

TRENDING AWAY FROM MEDICAL MONITORING?

By Rudy R. Perrino

“Medical monitoring is one of a growing number of non-traditional torts that have developed in the common law to compensate plaintiffs who have been exposed to various toxic substances.” *In re: Paoli R.R. Yard PCB Litigation*, 916 F.2d 829, 849 (3rd Cir. 1990). To be sure, the increase in exposures to harmful substances in recent times coupled with the availability of accurate means of early detection of disease has led numerous courts to recognize the costs of monitoring for latent disease as compensable injury. As the Massachusetts Supreme Court recently put it:

Modern living has exposed people to a variety of toxic substances. Illness and disease from exposure to these substances are often latent, not manifesting themselves for years or even decades after the exposure. Some people so exposed may never develop an illness or disease, but some will. Subcellular or other physiological changes may occur which, in themselves, are not symptoms of any illness or disease, but are warning signs to a trained physician that the patient has developed a condition that indicates a substantial increase in risk of contracting a serious illness or disease and thus the patient will require periodic monitoring. Not all cases will involve physiological change manifesting a known illness, but such cases should be allowed to proceed when a plaintiff's reasonable medical expenses have increased (or are likely to increase, in the exercise of due care) as a result of these physiological changes.

Donovan v. Philip Morris USA, Inc., 455 Mass. 215, 225 (Mass. 2009) (leaving for another day consideration cases calling for medical monitoring where no symptoms or subclinical changes have occurred). Since the first case to recognize claims for medical monitoring damages, *Friends for All Children v. Lockheed Aircraft Corp.*, 746 F.2d 816 (D.C.Cir. 1984), a steady procession of both Federal and state courts have recognized claims for medical monitoring. A number of courts have even extended the availability of medical monitoring damages to situations where there is no present physical injury. And a few of these courts have gone so far as to create a new cause of action in an effort to avoid the limitations imposed by traditional tort law.

But the trend toward recognition of medical monitoring claims took a sharp detour in 1997 when the Supreme Court issued its decision in *Metro-N. Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997). There, Justice Breyer, writing for a 7-2 majority, rejected a claim for medical monitoring absent physical injury, articulating three public policy considerations disfavoring recognition:

1. “[U]ncertainty among medical professionals about just which tests are most usefully administered and when” can pose special difficulties for judges and juries. *Id.* at 441. “[I]n part, those difficulties can reflect the fact that scientists will not always see a medical need to provide systematic scientific answers to the relevant legal question, namely, whether an exposure calls for extra monitoring.” *Id.*

2. Exposures to harmful substances potentially justifying medical monitoring occurs every day to virtually every person in society. “And that fact, along with uncertainty as to the amount of liability, could threaten both a ‘flood’ of less important cases . . . and the systemic harms that can accompany ‘unlimited and unpredictable liability’ . . .” *Id.* at 442.

3. Though not applicable in every case, the court articulated a policy of not wanting to interfere with possible collateral sources, including regulatory schemes designed to protect exposed workers and insurance: “a traditional, full-blown ordinary tort liability rule would ignore the presence of existing alternative sources of payment, thereby leaving a court uncertain about how much of the potentially large recoveries would pay for otherwise unavailable medical testing and how much would accrue to plaintiffs for whom employers or other sources (say, insurance now or in the future) might provide monitoring in any event,” *Id.* at 442-43 citing 29 C.F.R. § 1910.1001(l) (1996).

Since *Buckley*, the highest courts of several states, and some states’ lower courts, as well as a number of federal courts predicting state law have all relied on similar public policy considerations to reject medical monitoring claims for asymptomatic plaintiffs. See Herbert L. Zarov, Sheila Finnegan, Craig A. Woods, and Stephen J. Kane, *12 DePaul J. Health Care L.* 1, * n. 38 & 39, and cases cited therein. Nevertheless, numerous courts continue to recognize claims for medical monitoring, some without injury, some recognizing the claims as ordinary tort damages, some as a separate cause of action. These differing rules across jurisdictions can create confusion and difficult issues to resolve when practicing across multiple jurisdictions, such as in the case of mass torts. This article endeavors to impart a general understanding of the principles applicable to the differing views across jurisdictions.

The first case to recognize a claim for medical monitoring damages, *Friends For All Children, Inc. v. Lockheed Aircraft Corp.*, *supra*, involved the claims of some 149 Vietnamese orphans who had been in a horrific airplane accident as they were being transported by the U.S. government to the United States for subsequent processing for adoption. The crash put the infants at risk of a neurological development disorder called “Minimal Brain Dysfunction,” or “MBD”. *Id.*, 746 F.2d at 819. During the pendency of the litigation Lockheed and the Government engaged in a series of time consuming legal maneuvers aimed at securing dismissal of the suit. The court awarded medical monitoring damages to the orphans on an interim basis while some of the cases were awaiting trial, in part because the delays brought by these maneuvers (almost three years) caused the court great concern that the plaintiffs could be forced to wait an even longer period for a final outcome in the case, potentially causing the plaintiffs to miss any meaningful opportunity to detect and remedy the developing condition. Of course, the court’s conclusion was helped by the fact that liability had already been established.

In reaching its decision, the court rejected Lockheed’s argument that “[i]t is always impermissible for a court to provide interim equitable relief in a suit the ultimate objective of which is the recovery of money damages,” citing long standing precedent laid down by Judge Learned Hand in *Sims v. Stuart*, 291 F. 707 (S.D.N.Y. 1922). In contrast to *Sims* and its progeny, however, the *Friends for All Children, Inc.* court was simply looking to fashion an *interim* equitable remedy imposed against a party already found to be liable, to deal with an immediate threat of irreparable harm to the plaintiffs while bellwether trials proceeded to determine the amount of damages to which the plaintiffs were entitled:

While our legal system quite properly views damages ultimately as an adequate compensation for a particular kind of loss, it simply does not follow that equity may never be properly called upon, in order to prevent irreparable injury, to accelerate recovery of a portion of damages likely to be awarded when liability has already been determined. *Id.* at 830.

Since *Friends For All Children*, the law applicable to claims for medical monitoring has evolved in many states to allow recovery, even without the presence of a physical injury. In *Ayers v. Township of Jackson*, 525 A.2d 287 (N.J. 1987), for example, the first case to recognize a medical monitoring claim in the absence of either traumatic impact or physical injury, the New Jersey Supreme Court found ample reason to award medical monitoring damages without physical injury. There, the plaintiffs, who were residents of the Township of Jackson, New Jersey, had been exposed to a long list of toxic chemicals that had been discharged into the town's drinking water supply by operations at the town landfill. This contamination led the township to close the town's drinking water supply until an alternate supply could be established. *Id.* at 568. Plaintiffs sued and ultimately prevailed on three claims: emotional distress, deterioration of quality of life, and future costs of medical surveillance. *Id.* at 565. The Court of Appeal upheld the quality of life award, but reversed the awards for emotional distress and medical surveillance. *Id.*

While the New Jersey Supreme Court agreed with the appellate court that the claim for emotional distress damages was too speculative and remote, it disagreed on the claim for medical monitoring, holding that "the cost of medical surveillance is a compensable item of damages where the proofs demonstrate, through reliable expert testimony predicated upon the significance and extent of exposure to chemicals, the toxicity of the chemicals, the seriousness of the diseases for which individuals are at risk, the relative increase in the chance of onset of disease in those exposed, and the value of early diagnosis, that such surveillance to monitor the effect of exposure to toxic chemicals is reasonable and necessary." *Id.*

In reaching its conclusion, the *Ayers* court articulated three policy reasons for recognizing medical monitoring damages. First, the court found the recognition of medical monitoring damages as "consistent with the important public health interest in fostering access to medical testing for individuals whose exposure to toxic chemicals creates an enhanced risk of disease," noting that "[t]he value of early diagnosis and treatment for cancer patients is well-documented." *Id.* at 603. Second, the court found that "permitting recovery for reasonable pre-symptom, medical-surveillance expenses subjects polluters to significant liability when proof of the causal connection between the tortious conduct and the plaintiffs' exposure to chemicals is likely to be most readily available," thus avoiding the problem of proving causation many years after exposure in the typical toxic tort case seeking damages for latent injury. *Id.* Third, the court reasoned that it was inequitable for an individual to have to pay for his own medical intervention, where the intervention was reasonable and necessary and unquestionably caused by the defendant's tortious conduct. *Id.* The availability of medical monitoring damages closer in time to the tortious conduct, the court further reasoned, would serve as a better deterrent to defendants emitting toxic chemicals. *Id.*

A number of courts have relied on similar policy reasons since to conclude that medical monitoring damages are available, even without a concurrent physical injury. *See, e.g., Potter v.*

Firestone Rubber Co., 6 Cal.4th 965, 1007-09; (Cal. 1993); *Carey v. Kerr-McGee Chem. Corp.*, 999 F.Supp. 1109, 1120 (N.D.Ill. 1998); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 979 (Utah 1993); *Burns v. Jaquays Min. Corp.*, 156 Ariz. 375 (Ariz.App. 1987).

In *Potter v. Firestone*, *supra*, the California Supreme Court relied on long standing precedent that, under California law, future damages reasonably certain to occur are compensable: “[t]he cost of anticipated medical care reasonably certain to be required in the future has long been held to be a proper item of recoverable damages under [Civil Code section 3333],” *Potter v. Firestone*, *supra*, 6 Cal.4th at 1005-06, quoting *Buswell v. City and County of San Francisco*, 89 Cal.App.2d 123, 133 (1948). It was this existing recognition of reasonably certain future damages under California law that allowed the Court in *Potter* to avoid the limitations of traditional tort law that exist in most states requiring an actual injury before compensation can be awarded. *Id.*

Unlike California, however, many states’ laws lack provisions that allow them to avoid the limitations imposed by traditional tort law on awarding damages without physical injury. Most of the states that lack such provisions are states that have refused to recognize medical monitoring damages without injury. But a few have extended themselves, creating new causes of action in order to get around these limitations.

For example, in *Burns v. Jaquays Min. Corp.*, 156 Ariz. 375 (Ariz.App. 1987), the Arizona court of appeals adopted the elements of the cause of action for medical monitoring articulated by the New Jersey Supreme Court in *Ayers*, *supra*. Similarly, in *Simmons v. Pacor, Inc.*, 543 Pa. 664 (Pa. 1996), the Supreme Court of Pennsylvania recognized a cause of action for medical monitoring composed of the same elements in asbestos cases where only pleural thickening had been demonstrated. Some courts have been even more creative in fashioning a cause of action, finding that the right to avoid expensive medical examinations caused by the tortious conduct of others is a legally protected interest. See, e.g., *Meyer v. Fluor Corporation*, 220 S.W. 712, 717 (Mo.banc 2007) (“When a defendant invades this interest, the injury to which is neither speculative nor resistant to proof, it is elementary that the defendant should make the plaintiff whole by paying for the examinations,” quoting *Potter v. Firestone Rubber Co.*, *supra*); but see, Andrew R. Klein, *Rethinking Medical Monitoring*, 64 Brook. L.Rev. 1, 10-11 (1998) (challenging the propriety of construing the cases as creating a unique cause of action and arguing in favor of the notion that medical monitoring ‘simply describes a potential remedy in established tort actions.’)

In some states that have been hampered by the traditional paradigms of tort law, science has intervened. Improved techniques for monitoring and detection have led to studies showing the early effects of toxic chemicals at a “subclinical” level (Stedman’s Medical Dictionary (2008) defines the term “subclinical” as meaning “[d]enoting the presence of a disease without manifest symptoms; may be an early stage in the evolution of a disease.”). Those studies, in turn, have led plaintiffs seeking medical monitoring damages in states that require a showing of physical injury in order to obtain recovery to allege subclinical damage as the toxic effect leading to the need for medical monitoring. For example, in *Donovan v. Philip Morris USA, Inc.*, *supra*, plaintiffs sought to state a claim for medical monitoring on behalf of a class of plaintiffs who had smoked twenty pack-years of Marlboro cigarettes based on “subclinical effects of exposure to cigarette smoke.” *Donovan*, 455 Mass. 215, 216. Until the *Donvan* case, Massachusetts courts did not

recognize claims for medical monitoring damages without physical injury. Indeed, the *Donovan* court's analysis was prefaced with doctrinal statements of tort law: "[u]nder our law of negligence, injury and damages are integrally related: there can be no invasion of the rights of another unless legal damage is caused, and for that reason nominal damages cannot be recovered." *Id.* at 222. But, recognizing that most of the State's tort law had developed at a time when tortious injuries were mostly caused by blunt trauma, the court concluded that it "must adapt to the growing recognition that exposure to toxic substances and radiation may cause substantial injury which should be compensable even if the full effects are not immediately apparent," leading it to recognize a negligence claim for medical monitoring based on allegations of subclinical damage. *Id.* at 225-26.

But as indicated, *supra*, some courts have refused to recognize claims for medical monitoring damages without a showing of physical injury. Courts that do not recognize the claim reason that, under a traditional negligence claim, the plaintiff must demonstrate a physical injury in order to recover damages. See, e.g., *Henry, et al. v. The Dow Chemical Co.*, 473 Mich. 63, 72 (2005) (without physical injury, plaintiffs could not state a valid negligence claim); *Hess v. A.I. DuPont Hospital for Children*, Civ. Action No. 08-0229, at 20-21 (E.D.Pa. 3-5-2009) (also requiring present injury to justify the award of medical monitoring damages under Delaware law); cf. *Donovan, supra*; see also, *In re: Paoli R.R. Yard PCB Litigation, supra*, at 849-50, quoting Note, *Medical Surveillance Damages: A Solution to the Inadequate Compensation of Toxic Tort Victims*, 63 Ind.L.J. 849, 852 (1988) ("Often, the diseases or injuries caused by this exposure are latent. This latency leads to problems when the claims are analyzed under traditional common law tort doctrine because, traditionally, injury needed to be manifest before it could be compensable. Thus, plaintiffs have encountered barriers to recovery which 'arise from the failure of toxic torts to conform with the common law conception of an injury'.") Because in most cases, the whole point of medical monitoring is to detect injury *before* it happens, any award of the costs of medical monitoring in these jurisdictions comes at a point when it is too late. Without physical injury, many courts view tort law as simply incapable of recognizing the claim without some adjustment, an adjustment most courts are unwilling to make.

There are many reasons courts are unwilling to expand existing tort law to recognize a claim for an abstract injury like medical monitoring. As detailed in *Metro-N. Commuter R.R. Co. v. Buckley, supra* at 441-43, recognition of medical monitoring costs as a compensable item of damages without physical injury creates a number of concerns, not the least of which is uncertainty in whether there is in fact an injury that needs to be compensated, a question courts are ill equipped to address through an equitable crafting of the award. In all but the stipulated cases (see, e.g., *Friends For All Children, Inc. v. Lockheed Aircraft Corp., supra*), there is sharp disagreement between plaintiffs and defendants on the question of whether medical monitoring is even necessary. That disagreement is in part what led to the uncertainty articulated by the *Buckley* court, which resulted in that court denying recovery for medical monitoring.

Most courts to address claims for medical monitoring have also expressed concern for the potential for mischief when the plaintiffs seek a lump sum medical monitoring award. Lump sum awards typically are not used by the plaintiffs for their intended purpose. And the plaintiffs lawyers working on contingency have great incentive to overstate the cost and need for medical monitoring when the result will be a large monetary award. As a result, courts tend to be more

receptive to requests for court supervised programs because they tend to alleviate court concerns over mischief: “[t]hese courts expressed paternalistic reasons for certifying the class, such as ensuring the monies are used exclusively for medical monitoring and garnering the benefit to the public in general from generating medical data for group studies. ***In this case, the Plaintiffs have not requested a court-supervised medical monitoring fund or program.***” *Mehl, et al. v. Canadian Pacific Railway, Limited, et al.*, 227 F.R.D. 505, 519 (N.D. 2005) (denying certification of a medical monitoring class because plaintiffs failed to satisfy the requirements of Rule 23(b)(2)).

In conclusion, the law applicable to claims for medical monitoring has developed substantially since the first case of *Friends For All Children*. While the trend over time has been to recognize their availability through traditional tort law or new causes of action, there is now a growing trend toward non-recognition prompted by the concerns articulated by the Supreme Court in *Buckley, supra*. An interesting trend is also currently under foot toward non-recognition based on recent developments in the science showing that the risks of monitoring in many instances far outweigh the potential benefits. No doubt, credible studies establishing that the risks of monitoring greatly outweigh the benefits to be derived there from would be expected to have a further chilling effect on the trend begun in *Friends For All Children*. We will have to wait and see how these studies ultimately play into the law.