Delimiting the Manufacturer's Liability: An Examination of Loss of Consortium Recovery in Strict Products Liability Actions Under Section 402A of the Restatement (Second) of Torts

I. Introduction

In 1963, the judiciary first recognized the manufacturer's strict tort liability in *Greenman v. Yuba Power Products, Inc.*[1] The American Law Institute adopted section 402A of the Restatement (Second) of Torts—Special Liability of Seller of Product for Physical Harm to User or Consumer in 1965.[2] Based largely on policy considerations,[3] strict products liability evolved with great emphasis on consumer protection.[4] This led to the continued expansion of the scope of the doctrine.[5] Yet the courts rarely conducted a detailed analysis of whether the policy goals of section 402A were actually promoted by the ever-expanding scope of the manufacturer's liability.[6]

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1. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

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

3. *See, e.g.*, Greenman, 59 Cal. 2d at 63-64, 377 P.2d at 901, 27 Cal. Rptr. at 701. *See generally* Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 Minn. L. Rev. 791 (1966) [hereinafter *Fall of the Citadel*]; Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099 (1960) [hereafter *Assault Upon the Citadel*].

4. *See* Vandall, *Our Product Liability System: An Excellent Solution to a Complex Problem*, 64 Den. U.L. Rev. 703, 715 (1988). *See also* Manuel & Richards, *Economic Loss in Strict Liability—Beyond the Realm of Section 402A*, 16 Mem. St. U.L. Rev. 315 (1986).

5. *See* Shepard v. Alexian Bros. Hosp., 33 Cal. App. 3d 606, 612, 109 Cal. Rptr. 132, 135 (1973) (California cases expanded the scope of the *Greenman* doctrine by imposing strict liability on retail dealers (Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964)); wholesale and retail distributers (Barth v. B.F. Goodrich Tire Co., 265 Cal. App. 2d 228, 71 Cal. Rptr. 306 (1968)); home builders (Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969)); bailors and lessors of personal property (McClaflin v. Bayshore Equipment Rental Co., 274 Cal. App. 2d 446, 79 Cal. Rptr. 337 (1969)); and licensors of chattels (Garcia v. Halsett, 3 Cal. App. 3d 319, 82 Cal. Rptr. 420 (1970)). The standard of strict liability has been held to apply to a defect in design as well as a defect in manufacture (Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970)) and extends not only to actual consumers or users, but to any human being to whom an injury from the defect is reasonably foreseeable (Elmore v. American Motors Corp., 70 Cal.2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969)).

6. Shepard v. Superior Court, 76 Cal. App. 3d 16, 27, 142 Cal. Rptr. 612, 619 (1977) (Kane, J., dissenting).

The recognition of loss of consortium as a redressable cause of action within the context of strict products liability provides an excellent example of the expansion of section 402A with a lack of appropriate judicial discourse. Courts have consistently permitted the loss of consortium claim in strict products liability actions. Upon reviewing the decisions in many jurisdictions, a federal district court noted that it had "not found a single case where a consortium claim was dismissed in a products liability action. To the contrary, the decisions do not even question the validity of a consortium claim."[7] Yet liability under section 402A of the Restatement is strict liability in tort[8]—culpability of the defendant is not a necessary factor. Accordingly, the scope of the manufacturer's responsibility should be carefully delineated.

Whether the loss of consortium cause of action is appropriately within the scope of section 402A liability depends primarily upon policy considerations[9] which have significantly shifted in the two decades since the establishment of strict tort liability. Therefore, this note details the relevant historical aspects of the loss of consortium and strict tort liability doctrines, as well as society's current concern with delimiting liability. Analysis of the apposite case law and Restatement provisions follow. Although valid arguments support both views of the issue, countervailing policies are now sufficient to preclude continued manufacturer responsibility for this legal wrong. Thus, thorough judicial analysis of the loss of consortium claim under a strict products liability theory is both timely and appropriate.

II. Relevand Historical Considerations

A. The Loss of Consortium Cause of Action

A cause of action for loss of consortium has existed for hundreds of years.[10] Significantly, the nature of the claim continually adapted to meet the changing needs of society. Originally, the term consortium denoted the husband's legal right to the wife's performance of the duties and obligations assumed by her upon marriage.[11] The husband's cause

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7. Timms v. Verson Allsteel Press Co., 520 F. Supp. 1147, 1151 (N.D. Ga. 1981).

8. Restatement, *supra* note 2, § 402A comments a and m.

9. *See* Borer v. American Airlines, Inc., 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302, 306 (1977) (in delimiting the extent of a tortfeasor's responsibility for damages under the general law of torts, the courts must locate a line between liability and nonliability at some point, a decision which is essentially political).

10. This legal right was first recognized in Guy v. Livesey, 79 Eng. Rep. 428 (1681).

11. *See generally*, Note, *Loss of Consortium: Paradise Lost, Paradise Regained,* 15 Cumb. L. Rev. 179 (1984) (authored by Nancy C. Osborne).

of action originated at a time in history when the wife was wholly subserviant and the law viewed his loss primarily in terms of the deprivation of her services—her performance in caring for the home, rearing the children, and serving her husband.[12] Although the cause of action was first permitted only against one who intentionally infringed upon those rights,[13] the courts ultimately extended the loss of consortium claim to cases in which the injury to the wife was negligently inflicted.[14]

A wife, however, did not originally have a similar cause of action. Prior to the passage of the married woman's acts, a married woman did not have a separate legal identity and could not sue in her own name.[15] The emancipation statutes, therefore, played an important role in the evolution of the loss of consortium action. Once endowed with rights equal to her husband's, the courts quickly recognized the wife's cause of action where the defendant's wrong was an intentional one.[16] However, not until 1950, in *Hitaffer v. Argonne Co.*,[17] did a court allow a wife's claim for loss of consortium due to a negligent injury to her husband.[18] Further, no significant trend followed this decision until ten years later when one court aptly noted that "the obstacles to the wife's action were 'judge invented'" and were therefore subject to judicial destruction.[19] By the 1970's, an overwhelming majority of states recognized the wife's cause of action for loss of consortium.[20]

Concurrent with the grant of the wife's right to claim loss of consortium, a gradual shift in the focus of loss of consortium ensued. Rather than the tangible and pecuniary entitlement to services, the intangible relational aspects of the loss were emphasized.[21] Thus, the modern definition of consortium tends to be vague and indefinite and

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12. *Id.* at 184.

13. *See* Guy v. Livesey, 79 Eng. Rep. 428 (1681). *See generally* Note, *supra* note 11.

14. *See, e.g.*, Skoglund v. Minneapolis St. Ry., 45 Minn. 330, 47 N.W. 1071 (1891), *overruled*, Boland v. Morrill, 275 Minn. 496, 148 N.W.2d 143 (1967); Busch v. Busch Constr., Inc., 262 N.W.2d 377 (Minn. 1977).

15. *See generally* Chused, *Late Nineteenth Century Married Women's Property Law: Reception of the Early Married Women's Property Acts by Courts and Legislatures*, 29 Am. J. Legal Hist. 3 (1985); Chused, *Married Women's Property Law: 1800 - 1850*, 71 Geo. L.J. 1359 (1983).

16. *See, e.g.*, Hinnant v. Tidewater Power Co., 189 N.C. 120, 126 S.E. 307 (1925), *overruled*, Nicholson v. Hugh Chathan Mem. Hosp., 300 N.C. 295, 266 S.E.2d 818 (1980).

17. 183 F.2d 811 (D.C. Cir. 1950), *overruled on other grounds*, Smither & Co. v. Coles, 242 F.2d 220 (D.C. Cir. 1957).

18. *See Hitaffer*, 183 F.2d at 813.

19. Dini v. Naiditch, 20 Ill. 2d 406, ____, 170 N.E.2d 881, 892 (1960).

20. *See* Note, *supra* note 11, at 190-91 n.85.

21. *Id.*

the "various attempts at defining it only aggrevate its nebulosity."[22] Further, today the term is applied to many different relationships and is defined in the context of the particular relationship for which protection is sought.[23] The definitions typically include the term "society," which one court noted as referring to a "broad range of mutual benefits each family member receives from [the] other's continued existence, including love, affection, care, attention, companionship, comfort and protection."[24]

Accordingly, the loss of consortium claim evolved into the area of filial relationships in recent years. In 1975, in *Shockley v. Prier*,[25] the Wisconsin Supreme Court permitted parents to recover for the loss of their child's aid, comfort, society and companionship resulting from the defendants' negligence.[26] In 1980, in *Ferriter v. Daniel O'Connell's Sons Inc.*,[27] a child's cause of action for the negligent deprivation of parental consortium was granted by the Massachusetts Supreme Court.[28] Moreover, the court in *Ferriter* stated that "as claims for injuries to other relationships come before us, we shall judge them according to their nature and force."[29]

In conclusion, the doctrine of loss of consortium dramatically evolved through the years to conform to contemporary society. Although the courts expanding the cause of action routinely recognized the fear that

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22. Hodges v. Johnson, 417 S.W.2d 685, 691 (Mo. Ct. App. 1967).

23. *See, e.g.*, Berger v. Weber, 411 Mich. 1, 303 N.W.2d 424 (1981) (child sought recovery for loss of parental society and companionship); Kailimai v. Firestone Tire & Rubber Co., 87 Mich. App. 144, 273 N.W.2d 906 (1978) (spouse sought recovery for loss of society, companionship, services, and all other incidents of the marriage relationship); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437 (1980) (parent sought recovery for loss of child's services, society, companionship, and pecuniary support); Elden v. Sheldon, 46 Cal. 3d 267, 758 P.2d 582, 250 Cal. Rptr. 254 (1988) (cohabitant sought recovery for loss of conjugal society, comfort, affection, companionship and sexual relations because there was a stable and significant relationship parallel to a marital relationship).

24. Consolidated Machines., Inc. v. Protein Prods. Corp., 428 F. Supp. 209, 228 (M.D. Fla. 1976) (an action for loss of society under maritime laws).

25. 66 Wis. 2d 394, 225 N.W.2d 495 (1975).

26. *Id.* at ____, 225 N.W.2d at 501. *Accord* Reben v. Ely, 146 Ariz. 309, 705 P.2d 1360 (1985); Norvell v. Cuyahoga County Hosp., 11 Ohio App. 3d 70, 463 N.E.2d 111 (1983). *But see* Baxter v. Superior Court, 19 Cal. 3d 461, 563 P.2d 871, 138 Cal. Rptr. 315 (1977); Wilson v. Galt, 100 N.M. 227, 668 P.2d 1104 (1983).

27. 381 Mass. 507, 413 N.E.2d 690 (1980).

28. *Id.* at 413 N.E.2d at 696. *Accord* Weitl v. Moes, 311 N.W.2d 259 (Iowa 1981), *overruled*, Audubon-Exira Ready Mix, Inc. v. Illinios Cent. Gulf R.R., 335 N.W.2d 148 (Iowa 1983); Berger v. Weber, 411 Mich. 1, 303 N.W.2d 424 (1981); Hay v. Medical Center Hosp., 145 Vt. 533, 496 A.2d 939 (1985); Ueland v. Reynolds Metals Co. (State Report Title: Veland v. Pengo Hydra-Pull Corp.), 103 Wash. 2d 131, 691 P.2d 190 (1984); Theama v. City of Kenosha, 117 Wis. 2d 508, 344 N.W.2d 513 (1984).

29. *Ferriter*, 381 Mass at ____, 413 N.E.2d at 696.

liability might ultimately reach too far, the arguments advanced for restraining the claim were generally rejected due to policy considerations, or as one court noted, "due to an absence of sufficient countervailing policy."[30] As a result, it is reasonable to assert that the cause of action will continue to expand.

The cause of action for loss of consortium was initially available when the injury was intentionally inflicted, and only gradually extended to cases of negligence. Research yielded no case adopting a new cause of action for loss of consortium in which the legal injury resulted from conduct governed by the law of strict liability. Because the courts have analyzed and endorsed the validity of loss of consortium recovery in the negligence context, the issue becomes whether the policies and rationales underlying strict tort liability are distinct enough to justify a different result.

B. The Manufacturer's Strict Liability in Tort

Unlike the doctrine of loss of consortium, strict products liability is of relatively recent origin.[31] *MacPherson v. Buick Motor Co.*,[32] decided in 1916, is often noted as the father of modern products liability actions. *MacPherson's* abrogation of the privity requirement in negligence actions[33] was a major development in the evolution of the doctine. Yet the difficult task of proving the negligence of an often remote manufacturer still confronted the plaintiff.[34] Thus, the courts often resorted to the doctrine of res ipsa loquitur which permitted at least an inference of negligence from the presence of a defective product on the market.[35]

A leading re ipsa case, *Escola v. Coca-Cola Bottling Co.*,[36] provided the opportunity for Justice Traynor to enunciate the concept of strict

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30. Ekalo v. Constructive Serv. Corp., 46 N.J. 82, 215 A.2d 1, 8 (1965). *See also* Swartz v. United States Steel Corp., 293 Ala. 439, ____, 304 So. 2d 881, 883-87 (1974) (the court rejected each of the six arguments contending that allowance of the wife's claim would: (1) ignore the state constitution; (2) repudiate the doctrine of *stare decisis*; (3) violate the doctrine of separation of powers by judicial invasion of the legislative function; (4) create the possibility of double recovery for a single injury; (5) allow an extension of causes of actions to all persons who suffer a loss when a loved one has been injured; and (6) cause difficulties in assessing damages).

31. For a history of products liability, *see generally* R. Epstein, Modern Products Liability Law (1980); Prosser, *Assault Upon the Citadel*, *supra* note 3.

32. 217 N.Y. 382, 111 N.E. 1050 (1916).

33. *Id.* at ____, 111 N.E. at 1053.

34. *See* Prosser, *Assault Upon the Citadel*, *supra* note 3, at 1114.

35. *See, e.g.*, Gordon v. Aztec Brewing Co., 33 Cal. 2d 514, 532, 203 P.2d 522, 524-35 (1949). *See generally* Jaffe, *Res Ipsa Loquitur Vindicated*, 1 Buffalo L. Rev. 1, 13 (1951).

36. 24 Cal. 2d 453, 150 P.2d 436 (1944).

liability in tort in a concurring opinion issued in 1944. Traynor stated that "it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings."[37] In justification, Traynor noted the realities of modern manufacturing and marketing as well as the manufacturer's potential to increase product safety and the availability of insurance.[38] He presented a strong argument for the idea that the manufacturers, as a group and an industry, should absorb the inevitable losses which result from the use of their products, because they are in a better position to do so.[39] Thus, it was public policy which prompted the manufacturer's liability.

A number of legal scholars agreed with Traynor's reasoning and urged the judicial creation of strict tort liability.[40] However, no American court adopted such a rule until 1963 in *Greenman v. Yuba Power Products, Inc.*,[41] when Justice Traynor wrote for a unanimous court. The court in *Greenman* held that "[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."[42] Further, the court noted the policy that the costs of injuries resulting from defective products should be borne by the manufacturers who market them rather than by the consumers who are powerless to protect themselves.[43] Other jurisdictions rapidly adopted the "loss shifting" theory enunciated in *Escola* and adopted in *Greenman*. The courts manifested a unified purpose—to protect the consumer[44]—and thus the strict tort liability concept developed with the goal of making it easier for consumers to obtain compensation.[45]

The rapid acceptance of *Greenman* was aided by the American Law Institute's adoption of section 402A of the Restatement (Second) of

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37. *Escola*, 24 Cal. 2d at 461, 150 P.2d at 440 (Traynor, J., concurring).
38. *Id.* at ____, 150 P.2d 440-41.
39. *See* Prosser, *Assault Upon the Citadel*, *supra* note 3, at 1120.
40. *See, e.g.*, Green, *Should the Manufacturer of General Products Be Liable Without Negligence?*, 24 TENN. L. REV. 928 (1957); James, *General Products—Should Manufacturers Be Liable Without Negligence?*, 24 TENN. L. REV. 923 (1957); Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 TENN. L. REV. 963 (1957); Prosser, *Assault Upon the Citadel*, *supra* note 3; Wilson, *Products Liability Part I: The Protector of the Injured Person*, 43 CALIF. L. REV. 614 (1955).
41. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).
42. *Greenman*, 59 Cal.2d at 60, 377 P.2d at 900, 27 Cal. Rptr. at 700.
43. *Id.*
44. *See* Vandall, *supra* note 4, at 715.
45. *Id.* at 710.

Torts[46] two years later. The new section provided for the "special liability of sellers of products for physical harm to users or consumers."[47] However, the drafting of section 402A began well before the judicial recognition of strict tort liability in *Greenman*. In 1961, the Reporter for the Restatement, Dean William Prosser, introduced the original version of section 402A to the American Law Institute (ALI).[48] This draft indicated that a seller would be strictly liable for "bodily harm"[49] resulting from the sale of impure food for human consumption.[50] However, after noting that many jurisdictions had recently extended the rule to products intended for intimate bodily use, the ALI voted to correspondingly enlarge the scope of section 402A.[51] Yet the second draft of section 402A,[52] which was accepted at the 1962 ALI meeting,[53] still contained the provision that the seller would be subject to liability for "bodily harm."[54]

In 1964, although much of the Restatement (Second) of Torts was at the printer, Prosser resubmitted section 402A to the ALI due to the

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46. Section 402A provides:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Restatement (Second) of Torts § 402A (1977).

47. This is the title of § 402A. *See* RESTATEMENT, *supra* note 46, § 402A.

48. *See* 38 A.L.I. PROC. 49-58 (1961).

49. *See id.* at 64. "[A]s long as the section is limited to food, we are limiting it to personal injury—injury to the body." *Id.*

50. RESTATEMENT (SECOND) OF TORTS (Tent. Draft No. 6, at 24 (1961)). "One engaged in the business of selling food for human consumption who sells such food in a defective condition unreasonably dangerous to the consumer is subject to liability for *bodily harm* thereby caused to one who consumes it . . . ." *Id.* (Emphasis added).

51. *See* A.L.I. PROC., *supra* note 48, at 75. In addition, the movement toward strict liability for all products was recognized through the use caveats. *Id.* at 85-86.

52. RESTATEMENT (SECOND) OF TORTS (Tent. Draft No. 7, at 1 (1962)). "One engaged in the business of selling food for human consumption or other products for intimate bodily use, who sells such a product in a defective condition unreasonably dangerous to the consumer, is subject to liability for *bodily harm* thereby caused to one who consumes it . . . ." *Id.* (Emphasis added).

53. *See* 39 A.L.I. PROC. 244 (1962).

54. *See* Tent. Draft No. 7, *supra* note 52.

rapid development in the case law.[55] Prosser accordingly urged the ALI to expand section 402A to encompass all products.[56] With this revision, the term "physical harm" was substituted for "bodily harm."[57] Prosser explained that this semantic change was necessary to denote "not only physical injury, but also property damage; in other words, tangible damage."[58]

The ALI hurriedly passed the resubmitted version of section 402A,[59] and in the following decade a large majority of the jurisdictions adopted some form of strict tort liability against manufacturers and sellers for injuries caused by defective products.[60] Although subtle variations exist,

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55. 40 A.L.I. Proc. 349 (1964) (both *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960) and *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) had been decided by this time). In addition, a number of jurisdictions extended the strict liability to products for *external* bodily use, and several others were on the verge of such action. *Id.* at 350.

56. Prosser went so far as to predict that strict tort liability for injuries caused by defective products would be the majority rule within fifty years. *Id.*

57. Restatement (Second) of Torts (Tent. Draft No. 10, at 1 (1964). "One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property, is subject to liability for *physical harm* thereby caused to the ultimate user or consmuer, or to his property . . . ." *Id.* (Emphasis added).

58. A.L.I. Proc., *supra* note 48, at 64. Prosser stated: "If you want to include other products, then I think you are going to have to include property damage, and make that 'physical harm.' " *Id.*

59. *See* A.L.I. Proc., *supra* note 55, at 375.

60. *See, e.g.*, Clary v. Fifth Ave. Chrysler Center, Inc., 454 P.2d 244 (Alaska 1969); O.S. Stapley Co. v. Miller, 103 Ariz. 556, 447 P.2d 248 (1968); Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); Bradford v. Bendix-Westinghouse Automotive Air Brake Co., 33 Colo. App. 99, 517 P.2d 406 (1973); Garthwait v. Burgio, 153 Conn. 284, 216 A.2d 189 (1965); Stewart v. Budget Rent-A-Car Corp., 52 Haw. 71, 470 P.2d 240 (1970); Shields v. Morton Chemical Co., 95 Idaho 674, 518 P.2d 857 (1974); Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965); Cornette v. Searjeant Metal Products, Inc., 147 Ind. App. 46, 258 N.E.2d 652 (1970); Hawkeye-Security Ins. Co. v. Ford Motor Co., 174 N.W.2d 672 (Iowa 1970); Dealers Transport Co. v. Battery Distrib. Co., 402 S.W.2d 441 (Ky. 1965); Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958); Farr v. Armstrong Rubber Co., 288 Minn. 83, 179 N.W.2d 64 (1970); State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966); Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362 (Mo. 1969); Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 Mont. 506, 513 P.2d 268 (1973); Kohler v. Ford Motor Co., 187 Neb. 428, 191 N.W.2d 601 (1971); Ginnis v. Mapes Hotel Corp., 86 Nev. 408, 470 P.2d 135 (1970); Buttrick v. Arthur Lessard & Sons, Inc., 110 N.H. 36, 260 A.2d 111 (1969); Glass v. Ford Motor Co., 123 N.J. Super. 599, 304 A.2d 562 (1973); Stang v. Hertz Corp., 83 N.M. 730, 497 P.2d 732 (1972); Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973); Johnson v. American Motors Corp., 225 N.W.2d 57 (N.D. 1974); Lonzrick v. Republic Steel Corp., 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966); Kirland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974); Heaton v. Ford Motor Co., 248 Or. 467, 435 P.2d 806 (1967); Webb v. Zenn, 422 Pa. 424, 220 A.2d 853 (1966); Ritter v. Narragansett

the strict tort liability generally adopted has been that denoted in section 402A or enunciated in *Greenman*.[61] The judiciary and the drafters of section 402A intended the manufacturer's strict tort liability to be a "special liability of sellers for physical harm to users or consumers."[62] Thus, a reasonable question is whether loss of consortium, being an intangible and nonpecuniary harm to one with a special relationship to the injured person, was contemplated as being within the scope of the "special" liability.

C. Society's Current Concern—Delimiting Liability

As previously noted, the strict tort liability concept evolved with an emphasis on consumer protection.[63] The courts generally reiterated the policies of loss-distribution or risk spreading, the availability of insurance, and injury reduction through enhanced safety.[64] As a result, litigants view section 402A as a panacea to correct all of the alleged wrongs inflicted by a product manufacturer and thereby tend to use the theory indiscriminately.[65] Yet the judiciary and the ALI never intended for section 402A to be an exclusive remedy for all product liability litigation[66]—negligence and breach of warranty theories were intended to retain their distinctive functions.[67] Additionally, established law holds that the man-

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Elec. Co., 109 R.I. 176, 283 A.2d 255 (1971); Engberg v. Ford Motor Co., 87 S.D. 196, 205 N.W.2d 104 (1973); Ford Motor Co. v. London, 217 Tenn. 400, 398 S.W.2d 240 (1966); McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967); Zaleskie v. Joyce, 133 Vt. 150, 333 A.2d 110 (1975); Ulmer v. Ford Motor Co., 75 Wash. 2d 522, 452 P.2d 729 (1969); Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967). *See generally*, J. Beasley, *Products Liability and the Unreasonably Dangerous Requirement*, 101-339 (1981); Bieman, *Strict Products Liability: An Overview of State Law*, J. PROD. LIAB., 111-178 (1987).

61. *See* Maleson, *Negligence Is Dead But Its Doctrines Rule Us From the Grave: A Proposal to Limit Defendant's Responsibility in Strict Products Liability Actions Without Resort to Proximate Cause*, 51 TEMP. L.Q. 1, 38-40 (1978).

62. This is the title of § 402A. *See* RESTATEMENT, *supra* note 46, § 402A.

63. *See* Vandall, *supra* note 4, at 715; *see also* Hall v. E.I. Dupont de Nemours & Co., Inc., 345 F. Supp. 353, 368 (E.D.N.Y. 1972).

64. *See, e.g.*, *Hall*, 345 F. Supp. at 368; *see also* Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

65. *See* Manuel & Richards, *supra* note 4, at 315.

66. *See* RESTATEMENT, *supra* note 46, § 402A comment a.

67. Section 402A appears in Chapter 14 of the RESTATEMENT (SECOND) OF TORTS entitled "Liability of Persons Supplying Chattels for the Use of Others." This chapter also contains several sections imposing liability for *negligence* on suppliers of chattels—the basis of which is clearly fault. In addition, the continued role of the breach of warranty theory has been emphasized in cases such as *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965), in which the court recognized the limited role intended for strict liability and noted that the remedy for purely economic or commercial loss remained in the law of sales.

ufactuer is not an insurer of the product and his strict liability may not be equated with absolute, limitless liability.[68]

However, until the mid-seventies, commentors generally applauded the expansion of the plaintiff's rights and remedies for product related injuries under strict tort liability.[69] Moreover, because products liability insurance was at that time relatively inexpensive and easy to obtain, there was little resistance from the business sector.[70] Thus, few cases, if any, presented a thorough and detailed analysis of whether the ever-expanding scope of the manufacturer's liability in fact promoted the perceived policy goals of *Greenman* and section 402A.[71]

Around 1975, however, concern about a "products liability crisis" surfaced.[72] In many jurisdictions, the complaint that the tort system had become a compensation system with tort damages led to significant movement toward tort reform.[73] The emphasis on consumer protection that was predominant in the sixties began to wane with the concern that the scales of justice were tilted too much in favor of the consumer.[74] Today, along with many other aspects of the tort and insurance systems, states are evaluating the effectiveness of damage awards in the product liability area and are attempting to delimit them through legislation.[75]

A similar judicial evaluation is now necessary to preserve the intended objectives of strict tort liability. Legitimate concerns exist about the overextension of the legal theory. Today, products liability insurance is not inexpensive and readily available.[76] Further, it is recognized that there is a limit to the range of injuries and the dollar amount of recovery which can be spread across society.[77] The manufacturer's strict tort

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68. *See, e.g.*, Elliott v. Lachance, 109 N.H. 481, 256 A.2d 153, 156 (1969); Helene Curtis Industries, Inc. v. Pruitt, 385 F.2d 841, 849 (5th Cir. 1967); *see also* Traynor, *The Ways and Means of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 366-67 (1965).

69. *See* Reed & Watkins, *Product Liability Tort Reform: The Case For Federal Action*, 63 NEB. L. REV. 389, 392 (1984); *see generally* Epstein, *Products Liability: The Search For the Middleground*, 56 N.C.L. REV. 643 (1978); Prosser, *Assault Upon the Citadel*, *supra* note 4.

70. Reed & Watkins, *supra* note 69, at 392.

71. Shepard v. Superior Court, 76 Cal. App. 3d 16, ____, 142 Cal. Rptr. 612, 619 (1977) (Kane, J., dissenting).

72. Reed & Watkins, *supra* note 69, at 392.

73. *See* Dodd, *Proposal for Making Products Liability Fair, Efficient, and Predictable*, 14 J. OF LEGIS. 133 (1987).

74. *See generally* Vandall, *supra* note 4.

75. *See generally* Gilmartin, *States and Trends: Punitive Damages*, 14 J. OF LEGIS. 249 (1987); Dodd, *supra* note 73.

76. *See generally* Reed & Watkins, *supra* note 69.

77. Berger v. Weber, 411 Mich. 1, ____, 303 N.W.2d 424, 438 (1981) (Levin, J., dissenting).

liability must be carefully circumscribed if it is to be preserved as the remedy intended by Judge Traynor and the ALI for the primary victims of the multitude of today's product related injuries.

In delimiting the scope of a tortfeasor's liability, a court "must take into account considerations in addition to logical symmetry and sympathetic appeal;"[78] a court must balance the need for compensation against public policy considerations and social consequences.[79] "[T]he law cannot redress every injury, and the determination of where to draw the line of liability is essentially a question of policy."[80] Thus, considering today's emphasis on the relational, intangible and nonpecuniary aspects of loss of consortium,[81] a court could reasonably determine that there are now sufficient countervailing policies and social ramifications present to preclude the cause of action within a section 402A products liability case.

III. Analysis of the Arguments

A. Overcoming Precedent

Because valid arguments support both sides of this issue, an initial factor to address is that of precedent. Courts have consistently allowed the loss of consortium claim in products liability actions, almost without question.[82] Thus, one could logically assert that recovery should continue. Yet determining the extent of tort liability is more than an exercise in logic.[83] It is a pronouncement of social policy which should reflect the subtle balance of the interests involved.[84]

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78. Borer v. American Airlines, Inc., 19 Cal. 3d 441, ____, 563 P.2d 858, ____, 138 Cal. Rptr. 302, 306 (1977).

79. Sizemore v. Smock, 430 Mich. 283, ____, 422 N.W.2d 666, 670 (1988).

80. *Id.* at ____, 422 N.W.2d at 671.

81. *See supra* notes 21-24 and accompanying text.

82. *Cf.* Park v. Standard Chem. Way Co., 60 Cal. App. 3d 47, 131 Cal. Rptr. 338, 340 (1976) (Compton, J., concurring). This is the only case in which it was noted, in the concurring opinion, that the loss of consortium claim should not be compensable in an action based on a manufacturer's or retailer's strict liability. Judge Compton relied upon the reasoning of *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965)—that the manufacturer's liability should not be of unknown and unlimited scope.

83. Berger v. Weber, 411 Mich. 1, ____, 303 N.W.2d 424, 430 (1981) (Levin, J., dissenting). *See also*, Shepard v. Superior Court, 76 Cal. App. 3d 16, ____, 142 Cal. Rptr. 612, 621 (1977) (Kane, J., dissenting); Borer v. American Airlines, Inc., 19 Cal. 3d 441, ____, 563 P.2d 858, ____, 138 Cal. Rptr. 302, 305 (1977).

84. *Berger*, 411 Mich at ____, 303 N.W.2d at 430.

Both the manufacturer's strict liability in tort and the loss of consortium claims are essentially judicial creations,[85] and are thus subject to the scrutiny of traditional common law. The nature of the commom law requires that each time a rule of law is applied, the courts conduct a deliberate examination of the underlying policies to ensure that the conditions and needs of the times have not changed so as to make further application of the rule an instrument of injustice.[86] The inherent capacity of the common law for growth and change is a most significant feature. "But that vitality can flourish only so long as the courts remain alert to their obligation and opportunity to change the common law when reason and equity demand it . . . ."[87] There is then, a judicial duty to evaluate the loss of consortium claim to determine if equity and reason now call for a change in the law.

Further, although it could be asserted that this type of change would be better left to the legislature, the courts have frequently exercised their power to change the law within the fields of products liability and loss of consortium. As one court stated: "We find no wisdom in abdicating to the legislature our essential function of re-evaluating common-law concepts in the light of present day realities."[88] In additon, judicial action in no way precludes a legislative appraisal of the issue: the legislature is still free to act by way of ratification, limitation, or rejection of judicial holdings.[89] Therefore, because judicial analysis of whether the loss of consortium cause of action should remain within the scope of strict tort products liability is not constrained by precedent, the following arguments merit consideration.

B. Section 693 of the Restatement (Second) of Torts

Although the original Restatement of Torts recognized the husband's loss of consortium claim, it was not until 1969 that the American Law Institute adopted the wife's cause of action for loss of consortium.[90] Section 693 of the Restatement (Second) of Torts provides that one is

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85. *See* Weitl v. Moes, 311 N.W.2d 259, 266 (Iowa 1981) (loss of consortium is a creation of the common law); Reed & Watkins, *supra* note 69, at 391 (products liability law is essentially judge made).

86. 15A Am. Jur. 2d, *Commom Law*, § 3, 599 (1976).

87. Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, ____, 525 P.2d 669, ____, 115 Cal. Rptr. 765, 772 (1974).

88. Dini v. Naiditch, 20 Ill. 2d 406, ____, 170 N.E.2d 881, 892 (1960). *See also* Landes & Posner, *A Positive Economic Analysis of Products Liability*, 14 J. Legal Stud. 535, 551 (1985) (it can be implied that legislatures act in common-law fields such as torts only after the judiciary has failed to alter existing doctrine).

89. Hay v. Medical Center Hosp., 145 Vt. 533, ____, 496 A.2d 939, 946 (1985).

90. *See* 46 A.L.I. Proc. 148-157 (1969).

subject to liability for loss of consortium if "by reason of his tortious conduct [he] is liable to [the other] spouse for illness or other bodily harm . . . ."[91] Yet a manufacturer's strict tort liability is not predicated upon "tortious" or wrongful conduct.[92] The touchstone of section 402A is the presence of a defective product placed into the stream of commerce.[93] The manufacturer's conduct is not a determinative factor; rather, the liability is based largely upon a policy determination that the manufacturer or seller is in a better position to absorb the loss than the consumer.[94] Thus, a reasonable interpretation of section 693 is that strict products liability would not render the manufacturer liable for loss of consortium.

However, the commentary to section 693 notes that the word "tortious" includes "conduct intended to cause harm, conduct that is negligent and conduct that is carried on at the risk of the actor."[95] The original Restatement, as well as the tentative draft of this section presented to the ALI at its 1969 meeting, contained the above comment.[96] The question then becomes whether manufacturing can be deemed conduct carried on at the risk of the actor. The original Restatement and the tenative draft considered by the ALI further explained the category of "conduct carried on at the risk of the actor." Significantly, the final version of this commentary contained a portion not presented to nor debated by the ALI at its 1969 meeting:

> Thus one who has become liable to a spouse because of conducting an abnormally dangerous activity or because of harm inflicted by a wild animal in his possession or *because of supplying a defective and unreasonably dangerous product*, is subject to liability to the deprived spouse under the rule stated in this

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91. Section 693 provides:

(1) One who by reason of his tortious conduct is liable to one spouse for illness or other bodily harm is subject to liability to the other spouse for the resulting loss of the society and services of the first spouse, including impairment of capacity for sexual intercourse, and for reasonable expense incurred by the second spouse in providing medical treatment.

(2) Unless it is not possible to do so, the action for loss of society and services is required to be joined with the action for illness or bodily harm, and recovery for loss of society and services is allowed only if the two actions are so joined.

RESTATEMENT (SECOND) OF TORTS § 693 (1977).

92. *See, e.g.*, Shepard v. Superior Court, 76 Cal. App.3d 16, ____, 142 Cal. Rptr. 612, 618 (1977) (Kane, J., dissenting) (the manufacturer's negligence or culpability is not a necessary ingredient in strict products liability actions).

93. *See* RESTATEMENT, *supra* note 46, § 402A comment j.

94. *See supra* notes 36-45 and accompanying text.

95. *See* RESTATEMENT, *supra* note 91, § 693 comment b.

96. *See* RESTATEMENT (SECOND) OF TORTS (Tent. Draft No. 14, at 5 (1969)).

> Section, as well as one who has become liable because of an intentional or negligent injury to the impaired spouse.[97]

The tentative draft considered by the ALI did not include the underlined clause relating to strict products liability.[98] The Reporter, Dean Prosser, therefore made this inclusion largely on his own. Yet there was very little case law that Prosser could have used as justification for this addition—even the Reporter's Note indicates that the vast majority of cases involving loss of consortium were based on negligence.[99]

Further, a limitation found implicitly in the relevant case law should be considered. Decisions which have adopted loss of consortium as a cause of action express the claim in terms of a negligent or intentional infringement of a legally cognizable right. For example, in *Rodriguez v. Bethlehem Steel Corp.*,[100] the Supreme Court of California adopted the wife's loss of consortium claim and based its holding upon a recognition of liability "as it is currently understood by the large preponderance of our sister states and a consensus of distinguished legal scholars."[101] The court then declared that "each spouse has a cause of action for loss of consortium . . . caused by a negligent or intentional injury to the other spouse by a third party."[102] Although a few recent courts patterned their holdings after the Restatement (Second) language,[103] most decisions have continued to limit holdings in a manner similar to that of *Rodriguez*.[104] Moreover, the very recent cases recognizing loss of filial consortium have holdings limiting the liability to injuries resulting from negligence.[105]

Additionally, it is widely recognized that Prosser exaggerated the supporting case law in his zeal to establish the manufacturer's strict tort liability denoted in section 402A.[106] Thus, Prosser's inclusion of the

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97. *See id.* (emphasis added).

98. *See* A.L.I. Proc., *supra* note 90, at 148-157; Tent. Draft No. 14, *supra* note 96, at 5.

99. *See* Restatement, *supra* note 91, § 693 (Appendix) at 514-15.

100. 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974).

101. *Id.* at ____, 525 P.2d at ____, 115 Cal. Rptr. at 771.

102. *Id.* at ____, 525 P.2d at ____, 115 Cal. Rptr. at 782.

103. A few courts used the "tortious conduct" language. *See, e.g.*, Ueland v. Reynolds Metals Co., 103 Wash. 2d 131, 691 P.2d 190 (1984); Hay v. Medical Center Hosp., 145 Vt. 533, 496 A.2d 939 (1985).

104. *See, e.g.*, Diaz v. Eli Lilly and Co., 302 N.E.2d 555 (Mass. 1973); Ekalo v. Constructive Serv. Corp., 46 N.J. 82, 215 A.2d 1 (1965); Millington v. Southeastern Elevator Co., 22 N.Y.2d 498, 239 N.E.2d 897, 293 N.Y.S.2d 305 (1968); Clouston v. Remlinger Oldsmobile Cadillac, Inc., 22 Ohio St. 2d 65, 258 N.E.2d 230 (1970).

105. *See, e.g.*, Ferriter v. Daniel O'Connell's Sons, 381 Mass. 507, 413 N.E.2d 690 (1980); Berger v. Weber, 411 Mich. 1, 303 N.W.2d 424 (1981).

106. *See* Priest, *The Invention of Enterprise Liability: A Critical History of the*

above clause in the commentary to section 693 can legitimately be questioned as a "restatement of the existing case law" regarding loss of consortium under a strict tort liability theory. As a result, the issue becomes whether the manufacturer's strict liability in tort *should* be categorized with the other strict liability denoted in the commentary—that resulting from abnormally dangerous activities or the keeping of a wild animal.

Strict liability resulting from the keeping of a wild animal evolved out of the primitive law which held the owner of property strictly liable for the harm it did.[107] The survival of the primitive notion has been due to modern policy considerations.[108] Certain animals involve an obvious danger to the community; thus, those who keep such animals for their own purposes are required to protect the community, at their peril, against the risk involved.[109]

The roots of strict liability for the conducting of an abnormally dangerous activity extend to *Rylands v. Fletcher*,[110] which imposed an absolute duty on one who collected on his land something non-natural and likely to do mischief if it escaped.[111] Early American blasting cases[112] imposed liability without fault largely because the defendant elected to engage in this perilous activity as a business.[113] The underlying rationale for this type of strict liability was that even if the defendant exercised reasonable care, there was still a high degree of risk of harm,[114] as compared with negligence in which it is presumed that reasonable care will decrease the risk of harm.

In contrast, the rationales underlying strict products liability are readily distinguishable. First, if the manufacturer exercises due care, there

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Intellectual Foundations of Modern Tort Law, 14 J. LEGAL STUD. 461, 514-17 (1985) (today it is widely recognized that Prosser greatly exaggerated the case law supporting 402A). *See generally* Prosser, *Fall of the Citadel*, *supra* note 3; Prosser, *Assault Upon the Citadel*, *supra* note 3.

107. DOBBS, KEETON & OWEN, PROSSER & KEETON ON TORTS, § 76, at 538 (5th Ed. 1984).

108. *Id.*

109. *Id.* Consider for example, the propensity of cattle and horses to escape and roam and do mischief. *See, e.g.*, Page v. Hollingsworth, 7 Ind. 317 (1855); Gresham v. Taylor, 51 Ala. 505 (1874).

110. Fletcher v. Rylands, 3 H. & C. 774, 159 Eng. Rep. 737 (1865), *rev'd*, L.R. 1 Ex. 265 (1866), *aff'd*, Rylands v. Fletcher, L.R. 3 H.L. 332 (1868).

111. *Id.* If the thing likely to do mischief escaped, the owner was prima facie answerable for all damages which were the natural consequence of its escape. However, assumption of the risk and an "act of God" would constitute valid defenses. *Id.*

112. *See, e.g.*, Blackford v. Heman Construction Co., 132 Mo. App. 157, 112 S.W. 287 (1908); Dixon v. New York Trap Rock Corp., 293 N.Y. 509, 58 N.E.2d 517 (1944); Gossett v. Southern Ry. Co., 115 Tenn. 376, 89 S.W. 737 (1905).

113. *Id.*

114. *See* DOBBS, KEETON, & OWEN, *supra* note 107, § 78, at 554-56.

is not going to be a high degree of risk of harm. Defective products are generally the exception, not the norm.[115] Second, a predominant justification of strict tort liability is that it will enhance product safety;[116] this implies that the level of care exercised by a manufacturer will affect the degree of the risk of harm.[117] Third, rather than placing the loss on the defendant because of his election to conduct the business, the liability is imposed as a means of shifting the loss to the manufacturer because he is in a better position to absorb and distribute that loss among all consumers.[118]

Hence, the strict tort liability imposed on a manufacturer does not inherently belong within the same category of the strict liability enunciated in the original Restatement provision dealing with loss of consortium. Indeed, placing products liability within the same class as abnormally dangerous activities could arguably tend to discourage manufacturing and thereby adversely affect our national economy—in which case public policy would preclude such a classification. Therefore, although section 693 of the Restatement (Second) of Torts provides that it is appropriate to subject the manufacturer to strict liability for loss of consortium, it is lacking both the proper foundation and the thorough analysis necessary to justify such a pronouncement.

C. Section 402A of the Restatement (Second) of Torts

1. Express Limitations.—An analysis of valid recovery under strict tort products liability must also focus on the specific language of section 402A of the Restatement (Second) of Torts.[119] Section 402A expressly limits the manufacturer's liability to "physical harm thereby caused to the ultimate user or consumer, or to his property . . . ."[120] Dean Prosser

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115. An essential requirement for a § 402A action is that a "defect" must cause the harm. "[A] plaintiff must trace his injury to a quality or condition of the product which was unreasonably dangerous either for a use to which the product would ordinarily be put, or for some special use which was brought to the attention of the defendant." James, *supra* note 40, at 927.

116. *See, e.g.*, Hall v. E.I. DuPont de Nemours & Co., Inc., 345 F. Supp. 353, 368 (E.D.N.Y. 1972) (a rigorous rule of liability with enhanced possibilities of large recoveries is an "incentive" to maximize safe design).

117. *Id.* "A manufacturer is in the best position to discover defects or dangers in his product and to guard against them through appropriate design, manufacturing and distribution safeguards, inspections and warnings." *Id.*

118. *Id.* "Regardless of safety measures taken by manufacturer's and distributors, accidents and injuries will inevitably occur. . . . Accidents and injuries, in this view, are seen as an inevitable and statistically foreseeable 'cost' of the product's consumption or use." *Id.*

119. *See* RESTATEMENT, *supra* note 46, § 402A.

120. Id.

indicated that the deliberate use of "physical harm" was necessary if the section was to apply to all products in order to limit the liability to "tangible harms."[121] Comment d of section 402A states that the rule obviously includes the sale of food for human consumption and other products intended for intimate bodily use.[122] Prosser noted during the ALI debates that if section 402A had been limited to these products, the rule would have been drafted with the use of "bodily harm;"[123] because a defective food product or product intended for intimate bodily use would naturally result in harm to the body.[124]

However, comment d further states that the section applies "also to products which, if they are defective, may be expected to and do cause only 'physical harm' in the form of damage to the user's land or chattels . . . ."[125] This language appears to contemplate liability for either (1) the type of "bodily harm" to a person which would naturally be caused by a defective food product or product intended for intimate bodily use, or (2) "physical harm" in the form of damage to the user's land or chattels caused by any defective product.

Furthermore, one year after the adoption of section 402A by the ALI, Professor Keeton indicated that there were four categories of harm that could result from the use of a defective product: (1) physical injury to persons; (2) physical damage to tangible things other than the product; (3) physical harm to the product itself; and (4) commercial or economic loss.[126] Thus, nebulous and intangible harms, such as emotional distress and loss of consortium, were not contemplated as being within the scope of section 402A when drafted.

Section 402A further limits the manufacturer's liability to "users or consumers" of the defective product.[127] Interestingly, in spite of these

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121. *See* A.L.I. Proc., *supra* note 48, at 64.

122. Restatement, *supra* note 46, § 402A comment d.

123. *See* A.L.I. Proc., *supra* note 48, at 64.

124. *Id.* at 55.

125. Restatement, *supra* note 46, § 402A comment d.

126. *See* Keeton, *Products Liability—Some Observations About Allocations of Risks*, 64 Mich. L. Rev. 1329, 1343-44 (1966). However, most courts do not allow recovery for economic loss; *see also* Manuel & Richards, *supra* note 4, at 321.

127. The Restatement explains the terms "user or consumer" as follows: " 'Consumers' include not only those who in fact consume the product, but also those who prepare it for consumption; and a housewife who contracts tularemia while cooking rabbits for her husband is included within the rule stated in this Section, as is also the husband who is opening a bottle of beer for his wife to drink. Consumption includes all ultimate uses for which the product is intended, and the customer in a beauty shop to whose hair a permanent wave solution is applied by the shop is a consumer. 'User' includes those who are passively enjoying the benefit of the product, as in the case of passengers in automobiles or airplanes, as well as those who are utilizing it for the purposes of doing

express limitations, the courts have reached inconsistent results when a user or consumer has sought recovery for *emotional harms* in strict products liability cases.[128] In fact, only relatively recently have courts recognized a cause of action for the *negligent* infliction of emotional distress; and some jurisdictions still stringently limit such a claim.[129] In *Rahn v. Gerdts*,[130] the Illinois Appellate Court retained a restrictive interpretation of the "physical harm" requirement of section 402A and held that the plaintiff's depression, anxiety and nervousness caused by emotional distress, unaccompanied by other physical injury, were not compensable in a strict tort liability action.[131]

In contrast, in *Walters v. Mintec International*,[132] the Third Circuit Court of Appeals found the evidence of plaintiff's headaches, weakness under stress, insomnia and nightmares sufficient to satisfy the "physical harm" requirement.[133] This inconsistency, when the plaintiff seeking redress for emotional harm is the actual user or consumer of the defective product, implies an even greater need for analysis and justification for recovery of emotional distress or loss of consortium in cases in which the plaintiff is not the user or consumer. Thus, because the plaintiff in a suit for loss of consortium is generally not the user or consumer of the defective product, the courts should not automatically award such damages without an appropriate analysis of the arguments both for and against recovery.

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work upon it, as in the case of an employee of the ultimate buyer who is making repairs upon the automobile which he has purchased." RESTATEMENT, *supra* note 46, § 402A comment l; *see, e.g.*, Cottom v. McGuire Funeral Serv., Inc., 262 A.2d 807, 809 (D.C. 1970) (person utilizing product for the purpose for which it was made is a user of that product).

128. There have been many cases dealing with recovery for psychological reactions to the discovery of foreign objects or substances in food or drink; in these cases the courts generally allow recovery. *See, e.g.*, Kroger Co. v. Beck, 176 Ind. App. 202, 204-05, 375 N.E.2d 640, 643 (1978) (hyperdermic needle in steak); Shoshone Coca-Cola Bottling Co. v. Dolinski, 82 Nev. 439, 441-42, 420 P.2d 855, 857 (1966) (decomposed mouse in bottled beverage). *See generally* R. DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER, 236-37 (1951); Mead, *Recovery for Psychic Harm in Strict Products Liability: Has the Interest in Psychic Equilibrium Come the Final Mile?*, 35 DEF. L.J. 193, 242-43 (1986).

129. As of 1985, many jurisdictions still required physical impact for recovery of emotional distress. *See, e.g.*, Rickey v. Chicago Transit Authority, 98 Ill. 2d 546, 551, 457 N.E.2d 1, 5 (1983); Dziokonski v. Babineau, 375 Mass. 555, 559, 380 N.E.2d 1295, 1297-98 (1978); Bass v. Nooney Co., 646 S.W.2d 765, 771-72 (Mo. 1983) (en banc); Battalla v. State, 10 N.Y.2d 237, 240, 176 N.E.2d 729, 730, 219 N.Y.S.2d 34, 35-36 (1961).

130. 119 Ill. App. 3d 781, 455 N.E.2d 807 (1983).

131. *Id.* at 784-85, 455 N.E.2d at 809.

132. 758 F.2d 73 (3d Cir. 1985).

133. *Id.* at 78-79.

2. Bystander Analogy.—Significantly, the plaintiff in a loss of consortium action is generally not a "user or consumer."[134] Of course, all jurisdictions extended section 402A to include physically injured bystanders.[135] Yet a strict products liability "bystander" is a "non-user" of the product. Thus, allowing bystander recovery is in conflict with the black letter of section 402A.[136] The courts therefore made a policy determination that a bystander deserves the same protection as the consumer. In *Elmore v. American Motors Corp.*,[137] the court noted that privity had no place in strict products liability and that bystanders should recover for physical injuries.[138] The court further noted that a bystander might need even more protection than the user since he generally has no knowledge of the product or its warnings.[139]

Accordingly, a relevant issue in an analysis of whether loss of consortium is a valid recovery under strict products liability is whether the loss of consortium plaintiff is sufficiently akin to a bystander to reap the benefits of bystander status. Generally, a requisite for classification as a bystander is close proximity to the product user. The bystander is either physically injured in some way by the product or, in the case of an emotionally injured bystander, is an actual witness to the user's tragic injury. In contrast, such a requirement is not essential to the loss of consortium plaintiff. Further, in negligence cases, courts have adopted various tests to determine whether a bystander could recover for emotional distress.

For example, in the leading case of *Dillon v. Legg*,[140] recovery depended on whether the plaintiff (1) was in physical proximity to the scene of the accident, (2) had a contemporaneous sensory perception of the accident, and (3) had a close familial relationship with the physically injured party.[141] Yet the loss of consortium plaintiff can generally satisfy

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134. *See supra* note 127.

135. Bystander recovery was first permitted in *Elmore v. American Motors Corp.*, 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969). The court in *Elmore* noted that privity has no place in strict products liability and bystanders may even need more protection than the user or consumer. *See also* Caruth v. Mariani, 11 Ariz. App. 188, 463 P.2d 83 (1970); Mitchell v. Miller, 26 Conn. Supp. 142, 214 A.2d 694 (1965); Sills v. Massey - Ferguson, Inc., 296 F. Supp. 776 (N.D. Ind. 1969); Lamendola v. Mizell, 115 N.J. Super. 514, 280 A.2d 241 (1971); Darryl v. Ford Motor Co., 440 S.W.2d 630 (Tex. 1969).

136. A caveat to § 402A states: "The Institute expresses no opinion as to whether the rules stated in this Section may not apply (1) to harm to persons other than users or consumers . . . ." RESTATEMENT, *supra* note 46, § 402A caveat (1).

137. 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969).

138. *Id.* at ____, 451 P.2d at 88-89, 75 Cal. Rptr. at 656.

139. *Id.* at ____, 451 P.2d at 89, 75 Cal. Rptr. at 657.

140. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

141. *Id.* at 739-41, 441 P.2d at 919-21, 69 Cal. Rptr. at 79-81.

only the requirement of a close familial relationship. Thus, it is reasonable to assert that the loss of consortium plaintiff is not sufficiently similar to the bystander to gain analogous treatment. However, even if that status were to be conceded, loss of consortium recovery under section 402A is still debatable because the courts have experienced difficulty extending the rationales permitting recovery for the physically injured bystander in strict products liability cases to the emotionally injured bystander.

California was the first jurisdiction to consider whether a bystander suffering emotional harm as a result of an injury to a third party could recover under a strict products liability theory.[142] In *Park v. Standard Chemical Way Co.*,[143] the plainfiff's husband was injured when a container of drain cleaner exploded causing severe burns on his arms, torso and legs. The plaintiff, who returned from work two and a half hours after the explosion and found her husband permanently scarred, alleged severe emotional distress and anxiety.[144] The court recognized the husband's action for his injuries based on a theory of strict tort liability,[145] but rejected the wife's claim for emotional distress, also based on strict liability.[146] The court noted that *Dillon v. Legg* did not apply because the plaintiff did not allege the defendant's negligence and because she was not within the zone of danger at the time of the accident.[147]

However, the Court of Appeals for the First District of California ruled otherwise in *Shepard v. Superior Court*.[148] In *Shepard*, a family was riding in its automobile. Another car hit the vehicle, the rear door opened due to a defective locking mechanism, and the daughter fell out and was killed when struck by an oncoming car. The parents and brother brought a strict products liability action against the manufacturer of the car to recover for their emotional harm.[149] This court applied the *Dillon* test, labelled the plaintiffs Dillon-type bystanders and allowed recovery for their emotional distress in a strict products liability case.[150] The court noted that it would make no sense to permit recovery against a negligent driver, as in *Dillon*, while denying recovery from a manufacturer responsible for a defective product.[151] The court thus based its decision upon a policy rationale.

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142. *See* Park v. Standard Chem Way Co., 60 Cal. App. 3d 47, 50, 131 Cal. Rptr. 338, 339 (1976); *see also* Mead, *supra* note 128, at 248-259.
143. 60 Cal. App. 3d 47, 131 Cal. Rptr. 338 (1976).
144. *Id.* at 49, 131 Cal. Rptr. at 339.
145. *Id.* at 50, 131 Cal. Rptr. at 339.
146. *Id.*
147. *Id.*
148. 76 Cal. App. 3d 16, 142 Cal. Rptr. 612 (1977).
149. *Id.* at 18, 142 Cal. Rptr. at 613.
150. *Id.* at ____, 142 Cal. Rptr. at 615.
151. *Id.*

However, the court in *Shepard* did not allude to the Restatement's limitation to physical harm. Further, the *Shepard* dissent emphasized that in *Dillon* there was a focus on the defendant's fault, and aptly noted that the policies underlying strict products liability, in which the manufacturer's culpability is not a necessary ingredient, would seem to preclude recovery.[152]

California again faced this issue in *Kately v. Wilkinson*.[153] In *Kately*, the plaintiff owner of a speed boat struck and killed a family friend who was water skiing because a defect in the boat caused the steering mechanism to malfunction. The court in *Kately* relied on *Shepard* to find that a plaintiff could recover for emotional distress in a products liability case.[154] However, this plaintiff could not recover under the *Dillon* test, and the court therefore utilized a test based upon the directness of the injury.[155] The court wanted to avoid bystander limitations and permit recovery for policy reasons.

New York has also considered recovery for emotional harm based on strict products liability. In *Vaccaro v. Squibb Corp.*,[156] the plaintiffs were parents of a child born with severe defects allegedly caused by an anti-miscarriage drug administered to the mother during her pregnancy. The Appellate Division, distinguishing between the mother as a user of the drug and the father as a bystander, allowed the mother's claim but dismissed the father's because bystanders may not recover for emotional harm in New York.[157] However, the Court of Appeals, focusing on the mother as a bystander suffering through concern for her deformed child, dismissed the mother's cause of action.[158]

The Illinois Court of Appeals also expressly stated that bystander recovery for emotional distress was not compensable in strict products liability actions in *Woodhill v. Parke Davis & Co.*[159] In *Woodhill*, the

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152. *Id.* at ____, 142 Cal. Rptr. at 618 (Kane, J., dissenting).

153. 148 Cal. App. 3d 576, 195 Cal. Rptr. 902 (1983).

154. *Id.* at ____, 195 Cal. Rptr. at 908.

155. *Id.* The court in *Kately* used a test developed in *Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980) (if the injury was direct, the three prong test of *Dillon* was not controlling).

156. 71 A.D. 2d 270, 422 N.Y.S.2d 679 (1979), *rev'd*, 52 N.Y.2d 809, 418 N.E.2d 386, 436 N.Y.S.2d 871 (1980).

157. *Id.* at 277-78, 422 N.Y.S.2d at 683-84. (*Tobin v. Grossman*, 24 N.Y.2d 609, 611, 249 N.E.2d 419, 419-20, 301 N.Y.S.2d 554, 555 (1969), had previously established that a bystander may not recover for emotional harm caused by witnessing an accident that causes severe physical injury to a third person).

158. *Vaccaro*, 52 N.Y.2d at 812, 418 N.E.2d at 387, 436 N.Y.S.2d at 872 (1980) (Fuchsberg, J., dissenting).

159. 58 Ill. App. 3d 349, 374 N.E.2d 683 (1978), *aff'd*, 79 Ill. 2d 26, 402 N.E.2d 194 (1980).

mother of a child born with brain damage claimed emotional harm allegedly caused by the administration of pitocin, a drug used to induce labor. The court dismissed the action and, in dictum, stated that because section 402A expressly limits recovery to cases involving "physical harm," the Restatement did not intend to provide a strict liability action for mental anguish or emotional harm.[160]

Thus, even if the loss of consortium plaintiff could be labeled as an emotionally injured bystander, this alone would not validate recovery under section 402A. Further, the fact that the courts are struggling with the issue of recovery for an emotionally injured bystander is significant. Bystander recovery is rendered dependent on various tests and limitations to appropriately delineate the extent of a tortfeasor's responsibility to a plaintiff other than the primary victim. Yet a loss of consortium plaintiff is generally even more remote than a bystander,[161] and liability should thus be similarly circumscribed. However, the courts in general have failed to conduct the analysis of loss of consortium necessary for a proper delimitation of the manufacturer's responsibility under a strict tort liability theory.

3. Examples of Inadequate Judicial Analysis.—As previously noted, the Illinois courts do not permit recovery for emotionally injured bystanders under a strict products liability theory.[162] Yet recovery for loss of consortium in section 402A actions is permitted.[163] In *Hammond v. North American Asbestos Corp.*,[164] the wife of an asbestos worker who contracted asbestosis brought a strict products liability action against a manufacturer for loss of consortium.[165] The loss of consortium claim was dependent upon a "tortious" injury and the court thus conducted a lengthy analysis of whether the husband's injury properly met the requirements of a strict tort liability cause of action.[166] However, once that initial determination was affirmatively answered, the court only briefly questioned the validity of the wife's claim for loss of consortium in light of a statute of limitations problem.[167] Thus, the court presumed that loss of consortium was valid under section 402A, notwithstanding its prior holding in *Woodhill v. Parke Davis & Co.*[168] which expressly

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160. *Id.* at ____, 374 N.E.2d at 688.

161. *See infra* notes 179-83 and accompanying text.

162. *See supra* notes 159-60 and accompanying text.

163. *See* Hammond v. North Am. Asbestos Corp., 97 Ill. 2d 195, 454 N.E.2d 210 (1983).

164. *Id.*

165. *Id.* at ____, 454 N.E.2d at 213.

166. *Id.* at ____, 454 N.E.2d at 215-18.

167. *Id.* at ____, 454 N.E.2d at 218.

168. 58 Ill. App. 3d 349, 374 N.E.2d 683 (1978), *aff'd*, 79 Ill. 2d 26, 402 N.E.2d 194 (1980). *See supra* notes 159-60 and accompanying text.

limited recovery under section 402A to "physical harm." Interestingly, an Illinois court very recently denied a claim for loss of filial consortium in a strict products liability case in which the concurring opinion, noting that *Woodhill* should be controlling, emphasized that section 402A limits recovery to "physical harm."[169]

Also, in *Park v. Standard Chemical Co.*,[170] discussed above as denying recovery to an emotionally injured bystander in strict products liability actions,[171] the plaintiff alleged a "partial loss of consortium" cause of action.[172] The court denied this claim merely because recovery for loss of consortium required a complete loss for a definite period of time, or for a non-determinable period of time.[173] Therefore, although the court did not permit recovery as an emotionally injured bystander, it would have allowed the loss of consortium cause of action had it been properly pled. The concurring opinion would have gone further and denied the loss of consortium claim as noncompensable within strict products liability.[174] Noting that the manufacturer's liability is premised upon a social policy, the concurring opinion stated that the manufacturer should not be subject to damages of unknown and unlimited scope.[175] This was the only opinion the author discovered which even questioned the validity of loss of consortium under a theory of strict tort liability.

The inconsistencies and arbitrary delimiting devices highlighted by the foregoing cases indicate the complex considerations the judiciary faces when evaluating claims for intangible damages in strict products liability cases. There must be a proper balance between the need for adequate recovery and the principle that the manufacturer is not an insurer of the product.[176] Because the judiciary must strive to maintain logical limits on a tortfeasor's responsibility, the relational loss of consortium claim within the context of liability without fault should be the subject of thorough analysis.

D. Economic Considerations

As a matter of judicial policy, the courts could reasonably preclude the extension of the manufacturer's strict liability to areas where, as

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169. *See* Dralle v. Ruder, 124 Ill. 2d 61, 529 N.E.2d 209 (1988).

170. 60 Cal. App. 3d 47, 131 Cal. Rptr. 338 (1976).

171. *See supra* notes 143-47 and accompanying text.

172. *Park*, 60 Cal. App. 3d at ____, 131 Cal. Rptr. at 339 (allegation 9).

173. *Id.* at ____, 131 Cal. Rptr. at 340 (loss of consortium was not to be confused with the inevitable physical, mental and emotional damage normally suffered by one spouse when the other has been wrongfully injured).

174. *Id.* at 51, 131 Cal. Rptr. at 340 (Compton, J., concurring).

175. *Id.*

176. Shepard v. Superior Court, 76 Cal. App. 3d 16, 29, 142 Cal. Rptr. 612, 620 (1977) (Kane, J., dissenting); *see also* Helene Curtis Industries, Inc. v. Pruitt, 385 F.2d 841, 862 (5th Cir. 1967).

here, the injury is to a relationship and the damages are intangible and speculative. "The loss of companionship, emotional support, love, felicity, and sexual relations are real injuries."[177] Yet the liability is secondary.[178] The loss of consortium plaintiff does not bear the primary impact of the defendant's act; rather, the plaintiff's relationship to the primary victim is diminished as a consequence.[179] Thus, loss of consortium may be regarded as a "secondary layer of tort liability superimposed upon the defendant's liability to the primary victim."[180] Yet it is not true in the law of torts that all those who predictably suffer loss as a consequence of the tortious act will be compensated.[181] Rather, it is for the judiciary to carefully demarcate the line of liability.

Generally, the degree of liability is dependent upon the degree of culpability. Thus, because strict tort liability is not premised upon culpability,[182] the scope of the manufacturer's liability should arguably be less in a strict products liability action than in a negligence action. Yet determining the appropriate diminution of the manufacturer's liability must involve a delicate balancing of interests. A judicial analysis and assessment of the relevant policies in light of society's current concerns about the overextension of the strict tort liability theory is required. The question must be whether the liability should encompass a relational and intangible injury such as loss of consortium.

The underlying purpose of the manufacturer's strict liability in tort should be a primary consideration. The legal theory was a judicial response to the increasing number of injuries caused by defective products and the corresponding difficulty of proving the negligence of a remote manufacturer.[183] The relaxation of the fault requirement was justified by strong policy considerations.[184] However, it does not follow that those

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177. Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 400, 525 P.2d 669, ___, 115 Cal. Rptr. 765, 776 (1974).

178. Sizemore v. Smock, 430 Mich. 283, 294, 422 N.W.2d 666, 671 (1988).

179. Berger v. Weber, 411 Mich. 1, ____, 303 N.W.2d 424, 435 (1979) (Levin, J., dissenting).

180. *Id.*

181. *See Sizemore*, 430 Mich. at 292-93, 422 N.W.2d at 671 (the general rule in tort law is that a tortfeasor's liability only extends to an obligation to compensate the person directly injured); Norwest v. Presbyterian Intercommunity Hosp., 293 Or. 543, 652 P.2d 318, 333 (1982) (Tanzer, J., concurring) (court was hesitant to create an entitlement that is so unpredictable, formless and limitless). *Accord* Deloach v. Companhia de Navegacao Lloyd Brasileiro, 782 F.2d 438, 441 (3d Cir. 1986) (loss of consortium is somewhat an anomaly in the law of tort).

182. *See* RESTATEMENT, *supra* note 46, § 402A comments a and m; *see also* Shepard v. Superior Court, 76 Cal. App. 3d 16, 26, 142 Cal Rptr. 612, 618 (1977) (Kane, J., dissenting).

183. *See supra* notes 33-35 and accompanying text.

184. *See supra* notes 37-43 and accompanying text.

rationales adequately support the imposition of all the recoveries available under a negligence theory upon a manufacturer in a strict tort liability action. As a result, the validity of loss of consortium recovery under a negligence theory is not sufficient justification for the same recovery under a strict tort liability theory.

In addition, the burden of payment of awards for loss of consortium must realistically be borne by the public generally through increased insurance premiums or, otherwise, in the enhanced danger that accrues from the greater number of people or companies choosing to go without any insurance.[185] As one court aptly noted:

> There is a limit to the range of injuries and the dollar amount of recovery which can be spread across society through the interaction of the tort litigation and insurance systems. Increasing the load on the reparation system by recognizing causes of action in secondary tort victims in addition to the primary victim's action must increase insurance premiums, decrease participation in the system by marginal insureds, and perhaps decrease the amount that an insurer will willingly pay to the primary victim, thereby increasing litigation.[186]

Therefore, the inadequacy of monetary damages to make whole the loss suffered,[187] considered in light of the social costs of paying such awards, constitutes strong reason for denying the loss of consortium recovery in section 402A actions.

Moreover, it must be emphasized that section 402A was not intended to be an exclusive remedy.[188] The drafters of section 402A intended to impose a "special" liability upon the manufacturer or seller.[189] Other sections within Chapter 14 of the Restatement, in which section 402A appears, impose liability for negligence upon suppliers of chattels. For example, section 388 deals with chattels known to be dangerous for intended use;[190] section 395 imposes liability for the negligent manufacture of goods dangerous unless carefully made;[191] and section 398 addresses

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185. Borer v. American Airlines, Inc., 19 Cal. 3d 441, 447, 563 P.2d 858, ____, 138 Cal. Rptr 302, 306 (1977).

186. Berger v. Weber, 411 Mich 1, ____, 303 N.W.2d 424, 438 (1981) (Levin, J., dissenting).

187. *Borer*, 19 Cal. 3d at 447, 563 P.2d at ____, 138 Cal. Rptr. at 306 (1977). *But cf.* Ueland v. Reynolds Metal Co., 103 Wash. 2d 131, 691 P.2d 190, 194 (1984).

188. *See* RESTATEMENT, *supra* note 46, § 402A comment a.

189. The title of § 402A is: Special Liability of Seller of Product for Physical Harm to User or Consumer. *See* RESTATEMENT, *supra* note 46, § 402A.

190. *See* RESTATEMENT (SECOND) OF TORTS § 388 (1977).

191. *See id.* 395.

the manufacture of goods made under a dangerous plan or design.[192] Each of these negligence sections recognizes the non-privity rule of *MacPherson*,[193] yet the basis of each is clearly fault.

Thus, precluding loss of consortium damages in strict products liability cases would not necessarily prevent redress of the legal wrong. It would merely require the loss of consortium plaintiff to be able to allege a different cause of action against the manufacturer defendant; and this would not generally affect recovery. An economic analysis of products liability law by Posner and Landes indicated that an efficient solution is just as likely to be reached under negligence as strict liability.[194] Further, even Prosser noted that there "is not one case in a hundred in which strict products liability would result in recovery where negligence does not."[195]

Thus, a judicial analysis should consider the relational nature of the loss of consortium cause of action when balancing against the social ramifications and the fact that alternative theories are available for recovery. Arguably, there are now sufficient countervailing policies to preclude the claim within a strict tort liability action.

IV. Conclusion

A perpetual challenge for the law is to limit redress for legal wrongs to a controllable degree.[196] This is especially true when the liability is the result of policy determinations and not premised upon the actor's culpable conduct. Yet the judiciary has not sufficiently met that challenge in the area of loss of consortium recovery in strict products liability actions against manufacturers and sellers.

The pronouncement in section 693 of the Restatement (Second) of Torts that loss of consortium is within the scope of the manufacturer's responsibility is not adequately supported by case law or detailed judicial analysis.[197] In addition, because the express provisions of section 402A

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192. *See id.* 398.

193. *See* MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

194. Landes & Posner, *supra* note 88, at 541. Yet the economic argument for strict products liability to *physically injured* bystanders is stronger than the argument for strict liability to people in the chain of title. *Id.* at 551; *see also* Posner, *Strict Liability: A Comment*, 2 J. Legal Stud. 205, 207 (1973).

195. Prosser, *Assault Upon the Citadel*, *supra* note 3, at 1114.

196. An often quoted opinion noted:

> Every injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree.

Tobin v. Grossman, 24 N.Y.2d 609, 619, 249 N.E.2d 419, 424, 301 N.Y.S.2d 554, 561 (1969).

197. *See supra* notes 90-118 and accompanying text.

proscribe recovery to a plaintiff without physical injury,[198] it is reasonable to assert that recovery for a relational injury such as loss of consortium was not considered appropriate. Moreover, recovery for loss of consortium is not validated even if the plaintiff could be deemed analogous to a products liability bystander.[199] Yet the courts have consistently permitted the loss of consortium claim under a strict tort theory.

Again, in determining the parameters of the manufacturer's strict tort liability there must be a proper balance between the need for adequate recovery and the survival of a viable enterprise.[200] At the same time, there must be a recognition that the risk of harm from the loss of a loved one is pervasive. As one court noted, this is a risk of living and bearing children.[201] Thus, it is a risk that individuals must partially assume. Considering the fact that loss of consortium damages would continue to be compensable in products liability actions based on negligence or breach of warranty theories,[202] the preclusion of the cause of action under a strict tort liability theory would not be unreasonable. Accordingly, the time is appropriate for a judicial examination of loss of consortium recovery in a strict products liability action under section 402A of the Restatement (Second) of Torts.

KAREN A. JORDAN

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198. *See supra* notes 119-33 and accompanying text.

199. *See supra* notes 134-60 and accompanying text.

200. *See, e.g.*, Helene Curtis Industries, Inc. v. Pruitt, 385 F.2d 841, 862 (5th Cir. 1967).

201. *See Tobin*, 24 N.Y.2d at 619, 249 N.E.2d at 424, 301 N.Y.S.2d at 562.

202. *See supra* notes 188-95 and accompanying text.