Medical Monitoring without Physical Injury; The Least Justice Can Do for Those Industry Has Terrorized with Poisonous Products

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Over the past two decades a growing minority of state courts decided to grant tort relief to accident victims who manifest no physical injury but have been put at long-term risk of death or disease as a result of exposure to industrial activity at toxic dumps, production of dangerous drugs and other consumer products, or being in hazardous workplaces. While courts have suggested the possibility of ordering relief in auto accident cases, nearly all of the cases have involved environmental or toxic torts involving contamination from landfills, groundwater poisoning, petroleum products, insecticides, organic chemicals, radioactive emissions, tobacco products, and asbestos. The earliest cases granted the victims of unripened, but threatened, illness a

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common law right to have the defendant pay, as damages, the costs of medical screening that doctors would counsel a plaintiff to incur in order to assure early detection and treatment of those maladies the accident had made more likely to develop, often at a remote future date. A number of courts also ordered monitoring relief, not as an item of damages, but through exercise of the courts’ equitable powers, to compel defendants to supply or underwrite plaintiffs’ future medical monitoring expenses when they would not have had to be incurred but for the fact that defendant had increased plaintiffs’ risk. Medical screening was seen as a means of permitting early detection and treatment to minimize the threat defendants’ conduct had caused to plaintiffs’ mortality and morbidity.


11. The earliest monitoring case involved an injunction, not an award of damages. In that case, Friends for All Children, 746 F.2d at 819, a group of infant children survived an explosive decompression and airplane crash that threatened them with a neurological development disorder. Representatives of the children sought damages, but many had no obvious injuries, rather, they suffered a substantial likelihood that the disorder would develop. Id. at 818-19. The trial judge found that early detection and remedial treatment would likely reduce the severity of any mental disorder attributable to the decompression and crash and failure to engage in early diagnosis would lead to irreparable injury to many of the children. Id. After interminable delays in the litigation, the trial judge issued a preliminary injunction requiring the defendants to fund a thorough regime of neurological testing to see whether each of the children had been injured. Id. The court of appeals upheld the injunction. In explaining its holding, the court of appeals laid out a hypothetical case in which

Jones is knocked down by a motorbike which Smith is riding through a red light. Jones lands on his head with some force. Understandably shaken, Jones enters a hospital where doctors recommend that he undergo a battery of tests to determine whether he has suffered any internal... injuries. The tests prove negative, but Jones sues Smith solely for what turns out to be the substantial cost of the diagnostic examinations.

Id. at 825. In the court's view, the plaintiff was entitled to recover the cost of the examinations from the motorcyclist. Such a recovery would promote compensation, deter misconduct, and “accord[ ] with commonly shared intuitions of normative justice which underlie the common law of tort.” Id.

Ayers, 525 A.2d at 287 and Potter, 863 P.2d at 795, both relied upon Friends for All Children in rationalizing a damages award. Although they upheld lump sum damages...
Claims for medical monitoring prior to injury are only one of several types of claims victims of toxic torts have recently brought to seek redress for exposure to toxins before the victims have developed symptoms of disease. Plaintiffs have also sought damages for enhanced risk of getting sick as a result of exposure, and damages for non-intentional infliction of emotional distress. Some writers have lumped all three theories together “under the loose banners of ‘future injury’ or ‘inchoate torts.’”

The drive to hold defendants liable on one or more of these theories has developed in recent years because of a wave of cases involving exposure to products, known to be toxic to human beings, but which often do not cause symptoms of illness until after long periods of time—sometimes decades. Under traditional doctrines, a cause of action for personal injury is not ripe until the victim becomes symptomatic; a lawsuit filed before some injury could be diagnosed would be premature. Yet waiting is not in the best interests of the victim. Statutes of limitations may preclude any action in cases in which the time period between the tortious activity and manifestation of disease is so protracted. Even when these obstacles are overcome with discovery rules and the like, statutes of repose may preclude a suit, and the passage of time may make proof of liability and causation extremely difficult.

awards, each of those courts indicated a preference for equitable orders mandating that defendants fund the victims’ medical monitoring costs in the future. In recent years, many of the courts that upheld medical monitoring relief in the absence of physical injury have opted for equitable orders. See Barth v. Firestone Tire & Rubber Co., 673 F. Supp. 1466, 1478 (N.D. Cal. 1987) (holding that plaintiff could maintain claim for equitable relief); Burns, 752 P.2d at 34 (ordering creation of court-supervised fund); Petito v. A.H. Robins Co., 750 So. 2d 103, 107-08 (Fla. Dist. Ct. App. 2000) (ordering court supervised fund); Redland Soccer Club v. Dep’t of the Army, 696 A.2d 137 (Pa. 1997) (ordering medical monitoring trust fund); Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 982 (Utah 1993) (requiring use of court’s equitable powers to set up court supervised fund to administer surveillance payments or alternatively to require defendant to pay for insurance fund to cover plaintiff’s future monitoring needs).


13. If the statutes of limitation are deemed to run from the time of exposure or inhalation of a toxin, they can cut off a right to sue long before a plaintiff realizes she is injured. A number of courts have applied a discovery rule to provide relief from this problem, particularly in asbestos cases. See, e.g., Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 116 (D.C. Cir. 1982); Pustejovsky v. Rapid-Am. Corp., 35 S.W.3d 643, 653 (Tex. 2000); Hansen, 858 P.2d at 973 (dictum).

14. For discussion of statutes of repose, see generally Francis E. McGovern, The Status of Statutes of Limitations and Statutes of Repose in Products Liability Actions: Present and Future, 16 Forum 416 (1980); Francis E. McGovern, The Variety, Policy and Constitutional-ity of Product Liability Statutes of Repose, 30 Am. U. L. Rev. 579 (1981). As McGovern points out, the operation of these statutes can prevent a plaintiff from ever having a right to sue to redress injuries she suffers; this happens, for instance when, by the time a claim ripens sufficiently to become a cause of action, the right to sue for redress is cut off by a statute of repose. See 16 Forum at 418-19.

The banners that loosely cover the claims for enhanced risk, emotional distress, and medical monitoring should not obfuscate the fact that they are clearly different. The first category, cases of enhanced risk, involves no claim of present injury at all; what is claimed is that a plaintiff has been exposed in a way that increases her risk of serious illness beyond that of unexposed persons. The claim seeks damages for the future disease discounted by the likelihood that she might not contract the disease at all.\textsuperscript{15} The second category, damages claims for emotional distress, seeks to find present damage resulting from the fear and knowledge of the harmful exposure. The third category, medical monitoring claims, deals with enhanced risk but does not seek damages for the risk itself; instead, the claim attempts to find present injury in the ongoing medical diagnostic costs that a reasonable physician would suggest to the plaintiff in order to ensure prompt diagnosis of any illness that a defendant's activity has made more likely. Although the theories differ considerably,\textsuperscript{16} it should not be surprising that many plaintiffs' lawyers have sought relief on two or more of these theories contemporaneously.\textsuperscript{17}

Opponents of the move to create a right to medical monitoring relief when defendant has tortiously placed plaintiff in need of medical surveillance but has not yet suffered physical injury oppose such relief on several grounds. Aside from recognizing that the traditional rule requires physical injury and permits monitoring relief only as an item of consequential or parasitic damages after physical injury has been demonstrated,\textsuperscript{18} opponents' arguments suggest that proof of any real threat of

\begin{footnotes}
\item[15.] See John J. Kalas, \textit{Medical Surveillance Damages: A Solution to the Inadequate Compensation of Tort Victims}, 63 Ind. L.J. 849, 853 (1988) [hereinafter Slagel].
\item[16.] A number of articles have discussed and differentiated among the three theories. See, e.g., James A. Henderson, Jr. & Aaron D. Twerski, \textit{Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring}, 53 S.C. L. Rev. 815 (2002) [hereinafter Henderson & Twerski]; Kalas, \textit{supra} note 15; Slagel, \textit{supra} note 14.
\item[17.] Sometimes lawyers filed claims involving all three theories; this was particularly true in the eighties and early nineties, before the law began to become settled in this area. See, e.g., Hagerty, 788 F.2d 315; Herber, 785 F.2d 79; Burns, 752 P.2d 28; Potter, 863 P.2d 795; Ayers, 527 A.2d 287. More commonly, especially in recent years, plaintiffs have focused on medical monitoring and emotional distress theories, leaving out enhanced risk. See, e.g., Buckley, 521 U.S. 424; Ball, 958 F.2d 36; Barth, 673 F. Supp. 1466; Dragon v. Cooper/T. Smith Stevedoring Co., 726 So. 2d 1006 (La. Ct. App. 1999); Hansen, 858 P.2d 970.
\end{footnotes}
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injury before victims become symptomatic is too scientifically uncertain to warrant judicial interference and that monitoring relief rarely, if ever, has any real medical efficacy. Opponents also claim that the number and size of the potential claims threatens to hamstring, and even bankrupt, businesses, causing overdeterrence and, in some cases, leaving insufficient funds to compensate tort victims who suffer more serious physical injuries. Further, opponents argue that generally allowing such claims will promote a torrent of expensive and largely wasteful litigation.

Rather than imposing huge costs on industry, the argument is frequently made that society would be better off if it forced victims to absorb these costs through medical insurance, either because that is a more "efficient" way of handling the problem, or because, in the end, the fear and expense people may suffer as a result of tortious exposures to toxins are of negligible consequence. In the name of limiting these untoward conse-


20. See THOMAS M. GOUTMAN, MEDICAL MONITORING: HOW BAD SCIENCE MAKES BAD LAW, 6 (2001) [hereinafter Goutman] (claiming medical science indicates only six tests may properly be used for screening healthy patients for latent disease); Schwartz, supra note 19, at 1073.


22. Henderson & Twerski, supra note 16, at 844; Martin & Martin, supra note 21, at 142. Martin and Martin suggest that "in the very near future we may all have reasonable grounds to allege that some negligent business exposed us to hazardous substances and to get medical experts to testify . . . [as to a] reasonable medical necessity for us to receive regular medical testing." Martin & Martin, supra note 21, at 130-31. Henderson and Twerski are equally pessimistic: "The specter of a massive, never ending queue of claimants is very real." Henderson & Twerski, supra note 16, at 850.

23. Noting that the transactional costs of litigation aimed at forcing corporations to internalize the costs of their delicts is high, a number of writers recommend having plaintiffs buy their own insurance to handle the problem. See, e.g., Henderson & Twerski, supra note 16, at 844 (stating that medical monitoring relief is unnecessary for the "large majority of Americans . . . covered by . . . general health insurance which presumably is in place to carry the lion's part . . . of the financial burden of medical monitoring"); Martin & Martin, supra note 21, at 142-43 (calling for national health insurance or, in the alternative, for plaintiff-funded medical insurance coverage). These writers concede that universal coverage is presently unavailable, so an argument based on this sanguine view of reality admittedly fails for those without coverage. If a medical monitoring regime were fully in place and cost what these writers suggest, it is not altogether certain that general health insurance plans would not be modified to provide, at most, secondary coverage, with accompanying changes in insurance rates. Alternatively, it is likely that in some cases, including those of known toxic spills affecting large communities, private health insurance would dry up for the victims.

24. Invocation of the economic harm rule is a stand-in for this argument. The economic harm rule prevents tort plaintiffs from recovering for purely economic injury unless they are in privity with the defendant and have "directly" suffered loss as a result of some sort of economic tort (e.g., malpractice, fraud, etc.). See Robert L. Rabin, Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment, 37 STAN. L. REV. 1513 (1985). The action for damages for the future cost of medical screening is hard to reconcile with the economic harm rule. See also Goldberg & Zipursky, supra note 12, at 1706.

But as Rabin points out, the purpose of the economic harm rule is to limit the scope of liability to assure that the tort "punishment" is proportional to the "wrongfulness" of the
quences, some writers alternatively recommend that monitoring relief be limited to those who can prove by externally-adopted standards a high probability that their exposure will make them fall ill,25 or at least, tortfeasor's behavior. Rabin, supra at 1534-38. It is certainly true that economic harms fall lower on one's priority scale than physical injuries, and that this normative judgment is one the common law has made for a long time. See Geistfeld, supra note 18, at 1937. But medical monitoring is done to protect a person's health that is put in jeopardy by a defendant. As Geistfeld points out, one would think that the security interests of the medical monitoring plaintiffs would warrant considerable solicitude as compared to the economic interests of defendants. Id. This is especially true when one sees that the tortfeasors involved were quite blameworthy, which was the case in many of the monitoring cases. Consider, in this regard, the owners of landfills guilty of poisoning ground-water from toxic dumping in violation of safety regulations and known safety risks in Potter, 863 P.2d 795; Ayers, 525 A.2d 287; Redland Soccer Club, 696 A.2d 137, or the asbestos company that blew asbestos fibers from its factory into a neighboring trailer park in Burns, 752 P.2d 28, or the employer who lied to its employees about whether asbestos was being loosened at their work site in Hansen, 858 P.2d 970. But the purveyors of the economic harm rule denigrate the nature of plaintiff's economic injuries, arguing that defendants should not be made responsible for them so that people who are really hurt, that is, those who ultimately fall sick will be sure to get recoveries.

Related to the economic harm rule is a set of nearly polemic arguments regarding the worthiness of medical screening claims. There is the strong suggestion that judges have bought into medical monitoring because of "exogenous factors" like "popular culture's" tendency to "seize upon a . . . few . . . relatively minor risks from among many . . . and focus our collective energies on 'solving' those problems." Henderson & Twerski, supra note 16, at 847. Henderson and Twerski also opine that judges recognize medical monitoring because they kowtowed to the environmental movement and the machinations of academics, "especially authors of student notes," and have been persuaded by ambitious members of a greedy plaintiff's bar. Id. at 848-49. Aside from the rather ad hominem suggestion that judges upholding medical monitoring are weakminded, these arguments often denigrate the harm plaintiffs fear in the monitoring cases with epithets that scarcely hide the contempt of critics. Perhaps the high-water mark of this kind of argument was the early (and rather widespread) characterization of plaintiffs' fears of contracting cancer as "cancerphobia." See, e.g., Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1206 n.24 (6th Cir. 1988); Fournier J. Gale, III & James L. Goyer, III, Recovery for Cancerphobia and Increased Risk of Cancer, 15 CUMB. L. REV. 723, 724-25 (1985). As the California Supreme Court wryly pointed out, there is a proper distinction between phobic reactions which involve mental illness due to recurrent dread "in the absence of objective danger," and fear of cancer which, in many cases, involves perfectly proper anxiety in the face of the threat of developing cancer and is certainly no evidence of mental illness. See Potter, 863 P.2d at 804 n.5. I am unaware of any case approving medical monitoring that comes even close to recommending it as an appropriate response to phobic fears of toxic poisoning.

25. See, e.g., Schweitzer v. Consol. Rail Corp., 758 F.2d 936 (3d Cir. 1998); Hagerty, 788 F.2d 315; DeStories v. City of Phoenix, 744 P.2d 705 (Ariz. Ct. App. 1987); Potter, 863 P.2d 795; Askey, 477 N.Y.S.2d 242. As the California Supreme Court made clear in Potter, this position is a close correlative of the view that monitoring relief should not be awarded unless plaintiff has suffered present demonstrable injury. See Potter, 863 P.2d at 822 (citing Ball v. Joy Techs., Inc., 755 F. Supp. 1344, 1372 (S.D. W. Va. 1990), aff'd, 958 F.2d 36 (4th Cir. 1991), and Villari, 663 F. Supp. at 735). This is the position that the California Supreme Court took in Potter with respect to negligent infliction of emotional distress and that many courts have taken with respect to enhanced risk theories of relief. See, e.g., Hagerty, 788 F.2d at 315; Herber, 785 F.2d 79; Ayers, 525 A.2d at 287—with the altogether predictable result that application of the standard is the death knell to the risk in question. The stricter standard gives plaintiffs a more difficult task in demonstrating entitlement to medical monitoring relief because they have to prove, through expert testimony often backed by scientific support, that there is a reasonable certainty that the exposure to toxic materials will in fact result in physical injury. Commentators agree that this task is likely to be insurmountable. See, e.g., Kalas, supra note 15, at 133; Martin & Martin, supra note 21, at 128; Slagel, supra note 14, at 854.
that if they fall ill, it is only because they were wronged by defendant.26

This paper takes the position that the claims for money damages in all these areas should fail. Nevertheless, it argues that traditional equity doctrines should afford plaintiffs prospective medical monitoring relief to mitigate a plaintiff's fears and risk of death or serious harm. The courts should order defendants to afford a plaintiff's medical monitoring whenever a defendant's misconduct has created a clearly legitimate fear of enhanced risk of death or serious illness and medical monitoring could ease these fears while at the same time allowing for early detection and successful treatment of the maladies. In the author's view, plaintiffs' lawyers have erred by mischaracterizing their claims in such a way as to risk rejection on both doctrinal and practical grounds. Pre-injury medical screening costs should not be awarded to pay damages to cover future medical expenses involved in screening for disease, as most of the successful medical monitoring cases have argued. Nor should the claims for medical monitoring be segregated from the claims involving the emotional distress associated with fear of threatened harm. Instead, a claim for future medical monitoring should be perceived as an equitable order aimed at requiring the defendant to mitigate the plaintiff's fears and risk of harm caused by the defendant's misconduct. This could be accomplished by providing medical screening services to a plaintiff, whenever those services have medical efficacy, by providing for early detection and successful treatment of the illnesses that the defendant's tortious conduct may have caused or rendered more likely to occur. In short, while eschewing

To understand why plaintiffs have tended to avoid pursuing claims under this standard, consider how restrictive it is. A sixty-year-old man who has smoked two packs of cigarettes a day for forty years would not fall within the standard, although few would argue that his risk of lung cancer is tremendously enhanced by his smoking history, and this fact can be verified with epidemiological studies running back to before the issuance of the Surgeon General's Report in 1964. Limiting medical monitoring relief to plaintiffs who can prove with such studies—which, with respect to most toxins, are simply presently unavailable—that they are more likely than not to contract the feared disease, sets the standards of proof so high and narrows the definition of the class of victims so tightly as to make the theory singularly unattractive to run-of-the-mill victims of toxic exposures significant enough to open them up to very substantial risk of long-term harm.

26. See, e.g., Klein, supra note 21, at 16, 18-21; Matthew D. Hamrick, Comment, Theories of Injury and Recovery for Post-Exposure, Pre-Symptom Plaintiffs: The Supreme Court Takes a Critical Look, 29 Cum. L. Rev. 461, 486 (1998) [hereinafter Hamrick]. The heart of Professor Klein's argument goes to causation; in his view, forcing defendants to pay for preventative medical care for plaintiffs should only occur if the defendants would ultimately be forced to pay the plaintiff's medical costs because of a finding that the defendants caused the plaintiffs' injuries; going beyond that and imposing mere medical screening costs on defendants that plaintiffs might not have incurred but for what defendants did would increase deterrence against defendants' enterprises by forcing them to pay costs they otherwise would not have to pay because contracting the disease in question could not be laid at their feet. Of course, broader relief, while it increases deterrence for defendants, may not lead to "overdeterrence;" it may simply mean that defendants are to be required to bear a larger share of the costs of their enterprises than they would, but for monitoring relief regimes, have been able to pass off to others. Henderson and Twerski, though unalterably opposed to medical monitoring before injury in any context, nevertheless opined that Klein's piece "may prove to be influential." Henderson & Twerski, supra note 16, at 839-40.
claims for damages for medical monitoring or for non-intentional infliction of emotional distress, this article argues that the courts have ample equitable power to order preventative relief in the form of reparative injunctions mandating that voluntary medical screening services be made available to tort victims to limit the emotional distress, medical expenses, and increased mortality that a tortfeasor may have inflicted on innocent victims.

The rationale for allowing such a claim is simple. When a person is threatened with the substantial likelihood of contracting a serious disease in the future that could be effectively treated if detected early through readily-available medical monitoring procedures, in most cases, a physician would recommend a monitoring regime if early detection and treatment would likely alleviate the chances that the threatened future onset of disease will cause serious disease or death in the future. Such a course of treatment gives the person a realistic sense that she is doing everything within her power to avoid an untimely demise that she otherwise must helplessly sit by and pray will not occur, thus diminishing—though not entirely eliminating—her emotional distress, and at the same time, promising to prevent or limit the disease’s negative impact on her lifespan and future health. It seems elementary that the defendant, having wrongfully put the plaintiff in the position she is in, should alleviate it by paying for medical monitoring when such monitoring would, under current professional medical judgments, be efficacious in improving plaintiff’s mortality and long-term health prospects. At the same time, it would lighten the plaintiff’s emotional burden of having to face the unknown by being able to undergo preventative medical treatment for early detection.

I. THE DRIVE TO PERMIT MEDICAL MONITORING RELIEF WITHOUT PROOF OF PHYSICAL INJURY

The movement toward granting medical monitoring relief began in 1987 with Ayers v. Township of Jackson.\textsuperscript{27} Ayers was the first case decided by a state supreme court in what became a long series of toxic tort decisions where plaintiffs sought relief for medical monitoring, unintentional infliction of emotional distress, and enhanced risk of disease. Though differing in detail, most of these cases suggested that courts should grant medical monitoring relief when a defendant’s misconduct or tortious activity\textsuperscript{28} had caused a plaintiff’s exposure to

\textsuperscript{27} 525 A.2d 287 (N.J. 1987).

\textsuperscript{28} In an early article following the Love Canal Disaster, two writers suggested a wide variety of liability theories for toxic tort cases, including negligence, trespass, nuisance, and strict liability. See William R. Ginsberg & Lois Weiss, Common Law Liability for Toxic Torts: A Phantom Remedy, 9 Hofstra L. Rev. 859 (1981) [hereinafter Ginsberg & Weiss]. Although the primary theory actually used is negligence, all four theories have been used to ground medical monitoring claims. See Amy B. Blumenberg, Medical Monitoring Funds: The Periodic Payment of Future Medical Surveillance Expenses in Toxic Tort Litigation, 43 Hastings L.J. 661, 671-72 (1992) [hereinafter Blumenberg]. In the tobacco litigation context, “claims for medical monitoring relief have been tied to causes of action in torts and contracts, including fraud, failure to warn, misrepresentation, strict liability,”
and subjected them to a significant increase in the risk of contracting a serious future illness that could be treated or mitigated if detected early through medically advisable screening procedures. At the same time, most courts rejected claims of enhanced risk and non-intentional infliction of emotional distress.

Industry fought all of these claims on the basis of the traditional common law rule that there could be no tort liability until a plaintiff had suffered physical injury. To uphold the emotional distress claims, it argued, would invite suits by phony or phobic plaintiffs with wildly speculative breach of warranty (express and implied), negligence, "intentional infliction of emotional distress, intentional exposure to a hazardous substance, and violation of consumer protection statutes." Badillo v. Am. Brands, 16 P.3d 435, 440 (Nev. 2001) (citations omitted). In one case involving exposure to blood products of patients carrying the human immunodeficiency virus and close contact with a person sick with active tuberculosis, a state court found liability for medical monitoring under the state's workers' compensation statute. Doe v. City of Stamford, 699 A.2d 52 (Conn. Super. Ct. 1997). Finally, attempts have been made to base liability on statutes, such as the Federal Employers Liability Act, the Jones Act, and a variety of state enactments designed to protect consumers or the environment. See, e.g., Metro-N. Commuter R.R. Co. v. Buckley, 521 U.S. 424 (1997) (FEPA); Dragon v. Cooper/T. Smith Stevedoring Co., 726 So. 2d 1006 (La. Ct. App. 1999) (Jones Act); Redland, 696 A.2d 137 (Pennsylvania Hazardous Sites Cleanup Act).

The variety of kinds of exposure for which plaintiffs have sought medical monitoring relief is suggested in the text supra notes 1-9. Most involve environmental disasters, unsafe worksites, or claims involving alleged products liability. A substantial majority of the cases awarding medical monitoring relief require the plaintiff to demonstrate that the condition warranting screening can be detected early and that early detection will improve mortality or morbidity. See, e.g., In re Paoli R.R. Yard PCB Litig., 916 F.2d 829 (3d Cir. 1990); Potter, 863 P.2d 795 (Cal. 1993); Bourgeois v. A.P. Green Indus., Inc., 716 So. 2d 355 (La. 1998); Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 977 (Utah 1993); Ayers, 525 A.2d at 287. A small minority have not required plaintiff to show that medical science presently makes early treatment likely to improve plaintiff's health prospects. See Redland Soccer Club, 696 A.2d at 146 n.8; Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424, 434 (W. Va. 1999). Both courts indicated a reluctance to deprive plaintiff of information that might be helpful in the future as medical science advances; Bower added the view that allowing recovery even without the promise of medical relief that early detection might permit was appropriate to give a plaintiff peace of mind, a chance "of getting his financial affairs in order, making lifestyle changes, and even perhaps, making peace with estranged loved ones or with his religion." 522 A.2d at 434 (quoting Chief Judge Calogero's concurrence in Bourgeois, 716 So. 2d at 363).

See, e.g., Buckley, 521 U.S. at 424 (rejecting unintentional emotional distress claim but retaining question whether some sort of medical monitoring claim might lie); Hagerty v. L & L Marine Servs., 788 F.2d 315 (5th Cir. 1986), modified, 797 F.2d 256 (5th Cir. 1986) (upholding monitoring and emotional distress claim but rejecting claim for enhanced risk); Burns v. Jaquays Mining Corp., 752 P.2d 28 (Ariz. Ct. App. 1987) (upholding medical monitoring claim but rejecting enhanced risk and emotional distress claims); Potter, 863 P.2d 795 (upholding medical monitoring but limiting emotional distress and enhanced risk claim to cases where plaintiff can show prospective physical injury more probable than not); Dragon, 726 So.2d at 1006 (Jones Act case denying negligent infliction of emotional distress claim but upholding claim for medical monitoring relief); Bourgeois, 716 So.2d 355 (rejecting enhanced risk but upholding medical monitoring relief); Ayers, 525 A.2d 287 (upholding medical monitoring claim but limiting enhanced risk claim to cases where plaintiff can show future physical injury more probable than not); Hansen, 858 P.2d 970 (upholding medical monitoring claim but rejecting claim for negligent infliction of emotional distress absent proof of actual illness resulting from tortious conduct); Bower, 522 S.E.2d 424 (declining to address negligent infliction of emotional distress claim but upholding medical monitoring relief).
tive damages claims that warranted no relief.32 It fought the right to medical monitoring relief and enhanced risk by arguing that such claims, in the absence of actual evidence of injury, flew in the face of the ancient maxim *dannum absque injuria*, the "no harm/no foul" rule of Anglo-American tort law that prevents suits for wrongful misconduct unless and until it has caused a plaintiff some actual injury. Acknowledging that emotional distress33 and prospective medical monitoring relief34 are each often granted in the form of parasitic damages when a defendant's tortious conduct has caused a plaintiff to suffer an actual physical harm, defendants nevertheless asked courts to enforce the traditional rule that plaintiff has no right to sue for damages in a tort case unless and until the defendant has in fact suffered physical injury. In the cases where relief

32. The central arguments were not that the plaintiffs seeking emotional distress damages were all suffering from irrational phobias, although that argument occasionally made a back-door entrance into the discussion. See discussion of "cancerphobia," *supra* note 24. More commonly, the argument was that the physical injury requirement was necessary to prevent a flood of claims by people whose claimed injuries could be fraudulently made and hard to controvert. See, e.g., *Buckley*, 521 U.S. at 453; *Hansen*, 858 P.2d at 974. Alternatively, physical injury was *bona fide* but nevertheless so difficult to measure for valuation purposes as to invite the wildest speculation by juries. See *id*. In addition, courts expressed concern lest damages for emotional distress extend liability too far. See *id*. For much the same reason that the law uses proximate cause and the economic harm rule to limit the scope of actionable duty so as to preserve the assets of defendants for classes of victims more likely to be in need, the law gives priority to those with physical injury over those whose claims involve stand-alone emotional injury claims. See *Geistfeld*, *supra* note 18, at 1934-36. Less often stated in opposition to "pure economic harm" claims was the normative view that mental distress claims, unless the distress was so acute as to cause physical symptoms over a long period of time, were trivial and ought to be taken care of by the distress victims without succor from the tortfeasor or the courts. *Hansen*, for example, wanted the bar to emotional distress claims set high because "almost everyone is exposed from time to time to toxic substances of one sort or another. . . . [and e]veryone must deal with stress and anxiety in daily life." 858 P.2d at 975. In the court's view, "[t]ransitory sleeplessness and anxiety do not amount to the type of emotional distress with which a reasonable person, normally constituted, would be unable to cope." *Id*. Similar views were articulated in *Potter*, wherein the court noted that emotional distress should only be compensable when it is so serious that "a reasonable [person], normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." 863 P.2d at 810 n.12 (citation omitted). For a view that normative values favor treating serious emotional distress as compensable injury, see Goldberg & Zipursky, *supra* note 12, at 1694-95.

33. See, e.g., *Simmons v. Pacor*, Inc., 678, 674 A.2d 232, 239 (1996); *Restatement (Second) of Torts* § 924(a) (1977). The leading cases denying emotional distress claims acknowledge that emotional distress damages are recoverable when they accompany physical injury. See, e.g., *Buckley*, 521 U.S. at 430; *Ball v. Joy Techs.*, Inc., 958 F.2d 36, 38 (4th Cir. 1991). In fact, emotional distress claims without injury are permitted in a narrow range of special circumstances, including the bystander cases (e.g., plaintiff sees defendant injuring plaintiff's child), those in which defendant has some special relationship with the plaintiff (e.g., analyst-patient), as well as those in which the psychological harm is so immediate and overwhelming (e.g., the "fright cases") as to warrant judicial intervention. See Goldberg & Zipursky, *supra* note 12, at 1663-64; *Henderson & Twerski*, *supra* note 16, at 825-27.

34. See *Restatement (Second) of Torts* § 924(c) (1977); CHARLES McCORMICK, *DAMAGES* § 90 (1935); JACOB A. STEIN, *STEIN ON PERSONAL INJURY DAMAGES* § 5:18:1 (2d ed. 1991). The cases rejecting monitoring damages without proof of physical injury concede ongoing monitoring costs are appropriately recoverable as reasonable medical expenses when they accompany an award for physical injury. See, e.g., *Buckley*, 521 U.S. at 438-39; *Ball*, 958 F.2d at 39.
was sought for increased risk of future injury, the plaintiff might never come down with the malady she claimed threatened her. The physical injury requirement, it was argued, protected against speculative and wasteful litigation in cases where injuries are uncertain to ever occur and left resources available to plaintiffs who finally got sick and were in serious need of compensation.35

II. COLLAPSE OF EFFORT TO CREATE CAUSES OF ACTION BASED ON ENHANCED RISK AND NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS THEORIES

With few exceptions, these arguments on enhanced risk and negligent infliction of emotional distress theories prevailed. The courts nearly universally rejected claims for damages based on the fact that a plaintiff’s exposure to a toxin had increased his risk of later contracting disease.36 Such claims are a present award for a future injury that may or may not ever occur.37 Damages in such an action would have to take into account the fact that a plaintiff might never in fact contract the disease in question. Hence, in making the award, a court would have to calculate the prospective value of the case if plaintiff were to develop a full-blown case of the disease, thereby incurring “full” damages, and then discount that amount by the chances that she would not in fact contract the disease and that whatever disease she did contract was the result of factors other than defendant’s misconduct.38 Failure to provide a discount would result in

35. Judges nearly uniformly expressed concern about allowing speculative claims to be brought before a plaintiff had suffered real harm because allowing such claims might flood the courts with inherently speculative claims and leave defendants without sufficient resources to pay damages to seriously injured plaintiffs who, after the long incubation period that frequently attends toxic exposures, finally develop illness and need compensation from the depleted resources of the tortfeasor who loosed the toxin in the first place. In the asbestos area, before courts abolished the single action rule that precluded later suit if one had already sued for some damages earlier, a few early cases allowed enhanced risk claims for people who suffered minor exposures (including not only asymptomatic pleural plaque or thickening, but also asbestos). See Henderson & Twerski, supra note 16, at 819-21. But once the courts rejected the single action rule and allowed plaintiffs to sue for serious illnesses—such as mesothelioma or some other virulent form of cancer—as they became diagnosable, the courts flatly rejected enhanced risk claims. Id. at 822-23 and cases cited therein at n.27.

36. See supra notes 31, 35 and cases cited therein.


gross over-deterrence because it would impose on a defendant a duty to provide compensation for deaths and illnesses that could not be fairly attributable to its own conduct.\textsuperscript{39} Under traditional doctrine, of course, such claims fail where physical injury has not yet been realized.

There are several reasons why the courts' refusal to permit enhanced risk claims has been wise. First, allowing such claims would result in serious statute of limitations problems. When, after all, would the cause of action accrue—when plaintiff discovered her risk of injury had been increased, or when she became sick? Determination that the tort claim does not accrue until disease becomes symptomatic and implementation of a discovery rule have provided some relief in the toxic tort cases, though these do not fully take care of the problem of statutes of repose or the difficulties of proving causation when disease arises long after the tortious activity has come to an end.\textsuperscript{40} Putting those matters aside, there is the problem of the single action rule, which historically would have prevented plaintiff from bringing two actions for damages arising out of the same wrongful conduct. The courts have rightly disposed of the single action rule in the asbestos cases, allowing a plaintiff to sue first for minor illnesses and then later upon the onset of more serious diseases like cancer,\textsuperscript{41} and there is reason to believe that they might refuse to enforce the rule in cases where a plaintiff first sues for separate losses, such as medical monitoring expenses, and then later sues for disease, should that ultimately occur.\textsuperscript{42} But virtually no courts would allow the same plaintiff to

\textsuperscript{39} See David Rosenberg, The Causal Connection in Mass Exposure Cases: A “Public Law” Vision of the Tort System, 97 HARV. L. REV. 849, 858-59 (1984) (“to hold a defendant firm accountable not only for disease losses caused by its own tortious conduct, but also for those attributable to background risk, might inflict a ‘crushing liability’”) (footnote omitted). Professor Rosenberg is one of the few writers to argue for some sort of mechanism for making tortfeasors responsible for enhancing victims’ likelihood of disease prior to injury. The “public law” article proposes, in the interest of assuring perfect levels of deterrence for mass toxic tort cases, creation of an elaborate insurance mechanism whereby defendant would have to provide an insurance fund (which later could be distributed among the victims according to principles of insurability), the amount of which would be precisely determined by figuring out the gross value of disease the whole class of victims will suffer discounted by the degree to which such disease would be fairly attributable to background factors or other tortfeasors. He was very clear that liability should be awarded regardless of whether disease attributable to defendant’s misconduct was more or less than half the total cause of disease. \textit{Id.} at 859-60. In later writing, Professor Rosenberg has adhered to the same position. See David Rosenberg, Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss, 88 VA. L. REV. 1871 (2002).

\textsuperscript{40} See supra notes 12-13 and accompanying text.

\textsuperscript{41} See Blumenberg, supra note 28, at 669-70 and authorities cited therein at n.40; Henderson & Twerski, supra note 16, at 819-24.

\textsuperscript{42} See Kara L. McCall, Comment, Medical Monitoring Plaintiffs and Subsequent Claims for Disease, 66 U. CHI. L. REV. 969 (1999). As McCall notes, the dangers associated with abrogation of the single action rule are not present in the monitoring case: “A court permitting medical monitoring damages expressly decides not to compensate for future injury but instead to compensate only for the cost of monitoring. Therefore, when a medical monitoring plaintiff brings a second claim, there is no risk of double recovery.” \textit{Id.} at 987 (footnotes omitted). While there are few cases dealing with the issue, most (but not all) of the cases suggest by way of dictum that the single action rule would not be enforced in the monitoring cases. Accord Pankaj Venugopal, Note, The Class Certification of Medical Monitoring Claims, 102 COLUM. L. REV. 1659, 1674-75 (2002) [hereinafter Venugopal].
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recover twice, once for enhanced risk and later for damages associated with full-blown disease. Allowing her to recover again could force the defendant to pay twice, first for her discounted loss, then again for much of the same loss when plaintiff sued for the later recovery.\footnote{43} such actions would be inefficient and lead to overdeterrence of those participating in the defendant's industry because defendants would end up paying not only full damages for those who came down sick, but also partial damages for those who were exposed but never actually became ill.\footnote{44} And should the courts allow the plaintiffs a choice to sue now for enhanced risk or later for full damages, but not both, plaintiffs would rightly be chary of taking advantage of the right to sue early and would do so only where the chances of real illness were extremely remote.\footnote{45} Courts are rightly wary of encouraging a flood of expensive litigation that would divert judicial resources from efficiently handling the claims of more seriously injured plaintiffs who have suffered real harm at the hands of a business or governmental actor.

Moreover, the management of enhanced risk claims, particularly with avoiding speculation regarding proof of causation and calculation of damages, would prove a difficult and expensive task. First, the courts would have to measure the future "value" of a disease not yet contracted. One can imagine a court attempting to accomplish this by averaging out the results of a few test cases,\footnote{46} but one must realize the prospects for success in choosing the proper figure and then working out the value of a particu-

There is scant scholarly opinion in opposition to this view, but here and there one finds an article indicating the possibility that res judicata might preclude a second action. \textit{See, e.g.,} Schwartz, supra note 19, at 1079 ("a medical monitoring award could preclude plaintiffs from seeking additional damages if and when they actually develop a disease... ").

There is almost no judicial authority; outside the asbestos area, on the issue McCall, Venugopal and Schwartz address. What reported authority exists is dictum. A number of courts have suggested that the single action rule should not bar a subsequent action for damages. \textit{See, e.g.,} Hagerty v. L & L Marine Servs., 788 F.2d 315, 320-21 (5th Cir. 1986), \textit{modified,} 797 F.2d 256 (5th Cir. 1986); Ayers v. Township of Jackson, 525 A.2d 287, 300 (N.J. 1987). On the other hand, at least one court has suggested it would be inclined to bar a second action. \textit{See} Wood v. Wyeth-Ayerst Labs., 82 S.W.3d 849, 858-59 (Ky. 2002).

\footnote{43} \textit{See supra} note 42, and authorities cited therein.

\footnote{44} Even if the court allowed a second action and gave the defendant a set-off for those who it had paid discounted damages, to the extent of what had been paid, the result would involve a multiplicity of actions and would be inefficient, at least to the extent the defendant had to pay people who did not get sick.

\footnote{45} If the court allowed plaintiffs to sue now or sue later, but not both, a conscientious plaintiff's lawyer would have difficulty counseling her client to sue for enhanced risk damages if she really believed there was a serious likelihood that the client would ultimately contract the disease. So advising a client would in many cases result in leaving the seriously ill tort victim undercompensated unless she was able to show that her lawyer had engaged in malpractice in failing to warn her of the consequences involved in choosing the enhanced risk claim in the first place. In all likelihood, plaintiffs' lawyers would counsel their clients to sue for enhanced risk only in those cases where the chances of actually contracting the disease or showing that it was caused by defendant's misconduct was extremely improbable.

\footnote{46} \textit{See} George Rutherglen, \textit{Future Claims in Mass Tort Cases: Deterrence, Compensation, and Necessity,} 88 Va. L. Rev. 1989, 1993-94 (2002). For other articles suggesting either waiting for an appropriate sample of cases to be litigated or settled or creating such a sample from claims of class members, see authorities listed \textit{id.} at 1994 n.16.
lar plaintiff's losses are not good. Figuring out a generalized "value" for measuring the gross damages that contracting the disease would involve should be daunting enough. But the speculatory nature of this endeavor pales in comparison to that of determining what discount rate the court ought to employ so as not to make a defendant responsible for all the background risks that might have caused a particular plaintiff's loss. This, of course, involves proof of causation in fact: to what extent would the disease in question be caused by defendant's conduct and not by some extraneous events or conditions? The evidence of that strict proof of causation is all but impossible.15

47. Causation problems arise with respect both to general causation (for example, a product's generalized ability to cause harm to a wide population) and individualized or specific causation (that is, the likelihood that a specific exposure caused—or will cause— injury to a specific plaintiff, given his own peculiar medical history, exposure to other products, etc.). See Elizabeth J. Cabraser, Your Products Liability Hit Parade: A Class Torts "Top 20", 37 TORT & INS. L.J. 169, 213-14 (2001). Generally, nobody understands the mechanism through which toxins may cause a given disease, which means that even when a person is diagnosed, it is possible to conclusively attribute the illness to a particular toxin only in those rare cases where the disease is seen as a "signature disease"—diseases which are clearly the exception, not the rule. See Troyen Brennan, Helping Courts With Toxic Torts: Some Proposals Regarding Alternative Methods for Presenting and Assessing Scientific Evidence in Common Law Courts, 51 U. PIT. L. REV. 1, 21-22 (1989). More commonly, since there is usually no way to directly and scientifically link a particular toxic exposure to a particular onset of disease, the linkage must be proven inferentially, through use of epidemiological studies and other scientific data—animal studies, laboratory studies, etc.—that may shed light on the toxicity of a particular product. Unfortunately, for the wide range of toxins, there are precious few epidemiological studies indicating precisely what the chances of contracting disease will be. And what numbers there are rarely can account for the fact that different plaintiffs may have had different levels of exposure to the toxins and that each plaintiff may have a history of other health factors that would complicate determination of the extent to which his particular exposure may have increased his likelihood of disease. In addition to these problems, there often is the difficulty of actually ascertaining the level of exposure particular plaintiffs may have suffered many years previous to the onset of symptoms and their decision to bring suit, as well as the difficulty of determining whether and to what extent over that period plaintiffs may have been exposed to other factors that could have contributed to their chances of contracting whatever disease is in question. These problems are difficult enough in a single-plaintiff case, but they are multiplied a hundred-fold in complex litigation involving sometimes hundreds of plaintiffs and, in a few cases, multiple defendants.

Plaintiff's lawyers have had modest (perhaps one should say, "underwhelming") success in persuading courts to avoid the physical injury requirement by allowing plaintiff to recover for negligent infliction of emotional distress.48 A virtue of the emotional distress claims is that a plaintiff can at least claim that at the time of suit he has actually suffered an injury—albeit a nonphysical one. Thus plaintiffs are not claiming damages because they might get sick in the future; they are claiming that they are suffering presently.

But the emotional distress claims also run into problems. With rare exceptions, tort law has refused to allow damages for emotional distress unless and until the claim is associated with physical injury.49 There are many reasons for this view. Most frequently mentioned in the case law is the fear of fraudulent claims—a plaintiff's claimed injury is internal and open to her own self-serving testimony—as well as a sense that there are no objective standards for giving monetary valuation to whatever psychological harm a plaintiff may concededly suffer.50 Less frequently mentioned are normative concerns.51 Emotional peace is impossible in a

48. See supra notes 31-35 and accompanying text.
49. See supra notes 31-35 and cases cited therein. The reluctance of courts to openly embrace wide-ranging claims of damages for negligently inflicted emotional harm reflects a fear that doing so will open the floodgates to fraudulent or frivolous litigation. See generally DAN D. DOBBS, THE LAW OF TORTS § 308 (2000); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 360 (5th ed. 1984). This reluctance has meant that in the instances where courts relax the physical injury requirement, they require that there be a direct, immediate threat of physical harm to plaintiff or at least a threat of major, objectively overwhelming trauma to plaintiff's psyche. It seems safe to say that the cases upholding claims for negligently inflicted emotional distress never meant to provide compensation for general malaise and fear that one may contract a disease sometime in the future. See Henderson & Twerski, supra note 16, at 827.
51. A few cases mention such normative concerns. See, e.g., Potter v. Firestone Tire & Rubber Co., 863 P.2d 795, 810 n.12 (1993); Hansen v. Mountain Fuel Co., 858 P.2d 970, 975 (Utah 1993). But there is no question that they lurk behind judicial preference for victims demonstrating physical injury over those with less tangible illnesses. Goldberg and Zipursky suggest that the historic reason courts forbade recovery for emotional distress unless it was a consequence of physical injury was that the nineteenth-century judges who first elaborated the modern law of negligence labored under various pre-modern misconceptions about science and nature that led them to discount emotional injury as insubstantial or unreal. Moreover, their illusions were tied to a generally sexist disposition. Emotional distress was, to their eyes, the sort of thing that women, in all their delicacy, experienced. As women's interests were, at the time, of little concern to the law, emotional distress was not either. Goldberg & Zipursky, supra note 12, at 1668-69. After conceding that the line against claims for "pure" emotional harm (i.e., that unaccompanied by physical injury) has been substantially held for practical reasons involving fear of fake claims, hard to value claims, and the like, the authors note that these concerns could be addressed by requirements of heightened proof. See id. at 1670-71. In the authors' view, the reason the law continues to impose narrow limits on emotional distress claims involves a normative view that at least a large part of plaintiff's harm may often result from plaintiff's own weakness and not be the proximate result of defendant's breach of duty. Id. at 1675-76. In their view, hostility to
world where people are likely to interact and rub against one another,
and there is a very American notion that, by-and-large, the law should
hold people responsible for their own psychological well-being rather
than promote litigation through which they can blame their unhappiness
on others and receive generous compensation therefor. This fear—that
in many cases some or all of a plaintiff's stress might involve an inappro-
priate response to threats that are simply part of the wear and tear of
everyday life—has led many courts to be extremely reluctant to allow
recovery for infliction of emotional distress, lest doing so should open the
judicial floodgates to a sea of weak, sometimes faked, sometimes simply
neurotic, claims.52

III. SUCCESS OF MOVEMENT TO PERMIT CLAIMS FOR
MEDICAL MONITORING

Prosecutors of medical monitoring claims met far more success than
those of enhanced risk or emotional distress. The cases favoring medical
monitoring got around the injury requirement by defining the injury as
economic: the tortious conduct that had put the plaintiff at risk of future
death or serious bodily harm had forced upon her the medical necessity
of undergoing expensive periodic medical screening to gain the benefits
of early detection of disease so as to prevent premature death or to miti-
gate serious illness; a defendant, having imposed this medical necessity on
a plaintiff, ought to be required to pay for it.53 Decisions upholding med-
ical monitoring relief often contended that the remedy is in the public
interest because it would likely save lives and deter defendants from fail-
ing to avoid exposing the public to dangerous products by preventing
them from shifting the medical screening costs their conduct has imposed

plaintiff's claims of emotional distress as likely fraudulent fails when it is applied to cases
of serious and likely fear, as might be the case with substantial exposure to a carcinogen,
and certainly does not explain why a victim of such a harm should be left without a remedy
when a person claiming much more amorphous harms (e.g., pain and suffering), without
much in the way of elaboration should be awarded large sums of money if she suffered a
physical harm. But, they argue, the law's "focus on the subjectivity of emotional dis-
tress...points to a different and more plausible concern that does help explain negligence
law's suspicion of emotional harm claims: Emotional harm is often, though not always, in
the control of, and therefore the responsibility of, the victim." Id. at 1677.

52. Concern about the floodgates is real. The Supreme Court indicated this concern in
Buckley, 521 U.S. at 435-36, discussed infra at notes 70-98 and accompanying text; see also
writing evidences similar concerns. See, e.g., Geistfeld, supra note 18, at 1934 (arguing
generally that tort law gives higher priority to compensate for physical injury than it does
for emotional distress, not so much as to protect defendants or because it devalues emo-
tional injury per se, but principally in order to prioritize cases to assure that a defendant's
resources are conserved so as to give physically injured plaintiffs a much higher chance of
receiving full compensation); Henderson & Twerski, supra note 16, at 832-35 (discussing
emotional distress claims in asbestos-exposure cases).

53. See, e.g., In re Paoli R.R. Yard PCB Litig., 916 F.2d 829, 852 (3d Cir. 1990); Potter,
863 P.2d at 824; Ayers v. Township of Jackson, 525 A.2d 287, 311-12 (N.J. 1987); Askey v.
976.
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on innocent victims. The decisions point out that granting medical monitoring relief without physical injury would at least provide partial accountability for tortfeasors who might otherwise avoid having to pay because the lengthy period of time between initial defendant activity and manifestation of plaintiff's illness often forces a tort victim to sue too late, outside statutory time limits on bringing suit; even without a time bar on litigation, they noted that delay in discovery of one's claim not infrequently undermined the plaintiffs' ability to prove causation and made it difficult, if not impossible, to hold many defendants responsible for their misdeeds. Finally, the cases pointed out that it was simply inequitable for an individual, wrongfully exposed to dangerous products or toxic chemicals but unable to prove that disease is likely, to have to pay his own expenses when a doctor would not have required him to undergo those expenses but for the defendant's misconduct. As one court put it, holding the defendant liable is simply consistent with basic "societal notions of fairness and elemental justice."

The cases upholding medical monitoring prior to physical injury differ among themselves regarding precisely when monitoring relief should be permitted. While there are many differences in detail, perhaps the most significant involve the degree to which a plaintiff's exposure to a toxin is necessary to force a defendant to underwrite medical monitoring costs. The most liberal cases focus on the economic harm the victim will sustain because the defendant has pushed her into a class of persons whose history warrants, according to current medical standards, regular screening for one or more diseases that would not have been deemed advisable prior to her exposure to defendant's product. These courts would not limit liability for these costs to cases in which a defendant would be liable for the plaintiff's illness should it later develop. Instead, they would authorize medical monitoring when a variety of factors, considered in the aggregate, warrant mandating a medical monitoring regime.

54. See, e.g., Potter, 863 P.2d at 824; Ayers, 525 A.2d at 311-12; Hansen, 858 P.2d at 977.
56. As the Ayers court put it: "It is inequitable for an individual, wrongfully exposed to dangerous toxic chemicals but unable to prove that disease is likely, to have to pay his own expenses when medical intervention is clearly reasonable and necessary." 525 A.2d at 312.
57. Potter, 863 P.2d at 824.
58. The factors differ in detail from court to court. In Ayers, the New Jersey Supreme Court held that the cost of medical surveillance is . . . compensable . . . 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. 525 A.2d at 312.

In Potter, the California Supreme Court said that monitoring relief should be ordered when the plaintiff showed, through reliable medical testimony, that future medical moni-
The broad discretion the liberal courts would confer on trial judges to consider and balance myriad factors is not universally approved by either writers or courts who claim to approve medical monitoring. As noted above, a number of writers think the focus on the economic costs a defendant has forced a plaintiff to incur is misplaced unless it is tightly linked to the enhanced jeopardy a defendant has thrust upon a plaintiff's longevity. They argue that a defendant should be liable for monitoring only in those cases where a defendant ultimately would be liable for disease should a plaintiff contract it. In their view, unless a plaintiff can prove that the courts should not order defendants to pay for a plaintiff's monitoring. As one writer puts it, recovery should be limited to those cases in which the plaintiff can demonstrate that the risk of disease after exposure to a defendant's product more than doubles the odds that she will contract the threatened disease over those odds she would have been subject to before exposure.

In Paoli, the Third Circuit came up with a four point test, mandating that plaintiff prove that

1. she was significantly exposed to a proven hazardous substance through the negligent actions of the defendant;
2. as a proximate result of exposure, plaintiff suffers a significantly increased risk of contracting a serious latent disease;
3. that increased risk makes periodic diagnostic medical examinations reasonably necessary; and
4. monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial.

Other courts numbered their tests differently. See, e.g., Hansen, 858 P.2d at 979 (eight point test); Merry v. Westinghouse Elec. Corp., 684 F. Supp 847, 850 (M.D. Pa. 1988) (three point test). Whatever version the courts favoring medical monitoring used, most of them have authorized medical monitoring on the basis of judicial discretion using a similar list of factors.

My research has failed to find a single case expressly adopting the view taken by Klein and Hamrick in the articles cited supra note 26. But many of the cases upholding monitoring relief are consistent with it. This was true from the start. Friends for All Children v. Lockheed Aircraft Corp., 746 F.2d 816 (D.C. Cir. 1984), discussed supra note 11, was a case in which the conditions Klein and Hamrick would set for monitoring would have been found to exist; if the children came down with the neurological damage that threatened them, there is no question that it would have been attributable to the decompression and crash of the aircraft in which they were passengers. A similar analysis would follow in many cases. See, for example, Doe v. City of Stamford, 699 A.2d 52 (Conn. 1997), wherein the court upheld medical monitoring for a plaintiff who had been exposed to a person carrying the AIDS virus as well as tuberculosis. Moreover, many of the medical monitoring cases speak of monitoring payments as simply a means of assuring full recovery of consequential damages suffered as a result of defendant's tort. See, e.g., Hagerty v. L & L Marine Servs., Inc., 788 F.2d 315, 319 (5th Cir. 1986); Miranda v. Shell Oil Co., 7 Cal. Rptr. 2d 623, 627 (Cal. Ct. App. 1992); Askey, 477 N.Y.S.2d at 247. It is logical to conclude that, at least to the extent that these cases rely on that theory, they are really taking the same view as Klein, which is to say, absent free-standing tort liability for disease, medical expenses should not be compensable.

Klein, supra note 21.
Yet a third group of cases goes much further toward limiting medical monitoring relief—virtually to the point of prohibiting it. In their view, such relief should be awarded only in those cases in which there is a reasonable medical certainty that the defendant’s toxic product will in fact ultimately cause the plaintiff to come down with the disease. For these courts, the injury is not the medical costs at all, but the threat of physical harm that hangs over the plaintiff. To take care of that, it suffices that a defendant take steps to mitigate the future losses a plaintiff has been able to prove he will probably have because of a defendant’s misconduct.

Virtually all the courts permitting medical monitoring relief absent physical injury do so only when the state of current medical diagnostic tools and interventions are such that providing monitoring substantially increases the likelihood of reduction of long-term serious medical harm to the victim. A minority go further, indicating a willingness to provide monitoring relief even if early medical intervention would have no significant efficacy other than to give the victim advanced warning that she was in for a long-term illness, thus enabling her to make plans for the inevitable outcome. The difference between these views may be quite substantial. The more lax view seems to allow medical monitoring solely to provide solace to the victim, thus avoiding any real attempt to show that whatever monitoring regime is ordered has real promise of changing the clinical outcomes for people suffering exposure to toxic substances.

Cases favoring medical monitoring often distinguished such claims from those for negligent infliction of emotional distress or enhanced risk of future harm. The courts allowing medical monitoring claims where no physical injury has yet been inflicted were able to avoid many of the difficulties that would flow from allowing suits based on the other “unrealized tort” theories. They were able effectively to argue that there was nothing unreal or speculative about the monitoring costs plaintiffs must suffer as a result of a defendant’s toxins. Thus, medical monitoring claims favora-

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61. See supra note 25 and accompanying text.
63. One must be careful not to overstate the difference between these two views. The more lax view treats improving patient morale and quality of life as sufficient to tip the scales in favor of monitoring, while the tighter view requires substantial improvement in mortality or morbidity before it would permit monitoring. The cases conditioning monitoring relief on proof of the clinical efficacy of monitoring rarely mention issues involving general improvement of quality of life for a terminal patient, so it cannot be said that the courts are placing that factor on the scales when they authorize balancing factors to determine whether surveillance should be ordered. Nevertheless, one would be hard pressed to deny that at least a side effect of any monitoring regime aimed at improving longevity would be to improve the psychological and social life of the person being monitored.
64. In allowing medical monitoring in the absence of a showing that early detection would likely alleviate physical harm, the courts permitting it do say that a reason for allowing it now is that in the future new treatments may be developed that will permit treatment of previously untreatable diseases. Such speculations seem a weak reed indeed to use to support the cost of medical monitoring.
bly compared to those based on emotional distress and enhanced risk theories, which courts generally refused precisely because they were seen as speculative, likely to open the floodgates of litigation, and, at the end of the day, threaten to bankrupt defendants before the most seriously injured victims of their torts developed serious illness warranting substantial damages. Unlike enhanced risk claims, here a plaintiff is alleged to have suffered present injury—the economic harm of having to undergo tests needed to assure early detection so that she can save her life. This "injury" results directly from a defendant's misconduct, the argument runs, because a plaintiff would have no need of undergoing the tests—and paying their costs—but for the fact that the defendant's misconduct has now put her in a risk category for which her doctor, exercising reasonable medical judgment under current medical standards, now recommends the testing regime as necessary to her wellness. Furthermore, there is no problem of double damages or lack of efficiency. Instead, the defendants' payout to finance medical screening expenses they have forced upon those exposed to their toxic products is likely to deter misconduct by making defendants responsible for all the costs their misconduct causes, because it forces them to cover not only for the illnesses they cause but also for the additional healthcare costs their conduct would otherwise foist on other innocent victims who would have to pay in order to protect themselves against threatened death or sickness. An added boon is that, if the exposure defendants have wrongfully threatened plaintiffs with what in fact ultimately does cause the plaintiffs' harm, at least the monitoring relief financed by defendants will help to mitigate the plaintiffs' damages. If the plaintiffs then follow the regimen to the extent authorized by the court, presumably lives will be saved and the defendants' ultimate costs will be lowered; if the plaintiffs were to refuse to undergo the screening services offered to them by defendants, then the defendants' lawyers would be in a strong position to shift at least some responsibility for ultimate liability through doctrines of assumption of the risk, contributory negligence or avoidable consequences.

Medical monitoring claims also avoid many of the problems of litigation management that attend enhanced-risk claims. In the medical monitoring context, a court still must evaluate the extent to which a defendant's tort has substantially increased a plaintiff's absolute and relative risk of contracting disease above levels that are part of everyday life or which are peculiar to a plaintiff because of idiosyncratic factors relating to the plaintiff's own life experience. However, problems of proof

66. See cases cited supra notes 32, 35 and accompanying text.

67. It is important to realize that any serious risk assessment must involve evaluation of risk in both its absolute and relative senses. The distinction is succinctly explained by Abraham:

A significant increase requirement is designed to ensure that medical monitoring will be worthwhile. First, we are all exposed to a wide variety of risks in our lives; unless an increase of risk raises the threat faced by the plaintiff to a significant level, it is not an appropriate occasion for monitoring in order to mitigate possible future loss. Thus, the risk must be significant in an "ab-
are dwarfed in comparison to the difficulties of determining causation and damages that would necessarily attend any serious attempt to resolve enhanced risk claims. With respect to the latter, the task of measuring what the mean "value" of disease and then applying a proper discount rate would be daunting indeed. Medical screening costs, while they could go up or down as medical knowledge and techniques advance, are comparatively concrete and predictable. However, the need for mathematical precision in determining just how much defendant's actions have increased the likelihood of a particular illness in the claimant is cut short if the issue is not whether defendant has more probably than not caused plaintiff to contract a disease, but is instead simply whether a reasonable

solute" sense. Second, the very idea of an "increase" of risk presupposes a baseline—some background risk of suffering harm against which the change in risk level brought about by the defendant's conduct can be measured. The less "significant" that increase is, the less likely any harm that does materialize was in fact caused by the defendant's conduct. So the risk must also be significant in the "relative" sense.

Abraham, supra note 18, at 1979-80.

68. The reason for this is that most courts favoring medical monitoring have not required plaintiffs to "quantify" the level of risk with the same kind of statistics that are necessary to prove an enhanced risk claim. Instead, they have sustained claims when plaintiffs prove increase in risk of a "significant," "serious," or "substantial" nature, without requiring its precise quantification. This refusal to require quantification of risk has driven critics of medical monitoring to distraction. See, e.g., Henderson & Twerski, supra note 16, at 844-45 (effect of discharged toxins around world on risk levels at best speculative so as to leave no natural boundaries on duty to pay medical monitoring costs); Klein, supra note 21, at 18 (awarding medical monitoring damages without regard to a quantifiable enhanced risk standard "completely destroy[s]") causation rule of tort law); Schwartz, supra note 19, at 1072 (need for legislation to avoid current "'battle of the experts' to determine the 'confusing, highly technical presentation of scientific evidence in toxic tort cases. . .[that] can lead factfinders astray by tangling them in a web of statistical uncertainties and standards of persuasion.'"); Hamrick, supra note 26, at 476 (demanding more probable than not standard). One writer takes a dim view of even quantified risk, arguing that even if risk is quantified, it is likely to be proven "by way of linear extrapolation from high-dose rodent studies using [Environmental Protection Agency] risk assessment techniques that are specifically designed to greatly overstate the risk." Goutman, supra, note 20, at 31. Those writers satisfied with a clearly quantified standard sometimes appear satisfied if there is either quantification or some other "objective" definition of what constitutes an unacceptable exposure to a toxin so as to create a definite "trigger" that would be the principal way of determining when medical monitoring relief is appropriate. They claim that failure to set such requirements will lead to unprincipled decision-making and open the floodgates in ways that lead to gross overdeterrence of worthwhile projects. For recommendations of objective "triggers," see, for example, Schwartz, supra note 19, at 1077 (recommending legislation along lines of regulations issued pursuant to the Occupational Safety and Health Act, 29 U.S.C. § 651 et seq, which sets limits for hazardous substance exposures in workplaces and provides for surveillance procedures to determine whether workplaces have exceeded those limits); see also Troyen A. Brennan, Environmental Torts, 46 VAND. L. REV. 1, 69 (1993) (same) [hereinafter Brennan]; Klein, supra note 21, at 17; George W. C. McCarter, Medical Sue-Veillance: A History and Critique of the Medical Monitoring Remedy in Toxic Tort Litigation, 45 RUTGERS L. REV. 227, 275 (1993) [hereinafter McCarter] (recommending use of admittedly conservative medical surveillance guidelines recommended by National Institute for Occupational Safety and Health but rejecting standards set by EPA as heedlessly overbroad). Hamrick, supra note 26, at 476 (recommending limiting recovery only to those exposed to "significant concentrations" of one or more of the fifty most toxic chemicals as designated by the Agency for Toxic Substances and Disease Registry).

69. See, e.g., Ayers, 525 A.2d at 312.
physician would find medical monitoring reasonable and necessary under the new circumstances created by plaintiff's exposure to defendant's toxin.70

IV. METRO-NORTH COMMUTER RAILROAD COMPANY V. BUCKLEY

In 1997, the United States Supreme Court refused to permit medical monitoring damages relief in an action filed under the Federal Employees Liability Act ("FELA").71 The decision, Metro-North Commuter Railroad Co. v. Buckley,72 cast doubt on developments in the field during the previous decade and may have caused a partial stall in the movement among lower courts to adopt a cause of action allowing medical monitoring relief prior to the time the illness clinically manifests itself.73

70. According to the Ayers decision, there is little need to quantify risk in the monitoring cases precisely because, unlike a claim for enhanced risk, which would of course require proof of likelihood, extent, and monetary value, the medical surveillance claim seeks reimbursement for specific dollar costs of periodic examinations that are medically necessary regardless of the fact that it is unknown whether plaintiff will ultimately get sick. Id. Accord In re Paoli R.R. Yard PCB Litig., 916 F.2d at 852; Potter v. Firestone Tire & Rubber Co., 863 P.2d 795, 824 (Cal. 1993). Many scholars concur. See, e.g., Blumenberg, supra note 28, at 675; Leslie S. Gara, Medical Surveillance Damages: Using Common Sense and the Common Law to Mitigate the Dangers Posed by Environmental Hazards, 12 HARV. ENVTL. L. REV. 265, 275 (1988); Kalas, supra note 15, at 135-36; Jesse R. Lee, Medical Monitoring Damages: Issues Concerning the Administration of Medical Monitoring Program, 20 AM. J. L. & MED. 251, 263 (1994).

71. See Metro-N. Commuter R.R. Co. v. Buckley, 521 U.S. 424 (1997). Prior to Buckley, the trend, from Ayers through Paoli and down to Potter and Hansen, had been overwhelmingly in favor of allowing monitoring relief prior to the infliction of actual physical injury. Prior to Buckley, several lower court decisions bucked the trend, the most significant of which was Ball v. Joy Tech., Inc., 958 F.2d 36 (4th Cir. 1991) which denied monitoring relief under Virginia and West Virginia law because plaintiff had suffered no physical injury. See also Purjet v. Hess Oil V.I. Corp., No. 1985/284, 1986 WL 1200 (D.V.I. Jan. 8, 1996); Mergenthaler v. Asbestos Corp., 480 A.2d 647 (Del. 1984). The Buckley court held that the FELA did not authorize creating a pre-physical injury cause of action for damages for medical monitoring and reserved for future consideration whether any kind of pre-injury monitoring relief might be permissible under the statute. 521 U.S. at 443-44.


73. While not binding on state courts in defining state causes of action, the Buckley decision was inevitably going to be given due consideration by state and federal courts in defining whether and under what circumstances a right to medical monitoring relief should be recognized. In the wake of the Buckley decision, a number of courts have declined to create state causes of action for pre-injury monitoring. See, e.g., Duncan v. Northwest Airlines, Inc., 203 F.R.D. 601 (W.D. Wash. 2001) (no monitoring relief absent physical injury); Hinton v. Monsanto Co., 813 So. 2d 827, 831-32 (Ala. 2001) (same); Wood v. Wyeth-Ayerst Labs., 82 S.W.3d 849, 859 (Ky. 2002) (same); Badillo v. Am. Brands, 16 P.3d 435, 440 (Nev. 2001) (refusing to create cause of action for medical monitoring, but reserving question whether monitoring might be appropriate remedy in actions based on one or more substantive theories, including negligence, breach of warranty, strict liability, etc.). Others have indicated doubt as to whether medical monitoring relief is appropriate in the absence of physical injury. See, e.g., Trimble v. Asarco, Inc., 232 F.3d 946, 963 (8th Cir. 2000) (predicting Nebraska would reject claim). Cases like these have led critics of medical monitoring to conclude that although Buckley did not stop the trend in favor of creating a right to monitoring relief prior to actual physical injury, it certainly slowed it down. See, e.g., Henderson & Twerski, supra note 16, at 838-41; Klein, supra note 21, at 3 (The Buckley decision "places the 'tort' of medical monitoring at a crossroad.").
The *Buckley* case presented a claim by a railroad employee who had been exposed to asbestos for approximately one hour per working day over a three year period, from 1985 into 1988. After attending an "asbestos awareness class" in 1987, the plaintiff became fearful of contracting cancer or some other asbestos-related disease and, in 1989, undertook a regime of periodic medical check-ups for cancer and asbestos-related disease. The plaintiff then initiated a negligence action against the railroad, asking the court to order the defendant to make a lump sum damages award to cover his medical monitoring costs, defining those costs as the reasonable value of such medical regime that "a reasonable physician would prescribe . . . [over and above what] 'would have been prescribed’” had the defendant never negligently exposed plaintiff to the asbestos. In *Buckley*, the district court noted that plaintiff had failed to allege that he had suffered any physical impact or injury and dismissed his action. The Second Circuit reversed, holding that Buckley could recover for the costs of medical check-ups because the FELA permits recovery of all reasonably incurred extra medical monitoring costs whenever a "reasonable physician would prescribe . . . a monitoring regime different than the one that would have been prescribed in the absence of” a particular negligently caused exposure to a toxic substance.

A divided Supreme Court reversed. Justice Breyer's majority opinion assumed that plaintiff would have been able to recover for both emotional distress and medical monitoring...
if and when he developed symptoms. While acknowledging that emotional distress damages are sometimes available in narrow and particularized circumstances, the Court nevertheless pointed out that the overwhelming majority rule is that non-intentionally inflicted distress, unaccompanied by physical impact or harm, is not compensable. The Court noted three reasons for this position: "(a) special 'difficulty for judges and juries' in separating valid, important claims from those that are invalid or 'trivial,' (b) a threat of 'unlimited and unpredictable liability,' and (c) the 'potential for a flood' of comparatively unimportant... claims." As for medical monitoring, the Court acknowledged that the claimed injury was the economic cost of extra medical checkups plaintiff would have to undergo because of his exposure to the defendant's toxin. But the Court balked at creating a "traditional, full-blown ordinary tort liability rule" allowing plaintiff a lump-sum damages award to cover such future costs. The Court offered several reasons for this reluctance. First, it noted that the vagaries of current scientific knowledge would make it difficult for judges and juries to evaluate the necessity and cost of future medical monitoring mechanisms. Second, it expressed concern about the enormous breadth of toxic exposures in the country as well as the cost

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80. Id. at 430, 438. Based on Buckley's facts, the assumptions of the majority opinion were quite generous to the plaintiff. First, prior to instituting the lawsuit, the plaintiff had smoked cigarettes at a rate of one pack per day over a fifteen year period. The Court indicated that his exposure to defendant's asbestos "created an added risk of death due to cancer of" one to three percent or one to five percent, depending on which of his own experts the trier of fact chose to believe. Id. at 427 (emphasis in original). This fact seriously undermines the claim that his need for medical monitoring was real or had been substantially caused by Metro-North's behavior.

Second, there was no evidence in the record to indicate that Buckley suffered severe emotional distress as a result of his exposure. He offered no expert testimony to support his claim of emotional distress, and he had in fact never sought professional help to ease whatever psychological troubles he claimed to suffer from; indeed, the only evidence of emotional distress in the record was his own self-serving testimony that he was angry at Metro-North for exposing him to asbestos and was fearful of contracting cancer in the future. These facts led Justice Ginsburg and Stevens to conclude that he failed to prove emotional injury sufficient to warrant damages for emotional distress. See id. at 445.

In sum, given the objective weakness of the added threat to his health and his failure to put on any real evidence of emotional distress, one could argue that, even if he had proven physical injury, a court would have been hard pressed to find that his exposure justified awarding damages to cover added medical monitoring or emotional disorder resulting from the injury he claimed to have sustained.

81. Id. at 429-30. The Court acknowledged the existence of facts other than physical impact that some courts have used to justify awarding damages for negligently inflicted emotional distress. The Court explicitly noted the willingness of some courts to permit recovery for distress suffered by a close relative who has witnessed the physical injury of a negligence victim as well as to allow damages to those who have suffered an immediate risk of physical harm by negligent conduct. Id. at 430.

82. Id. at 433 (citations omitted).

83. Id. at 439. Later in the opinion, Justice Breyer acknowledged that as an important consideration in determining whether any kind of monitoring relief should be granted, "it is inequitable to place the economic burden of [medical screening] on the negligently exposed plaintiff rather than on the negligent defendant." Id. at 443.

84. Id. at 442.

85. Id. at 441-42.
of monitoring for disease caused by such exposures. These facts made the court wary of opening the door to a "'flood' of less important cases (potentially absorbing resources better left available to those more seriously harmed . . . )."

Finally, it noted that such a remedy would ignore the presence of collateral 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 . . . might provide monitoring in any event."

The Court acknowledged that cases favoring medical monitoring present important competing policy considerations. Among those noted were the inequity of placing the burden of screening on the innocent victim rather than the negligent defendant, and the potential public health impact of mitigating serious future impact of toxic exposures by facilitating early detection and treatment of the diseases made more likely by such exposures.

Recognizing that various courts had divided over what kind of relief to order in monitoring cases, the Court noted that most cases authorizing recovery did "not endorse a full-blown, traditional tort law cause of action for lump-sum damages—of the sort that the Court of Appeals seems to have endorsed here," but instead had "suggested, or imposed, special limitations on that remedy." The opinion found it significant that although the seminal case of Ayers had ordered a lump-sum payment of damages, that court had also recommended the future creation of a court-supervised fund to administer court supervised payments. Justice Breyer went on to note that other courts had recommended or ordered use of an insurance mechanism, a court-supervised fund, or some other mechanism for future periodic reimbursement for screening services as they were incurred. This kind of order not only assures that the monies ordered to be paid over to plaintiffs will be used to promote their health and not squandered on other goods and services, but its also permits future ad-

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86. Id. at 442.  
87. Id.  
88. Id. at 442-43.  
89. Id. at 443-44. The Court also saw fit to note that, compared to emotional distress, medical monitoring claims are less speculative, thus making it easier to "separat[e] justified from unjustified claims." Id.  
90. Id. at 440.  
91. After quoting various statements of the courts in the leading cases approving medical monitoring, the Court concluded this part of the discussion with the belief "that the note of caution, the limitations, and the expressed uneasiness with a traditional lump-sum damages remedy are important, for they suggest a judicial recognition of some of the policy concerns that have been pointed out to us here." Id. at 441.  
92. Those resisting claims for medical monitoring suggest that the primary reason for avoiding lump-sum awards is precisely this fear that plaintiffs would usually rather spend whatever they earn from a lawsuit as they see fit rather than spend much of it on medical testing. See, e.g., Henderson & Twerski, supra note 16, at 844; Klein, supra note 21, at 24; Arvin Maskin, Konrad L. Cailteux & Joanne M. McLaren, Medical Monitoring: A Viable Remedy for Deserving Plaintiffs or Tort Law's Most Expensive Consolation Prize, 27 WM. MITCHELL L. REV. 521, 541 (2000) [hereinafter Maskin]. A number of cases have ex-
justments of payments, up or down, depending upon whether there is a material change of circumstances warranting adjustment of the flow of monies paid out of a defendant's resources for the plaintiff's screening costs.93

Given this background, the Court declined to balance the considerations that other courts had wrestled with in deciding whether to provide medical screening to asymptomatic claimants based on the enhanced risk and economic costs these risks imposed on them. Rather than even attempt to "balance [the] . . . competing considerations [presented by these cases]," the Court held only that FELA would not support an "unqualified rule of lump-sum damages recovery that is, at least arguably, before us here."94

Justice Ginsburg, dissenting, pointed out that the relief the plaintiff had sought merely asked for "'an amount of money' sufficient to 'compensate' him for 'future medical monitoring expenses.'"95 This request made

pressed similar reservations, albeit in a more neutral way. In Ayers, for instance, the New Jersey Supreme Court suggested monitoring because it "will insure that in future mass-exposure litigation . . . medical-surveillance damages will be paid only to compensate for medical examinations and tests actually administered, and will encourage plaintiffs to safeguard their health by not allowing them the option of spending the money for other purposes." 525 A.2d at 314.

Summing up both views, one commentator explains:

Anyone who has undergone rigorous medical examinations will acknowledge that they often involve inconvenience, discomfort and some degree of risk. This suggests two policy considerations: (1) a person will not lightly submit to such procedures and so should not be lightly compensated for them, and (2) when such procedures are indeed "medically necessary," a person should be encouraged to undergo them, despite the associated risk and inconvenience.

To award unrestricted money damages for medical monitoring is to ignore both considerations.

McCarter, supra note 68, at 255-56.

93. This argument is more nuanced. It essentially treats the duty to pay monitoring expenses as limited, conditional on ongoing specific equities justifying imposition of the duty. This is much in the same way that support payments are ordered, terminated, or modified in family law litigation, depending on the court's consideration of the material circumstances at the time.

The cases do not specifically speak in terms of the support order analogy, but they come close. In the Hansen case, for example, the Utah Supreme Court indicated that if a plaintiff's screening costs were to fail to exhaust the fund created to pay monitoring expenses, the remainder should be returned to the defendant. 858 P.2d at 982. The court in Friends for All Children, 746 F.2d 816 (D.C. Cir. 1984), entered a similar order, requiring that monies not spent for monitoring expenses be returned to the defendant with interest. Id. at 823 n.10. The Hansen court accepted the common view, supported by the weight of authority, that if there were no test available that would provide a reasonable basis for achieving early diagnosis of disease, there would be no point in ordering monitoring, but then it went on to say that should diagnostic testing later become available, the plaintiff should then be able to demonstrate the effectiveness of the test, and, if the other grounds for monitoring are met, he should be able to then have the court order monitoring at the expense of the defendant. 858 P.2d at 979 n.12. This kind of flexible approach to the duty to pay is perfectly consistent with the support payment model.

A number of writers have tried to explain how monitoring funds would work. See, e.g., Blumenberg, supra note 28, at 665-66 (explaining periodic payment approach to dispersing monitoring funds); McCarter, supra note 68, at 256-62 (explaining benefits of periodic payments, especially from trust funds, over lump-sum damages).

94. Buckley, 521 U.S. at 444 (emphasis added).
95. Id. at 455.
it ambiguous whether he wanted money damages or relief in some other form. According to Justice Ginsburg, the parties had never argued, either in the courts below or before the Supreme Court, over what form the remedy should take, but had focused instead on the larger question of whether a plaintiff's claim for medical monitoring could warrant any relief at all. She concluded that the Court's narrow decision to parse the question presented and to flatly bar only a lump sum damages award for screening costs was "enigmatic" at best.

Whatever Buckley decided, of course, is only controlling in FELA and kindred actions. Nevertheless, it seems fair to assume that many state courts give heavy weight to what the Supreme Court said there in decid-

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96. As she put it, "[N]o party argued in the District Court, the Second Circuit, or even this Court, that medical monitoring expenses may be recoverable, but not through a lump sum, only through a court fund. The question aired below was the prime one the Court obscures: Does Buckley's medical monitoring claim warrant any relief?" Id. at 454-55.

97. Id. at 455. On this point Justice Ginsburg's critique of the majority opinion was scathing:

As to Buckley's [medical monitoring] claim, however, the Court speaks tentatively. "The respondent in this case [Buckley]," we are told, "has not shown that he is legally entitled to recover [medical monitoring] costs." "Arguably," the Court explains, Buckley demands an "unqualified rule of lump-sum damages recovery," a rule for which the Court finds "[in]sufficient support in the common law." The Court pointedly refrains, however, from expressing any view... about the extent to which the FELA might, or might not, accommodate medical cost recovery rules more finely tailored than "a rule of [the] unqualified kind." It is not apparent why (or even whether) the Court reverses the Second Circuit's determination on Buckley's [medical monitoring] claim. The Court of Appeals held that a medical monitoring claim is solidly grounded, and this Court does not hold otherwise. Hypothesizing that Buckley demands lump-sum damages and nothing else, the Court ruminates on the appropriate remedy without answering the anterior question: Does the plaintiff have a claim for relief? Buckley has shown that Metro-North negligently exposed him to "extremely high levels of asbestos" and that this exposure warrants "medical monitoring in order to detect and treat [asbestos-related] diseases as they may arise"... [valued at $950 per year]. We do not know from the Court's opinion what more a plaintiff must show to qualify for relief.

Id. at 448 (emphasis in original) (citations omitted).

The court's treatment of plaintiff's claim led Ginsburg to state flatly that the majority opinion simply "leaves open the question whether Buckley may state a claim for relief under the FELA." Id. at 452. What this meant, according to her, was that the way was open for Buckley, on remand, to replead his claim and recover for medical monitoring so long as he did not seek that relief in lump-sum form. In her view, this course was wasteful, irresponsible, and in violation of the letter and the spirit of Federal Rule 54(c), which prohibits dismissal of a claim if plaintiff is entitled to relief under his proof, no matter what legal theory he is deemed to have tried to follow. Id. at 455-56.

98. For example, a claim under the Jones Act, 46 U.S.C. § 688 (2000), which grants seamen a claim for personal injury caused by an employer's negligence, incorporates the FELA. Kernan v. Am. Dredging Co., 355 U.S. 426, 439 (1958). Lower courts handling Jones Act cases have looked to Buckley for guidance on how to deal with Jones Act medical monitoring claims brought before them. See, e.g., In re Marine Asbestos Cases, 265 F.3d 861; Dragon, 726 So. 2d 1006; Badillo, 16 P.2d 435. The ambiguities in the Buckley opinion have led these courts to treat it in disparate ways. For instance, in Marine Asbestos Cases, the Ninth Circuit said it felt Buckley had left the availability of future monitoring costs an open question, foreclosing only lump-sum damages awards. 265 F.3d at 867. Dragon read Buckley even more narrowly, concluding that it had given the green light to monitoring relief unless it came in the form of a lump-sum damages award. 726 So. 2d at 1011.
ing whether to create or reject a state law claim for medical monitoring relief for asymptomatic victims of tortious conduct. Indeed, in the years since Buckley, state courts have been divided on the issue, some citing Buckley to reject claims for relief and others granting non-lump sum damages relief in ways they claim follow a relief route left open by the Buckley decision.99

V. THE INDETERMINACY OF MEDICAL MONITORING CLAIMS

While courts granting medical monitoring relief have attempted to distinguish such claims from enhanced risk and emotional distress claims, a number of critics remain unpersuaded. The claimed simplicity of the medical monitoring claim—a claim for medical costs a defendant has forced upon innocent victims—is, according to these critics, largely a mirage, opening up the tort system to “unprecedented expansion.”101 In their view, the indeterminacy of the standards used by courts allowing medical monitoring claims renders such claims an open invitation for abusive and wasteful use of the court system.102

As a general matter, most of the courts permitting medical monitoring relief absent physical injury have authorized use of a generalized test employing and balancing a variety of factors. A shorthand statement of their position is that monitoring relief should be granted upon a showing that a defendant’s conduct has caused a plaintiff to have a significant increase of risk of serious disease which a reasonable physician might think could be substantially mitigated by currently available methods of early detection.103 The decisions steadfastly refuse to require that risk be quantified, that pre-suit objective tests be employed to determine toxicity, or that any precise definition be given as to how necessary medical surveillance must be before it is ordered.104

The refusal to set objective, measurable standards has driven critics of medical monitoring to distraction. They believe that awarding damages without regard to a quantifiable enhanced risk standard “completely destroy[s]” the causation requirements of tort law.105 Occasionally, their

99. Compare, for example, the differing readings accorded Buckley by the courts discussed in note 98 supra.
100. See supra note 68 and accompanying text.
102. Id. at 14.
103. The test set out here is similar to those used in most of the pro-monitoring decisions flowing from Ayers. See supra note 58 and the cases cited therein. All limit relief to cases in which plaintiff proves her case through expert testimony, but permit relief if the balance of factors appear to the court to warrant a monitoring regime and do not require scientific proof or mathematical quantifiability of the various imponderables—the seriousness of disease, the level of risk imposed by defendant, or the precise efficacy of early detection and treatment.
104. See, e.g., Hamrick, supra note 26, at 477.

Not everyone who recommends using objective “triggers” seeks to do so with a view toward limiting plaintiffs’ rights to medical monitoring. Courts and commentators have
writing betrays strong skepticism—perhaps even cynicism—about the ability of courts and juries to make fair evaluations of standards like “significant,” “serious,” “substantial,” and the like.\textsuperscript{106}

It can hardly be argued that application of \textit{standards} like “significant” and “substantial” leaves wide room for some level of discretionary justice that would not be in play if the monitoring cases employed clear \textit{rules} mandating mathematical measures and guaranteeing mathematical certainty.\textsuperscript{107} In the toxic tort area, forcing each case to turn on mathematical certainty would lead to a result in which there would likely be no justice at all. This is because, in most cases, there simply is no scientific evidence available to prove or disprove the crucial variables, particularly those related to the question of how or at what levels of exposure to a toxin \textit{causes} disease.\textsuperscript{108} To avoid this result, the courts have been forced to

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also taken the view that such “triggers” might be used as a substitute for proof of toxicity, thus lightening the difficulty and expense of proving toxicity that might otherwise create an insurmountable burden on plaintiffs’ ability to prove toxic tort cases. \textit{See}, e.g., Hansen v. Mountain Fuel Co., 858 P.2d 970, 979 n.11 (Utah 1993); Kristen Chapin, Comment, \textit{Toxic Torts, Public Health Data, and the Evolving Common Law: Compensation for Increased Risk of Future Injury}, 13 J. ENERGY NAT. RESOURCES & ENVTL. L. 129, 148-57 (1993).

\begin{itemize}
\item \textsuperscript{106} Hamrick quotes Justice Ginsburg’s opinion in \textit{Buckley} to the effect that monitoring should be allowed if plaintiff “establishes that he was \textit{significantly} exposed to a \textit{proven} hazardous substance . . . [and] as a . . . result of the exposure, [he] suffers a \textit{significantly} increased risk of contracting a \textit{serious} latent disease . . .” Hamrick, \textit{supra} note 26, at 483 (emphasis added). He then states: “These seemingly straightforward factors belie the difficulties inherent in such a theory of injury and recovery. For instance, what level of exposure is ‘significant’? Which substances have been ‘proven hazardous,’ and by whom? What level of increased risk is ‘significant’? What latent diseases are serious?” \textit{Id.} at 484.
\item Henderson and Twerski, after quoting a similar list of factors from the West Virginia Supreme Court’s decision upholding medical monitoring in \textit{Bower v. Westinghouse Electric Corp.}, 522 S.E.2d 424, 434 (1999), admonish the reader to note that “[a]nyone familiar with modern American trial practice will understand that, however well-meaning, this reliance on superlatives will not prevent most well-prepared cases from reaching triers of fact. . . . [leading inescapably to] the conclusion that defendants in these medical monitoring cases face potentially crushing liabilities.” \textit{See} Henderson & Twerski, \textit{supra} note 16, at 845 (footnotes omitted).
\end{itemize}

Goutman’s critique is even more biting:

\begin{quote}
[T]he elements of medical monitoring virtually obliterate any real burden of proof at all. Plaintiffs must prove “significant exposure.” Easy, have an expert call it “significant.” Your product must be a “proven hazardous substance.” No problem. High dose rodent experiments will do the trick. . . . Plaintiffs must be at a “significantly increased risk.” A piece of cake. Plaintiffs’ expert does not need to quantify the risk, just divine that it is somehow “significant.”
\end{quote}

\begin{itemize}
\item Goutman, \textit{supra} note 20, at 31.
\item Kalas writes: “As commentators repeatedly bemoan, science is not yet able to explain, much less quantify, that disease or injury will develop following exposure to a toxic agent. Latency periods that allow for numerous intervening causes make a determination of cause almost prohibitive.” Kalas, \textit{supra} note 15, at 133. Given the fact that solid epidemiologic evidence is prohibitively expensive for a plaintiff to produce and generally unavailable for most toxic substances, it is unreasonable to expect plaintiffs to produce such evidence. \textit{See} Green, \textit{supra} note 47, at 680; Linda A. Elfenbein, Note, \textit{Future Medical Surveillance: An Award for Toxic Tort Victims}, 38 Rutgers L. Rev. 795, 802-03 (1986); Slagel, \textit{supra} note 14, at 853-56; .
\end{itemize}
take the position that plaintiffs should be allowed to prove issues like "causation by a preponderance of the available evidence, not by some predetermined standard that may require nonexistent studies."109 In effect, with respect to how powerful the evidence must be to justify judicial intervention on behalf of a plaintiff, rather than leaving plaintiffs with no redress at all, the courts have fixed the risk of uncertainty on the wrong-doing defendant rather than fixing it on the innocent plaintiff.110

The detractors of medical monitoring claims also challenge them on the ground that they invite frivolous claims every bit as often as do the emotional distress claims. Much of the critique of emotional distress claims arose from a fear that the standards were too vague for separating the truly sick from the fraudulent claimant, and that the plaintiff's emotional injury, assuming it to be real, was far too indeterminate to allow for any kind of principled measurement of damages.111 In addition, there is the view that American tort law simply gives physical injuries a higher priority than emotional ones.112

Critics of medical monitoring express kindred fears regarding those claims. They first note the indeterminacy of the finding that a plaintiff's risks are serious or have been increased significantly by exposure to a defendant's toxin.113 But even conceding that, they argue about whether the remedy of medical monitoring is appropriate. Ayers said monitoring

110. See id.
111. See supra notes 49-50 and accompanying text.
112. See supra notes 51-52 and accompanying text. See also Geistfeld, supra note 18, at 1934:

"Tort law gives the highest priority to physical security. . . . Tort law accordingly limits duty to exclude stand-alone claims for emotional harm in order to give physically injured plaintiffs a much higher chance of receiving full compensation for their injuries," Peter H. Schuck, The Worst Should Go First: Deferral Registries in Asbestos Litigation, 15 HARV. J.L. & PUB. POL'Y 541, 575-76 (1992) [hereinafter Schuck] (arguing that asbestos patients' claims for distress should be docketed after disposal of physical injury cases because defendants' resources are limited, and "the claims of those who are not now (and may never become) sick, but who genuinely fear becoming so" are entitled to lower priority than claims of those already impaired). This, indeed, is what many courts ended up doing in the asbestos cases: Once it became obvious that early emotional distress claims were draining the defendants' resources to the point that they were no longer likely to be able to meet their obligation to pay for more serious physical illnesses, judges began to set up registry systems. These registry systems put emotional distress and other early claims on indefinite hold, only to be put back on the courts' active dockets once full-blown serious diseases manifested themselves. See generally Mark A. Behrens & Monica G. Parham, Stewardship for the Sick: Preserving Assets for Asbestos Victims Through Inactive Docket Programs, 33 TEX. TECH. L. REV. 1 (2001) [hereinafter Behrens].

113. See supra note 68. It is often argued that the standards of liability are so weak that plaintiffs can secure monitoring relief in cases in which the increase in risk to their health is infinitesimally small, thus creating a grossly overbroad and expensive remedy. See, e.g., Maskin, supra note 92, at 532. One author said that judges had found "significant" an increase in risk from exposure when the increase measured between 1 x 10^-4 and 1 x 10^-5. Goutman, supra note 20, at 28. Still another writer critical of monitoring began his article by setting out as a "paradigm case" a scenario by which plaintiff's exposure has increased her likelihood of contracting liver cancer from 10 in 100,000 to 15 in 100,000. Klein, supra note 21, at 1.
should be ordered if it was "reasonable and necessary."114 Do these words mean the same thing, and if not, by what standard should "necessity" be judged?115 A number of writers express strong reservations about the medical efficacy of monitoring regimes, suggesting that the costs of monitoring for most diseases far outweigh any likely medical benefits, and that the main reason plaintiffs may go for such relief may be psychological.116 George McCarter notes the unpredictability of diagnostic testing procedures, the risks and costs of many tests, and the paucity of evidence that many lead to real improvement in mortality or morbidity through early detection of a large variety of diseases.117 His skepticism pales in comparison to that expressed by Thomas M. Goutman in Medical Monitoring: How Bad Science Makes Bad Law.118 Immediately prior to a discussion of "The Science of Medical Monitoring" between "Medical Monitoring 101" (i.e., "real" science for the nonscientists) and "Courtroom Medical Monitoring 101" (i.e., the "baroque" pseudoscience of the legal world),119 Goutman flatly tells the reader that medical science recommends only six identified diagnostic tests (each for specific medical conditions) for apparently healthy, asymptomatic patients; in his view, no other screening protocols for asymptomatic individuals are ever medically appropriate.120

Medical monitoring claims have proven more palatable to courts than claims for emotional distress because the monitoring costs are seen as more concrete and definite than emotional distress. While resolution of questions of causation and damages still requires presentation and evalu-

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114. 525 A.2d at 312.
115. Among courts favoring medical monitoring, the proof plaintiff must put on to justify the monitoring regime varies from tribunal to tribunal. At one end of the spectrum are cases like In re Paoli R.R. Yard PCB Litig., 916 F.2d 829 (3d Cir. 1990). One of the early leading cases upholding monitoring relief, the Third Circuit found it sufficient that there was expert testimony that, in the opinion of the physician in question there was a reasonable medical need for early detection and treatment warranting monitoring relief. Id. at 861. The Ayers court went even further, upholding a claim for medical monitoring not only of "conventional" screening protocols but also of "unconventional" ones, so long as they were supported by expert medical testimony. 525 A.2d at 287 n.13. They also had to be "consistent with contemporary scientific principles." Id. at 309. Other cases have not been so generous to plaintiffs. Several courts have required the plaintiff to show that the testing she desires "is of a type that a reasonable physician in the area of specialty would order for a similarly situated patient." Bourgeois v. A.P. Green Indus., Inc., 716 So. 2d 355, 361 (La. 1998); Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 980 (Utah 1993). A few courts set an even more stringent standard; to prevail, a plaintiff must show that "accepted medical practice . . . deem[s] it necessary to perform such tests in the future." Miranda v. Shell Oil Co., 7 Cal. Rptr. 2d 623, 626 (Cal. Ct. App. 1992).

Slagel, attempting to draw a middle ground, argues that no test should be covered by monitoring relief unless "a 'respectable minority' of physicians recognize the test as beneficial in the early detection of latent toxic substance diseases." Slagel, supra note 14, at 875. 116. See, e.g., McCarter, supra note 68; Goutman, supra note 20.
117. McCarter, supra note 68, at 275-82.
118. Goutman, supra note 20.
119. See id. at 6-16.
120. See id. at 6. It probably will not surprise the reader to learn that none of the conditions Goutman lists as appropriate for screening is a condition commonly asserted to have been made more risky on account of toxic exposures.
ation of expert testimony, plaintiffs have often been able to persuade the courts that the monitoring remedy is less subject to subjective and wildly emotional factors than is the case in the emotional distress cases.121 Though not inexpensive, the ultimate damages awards are believed likely smaller and make the suits less subject to fraudulent claims because the relief can be tightly tied to covering only expected medical bills for screening services the average plaintiff would likely forego unless she thought they were necessary.122 Moreover, focusing on whether the threat is objectively real and sufficient enough so that a reasonable plaintiff ought not to have to endure it without having at least her out-of-pocket medical costs paid clearly seems less likely to invite a flood of false, fraudulent, or frivolous claims than would a cause of action focused on the enhanced, but ultimately subjectively measured, emotional distress levels of a plaintiff’s condition.

The indeterminacy of issues like toxicity of particular products, causation of particular diseases, or the efficacy of particular medical protocols in response to toxic exposures presents troubling issues. The courts are rightly concerned about the quality of proof of toxicity, causation, and the efficacy of treatment protocols in all toxic tort cases, and they certainly should be so in the cases in which, before actual physical injury, a plaintiff seeks some monitoring relief to limit the effects of enhanced risk of disease. The fact is that, in today’s world, proof to a moral certainty of just how destructive a given toxin is, just what the statistical likelihood is that a given exposure is likely to cause injury, or even precisely how accurate screening technologies are and how effective early medical interventions are likely to be, is simply unavailable—and not likely to be available for some time into the future, if ever. Requiring a particular quantum of proof in effect would write off medical monitoring in all but the most limited circumstances, simply because in most cases nobody knows pre-

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121. See, e.g., Metro-N. Commuter R.R. Co. v. Buckley, 521 U.S. 424, 433, 443 (1997) (FELA case rejecting negligent infliction of emotional injury because of difficulty in separating serious from trivial claims, fear of unlimited liability, and “potential flood of litigation,” while reserving issue whether monitoring should be ordered in part because issue of separating justified from unjustified claims may be less serious there than in emotional distress cases); Potter v. Firestone Tire & Rubber Co., 853 P.2d 795, 814, 823-24 (Cal. 1993) (rejecting emotional distress claims unless physical disease more probably than not to come because of “intangible nature of the loss: difficulty of measuring the damage” and unsuitability of money to cover it, and social costs involved in trying to compensate plaintiff, while accepting monitoring as reasonable claim for predictable, non-speculative losses caused by tortious activity established under traditional theories); Hansen, 858 P.2d at 975, 978-79 (rejecting emotional distress claim as too speculative where not proven through substantial evidence of objectively reasonable contraction of recognized mental illness or physical symptoms, but allowing claim for medical monitoring where there is a demonstrable need for medical monitoring services and there is no need to quantify risk because issue is not whether disease will ensue, but simply whether risk is high enough to warrant monitoring).

122. Most writers have to concede that the incentives to undergo medical monitoring, precisely because it is often unpleasant and time-consuming, are not great, and that any medical monitoring regime that limits payment to funding or reimbursing monitoring costs eliminates most of the risk that plaintiffs will bring bad faith claims with a view of getting rich off of defendants. See supra note 92 and authorities cited therein.
ciscely how likely the chances are that a given dosage of a toxin will cause a particular disease. In most cases being brought to the courts, nobody has conducted sound epidemiological studies of the disease process resulting from exposure to toxins, and such studies may be decades away. Nor, in most cases, is there clear, irrefragable scientific evidence regarding the medical efficacy of early detection and disease.

This does not mean that courts should not take current knowledge, such as it is, seriously. After all, the medical profession does. In an area where the doctors believe that a given exposure creates a sufficiently substantial risk to warrant a medical intervention, it hardly seems appropriate for courts to ignore the doctors' educated judgments by refusing to rely upon them when determining how the common law should operate. The fact that our knowledge of toxicity, causation, cure rates, and the like present questions today answerable only with professional judgments rather than with tight statistical proof does not mean one should adopt a head-in-the-sand view toward them. If doctors cannot solve these questions with tight mathematical solutions, neither can patients; why on earth should the courts? Given the fact that in most cases sound scientific studies have not yet been conducted and may be decades away, if there is some uncertainty, it only seems fair to say where uncertainty is not large and the burden on the tortfeasor not great, the burden of uncertainty should fall upon the wrongdoer, not the victim.

VI. OVERDETERRENCE AND COMPENSATION: JUDICIAL BREAKDOWN IN THE ASBESTOS CASES

Opponents of medical monitoring frequently note that monitoring relief is often not cheap. In a mass tort situation, with thousands of victims each requiring an annual array of examinations and tests over the next twenty or thirty years, the burden on industry clearly would not be inconsequential. But in the usual toxic tort case, the issue is not whether the medical surveillance should be conducted, but who should pay for them. The expense argument, standing alone, does not advance the argument one way or the other; the costliness of the tests can cut two ways because it also demonstrates that plaintiffs' claims for monitoring relief are clearly not frivolous but indeed may be quite substantial.

123. Courts currently do not set standards of proof unreasonably high when deciding whether monitoring is appropriate after a victim has suffered a physical injury.

124. The public injunction cases tell us that allowing a remedy to go beyond what the law requires it can nevertheless be justified if such an order is necessary to assure at least full protection of the plaintiff's rightful position. See, David S. Schoenbrod, The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy, 72 MINN. L. REV. 627, 679 (1988). See also Hutto v. Finney, 437 U.S. 678, 688 (1978) (allowing 30-day injunction to correct prison violence from overcrowding). At law, the courts have long held that, in measuring damages where there is some uncertainty as to the precise measure, the risk of uncertainty should fall upon the defendant whose misconduct created the problem rather than upon the innocent victim. See Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264 (1946); DAN B. DOBBS, 1 LAW OF REMEDIES 319-20 (2d ed. 1993).
Opponents of medical monitoring usually tie concerns about expense to the two core functions of tort law—deterrence and compensation. First, they often point out that the use of chemicals in the modern world is widespread and the number of potential claims and claimants is potentially mind-boggling; they then suggest that allowing monitoring claims is likely to swamp industry with a gigantic flood of claims that are wasteful because they serve little public good and principally enrich the plaintiffs' bar, and because they likely will dampen entrepreneurial enthusiasm and innovation in developing new products and technologies. Second, opponents often express fear that allowing plaintiffs to recover for unrealized injuries will bankrupt defendants, leaving the most seriously injured victims of mass toxic torts haplessly without remedy by the time their illnesses fully ripen. Not infrequently, the argument invites attention to the history of asbestos litigation in this country; the claim is that the asbestos cases represent an unmitigated disaster for the American tort system and that the problem is likely to be repeated in other toxic tort cases. Finally, at the least, these writers argue, the concerns about overdeterrence and bankruptcy should make courts chary of modifying time-honored (if arbitrary) limits on common law liability. This argument would remove the whole debate from the courts and place

125. See, e.g., Henderson & Twerski, supra note 16, at 850; Klein, supra note 21, at 13; Martin & Martin, supra note 21, at 130-31; Maskin, supra note 92, at 529; Schwartz, supra note 19, at 1071-72; Hamrick, supra note 26, at 471.

126. The belief that monitoring regimes are largely a waste of money is widespread among critics. See, e.g., Henderson & Twerski, supra note 16, at 844 (“wasteful of scarce resources”); Martin & Martin, supra note 21, at 121 (“unwarranted expense”) (“not . . . worthwhile”); Maskin, supra note 92, at 547 (“plaintiffs’ counsel . . . only real winners”); see also Schuck, supra note 112, at 576-77 (suggesting that, in asbestos cases, at least, “some evidence suggests that . . . effective screening procedures are not yet available, and . . . early detection does not improve the prospects of cure”).

127. Overdeterrence is a problem for both Klein as well as Henderson and Twerski, see Klein, supra note 21, at 22, 25-27; Henderson & Twerski, supra note 16, at 843. Others—even critics of medical monitoring—disagree. See, e.g., Brennan, supra note 68, at 6, 48 n.163, 70; Martin & Martin, supra note 21, at 139-40.

128. Hamrick, supra note 26, at 471; Henderson & Twerski, supra note 16, at 850; Schwartz, supra note 19, at 1062.

129. Henderson & Twerski, supra note 16, at 850. Other writers do not push the argument beyond the asbestos context, but do strongly suggest that the flood of asbestos litigation certainly left many seriously ill victims without a remedy because litigation claims and expenses of less serious claims exhausted defendant's resources before the more seriously ill claimants could recover. See, e.g., Schuck, supra note 112, at 554-57. The scarcity of resources to pay the bill for asbestos injuries has created attempts by plaintiffs suffering from more serious injuries to get a priority over anyone suffering less serious injuries, as was attempted in behalf of persons suffering malignancies against non-malignant victims in the settlement provision set aside in Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999). This scarcity has also led to conflicts between persons suffering present injuries and those with only likely future injuries as in Achem Prods. v. George Windsor, 521 U.S. 591 (1997). Such conflicts have impeded the orderly and fair resolution of the asbestos cases. See generally Behrens, supra note 112; Francis E. McGovern, The Tragedy of the Asbestos Commons, 88 VA. L. REV. 1721 (2002) [hereinafter McGovern]; and led courts to set up sophisticated docketing systems to prevent emotional distress claims from exhausting defendants' resources before more seriously ill people could have opportunity to sue for and collect for their physical illnesses.
it in legislatures.\textsuperscript{130}

None of these arguments should be persuasive. The argument that medical monitoring is an unmitigated waste of resources, asserted with quite variable levels of vigor and confidence by opponents of medical monitoring,\textsuperscript{131} has not been accepted by a single court that has examined the issue.

The waste of money argument takes four forms. First, there is an argument that rules relating to elevated risk are so lax as to be nonexistent.\textsuperscript{132} Proponents of this argument obviously reject as mere verbiage the admonition of courts like Ayers that the plaintiff must prove a “significant” or “serious” increase in risk before monitoring should be ordered.\textsuperscript{133} Second, it is often strongly argued that victims of toxic torts may not really want medical monitoring or may not avail themselves of it when it is offered to them.\textsuperscript{134} This argument is speculative on its face, and court orders creating trust funds or limiting plaintiffs to getting reimbursement for monies expended for monitoring eliminates whatever danger may exist that monies awarded will be frittered away. Third, there is the argument that since a plaintiff may have medical insurance, payment of monitoring costs by defendant is unnecessary and redundant.\textsuperscript{135} This argument may explain why allowing medical monitoring relief is not, for the insured, an absolute necessity. However, this argument ignores the

\textsuperscript{130} See, e.g., Martin & Martin, supra note 21, at 131; Schwartz, supra note 19, at 1071-80. See also, E. Donald Elliot, Why Courts? Comment on Robinson, 14 J. LEGAL STUD. 799, 803 (1985) (institutions other than courts better equipped to evaluate risks); Peter Huber, Safety and the Second Best: The Hazards of Public Risk Management in the Courts, 85 COLUM. L. REV. 277, 318 (1985) (courts poorly equipped to assess risk).

\textsuperscript{131} Goutman, supra note 20, is the most vigorous proponent of this position. Others are less certain. See supra notes 113-15 and accompanying text. Perhaps the most indirect and weakest version of the argument is set out by Henderson & Twerski, supra note 16, who argue against the need for monitoring by suggesting (1) that “many, if not most, persons exposed to toxic substances do not want to be monitored,” basing this conclusion on the belief that if lump-sum awards were made for monitoring the recipients would spend it on other subjects, and (2) that most Americans (“admittedly not all) are [already] covered by... general health insurance which presumably is in place to carry the lion’s part (admittedly not all) of the financial burden of medical monitoring.” Id. at 844.

Close examination shows that their first argument is incomplete; whether people are anxious to undergo inconvenient, uncomfortable, and occasionally risky medical examinations is simply not the same question as whether they need to do so, or whether they would undergo examinations if they were told by their doctors that they were necessary and the examinations were free.

Given all the caveats, (the “admittedly not all” limitations they conceded), their collateral source argument is incomplete on its face. It suffers from other infirmities as well. It assumes that insurance markets would remain static after a toxic tort occurred and that insurance coverage would remain the same even if tortfeasors were forced to pay monitoring costs. Neither assumption has been verified and both are highly questionable. See supra note 23. In addition, even if it were true that everyone had prepaid for diagnostic services through insurance, that would not justify refusing to reimburse them (or their insurers) for their expenses. The whole question is who should pay for the monitoring expenses, and it simply is not an answer to say somebody else has shown a willingness to pay so the tortfeasors should get off the hook.

\textsuperscript{132} See supra notes 68 and 106 and authorities cited therein.

\textsuperscript{133} 525 A.2d at 312.

\textsuperscript{134} See supra note 92 and authorities cited therein.

\textsuperscript{135} See supra notes 23 and 129 and authorities discussed therein.
fundamental tenet of the American remedial justice system that an innocent plaintiff is rightfully entitled to full compensation for wrongs done him by a defendant, and that forcing plaintiff to pay extra insurance rates to cover losses defendant has imposed on him is inefficient because it permits defendant to foist off on plaintiff what in reality is a cost of defendant's doing business. Finally, there is an argument that there is little or no medical efficacy to monitoring for many diseases. This argument completely bypasses the fact that medical necessity is an element of the cause of action in all the cases upholding medical monitoring.

Professor Klein has argued that it is inappropriate to allow monitoring relief in any case in which a plaintiff, once his latent disease becomes manifest, would not be able to recover for personal injury. As he states it, "monitoring plaintiffs . . . are not truly seeking compensation for what the defendant has done, [but] rather they are seeking compensation to protect against what the defendant's conduct might do in the future." In his view, monitoring relief covering people whose sickness, if and when it arrives, would not be chargeable to defendant's misconduct is overbroad, and affording it leads to overdeterrence.

Klein's argument is flawed, however. It assumes that the only loss people suffer when a toxic tort is visited upon them is the disease they may

136. The fundamental principle of damages is to restore a victim, as nearly as possible, to the position he would have enjoyed had it not been for the wrong committed by the defendant. See, e.g., Chronister Oil Co. v. Unocal Ref. & Mktg., 34 F.3d 462, 464 (7th Cir. 1994); United States v. Hatahley, 257 F.2d 920 (10th Cir. 1958).

137. The classical school of law and economics subscribes to the notion that the law should generally encourage profitable activity, even activity that harms others, so long as law violators pay for the damages they cause. Activity that is profitable after payment of the costs it imposes on others is "efficient" or "economical," according to this view, and therefore, good. Under this view, it really does not matter who directly gets paid those costs—victims, the government, or even plaintiffs' lawyers—so long as they get paid, because it is payment that promotes efficiency by deterring only "inefficient" conduct and encouraging that which is "efficient." But there may be "secondary" reasons for paying the money as compensation to victims, which include the fact that such payments encourage the right level of enforcement of rights and because without such payment victims would likely become overcautious in trying to avoid being injured. See Richard A. Posner, Economic Analysis of Law § 6.10 at 209 (5th ed. 1998).

138. See generally Goutman, supra note 20; McCarter, supra note 68 and accompanying text.

139. See, e.g., In re Paoli R.R. Yard PCB Litig., 916 F.2d 829, 852 (3d Cir. 1990); Potter v. Firestone Tire & Rubber Co., 863 P.2d 795, 825 (Cal. 1993); Ayers v. Township of Jackson, 525 A.2d 287, 312 (N.J. 1987). In order to impose liability on a tortfeasor for monitoring expenses, every single case upholding the relief has mandated that plaintiff to show, through expert testimony, that the surveillance regime to be funded has been made medically reasonable and necessary by plaintiff's exposure to defendant's toxin. Failing such proof, defendant has no liability.

A small minority of jurisdictions take the view that plaintiff need not show that early detection is likely to improve her health prospects. See Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424, 434 (W. Va. 1999); Redland Soccer Club v. Dep't of the Army, 696 A.2d 137, 146 n.8 (1997). These cases uphold monitoring if it provides early detection because it will improve a plaintiff's quality of life and because, as medical science improves, new treatments may be developed that would be aided through early detection. See also discussion supra note 30.


141. Id. at 12.
later contract; the only cost of a toxic tort is the disease it causes, and once industry pays that cost it should get off free. But this is clearly not so. Klein seems utterly oblivious to the fact that failure to make defendants responsible for putting people at risk of harm actually encourages anti-social dumping of toxins on society by allowing defendants to externalize the costs they impose on society by threatening it with harm. The argument assumes that, for people who ultimately are not destined to get sick or for whose illnesses a corporate defendant would not be found liable, the harms that a defendant's misconduct causes are inconsequential. But they are not. Consider, for a moment, a defendant who forces upon a fifty-five year-old plaintiff the equivalent of a twenty-five year dosage of four packs of cigarette smoke per day. A plaintiff would very likely want medical monitoring for lung cancer and heart disease. The fact is that it is not true that a plaintiff is probably going to contract lung cancer, and if she comes down with heart disease, it would be hard to maintain that the smoking is probably what caused it. Does this mean that a plaintiff would not be apprehensive about contracting one or the other of these major killers? Of course not. If her doctor were to tell her that her history warranted a regimen of yearly chest X-rays and an annual examination for cardiovascular disease, why should plaintiff have to pay for it?

Beyond that, limiting recovery of medical monitoring costs to situations in which a defendant's toxin is probably going to cause a plaintiff serious illness, or in any event would, if a plaintiff did get sick, render a defendant liable, ignores the burdens a defendant's wrongful conduct will impose upon victims who cannot prove that their illness will arise from or has arisen from defendant's conduct; the fact is that whenever the defendant has put a reasonable plaintiff in the position where a doctor must tell her to undergo a reasonable, long term regimen of preventive screening tests to save her life, a plaintiff has been placed in the position of suffering harm independent of those harms involved in actually coming down with the disease. Put in this position, the plaintiff is forced to spend time and money on tests she thinks she must undergo to survive, and she is likely scared out of her wits to boot.\textsuperscript{142} It can hardly be overdeterrence

\textsuperscript{142} As stated in Goldberg & Zipursky, supra note 12, at 1694-95, A person who is wrongly subjected to a significant threat of a serious disease has been harmed in very important respects. A cloud has been placed over her life, and one can imagine that cloud of impending death intruding on her life significantly. Particularly if the risk is associated with an infectious and potentially fatal disease, the pall cast not only by the reduced prospects for normal life-expectancy, but also by the risk of infection, might undermine her self-confidence and cause her to alter significantly her plans, relationships, and activities . . . as false imprisonment causes a spatial confinement and thereby deprives one of an important form of liberty, so this cloud of impending disease constitutes a temporal confinement. . . . It is a platitude . . . that what constitutes [actionable] injury is a normative matter . . . Undoubtedly it is tempting to treat . . . the "cloud" or "pall" associated with threat of illness as boiling down to probabilities: If the likelihood of the disease reaches a certain threshold, then it is actionable as a negligently created threat; otherwise it is not . . . No doubt, percentage likelihood matters—the more remote the possibility, the less it is plausible to say
to make defendant pay these "costs," too.

The argument that medical monitoring will lead to overdeterrence is impossible to prove, but what evidence there is suggests that overdeterrence from medical monitoring relief is in fact highly unlikely. Factors militating against overdeterrence include the lack of knowledge of victimization that people exposed to toxins may have which prevents them from even considering bringing toxic tort cases, the enormous problems and costs of proof that plaintiffs' lawyers encounter in pursuing toxic tort cases, the difficulties of bringing class actions in toxic tort situations, the admitted reluctance of many victims to undergo medical surveillance protocols even when they are recommended and offered for free, and the resistance of the bar to taking on cases wherein collection of a contingent fee is difficult and likely to result in payments over long periods of time.

Medical monitoring claims are unlikely to provide enough deterrence to compel defendants to avoid committing toxic torts. But failing to allow monitoring claims will systematically cause underdeterrence. This is true for several reasons. First, failure to allow monitoring claims shifts to victims a whole host of costs of corporate enterprise that businesses ought to bear if one is to maximize efficiency. The costs of toxic torts include more than simply the cost of disease; they also include the out-of-pocket medical screening expenses fairly chargeable to a defendant's tortious activity because, but for those activities, the victims would not have had to

that defendant's negligence is responsible (as opposed to the plaintiff) for the resulting pall. . . . But the question is not strictly factual. Whether the threat of disease and the interferences [with daily living] constitute something significant enough to count as an "injury" seems to call for a more general account of what goods are needed for a life to go well or to be going well. . . . It resembles the question of what sorts of conditions constitute a "disability": it is a normative question that hinges on an assessment of the capacities and activities that are important to a person's life going well.

143. Opponents argue that medical monitoring cases create "the possibility of significant overdeterrence," Henderson & Twerski, supra note 16, at 843, or "raise[] serious concerns of overdeterrence," Klein, supra note 21, at 27. The weight of opinion is against their position. Martin & Martin, supra note 21, who also oppose medical monitoring, nevertheless concede that "the deterrent value of awarding medical monitoring costs is usually minimal." Id. at 139. Brennan, supra note 68, conurs. The latter flatly states that "e]mpirical evidence suggests that environmental torts suits currently send a weak deterrent signal." Id. at 6. He also argues that, given the relative lack of deterrence provided by other institutions, future "overdeterrence seems doubtful." Id. at 48 n.163.

144. Id. at 70.

145. The average medical monitoring award for an individual would likely be too small to support a contingent fee arrangement with a good attorney, especially one adept enough to handle the difficulties of complex litigation involving experts in toxicology, medicine, and the like. The most likely way to make such litigation feasible, absent an attorney fee-shifting statute like the environmental protection statute being enforced in Redland Soccer Club, 696 A.2d at 139-40, would be for plaintiff's lawyer to take the case as a class action so that the attorney could collect a fee, through the common fund rule, from the class. For a discussion of the difficulties of pursuing monitoring claims as class actions, see infra note 187.

146. Blumenberg, supra note 28, at 695-97, attempts to discuss the difficulties attorneys may have in collecting contingent fees from future flow of payments, but she does not explain why many lawyers will want to collect fees over such a long period of time.
undertake medical screening. Even if medical monitoring awards were limited to those who could show that, should they become sick, the disease contracted was fairly attributable to the defendant’s misconduct, defendants would not have a full incentive to pay early in hope of avoiding more ruinous expenses for even larger costs in the future. Business defendants have a disincentive to pay monitoring costs for long-delayed diseases until the diseases occur, because they can have the benefit of investing the money they should have paid out in monitoring costs in other endeavors until such time as the victim comes down sick.\footnote{147}

Standing alone, the argument that medical monitoring relief will lead to the financial ruin of defendant corporations has little force. After all, if a business causes harm to others that costs more than the business can bear without going broke, it is hard to argue that it is better that the victims be forced to subsidize the business by absorbing its externalized costs than it is to note simply that, at least in a capitalistic system, it is the business that should suffer, through internalization of its costs, even if this leads the business into bankruptcy. Neither the corrective justice model of classic American remedies doctrine\footnote{148} nor “law and economics” theory\footnote{149} justify sacrificing good justice for corporate welfare.

The bankruptcy argument is not left to stand alone, however. It is usually accompanied by an argument that monitoring relief, in the toxic tort case, will prove so expensive that it will likely exhaust the financial resources of corporate defendants with the result that they will be bankrupted by the time that other victims of the torts in question, those who suffer serious physical harms years or even decades after discovery of the tortious activity, realize their injuries and get around to trying to collect damages for them.\footnote{150} The argument is often reinforced by giving reference to the history of asbestos litigation over the past several decades—a history in which a number of generous damages awards for minor illnesses early in the game left many more seriously ill plaintiffs without recourse when their illnesses came to flower so late that when they finally were able to assert claims for full damages, they discovered that the manufacturers legally responsible for their losses were hopelessly insolvent.\footnote{151} Indeed, invocation of this “horrible” is, to the opponent of medical monitoring, very much like showing that the opponent holds a trump card that ought to foreclose further debate.

\footnote{147}{Brennan, supra note 68, notes that “[m]edical monitoring . . . creates costs, hence deterrence signals, for producers who could otherwise, quite rationally in a market sense, discount to present values the cost of injuries that will occur after a latency period has run.” Id. at 70.}

\footnote{148}{See supra note 136.}

\footnote{149}{See supra note 137.}

\footnote{150}{This concern was expressed by Justice Breyer in Metro-N. Commuter R.R. Co. v. Buckley, 521 U.S. 424, 435-36 (1997). For a discussion of Buckley, see text supra at notes 71-99. Numerous law review articles express the same concern. See, e.g., Henderson & Twerski, supra note 16, at 850; Schwartz, supra note 19, at 1062; Hamrick, supra note 26, at 471.}

\footnote{151}{See supra note 127 and authorities discussed therein.}
Like the claim of threatened overdeterrence, the bankruptcy argument is grossly overdrawn. There is no evidence that medical monitoring claims have ever driven any defendant in the United States into insolvency. The very unattractiveness of medical monitoring procedures to many plaintiffs¹⁵² suggests that, if the remedy is limited to funding monitoring costs through an injunction creating an equitable trust fund or otherwise mandating only reimbursement for monitoring expenses actually incurred,¹⁵³ many patients who are entitled to monitoring relief will not avail themselves of it, and that those who do will be people whose health prospects have indeed been dimmed by what defendants have done and are believed by the plaintiffs to be enhanced by the screening they are now able to get.

Moreover, the asbestos cases are not a fit paradigm for most of the monitoring claims that will be brought in the future. Experience of the asbestos cases can be instructive, but the lesson learned need not be that nothing should ever be done about toxic torts until people are so sick as to be on the verge of death; to suggest otherwise is essentially to use the asbestos cases as a bogey-man rather than to analyze what happened there with a view toward not repeating it. What drove the asbestos companies into early bankruptcy was not a spate of medical monitoring judgments or settlements, but a series of suits in which plaintiffs with evidence of exposure but no disease (e.g., thickening of the pleura of the lungs, discovery of minute threads of asbestos in the lungs, etc.) or relatively minor disease (i.e., asbestosis) were allowed to collect generous damages awards for full-fledged injury, emotional distress, and enhanced risk of future losses. The result of the treatment of the early cases stripped most players in the industry of funds before more serious asbestos-caused malignant diseases ripened, so that in the end, when there was widespread bankruptcy in the industry; the victims who came to seek relief late in the game all too often found the cupboard had been stripped bare by those who had suffered no, or only minor, losses.¹⁵⁴

The monitoring cases simply do not fit into the asbestos paradigm for several reasons. First, the awards in medical monitoring cases are limited to future medical expenses and are not likely to involve overcompensation. This is true for two reasons. First, the very fact that the awards are limited tends to differentiate them from the asbestos judgments, which often permitted generous recoveries on negligent infliction of emotional distress theories and often counted even minor injuries as the proper occasion for making lump-sum awards for “pain and suffering,” enhanced risk of future complications, and future medical treatment costs. It was this problem that led to the docketing registries in the asbestos cases, not excessive medical monitoring expenses.¹⁵⁵ Additionally, the monitoring

¹⁵². See supra note 92 and authorities discussed therein.
¹⁵³. This kind of limitation is recommended in Ayers and Potter and is mandated under the law of a number of states. See supra note 11 and cases cited therein.
¹⁵⁴. See McGovern, supra note 129; Schuck, supra note 112.
¹⁵⁵. See Behrens, supra note 112; Schuck, supra note 112.
remedy should not ever produce a "double recovery," unlike the asbestos cases which, once they began permitting multiple successive asbestos exposures actions, first for the fear of contracting serious illness, then again for getting it (along with the mental anguish that entailed), virtually guaranteed double recoveries.

Second, a properly administered monitoring case should be triable in equity.\textsuperscript{156} This makes a monitoring case different from an asbestos damages case in several ways. First, the mere fact that the case will be tried to a judge, not to a jury, should eliminate, or at least minimize, the fears that inflamed jury passions will lead to inflated, pro-plaintiff verdicts. In addition, because the proceeding would be in equity, the judge could decide, in the few cases wherein she believed the empty cupboard scenario was a real threat in the future, to disallow monitoring, either on a limited basis for those plaintiffs whose own insurance will pay the bill,\textsuperscript{157} or on a total basis, where the equities demanded eliminating screening for future disease so as to take care of the more pressing need of caring for victims already afflicted with serious illness.

Third, many toxic tort cases simply differ from the asbestos cases in ways which make replication of the asbestos "horrible" extremely unlikely. Professor Brennan has indicated that environmental pollution problems vary in terms of toxicity levels, the degree to which the toxin is dispersed, and the number of sources of the toxin, and that the variety of environmental paradigms ought to logically give rise to different legal responses.\textsuperscript{158} Environmental disasters involving contaminated water sup-

\textsuperscript{156} See infra notes 174-90 and accompanying text.

\textsuperscript{157} Note here I am assuming that, as a normal matter, the court should not refuse monitoring where there is a collateral source of insurance money available to defray the victim's monitoring costs; in my view, such refusal should only occur in extremis.

My position is inconsistent with that suggested by several courts and commentators to the extent that monitoring relief should be unavailable if plaintiff has her own insurance. None that I know of provide any real explanation for this view, and it certainly is not the dominant one regarding the availability of payments from collateral sources. As Ginsberg & Weiss, supra note 28, point out:

From a logical point of view, . . . all medical expenses should be reimbursed even if other coverage exists, since maximum internalization of cost will thereby be achieved. An additional rationale for such an approach is that the victim has paid the premiums for other health coverage. If the Fund paid all medical expenses, the additional "windfall" payment from private or group health insurance would be in lieu of a return of premiums.

\textit{Id.} at 936.

Conceding that as a practical matter, such a policy might have an adverse impact on private premium rates [because] other policyholders would [end up] subsidizing the victim's double recovery," \textit{Id.} Ginsberg & Weiss conclude that "[t]he question would resolve itself within a short period of time in any event, since full medical reimbursement by the Fund would probably result in excluding from private policy coverage injuries caused by exposure to hazardous wastes." \textit{Id.} In short, if the court allowed liability in all cases regardless of whether plaintiff had other insurance, in the cases where plaintiff did have insurance the insurance carriers would quickly respond by cutting coverage and premiums, thus eliminating overinsurance, double recoveries, and high premium rates among the general public.

\textsuperscript{158} Brennan, supra note 68, at 10-17.
plies,\textsuperscript{159} landfills,\textsuperscript{160} toxic dumps,\textsuperscript{161} or workplace radiation\textsuperscript{162} create narrower and more localized disputes than did the asbestos paradigm, presenting more discrete claims involving a limited number of victims exposed over a short period of years in a small geographic area. Such cases present vastly different problems as compared to the asbestos cases, and it is simply inappropriate to suggest that the asbestos "horrible" is likely to be replicated in the context in which cases like them have to be resolved.\textsuperscript{163}

In the end, the last argument standing is that the complexities of toxic tort litigation, the concerns about overdeterrence, and the risk of bankrupting tortfeasors by having them pay minor costs before the big bills come in from victims with full-blown disease combine to mandate that courts adhere to the physical injury rule and decline to grant monitoring relief unless and until legislatures have had a chance to study the matter and resolve it. The suggestion that courts are inappropriate organs for changing the law and should await legislative intervention ignores the fact that it was the courts, not the legislatures, that created the physical injury requirement in the first place. More important, it assumes a willingness of the legislature to engage itself in addressing the problem—an assumption that, so far, does not seem realistic.\textsuperscript{164} Indeed, the most ardent supporters of this alternative have little good to say about any medical monitoring regime,\textsuperscript{165} thus suggesting that their ode to the wisdom of legislative solutions may be little more than an excuse for burying reform in the pit of legislative inertia. In addition, the argument ignores the fact that the common law tort action may, in some cases, be the best available way to deter dangerous environmental poisonings. As Professor Brennan has pointed out elsewhere, different environmental paradigms may well warrant different kinds of legal responses, with the nod going toward litigation in those cases where the number of potential defendants is relatively low, the dispersal of the toxin not wide in time or space, and the relief limited to monitoring, as opposed to general, damages.\textsuperscript{166}

\textsuperscript{159} E.g., Ayers v. Township of Jackson, 525 A.2d 287 (N.J. 1987).
\textsuperscript{160} E.g., Redland Soccer Club, 696 A.2d at 137.
\textsuperscript{162} E.g., Day v. NLO, 851 F. Supp. 869 (S.D. Ohio 1994).
\textsuperscript{163} This is not to say that some mass tort claims have similarities to the asbestos claims. Consider, in this regard, tobacco litigation, for example, Barnes v. Am. Tobacco Co., 161 F.3d 127 (3rd Cir. 1998) and the fen/phen cases, for example, In re Diet Drugs Products Liability Litig., No. 98-20626, 1999 U.S. Dist. LEXIS 13228 (E.D. Pa. Aug. 26, 1999), both of which involved several million claimants claiming to suffer nationwide exposures to toxins derived from multiple sources in variable circumstances over varying periods of time.
\textsuperscript{164} See Schuck, supra note 112, at 552 (counting on Congress to initiate legislation to solve asbestos crisis likened "to plac[ing] one's faith in tooth fairies").
\textsuperscript{165} See, e.g., Schwartz, supra note 19, at 1071-80.
\textsuperscript{166} Brennan, supra note 68. Brennan suggests that thirty or more years of regulatory response to environmental poisoning has not provided an adequate deterrent to the flow of toxins into the environment, \textit{id}. at 22-38, and that criminal law and market forces have also failed in the task. \textit{id}. at 38-44. He then suggests that the overhead costs of litigation and the problems of proving causation make it almost impossible for tort law to adequately
VII. COST-BENEFIT ANALYSIS SHOWS ALLOWING PLAINTIFF MEDICAL MONITORING RELIEF EXPANDS SOCIAL WELFARE AND FAILURE TO DO SO DIMINISHES IT

Allowing a cause of action for medical monitoring relief advances public welfare on almost any fair cost-benefits analysis of the issues in question. In virtually any case, a plaintiff's gain from getting medical monitoring relief far outweighs a defendant's costs. I am not here referring to an argument that a plaintiff's life may be saved by the monitoring regime and life is of incalculable value. Rather, I am noting that the psychological benefit to the plaintiff of being able to carry through a program of medical screening to save her life is offset by no cost to the defendant. Failure to count the benefits involved in relieving plaintiff's fears and anxiety that medical monitoring might afford—benefits not only to the plaintiff but also in her family relations and productivity as a worker in society—can lead one to conclude that there is no net social welfare gain to be had from passing medical monitoring costs from the defendant to the plaintiff, and no loss to be suffered if the loss is simply allowed to lie upon the plaintiff. But this is clear error.

It is no accident that lawyers have frequently accompanied their medical monitoring claims with claims of negligent infliction of emotional distress. In the cases in which defendants have placed plaintiffs in perilous limbo—facing the long term threat of harm because of the indeterminate but real threat of future illness—the cost to the plaintiffs is unlikely to be simply the cost of medical testing; in addition to suffering that economic harm, the plaintiffs are also suffering psychological stress. As indicated above, the courts have generally refused to provide compensation for this psychological stress because the loss suffered is not subject to objective proof and valuation, and it is open to the wildest speculation. But the courts that reject psychological harm do not do so because they believe it is not real; their concern is that it is too hard the measure.

Medical monitoring relief would not only relieve a plaintiff of the financial costs of paying for preventive medical screening; it would also alleviate much of the fear and anguish imposed on the victim by providing her with a means to take control of her life and to take steps that promise at least substantial improvement of her long term health pros-

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167. See supra notes 16-17 and accompanying text.
168. See supra notes 49-52 and accompanying text.
pects. This latter gain has no counterpart as a cost to defendant, and failure to facilitate its realization diminishes social welfare.

Nor would allowing limited relief for emotional distress offend the concerns courts have expressed related to claims for damages for non-intentional infliction of emotional distress. If medical monitoring relief is not seen as compensation for distress already imposed but rather as preventive relief designed to abate ongoing psychological stress, one readily avoids the difficulties of making nice calculations of what the amount of damages ought to be for the distress. And medical monitoring relief offered to respond to not only the expected economic harm a plaintiff otherwise would suffer, but also to her emotional distress, eliminates the economic harm rule taboo on preventing recovery for non-economic torts by expanding the focus of the lawsuit to resolving non-economic harm.

Given the obvious benefits of allowing some sort of relief for stress, so long as the problem of avoiding overlarge damages awards for immeasurable psychological losses can be avoided, it is surprising that stress claims have not been recharacterized as not involving emotional damage to plaintiff, but instead as the right not to be subjected to objectively unreasonable threats to one’s well-being. As stated elsewhere, a person claiming emotional distress should complain against having been wrongly subjected to a significant threat of a serious disease. A cloud has been placed over [the victim’s] life, and one can imagine that cloud of impending death intruding on her life significantly. Particularly if the risk is associated with an infectious and potentially infectious disease, the pall cast not only by the reduced prospects for normal life-expectancy, but also by the risk of infection, might undermine her self-confidence or cause her to alter significantly her plans, relationships, and activities.\textsuperscript{169}

Properly cast, America’s courts should accept a claim that takes care of mitigating the ongoing harm this kind of ongoing threat poses for toxic tort victims.

\textsuperscript{169} Goldberg & Zipursky, \textit{supra} note 12, at 1694. The authors analogized these cases to claims for false imprisonment. The right involved, they said, is not the right to not be stressed, but the right to not be threatened; if the threat is real and substantial, the claim should lie even if plaintiff is not terribly stressed out, though the plaintiff would likely only get nominal damages in the case where she “remains unflapped” by the stress. \textit{Id.} at 1695.
VIII. CONCLUSION: MEDICAL MONITORING CLAIMS SHOULD BE ALLOWED, BUT ONLY WHEN RECHARACTERIZED AS EQUITABLE CLAIMS TO COVER THE COST OF MEDICAL SURVEILLANCE WHERE THE SCREENING HAS SUBSTANTIAL MEDICAL EFFICACY IN PROVIDING EARLY DETECTION AND POSSIBLE CURE AND IS LIKELY TO MITIGATE SEVERE EMOTIONAL DISTRESS CAUSED BY THE THREAT OF DISEASE CAUSED BY DEFENDANT

Medical monitoring relief before physical injury manifests itself has received broad support from the courts, and it certainly brings many advantages to the litigation system compared to the alternative, which is to leave plaintiff without remedy unless and until she becomes sick, sometimes years or even decades after the tortfeasor has exposed her to its toxins. For relatively predictable, though not de minimis costs, medical monitoring relief can deter tortfeasors and discourage them from passing onto persons exposed to their toxins the costs of doing business that their misconduct ultimately inflicts. Though not fully compensatory, it does defray ordinary and necessary medical expenses a plaintiff may be forced to undertake because of defendant’s misconduct, can improve the plaintiff’s life prospects and the public health, and certainly can help alleviate the psychological pain and loneliness suffered by a person threatened with a terrible, silent disease that will come to fruition, if at all, only after a long drawn-out latency period.

But monitoring relief has its problems. Unless it is recharacterized as involving risk of physical injury or alleviating psychological injury, a damages action for monitoring violates the economic harm rule. More importantly, its indeterminacy—the fact that it is granted only upon proof of significant increase of substantial risk of serious harm under circumstances where relief should come only when there is a likely and significant increase in life prospects because early detection and early treatment have demonstrable benefits—has been seen as threatening to lead to costly litigation of little practical value and possible destruction of a defendant’s assets to the detriment of people who become seriously ill, but whose illnesses become apparent, because of the long lag time between exposure and disease symptoms, too late in the litigation process.

None of these problems need stand in the way of monitoring relief, once it is recharacterized as an equitable means of funding future costs of screening services defendants have imposed on the plaintiffs and of alleviating the sense of stress innocent plaintiffs suffer from exposure to the toxins of defendant tortfeasors. It has infrequently been noted that most of the reported medical monitoring cases have indicated a strong prefer-
ence for requiring the defendant to create or finance some sort of fund or insurance mechanism to handle medical monitoring claims over time, rather than simply ordering a lump sum payment of the capitalized value of future expected medical monitoring costs.\textsuperscript{173} While many of these courts still viewed the relief as involving legal (i.e., non-equitable) relief assuring a pay-out of future "damages," they rarely explained why;\textsuperscript{174} the relief they authorized is perfectly consistent with what an equity court would do in granting a reparative injunction limiting the prospective effects of past misconduct\textsuperscript{175} where the misconduct itself could not be undone and the infliction of future damages is uncertain or so hard to calculate as to be wildly conjectural.\textsuperscript{176}

\textsuperscript{173} See supra notes 71-99 and accompanying text.

\textsuperscript{174} One exception is Werlein v. United States, 746 F. Supp. 887, 895 (D. Minn. 1990), \textit{vacated on other grounds}, 793 F. Supp. 898 (D. Minn. 1992), where the court said that a fund to cover medical monitoring costs must be legal in nature because it involved "payment of cash . . . to reimburse [another] . . . for costs incurred." This conclusion is mistaken in terms of what the parties actually will experience as well as legal theory. See Venugopal, \textit{supra} note 42, at 1665-66. The Supreme Court has long noted that equity courts sometimes require defendants to pay monies to others. See, e.g., Bowen v. Massachusetts, 487 U.S. 879, 895 (1988); Curtis v. Loether, 415 U.S. 189, 196 (1974).

A number of courts have suggested that characterization of monitoring claims should turn on whether the relief sought involves judicial creation and supervision of the monitoring regime. \textit{See, e.g.,} Zinser v. Accufix Research Inst., Inc. 253 F.3d 1180, 1194-96 (9th Cir. 2001); Wilson v. Brush Wellman, Inc., 817 N.E.2d 59 (Ohio 2004). In the view of these courts, unless the action contemplates such relief, it is really little more than an action for damages, however characterized.

This view may or may not prove correct. Even if it does, however, it only means that a plaintiff could assure herself that her claim would gain equitable characterization by requesting that the court require some mechanism for reporting the monitoring results to the public or to the court and supervise the monitoring program as it unfolds in future years. Plaintiffs have often refused even to attempt to get their actions characterized as equitable, in part because they may want jury trial and in part because they want a lump sum recovery to assure full payment of their attorneys. One reason some have sought to have their claims characterized as equitable lies in an argument that, in class action cases, an equitable characterization of the claim might make class certification easier under Rule 23(b)(2) and its state counterparts than under Rule 23(b)(3), which requires that class issues "predominate" over non class issues and that class treatment be "superior" to alternative mechanisms of dispute resolution. \textit{See Fed. R. Civ. P. 23.} However, it is not altogether clear that equitable characterization would help solve the class certification problem. \textit{See infra} note 192.

\textsuperscript{175} See Douglas Laycock, \textit{Injunctions and the Irreparable Injury Rule}, 57 Tex. L. Rev. 1065, 1073-75 (1979) (explaining that a reparative injunction is one that prevents future harm from flowing from a past wrong and distinguishing that from damages, which compensates for a past wrong already sustained). Thus, calling the relief preventative—and thus appropriate for injunctive relief—is not inconsistent with the notion that some harm may already have been inflicted. Instead, it simply involves recognition that many injunctions are reparative in nature. When defendant has done a wrong to someone, courts are unable to roll back the calendar and make it so that the wrong has never been committed, but they can order the defendant to take steps to limit or mitigate the harm flowing from the wrong he has done. If a defendant wrongfully lets my horse out of the barn, he cannot be enjoined from releasing the horse, but he can be required to catch and return the animal.

\textsuperscript{176} Monitoring relief, because it is prospective and preventative rather than retrospective and compensatory, clearly more closely resembles an \textit{in specie} injunctive remedy than a substitutionary award of legal damages. Injunctions are allowed where the remedy at law is inadequate. Inadequacy can flow from many sources, but one of the most common reasons for allowing injunctive relief is to avoid assessment of damages where the assessment
In an influential article, John C.P. Goldberg and Benjamin C. Zipursky suggested that medical monitoring claims should not be characterized as compensation for economic harm, as was done in cases like *Ayers* and *Buckley*, but rather as preventative equitable relief designed to save lives by limiting the risk of ultimate mortality or morbidity threatened by exposure to defendant's toxins. Under this view, medical monitoring relief is, at bottom, an injunction against a tortfeasor "to undertake affirmative efforts to protect plaintiffs who have been exposed to heightened risk of disease by their negligence." In this same paper, Goldberg and Zipursky argued for recharacterizing emotional distress claims as complaints against the threat of serious disease.

The notion that claims for medical monitoring should be raised in equity rather than law is not original with writers like Goldberg and Zipursky. Indeed, the earliest monitoring cases treated claims for monitoring relief as equitable, granting injunctive relief because the courts found that the remedy at law—damages after injury was sustained—to be inadequate. In the earliest medical monitoring case, *Friends for All Children v. Lockheed Aircraft Corp.*, a federal court of appeals ordered monitoring relief in the form of a preliminary injunction coercing defendant to set up a fund to defray medical screening costs of members of a plaintiff group the court felt might suffer irreparable brain damage *pendente lite* as a result of the likely, but unproven, wrongdoing of the defendant. Three years later, in *Barth v. Firestone Tire & Rubber Co.*, a federal district court refused a motion to dismiss an action for monitoring relief by concluding that the plaintiff's complaint demanding class action monitoring relief set forth a claim upon which relief could be granted. The court said the proper relief in the case was an injunction requiring creation of a fund to cover the cost of medical screening for members of the putative class of over 5,000 former employees of the defendant whom the plaintiff sought to represent. The plaintiff's claim was that the defendant had exposed its employees at one of its plants, for a period running from 1963 until the plant closed in 1981, to a variety of toxic chemicals without their consent, and that virtually all of these employees had not only not yet become ill from these exposures, but in many cases did not even know of the chemical exposure or the health risk that defendant had placed

would be highly speculative. Ascertaining what valuation to put on plaintiff's ongoing psychological injury is speculative—so much so that many courts refuse to allow damages for it at all. See supra notes 48-52.

177. Goldberg & Zipursky, supra note 12, at 1702-08. See also Venugopal, supra note 42.

178. Goldberg & Zipursky, supra note 12, at 1635. Later in the same paper the authors suggest that the duty to pay monitoring costs closely tracks the duty in tort of one who has created a dangerous condition that places another in peril and hence in need of affirmative aid to take steps to rescue the person from the peril. Id. at 1710.

179. Id. at 1694-95. See also supra note 16 and accompanying text.

180. 746 F.2d 816 (D.C. Cir. 1984), discussed supra note 11.


182. Id. at 1478.
them under.\textsuperscript{183} Under these circumstances, the court ordered the injunction.

The \textit{Barth} court concluded that the named plaintiff—who obviously knew about the exposure and attendant risk—would “likely benefit from . . . the increased pool of information [the injunction would help bring to light] . . . and may ease his emotional distress.”\textsuperscript{184} Damages could not adequately compensate the putative class. It accepted the plaintiff’s argument that only a monitoring program could prevent the manifestation of harms that otherwise might appear after a lengthy latency period and that might be preventable if diagnosed early. The damages remedy, the court said, was no substitute for a monitoring program that would lead to gathering, pooling, and sharing knowledge about the results of the exposure and provide for early diagnosis and preventive medical advice. Since the remedy at law for the individual plaintiff and the class he represented was inadequate, the court held that injunctive relief was appropriate.\textsuperscript{185}

Recharacterization of medical monitoring claims along these lines is long overdue. Reconstituting medical monitoring claims in terms of enjoining performance of a primary duty rather than seeking compensation for a completed wrong “explains, at the level of doctrine, the plausibility of these claims.”\textsuperscript{186} Calling medical monitoring claims suits to recover for economic losses runs afoul of the economic harm rule, but recognizing that it may mitigate against future deleterious and debilitating effects of fear caused by enhanced risk removes them from the limitations of that rule.\textsuperscript{187}

In \textit{Buckley}, the Supreme Court recognized the possibility of allowing some sort of flexible relief in a future FELA case but balked at upholding the relief the plaintiff had sought and the lower court had ordered—lump sum damages;\textsuperscript{188} the Court said the issue of striking the proper balance between the various considerations favoring or disfavoring monitoring relief would have to await another day.\textsuperscript{189} Recharacterizing medical monitoring claims as equitable in nature helps explain the otherwise mysterious linkage \textit{Buckley} drew between right and remedy. \textit{The duty is to provide monitoring services, not to pay for them.}\textsuperscript{190}

There are additional benefits that would arise from characterizing monitoring claims as equitable rather than legal. Treating monitoring claims as equitable would mean that they would not normally be triable of right to a jury, except with respect to common issues of fact of legal claims

\textsuperscript{183} \textit{Id.} at 1467-68, 1476-77.
\textsuperscript{184} \textit{Id.} at 1477.
\textsuperscript{185} \textit{Id.} at 1477-78.
\textsuperscript{186} Goldberg & Zipursky, \textit{supra} note 12, at 1711.
\textsuperscript{187} \textit{Id.} at 1711-12.
\textsuperscript{188} \textit{Buckley}, 521 U.S. at 442.
\textsuperscript{189} \textit{Id.} at 444.
\textsuperscript{190} Goldberg & Zipursky, \textit{supra} note 12, at 1712.
joined with the claims for injunctive relief;¹⁹¹ the impact of such treatment would likely be to cut down on runaway awards actuated by jury sympathy. The fact that the decision will lie with judges should assuage some of the fear that opening the door to medical monitoring claims is inviting a veritable deluge of weak sham claims by phobic or hysterical plaintiffs joined at the hip with wildly greedy plaintiff’s counsel.

Further, calling the claims equitable may help lawyers who would rather have their medical monitoring claims brought as class actions under Federal Rule of Civil Procedure 23(b)(2) and similar state class action rules, rather than as small claims damages actions maintainable only under Rule 23(b)(3) and its state equivalents.¹⁹²

¹⁹² Goldberg & Zipursky, supra note 12, at 1712. Since big litigation may provide more generous fees and therefore be more likely to attract plaintiffs’ lawyers than single-victim claims, there is a clear interest in the plaintiffs’ bar in having class treatment given to monitoring claims. It has been argued that monitoring claims have a better chance of class treatment than do other kinds of personal injury claims. See, e.g., Elizabeth J. Cabraser, Your Products Liability Hit Parade: A Class Torts “Top 20,” 37 TORT & INS. L.J. 169, 213-14 (2001) (problems of causation less difficult and individualized in monitoring cases than in personal injury cases); Venugopal, supra note 42 (medical monitoring claims should be treated as equitable claims under Federal Rule 23(b)(2) and its state counterparts rather than as damages claims under Rule 23(b)(3), with its requirements of predominance and right to opt out).

Whether a class claim fairly fits within Rule 23(b)(2) or Rule 23(b)(3) may depend on what kind of relief plaintiff is actually seeking. See, e.g., Phillip Morris Inc. v. Angeletti, 752 A.2d 200, 252 (Md. 2000) (acknowledging that while medical monitoring claims might be framed in terms of equitable relief and thus fit within Rule 23(b)(2), those seeking monetary damages as the primary remedy warrant characterization as legal claims fitting within Rule 23(b)(3)). In some cases, the plaintiff has clearly asked for money damages, and while the court might prefer that future such cases be brought for equitable relief, it would be hard to deny that in the particular case at hand plaintiff was seeking money damages. See, e.g., Metro-N. Commuter R.R. Co. v. Buckley, 521 U.S. 424 (1997) (rejecting FELA medical monitoring claim for lump sum damages but reserving question whether FELA claim for equitable order requiring monitoring services might be upheld); Potter v. Firestone Tire & Rubber Co., 863 P.2d 795 (1993) (stating preference for equitable trust fund in future but upholding award of legal damages); Ayers v. Township of Jackson, 525 A.2d 287 (N.J. 1987) (same).

Even if plaintiffs say that they are seeking an equitable remedy, the lack of cohesiveness of the plaintiffs’ class may foreclose allowing the action to fit within Rule 23(b)(2) and force plaintiff to comply with Rule 23(b)(3). See Barnes v. Am. Tobacco Co., 161 F.3d 127, 142-43 (3rd Cir. 1998); Clay v. Am. Tobacco Co., 188 F.R.D. 483, 495 (S.D. Ill. 1999). But see Venugopal, supra note 42; see also Lockheed Martin Corp. v. Superior Court, 63 P.3d 913 (Cal. 2003) (medical monitoring action fails under state Rule 23 analogue because it sets forth a claim for damages and plaintiffs failed to show class issues predominate).

While there have been efforts in some courts to treat medical monitoring claims as Rule 23(b)(2) claims and gain certification under its requirements without demanding that class issues “predominate” and that class treatment of the action be “superior” to alternatives, as is required by Rule 23(b)(3), not all courts have been willing to avoid Rule 23(b)(3)’s requirements through Rule 23(b)(2) characterization of the claims as “equitable.” See, e.g., Barnes, 161 F.3d at 142-43; Clay, 188 F.R.D. at 495; Wilson v. Brush-Wellman, Inc., 817 N.E.2d 59 (Ohio 2004). Even if the claims are injunctive, there may be good reasons for treating them as Rule 23 (b)(3) cases; these reasons arise from the disconnected nature of the class of victims of most toxic torts and the fact that litigation almost inevitably is going to fragment in determining many individualized issues such as the degree defendant’s conduct threatens particular plaintiffs with actual injury and the level of monitoring relief appropriate to each plaintiff’s case. Indeed, the lack of cohesiveness of the class might well foreclose giving the action class treatment whether it is characterized as a Rule 23(b)(2)
Calling the relief equitable explains and justifies making the screening remedy flexible. This has tremendous practical, as well as theoretical, advantages over damages awards for sums certain. A number of courts have suggested that, if the amount of funding for the program of monitoring ordered by the court should require adjusting, the court would retain jurisdiction to make such an adjustment.\(^{193}\) This provides needed flexibility in an area in which medical science may change from year to year or decade to decade—certainly over the life of the injunction—requiring a change in the medical monitoring regime that reasonable physicians would recommend and hence, an adjustment of the amount of money needed to pay for monitoring services.

Treating monitoring claims as equitable has added appeal because it allows for careful, conservative, discretionary judicial decision-making. In equity, the court is mandated to balance the equities, and to refuse granting an injunction when the burden on the plaintiff or on public interests substantially outweighs the benefits to the plaintiff.\(^{194}\) There is a wide variety of indeterminate factors that warrant consideration before a decision should be made as to whether monitoring ought to be ordered, and if so, what level of monitoring is appropriate. These factors include the seriousness of the threatened disease, the degree to which a plaintiff’s exposure is likely to have increased her risk levels, both in comparison to the levels of those in the general population and in absolute terms, the cost of the various methods of monitoring for given diseases threatened by the exposure, the efficacy of early detection and treatment of disease once it should develop, the degree to which the defendant’s liability is blameworthy,\(^{195}\) and—at least in the case of the defendant that claims its finances threaten it with bankruptcy—the number of other claimants and the strength of their various claims to the limited funds the defendant may be able to come up with.\(^{196}\) A judge sitting in equity is far better

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action or a Rule 23(b)(3) action. As recent Supreme Court cases have made clear, class actions in the toxic tort area are fraught with difficulties and conflicts, and courts often will not certify them as class actions. See Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) (decertifying class action because of conflicts among various plaintiffs in settlement of claims); Amchem Prods. v. Windsor, 521 U.S. 591 (1997) (failing class action because of lack of predominance of class over individual issues and class representatives failed adequately to represent absentee members of class).\(^{193}\) See supra note 93 and accompanying text.\(^{194}\) See DAN B. DOBBS, 1 LAW OF REMEDIES 109-12 (2d ed. 1993).\(^{195}\) Id. at 109-10. For example, in some toxic tort cases, the tort theory is essentially trespass, in which case only a very low level of scienter may be required; in others, the theory may involve negligence and the facts may indicate willful disregard of the interests of others. Treating monitoring claims as simply another kind of damages claim suggests that the degree to which defendant is at fault should be irrelevant to its liability. This may be consistent with the fact that the best tort damages analogy to a suit for monitoring damages comes in the duty to rescue cases, wherein a person who places another in peril, regardless of fault, owes the person in peril a duty of rescue, and hence is strictly liable in damages. See Goldberg & Zipursky, supra note 12, at 1710-11. Given the broad dispersal of toxic agents by industry in the modern world, such liability might indeed be overbroad. A judge balancing equities would be able to consider this factor and refuse to grant relief.\(^{196}\) Critics of medical monitoring have often suggested that monitoring relief is inappropriate because it threatens to bankrupt the defendant before the most serious victims of
qualified than a jury to make these determinations and to balance them.

The broad discretion judges should have in deciding whether to order medical monitoring relief could also make allowance for normative values about just when defendants should pay for plaintiff's screening procedures. In deciding liability and relief, judges might wish to take into consideration factors like the blameworthiness of defendant's conduct and the ability of plaintiff to pay her own monitoring costs out of pre-existing insurance policies and the like. Perhaps a merely negligent defendant—or one who is liable only because it is guilty of a technical, non-negligent trespass—should not pay, while a company that has flaunted safety regulations and rules in dumping hazardous wastes in crowded neighborhoods should enjoy less solicitude. While tortfeasors generally should not be able to shift the costs of their own wrongdoing to others, to the extent that plaintiffs already carry enough insurance to meet the public health and emotional distress concerns, it has been argued that the desirability of avoiding double recoveries and overinsurance might justify toleration of such cost shifting and that the problem would resolve itself in a short time as insurers sought to eliminate coverage in cases where toxic tortfeasors would be found responsible.

The recharacterization of medical monitoring claims as equitable mechanisms to relieve plaintiffs of the economic costs that defendants' conduct may have thrust upon plaintiffs would be incomplete if it were not also recognized that the monitoring ordered also helps redress, in a limited but very focused way, the often palpable threat defendants have created for plaintiffs. In the toxic tort cases, this threat is often not so small or insignificant that the law should simply blow off the plaintiff with an admonition to "suck it up" and move on because the law is helpless to intervene or because she ought to take responsibility for her feelings. Relief clearly ought to be limited to cases in which the threat to plaintiff's well-being is objectively palpable and real and in which there is a substantial possibility that medical monitoring would improve her morbidity and mortality by providing early diagnosis and possible cure. In such a setting, the fear of frivolous or faked damages claims for emotional distress would disappear, and the relief granted—payment for monitoring costs to provide early detection and cure—would narrowly lift at least part of the pall defendant's conduct has placed over plaintiff's life and alleviate some defendant's misconduct develop serious, life threatening illnesses, and that in cases where a victim has prepaid for her own health insurance it is wrong to order defendant to underwrite her screening costs. See supra notes 150-57 and accompanying text. Treated as all-or-nothing arguments, neither position is persuasive. Not all toxic tort judgments for monitoring threaten bankruptcy, and it is not unjust on its face to force defendants to pay for wrongs simply because plaintiffs have prepaid a collateral source to cover their losses. But equity would not have to accept these all-or-nothing arguments. Instead, where bankruptcy of defendant was in the offing, the judge could decide not to allow monitoring relief, to limit its availability to those lacking insurance, or to raise the threshold of liability regarding seriousness of future threat to accommodate the public and private interests at stake in the case.

197. See Goldberg & Zipursky, supra note 12, at 1681-82, 1686-87.
of the emotional distress plaintiff suffers because defendant has scared her out of her wits. While not full compensation for what may be immeasurable losses, provision of monitoring services helps to mitigate (though it cannot fully prevent) future emotional distress and physical injury, and is but a small price the defendant ought to bear for the threat it has cast off onto the plaintiff.