Kevin L. Colbert

The medicine and science come first.

IN RECENT YEARS, plaintiffs have attempted to obtain recognition of a novel tort for the recovery of damages absent some present injury. Medical monitoring is a developing theory seeking the recovery of damages for wholly asymptomatic persons who do not yet have an existing physical injury or disease, but merely have an “increased risk” of injury or disease. When medical monitoring is sought, it is sought as either an independent claim or as an element of damages arising from alleged exposures to some toxic substance. A claim for medical monitoring, either as a cause of action arising in tort or as an element of damages, seeks to recover the anticipated costs of long-term diagnostic testing necessary to detect latent disease that may develop as a result of an alleged tortious exposure to toxic substances. In either case, the plaintiff typically is seeking medical monitoring when there is no proof of present physical injury or illness or, if there is proof of a present physical injury, a claim for fear of some disease or injury, such as cancer, in the future.

CAUSE OF ACTION OR ELEMENT OF DAMAGES? • Currently, fewer than 15 states, and the District of Colombia, recognize a cause of action for medical monitoring or allow damages for medical monitoring absent present injury or “proof of injury”:
• **Burns v. Jaquays Mining Corp.,** 752 P.2d 28 (Ariz. Ct. App. 1987);  
• **Potter v. Firestone Tire & Rubber Co.,** 863 P.2d 795 (Cal. 1993);  
• **Cook v. Rockwell International Corp.,** 755 F. Supp. 1468 (D. Colo. 1991);  
• **Friends For All Children, Inc. v. Lockheed Aircraft Corp.,** 746 F.2d 816 (D.C. Cir. 1984);  
• **Doe v. City of Stamford,** 699 A.2d 52 (Conn. 1997);  
• **Petito v. A.H Robbins,** 750 S2d 103, (Fla. Dist. Ct. App. 1999);  
• **Carey v. Kerr-McGee Chemical Corp.,** 999 F. Supp.1109 (N.D. Ill. 1998);  
• **Allgood v. General Motors Corp.,** 2006 WL 2669337 (S.D. Ind. Sept. 18, 2006);  
• **Ayers v. Township of Jackson,** 525 A.2d 287 (N.J. 1987);  
• **Askey v. Occidental Chemical Corp.,** 102 A.D.3d 130, 477 N.Y.S.2d 242 (N.Y. App. Div. 1984);  
• **Redland Soccer Club, Inc. v. Department of the Army,** 696 A.2d 137 (Pa. 1997);  
• **Sutton v. St. Jude Medical S.C., Inc,** 419 F.3d 568 (6th Cir. 2006) (applying Tennessee law);  
• **Hansen v. Mountain Fuel Supply Co.,** 858 P.2d 970 (Utah 1993);  
• **Stern v. Chemtall Inc.,** 617 S.E.2d 876 (W. Va. 2005).

A claim for medical monitoring may exist, concurrent with proof of some existing injury, in other jurisdictions. See, e.g., **Baker v. Wyeth-Ayerst Lab. Division,** 992 S.W.2d 797 (Ark. 1999). Certain states, such as Texas and Nevada, allow the recovery of medical monitoring damages when there is a present or legally cognizable injury but do not recognize an independent cause of action. **Badillo v. American Brands, Inc.** 16 P.3d 435 (Nev. 2001). Mississippi is the latest state to address whether medical monitoring exists as an independent cause. In **Paz v. Brush Engineered Materials, Inc,** 949 So.2d 1 (Miss. 2007), the Mississippi Supreme Court stated that it has “continuously rejected the proposition that within tort law there exists a cause of action or a general category of injury consisting solely of potential future injury.” *Id.* at 9. Furthermore, responding to the Fifth Circuit’s certified question, “Whether Mississippi recognizes a medical monitoring cause of action without a showing of physical injury,” the court held that it “has previously refused to recognize such an action and in accordance with Mississippi common law continues to decline to recognize such a cause of action.” *Id.*

### Elements Of The Medical Monitoring Claim

To accompany the apparent lack of uniform recognition of medical monitoring as either an independent tort or claim for damages, is the apparent lack of uniformity or guidance regarding the proper elements to be proved to support any claim for medical monitoring. Successful prosecution of a medical monitoring claim (either as an independent tort or element of damages) should require the following elements to be proven:  
• A “significant” exposure;  
• To a hazardous substance with a proven or probable causal link to a human disease;  
• Caused by the defendant’s negligence or intentional act;  
• That creates a significantly increased risk to the person actually exposed;  
• Of developing a serious disease that is medically cognizable;  
• A monitoring procedure exists that makes the early detection of the disease possible;  
• The prescribed monitoring is different from that normally recommended in the absence of exposure;  
• The prescribed monitoring regime is reasonably necessary according to contemporary scientific principles; and  
• A treatment exists that makes the early detection of the disease beneficial.
Certain of the more problematic elements are discussed below.

“A ‘Significant’ Exposure”

Daily, we are exposed to many chemicals that, in the abstract, can cause some ill effects. The basic premise of toxicology is that the dose makes the poison. It is when a person is directly exposed to enough of a chemical, over a long enough period of time, that determines if there is a “significant” exposure. Although some courts suggest this exposure is to be “above background,” there are few instances in which any exposure above background would cause harm. (“Background,” as the term is used here, indicates the measured amount of a chemical or substance that all members of a community are exposed to as a result of community factors or natural occurrence.) To determine if there is a “significant” exposure, practitioners and the courts should be guided by sound principles of medical science in determining significance.

“Hazardous Substance With A Proven Or Probable Causal Link To A Human Disease”

Not all “hazardous substances” have a proven or probable causal link to a human disease. Some are “environmental hazards,” whereas others have been shown only to cause some harm to laboratory animals under certain conditions that are not seen in the human experience (for example, humans typically are not administered substances by gavages, wherein a syringe is forced down a person’s throat, or by subcutaneous injections). Is there current and well-conducted epidemiology or other methodologically sound scientific studies that either “prove” or suggest a probable causal link to the specific human disease from the exposure to the hazardous substance? If only animal studies are available, is there sound reason to believe the substance will act the same way when humans are exposed (do the study animals react in the same or a similar way that humans react to the exposure)?

“That Creates A Significantly Increased Risk To The Person Actually Exposed”

Not all exposures to a hazardous chemical warrant attention. To show there is a “significantly increased risk,” plaintiffs should be able to prove the intensity and duration of an exposure sufficient that the risk of an injury from that exposure is higher for the plaintiff than for all others in the community. If the risk of illness or death in the community, generally, is “x,” and the plaintiff’s risk of contracting the illness, had she not been exposed, is “x,” then the plaintiff must show that his or her risk is not only greater than “x,” but significantly greater than “x” for becoming ill as a result of the exposure. Factors that could determine an individual’s risk for a certain illness or disease must also be taken into account. Examples include genetic and lifestyle factors, and pre-existing or co-existing illnesses.

“Developing A Serious Disease That Is Medically Cognizable”

Some courts have indicated that only serious diseases are subject to medical monitoring. Recently, the Mississippi Supreme Court added the requirement of “medically cognizable” to the types of illnesses and injuries that may be subject to medical monitoring. Interestingly, this added requirement may allow medical monitoring for injuries to the “personality” or nervous system of the plaintiff.

Serious disease has been defined as “serious impairment” or death. Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 979 (Utah 1993). The requirement that the disease be a “latent” disease has also been enunciated. A “latent” disease is an illness that