[63] Defense counsel argued the plaintiff's injury was not caused by any product defect, but rather by the way the plaintiff used the diving board. In closing argument, defense counsel argued:

> You must find that this defect proximately caused the accident. The clear testimony here from Mr. Weiner and using your common sense is that if someone steps on the board with about an inch of their foot on it, they will fall off the side. That was the proximate cause, the way the board was used, not the design of the board. I am not willing to concede for a moment that there is anything defective about the board. . . . [E]ven if you feel there was, I ask you to find that the proximate cause was the way Mr. Sheehan used it, not the way it was designed.[64]

The trial judge denied the defendant's request to instruct the jury that contributory negligence was a defense, and also denied the plaintiff's request to instruct the jury that the plaintiff's inadvertence in using the diving board was not a defense.[65] Reversing the jury verdict for the defendant, the Court of Special Appeals of Maryland held that the trial court should have granted the plaintiff's instruction on inadvertence.[66]

*Anthony Pools* indicates that juries can be easily confused about the role of the accident victim's conduct in establishing product defect and liability. Accident victim carelessness, inadvertence, and risk-taking activity must be considered, but should not be a complete bar to

61. *See id.* at 622, 440 A.2d at 1090.
62. OWEN, PRODUCTS LAW, *supra* note 46, at 809-10.
63. *Anthony Pools*, 50 Md. App. at 616, 440 A.2d at 1087.
64. *Id.* at 622, 440 A.2d at 1090. In this case, the defense counsel is using the rubric of "sole proximate cause" to defeat the plaintiff's strict liability claim by arguing that the way the plaintiff used the diving board rather than the design of the diving board was the proximate cause of the injury.
65. *Id.*
66. *Id.* at 626, 440 A.2d at 1092.

products liability recovery. Their effect, as doctrines limiting liability, and the effect of the doctrine of sole proximate cause, must only be applied in a manner which assures fairness in products liability litigation.

Maryland negligence law, with its emphasis on contributory negligence, adds to the problems women litigants face. In evaluating whether an individual has acted "reasonably," negligence standards, by definition, measure women's actions according to traditional male norms and viewpoints. Male norms simply may ignore the impact of female experience and conduct on notions of reasonableness. Similarly, confusing the separate products liability doctrines of defect and causation with the unhelpful rubric of "sole proximate cause" reduces the likelihood of achieving a just result.

## VI. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY

The Products Liability Restatement has not been adopted in Maryland. Nevertheless, its potential impact on gender discrimination must be considered. The Restatement (Third) of Torts: Products Liability has been the subject of considerable debate[67] and criticism.[68] However, the concerns of feminist jurisprudence have been largely ignored.[69] Increasingly, feminist scholars[70] have argued that an ethic

67. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998) [hereinafter PRODUCTS LIABILITY RESTATEMENT]; *see, e.g.*, Symposium, *Restatement (Third) of Torts: Products Liability: Is the Best Defense Redefining the Offense?*, 26 N. KY. L. REV. 531, 678 (1999); *see also* James A. Henderson, Jr. & Aaron D. Twerski, *Will a New Restatement Help Settle Troubled Waters: Reflections*, 42 AM. U. L. REV. 1257 (1993).

68. *See, e.g.*, Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631 (1995); *see generally* John F. Vargo, *The Emperor's New Clothes: The American Law Institute Adorns "New Cloth" for Section 402A Products Liability Design Defects: A Survey of the States Reveals a Different Weave*, 26 U. MEM. L. REV. 493 (1996).

69. For a student comment addressing feminist concerns with section 6(c), see Dolly M. Trompeter, Comment, *Sex, Drugs, and the Restatement (Third) of Torts, Section 6(c): Why Comment E is the Answer to the Woman Question*, 48 AM. U. L. REV. 1139 (1999). There is considerable feminist jurisprudence on tort law. *See, e.g.*, Bender, *A Lawyer's Primer*, *supra* note 9; Bender, *supra* note 11; Finley, *supra* note 45; Lucinda M. Finley, *Guarding the Gate to the Courthouse: How Trial Judges Are Using Their Evidentiary Screening Role to Remake Tort Causation Rules*, 49 DEPAUL L. REV. 335 (1999).

70. There are many schools of feminist scholarship including cultural feminists, accommodation feminists, radical feminists, and critical legal studies feminists. They all share the goal of incorporating women's experiences and values into law and of employing feminist methodology. *See generally* Katharine T. Bartlett, *Feminist Legal*

of care,[71] promoting considerations of empathy and interdependence must be integrated into law. Unlike competing analyses, such as the law and economics approach,[72] which seek to achieve justice by deciding disputes with the object of promoting greater social good through wealth maximization resolutions,[73] cultural feminists find the efficiency norm unworkable. Cultural feminism regards law as just and equitable only when administered with empathy, resulting in a redistributive impact for economically and politically disadvantaged members of society.[74] At first blush, efficiency and empathy appear to be irreconcilable.[75] Nevertheless, I argue that, in the world of products liability, efficiency and wealth maximization must be reconciled with requirements of empathy and fairness. The Products Liability Restatement shift from strict liability to negligence essentially adopts the law and economics focus on efficiency and wealth maximization in derogation of empathic care as a normative principle of justice.[76] The claims of cultural feminism, emphasizing empathic care and interdependence, are essential for a valid products liability doctrine. Indeed, empathy and efficiency can and must be merged into a construct where both are achievable and viable.

Major concepts in the law of products liability, such as defectiveness, causation, and damages, reveal social policy considerations. One group of scholars emphasizes the role of products liability law in deterring product injury by providing appropriate incentives to product manufacturers. The other group focuses on products liability as an after the fact attempt to achieve corrective justice between the product producer and the product user. Often the scholarship of each group either ignores or deprecates the views of the other. I suggest that feminist jurisprudence may provide an important

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*Methods*, 103 HARV. L. REV. 829 (1990); Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617 (1990).

71. The ethic of care or cultural feminism owes much to the work of Carol Gilligan. *See, e.g.*, CAROL GILLIGAN, IN A DIFFERENT VOICE (1982).
72. *See generally* GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970).
73. *See generally* RICHARD A. POSNER, THE ECONOMICS OF JUSTICE (1981).
74. *See* Ann C. Scales, *The Emergence of a Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988); *see generally* MATTHEW H. KRAMER, CRITICAL LEGAL THEORY AND THE CHALLENGE OF FEMINISM (1995).
75. *Cf.* CALABRESI, *supra* note 72, at 24, 307-08.
76. *See, e.g.*, Mark McLaughlin Hager, *Don't Say I Didn't Warn You (Even Though I Didn't): Why the Pro-Defendant Consensus on Warning Law Is Wrong*, 61 TENN. L. REV. 1125, 1133 (1994); *see generally* William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

bridge in this products liability scholarly gap. Specifically, a cultural feminist ethic of care can provide significant new insights for products liability doctrine.

*A. Products Liability Goals of Efficiency and Corrective Justice*

For more than a decade, a vigorous tort reform debate has refocused examination of how legal rules promote the goals of compensation and deterrence.[77] Numerous scholars have studied the question of how to compensate tort victims for their injuries.[78] Clearly, payments to tort victims can have both compensatory and deterrent goals. Nevertheless, payments needed to promote deterrence may not be identical to payments needed to attain compensatory goals.[79]

An important tort compensation theory is the insurance theory -- the theory that tort payments should be based on the insurance choices which individuals would make in actuarially fair markets.[80] The insurance theory has significant theoretical and practical implications in that it provides a radical shift from the major compensation paradigm of tort law -- the "make the tort victim whole" theory of recovery.[81] Moreover, the insurance theory has received support from prominent scholars in the tort reform debate, including law and economics scholar Professor Steven Shavell,[82] empirical analysts Professors W. Kip Viscusi [83] and Patricia Danzon,[84] and theorists such

77. *See, e.g., Products Liability Law Symposium,* 53 S.C. L. REV. 777 (2002).
78. *See, e.g.,* Randall R. Bovbjerg, Frank A. Sloan & James F. Blumstein, *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 NW. U. L. REV. 908 (1989); Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772 (1985).
79. *See generally* George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987).
80. *Id.* at 1556 (stating that when the tort victim purchases a product or service she pays in advance for insurance so that "[C]ompel[ing] insurance greater than the amount demanded by the purchaser reduces, rather than increases, his or her welfare.").
81. *See, e.g.,* FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, THE LAW OF TORTS, § 25.1 at 493 (Little, Brown, and Co. 2d ed. 1986) (1956) (examining the traditional tort damage rule).
82. *See* Steven Shavell, Economic Analysis of Accident Law 260-61 (1987).
83. *See* W. Kip Viscusi, Reforming Products Liability 89-94 (1991).
84. *See* Patricia M. Danzon, *Tort Reform and the Role of Government in Private Insurance Markets*, 13 J. Legal Stud. 517, 520-26 (1984); Patricia M. Danzon, Medical Malpractice: Theory, Evidence and Public Policy 10 (1985).

as Professor Alan Schwartz.[85] It is also supported by the American Law Institute.[86]

Some aspects of the Products Liability Restatement, no matter how well grounded in products liability policy or in theories of justice, nevertheless, will have the unintended consequences of harming women. Therefore, the Restatement doctrine must be analyzed and evaluated. In particular, the Restatement's transition from strict liability to negligence doctrine raises legitimate concerns for feminists. Negligence is generally considered more difficult to prove than strict liability in tort law.[87] Another concern is the adoption of a more stringent standard for determining medical product and prescription drug defectiveness than for other products.

An additional concern is normative, asking which values should fashion products liability doctrine. Products liability doctrine reveals societal values and priorities in valuing wealth, safety and innovation. Should products liability be premised on fault or on strict liability? Should deterrence or compensation be preferred?[88]

### *B. Moral and Economic Theories*

#### *1. Corrective Justice and Distributive Justice*

Corrective justice seeks to right wrongs by restoring the balance of rights which have been wrongly disrupted.[89] Suppose a manufacturer's product injures a product consumer. The manufacturer's liability might depend on concepts of corrective justice -- what it takes to right the wrong done by the manufacturer. If the manufacturer is bankrupt or judgment-proof, the issue might be whether consumers and manufacturers as a group should use some of their money to help the injured consumer. This becomes a distributive

85. Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 Yale L.J. 353, 362-67 (1988).

86. *See* The Am. Law Inst. Reporters' Study on Enter. Responsibility for Pers. Injury: Volume II Approaches to Legal & Institutional Change (1991). This study, released in April 1991, discusses the insurance theory of compensation, and states that "[e]mpirical corroboration of these analytical claims" exists. *Id.* at 206 n.13; *see generally* Stephen D. Sugarman, *A Restatement of Torts*, 44 Stan. L. Rev. 1163 (1992) (book review).

87. *See, e.g.*, Page Keeton, *Product Liability and the Meaning of Defect*, 5 St. Mary's L.J. 30, 34-35 (1973).

88. *See generally* David G. Owen, *Philosophical Foundations of Fault in Tort Law*, *in* Philosophical Foundations of Tort Law 201 (1995).

89. Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 Mich. L. Rev. 2348, 2350 (1990).

justice question of how society's assets should be distributed among people.

### 2. *Corrective Justice v. Utilitarian Approach to Justice*

Corrective justice can be contrasted with a utilitarian approach to justice. Under a utilitarian approach, we ask what is good for society as a whole.[90] The manufacturer's fault in causing the product user's harm is a basis for deciding the case based on corrective justice.[91] We can conclude that the blameworthy manufacturer should pay compensation to the product user since it redresses a wrong when compensation is paid. As a result, fault or unreasonableness provides a legitimate moral basis for corrective justice.[92]

### 3. *Corrective Justice and Strict Liability*

In some situations, although neither the product manufacturer nor the product user is at fault, the user, nevertheless, is injured by the product. Unless the product manufacturer is held strictly liable, the innocent product user must bear the loss. In other words, without manufacturer strict products liability, the blameless product user must pay for his losses. Therefore, strict products liability is consistent with concepts of corrective justice.[93]

Richard Epstein is a major proponent of strict liability on the basis of corrective justice. Basically, Epstein argues that strict liability is preferable to a negligence system because negligence is not morally grounded.[94] Negligence cannot promote moral responsibility because it weighs into the balance the social utility of the defendant's conduct or product.[95] Epstein would argue that regardless of the social utility

90. Virginia E. Nolan & Edmund Ursin, *The Revitalization of Hazardous Activity Strict Liability*, 65 N.C. L. Rev. 257, 286-93 (1987) (stressing the importance of loss spreading, fairness and safety in strict products liability).
91. *Id.* at 286.
92. *See generally* Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 Ind. L.J. 349 (1992). Often court decisions confirm the core morality of redressing fault. *Cf.* Gary T. Schwartz, *The Beginning and Possible End of the Rise of Modern American Tort Law*, 26 Ga. L. Rev. 601 (1992) (analyzing judicial rejection of some forms of strict liability in products liability cases).
93. *See generally* Jules L. Coleman, *The Morality of Strict Tort Liability*, 18 Wm. & Mary L. Rev. 259 (1976).
94. *See generally* Richard A. Epstein, *A Theory of Strict Liability*, 2 J. Legal Stud. 151 (1973).
95. *Id.* at 153.

of defendant's product, if it harms the plaintiff, the defendant should be liable.[96]

### C. *The Products Liability Restatement Meets the Feminist Ethic of Care*

Cultural feminists argue that tort law should emphasize safety rather than profit or efficiency.[97] They view the masculine voice, with its protection of rights, autonomy, and abstraction, as a standard which promotes only efficiency and profit.[98] According to the feminist ethic of care, a much-needed feminine voice would refocus the tort system to encourage behavior which is caring about safety and responsive to victim needs, with their attendant human contexts and consequences.[99] Over the past decade, feminist scholars have provided significant critiques of tort doctrines.[100] The critiques have applied various schools of feminist theory.[101]

Feminist scholarship has demonstrated that contemporary tort law reinforces the economic subordination of women.[102] The traditional devaluation of women's work, including child rearing and homemaking, has affected the damage awards for women.[103] When the tort law determines which harms are worthy of legal protection, to what extent these harms should be compensated, and how they should be valued, it makes fundamental judgments which affect tort victims.[104] Tort settlements and damage awards represent both economic security and fundamental fairness.[105] Moreover, tort law expresses the social value placed upon certain relationships and personal interests.[106]

Given the economic position of women, it is not altogether surprising that women receive less tort compensation than men. The basic, underlying purpose of tort damages is to place the injured

96. *Id.; see generally* Richard A. Epstein, A Theory of Strict Liability: Toward a Reformation of Tort Law (1980); Jules L. Coleman, *Corrective Justice and Wrongful Gain*, 11 J. Legal Stud. 421 (1982).
97. *See, e.g.*, Bender, *A Lawyer's Primer, supra* note 9.
98. *Id.*
99. *Id.*
100. *See generally* Bender, *supra* note 11.
101. *Id.*
102. *See* Chamallas, *supra* note 19.
103. *Id.*
104. *See* Finley, *supra* note 10.
105. *Id.*
106. *Id.*

plaintiff in her pre-accident economic position.[107] Most empirical studies demonstrate that women, regardless of race, receive significantly lower tort damage awards than white men.[108] Interestingly, the efforts to study gender and race bias in the courts have provided much of the data demonstrating the higher value placed on white men's lives and injuries.[109] For example, as previously discussed, Martha Chamallas has demonstrated through empirical studies that awards for male plaintiffs were twenty-seven percent higher than those for women in a 1995 guide for personal injury lawyers.[110]

Gender-based generalizations about women lead courts to under calculate tort damages for the loss of future earning capacity.[111] Damages for the loss of future earning capacity compensates the tort victim for injuries that impair earning power.[112] When a young woman is injured, economists appearing as expert witnesses often rely on tables based on past economic patterns.[113] These tables project that women will work fewer years than men and will earn less money than their male counterparts.[114] As a result, women receive dramatically reduced awards.[115] Employing these gender-based generalizations ignores the fact that individual women may alter traditional patterns of employment participation. Applying liberal feminist principles would produce tangible gains for women because their experiences and viewpoints would be the norm rather than the exception.

General tort principles submerged into the Products Liability Restatement, as previously discussed, create problems from a feminist perspective. For example, the "reasonable person" tort law standard can be viewed as problematic. Although the standard may be perceived as objective, it may actually result in what Catherine MacKinnon has described as "point-of-viewlessness."[116] Objective

107. Fleming James, Jr., *Damages in Accident Cases*, 41 Cornell L. Q. 582, 582 (1956).
108. *See* Chamallas, *supra* note 19.
109. *See generally* Judith Resnik, *Asking About Gender in Courts*, 21 Signs: J. Women in Culture and Soc'y 952 (1996).
110. Chamallas, *supra* note 19.
111. *See generally* Chamallas, *Questioning the Use*, *supra* note 13, at 84-89; Chamallas, *Architecture of Bias*, *supra* note 11, at 465-66.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. MacKinnon, *supra* note 54, at 162 (arguing that objectivity does not exist -- rather the attempt to appear objective actually reflects the viewpoint of the dominant group).

analysis is often the viewpoint of the dominant group, accepted as valid because the dominant group's version of reality is deemed true.[117]

Leslie Bender has re-examined the tort "no duty to rescue" doctrine from a cultural feminist perspective.[118] Bender argues that liability should result when an individual refuses to save a stranger since that stranger should be viewed as a person who is interconnected with the community and whose well-being, therefore, affects others.[119] Another problematic area of the products liability arena is the "fetal protection" policies which exclude women from certain workplaces.[120]

American products liability law, as it developed for three decades, came closer to achieving these goals than the Products Liability Restatement. Under the Restatement (Second) of Torts, if a medical product harmed a patient, she could be compensated by bringing a tort claim against the manufacturer.[121] The patient could establish liability in one of two ways: (1) under a negligence theory, she could establish liability by proving that the manufacturer lacked due care in designing, manufacturing or marketing the product; (2) under the theory of strict liability in tort, she could prove that the product was in a defective condition, unreasonably dangerous to the user.[122] Under the Restatement (Second) of Torts, section 402A, a patient could find protection in a tort system concerned with care and safety rather than insulating product manufacturers from liability.[123] This focus on the product user was to be expected since strict liability in tort, as recognized by Dean Prosser, a Reporter of the Restatement (Second), is grounded in notions of fairness and product user protection.[124]

However, the "tort reform" movement may have elevated product innovation, profit maximization and efficiency above user safety.[125]

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117. *See id.*

118. Bender, *A Lawyer's Primer, supra* note 9, at 33-36.

119. *Id.*

120. *See generally* Sally J. Kenney, For Whose Protection? Reproductive Hazards and Exclusionary Policies in the United States and Britain (1992) (arguing that "fetal protection" policies excluding women from some toxic workplaces discriminate only against mothers even though fathers can also be affected from this environment).

121. Restatement (Second) of Torts § 402A (1965).

122. *See generally* Kenney, *supra* note 120.

123. *Id.*

124. Prosser, *supra* note 76, at 1120 (quoting Escola v. Coca Cola Bottling Co., 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring)).

125. *See, e.g.,* Joan E. Steinman, *Women, Medical Care, and Mass Tort Litigation*, 68 Chi.-Kent L. Rev. 409 (1992).

Arguably, a prime example of this trend is section 6(c) of the Products Liability Restatement.[126] Section 6(c), which governs design defect liability for prescription drugs and medical devices, is one of the most controversial sections of the Products Liability Restatement since it requires the patient to prove that no reasonable healthcare provider would have prescribed the product for any class of patients.[127] Thus, in order for a patient to bring a successful claim for design defect, product users must demonstrate that they suffered harm and that no patient class could have derived benefit from the prescription drug or medical device. This new standard basically relieves medical product manufacturers of liability and responsibility. Since women consume more prescription drugs and products than men,[128] they are likely to be more disadvantaged by section 6(c). First, women consume a greater share of medical products than men.[129] Second, the regulatory system has not adequately tested and monitored products intended for women since men are generally the prototypes for medical studies and testing.[130]

Significantly, section 6(c) is not the only Products Liability Restatement provision which defines product design defect. Section 2 establishes a separate standard of liability for defective product design.[131] This standard of liability for general product design is separate from medical or prescription products.[132] Section 2 allows an aggrieved product user more latitude in establishing design defect

126. Products Liability Restatement, § 6(c) states:

> A prescription drug or medical device is not reasonably safe due to defective design if the foreseeable risks of harm posed by the drug or medical device are sufficiently great in relation to its foreseeable therapeutic benefits that reasonable health care providers, knowing of such foreseeable risks and therapeutic benefits, would not prescribe the drug or medical device for any class of patients.

127. *Id.*

128. L. Elizabeth Bowles, *The Disfranchisement of Fertile Women in Clinical Trials: The Legal Ramifications of and Solutions for Rectifying the Knowledge Gap*, 45 Vand. L. Rev. 877, 878 (1992) (discussing the fact that women consume more prescription drugs than men and disproportionately suffer a greater number of side effects from these drugs).

129. *See, e.g.*, Joan E. Steinman, *Women, Medical Care, and Mass Tort Litigation*, 68 Chi.-Kent L. Rev. 409 (1992).

130. *Id.*

131. *See* Products Liability Restatement, §§ 2(b), 6(c). "Because of the special nature of prescription drugs and medical devices, the determination of whether such products are not reasonably safe is to be made under Subsections (c) and (d) rather than under §§ 2(b) and 2(c)." *Id.* § 6 cmt. b.

132. Products Liability Restatement § 2 cmt. a.

liability. The Reporters of the Restatement admit that the requirements to establish general design liability are less stringent than those for medical products.[133] Rather than proving that the product was ineffective for all users, section 2 allows the product user to present a reasonable alternative design as an effective means of establishing a design defect claim for general product defectiveness.[134] The Restatement offers comment (e) as an exception to the liability standard for general product design defect claims in section 2.[135] Comment (e) provides that if the product's design renders its social utility low in relation to its potential to cause harm, liability attaches even though no reasonable alternative design exists.[136] The reasoning behind comment (e) is that rigid liability standards should not apply to products with extremely low social utility.[137] Unfortunately, section 6(c) does not have the same exception for prescription drugs and medical devices design defect claims. Simply stated, not all prescription drugs deserve special protection for public policy reasons; a cosmetic drug is not as important as life-saving chemotherapy.

The seriousness of the general product defect exception in comment (e) is most harshly felt when examining these new theories of liability from the vantage point of the injured female patient. Clearly, adopting this exception to women asserting medical product design defect claims would lighten the female patient's legal burden. In turn, this would shift the focus from maximization of product manufacturer profits to appropriate concern for patient safety.

Lucinda Finley argues that, "[T]orts suits define and signify basic social values about what human activities are worthy of protecting . . ."[138] Unfortunately, the new standard established by section 6(c) of the Products Liability Restatement does not seem to value women's health and safety over corporate profits. The tort reform achieved by

133. *See id.* § 6 cmt. f, (arguing Subsection c of section 6 imposes a more rigorous test for defect than does section 2(b) which does not apply to prescription drugs and medical devices).

134. *Id.* § 2(b). This section provides a product defect:

> [I]s defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.

135. *See id.* § 2 cmt. e.

136. *See id.*

137. *Id.*

138. Finley, *supra* note 34, at 849.

the Products Liability Restatement reduces corporate liability and responsibility, resulting in an increase in corporate profits and a decrease in patient safety. Since men and women are different biologically, women suffer injuries from defective reproductive products placed inside their bodies, while men are seldom injured by such products.[139] These injuries suffered by women are difficult to assess in traditional economic terms, since they affect reproductive loss and other noneconomic losses.[140] Often these reproductive and emotional harms are not compensated in traditional tort damages.[141] Nevertheless, they affect women's economic, educational and career choices.[142] The traditional tort approach, as exemplified by the Products Liability Restatement, tells women that their value in the labor force is not important enough to be incorporated into the market-based tort reform formula.[143] Not only is the Products Liability Restatement approach unfair to those women harmed by medical products, it also sends a message to society as a whole that women are less valuable than their male counterparts.[144]

## VII. CONCLUSION

Maryland tort law discriminates against women in a number of important ways. Although facially neutral, the Maryland statutory cap on noneconomic damages and the standard for awarding punitive

139. Koenig & Rustad, *supra* note 12, at 48.

140. *See, e.g.*, Finley, *supra* note 34, at 857-58. Many of these defective, unsafe products have been intended for the use by healthy women to affect, interrupt, or enhance natural bodily processes, rather than to treat illness or disease. They include: (1) Des, a synthetic estrogen marketed to prevent miscarriage which proved ineffective for that purpose, but elevated the risk of breast cancer among the exposed mothers by forty percent, and which caused cancer, reproductive abnormalities and infertility in the exposed daughters and sons of the pregnant women who took it; (2) Early versions of birth control pills which had high hormone levels that caused strokes, heart attacks and blood clots; (3) IUDs such as the Dalkon Shield and Copper-7, which presented an elevated risk of pelvic inflammatory disease, sterility, perforated uteruses and septic abortions; and (4) Parlodel, a drug prescribed to suppress lactation, which proved ineffective and caused deaths from strokes or heart attacks. *See id.* at 869.

141. *Id.* at 857-58.

142. *Id.* at 858.

143. Finley, *A Break in the Silence, supra* note 27, at 52. The disparate impact of market-based damage measurement is derived from two principle sources: 1) the generally lower value the market assigns to women's work and 2) the market's failure to recognize or value many productive activities in which women engage, such as household management and care-taking performed within the family.

144. *Id.* As Professor Martha Chamallas has noted, earning-based damages calculations signal that white men are worth more, and reinforce beliefs that they will achieve more than white women or minority men and women. Chamallas, *supra* note 19, at 197-98.

damages disadvantage women litigants. Moreover, adoption of the Products Liability Restatement would exacerbate the situation. Adding to this problem is Maryland's failure to adopt the doctrine of comparative negligence. The current Maryland approach is confusing and unfair. Disadvantaging women may be an unintended result of the current Maryland regime. Nevertheless, it should be remedied. Maryland tort law should take women's experiences and lives seriously.