Comments

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Medical Monitoring: The Viability of a New Cause of Action in Oregon

On August 21, 2001, Oregon took one step closer to entering the national debate regarding "medical monitoring." A class action, filed by a Beaverton, Oregon, couple, asserted that nine vaccine manufacturers and distributors, a pediatrician, and a clinic negligently failed to inform parents of the risk of mercury exposure from thimerosal-based vaccinations and the availability of mercury-free alternatives.[1]

The complaint alleged that childhood contact with mercury-laced vaccines increases the risk of neurological damage and autism.[2] In addition to claims in negligence, fraud, and products liability, among others, $1,000 was sought per child for future medical testing under a medical monitoring theory.[3] The class action, which could extend to thousands of families nationwide, places the state of Oregon at the forefront of the national search for answers about autism, and puts the Oregon courts in an influential position to determine the future viability of the medical monitoring claim.

In a medical monitoring suit, the plaintiff seeks to recover the

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[1] First Amended Complaint, Mead v. Aventis Pasteur, Inc., No. 0107-07136 (Cir. Ct. Multnomah County, Or., filed Aug. 21, 2001), *available at* http://www.mercvacalliance.com/FINAL%20AM%20CMPLT.pdf.

[2] *Id.* at 10.

[3] *Id.* at 39.

anticipated costs of diagnostic testing necessary to detect latent diseases that could develop as a result of tortious exposure to toxic substances.[4] Such screening measures, it is reasoned, will prevent disease or at least detect it early enough to facilitate early treatment for exposure victims.[5] However, despite obvious policy reasons in favor of compensating innocent toxic tort plaintiffs, one practical problem cannot be overlooked: exposure plaintiffs often do not suffer from a present physical injury, nor will they necessarily in the future.

For two hundred years now,[6] in promoting its goals of compensation, cost allocation, and deterrence,[7] the tort system has required plaintiffs to allege an actual injury to file suit. But in the past twenty years, this longstanding prerequisite has unraveled substantially. In fact, less than one quarter of the jurisdictions to have considered medical monitoring still insist on a physical injury.[8]

This Comment examines whether Oregon should recognize medical monitoring as an independent cause of action despite the absence of this traditional tort requirement. Part I traces the development of the medical monitoring claim from its origins in the early 1980s to recent case decisions. Part II briefly outlines several established arguments in favor of a medical monitoring tort, while Part III more thoroughly examines arguments against the judicial creation of the tort. Specifically, this Comment examines the legislature's role in creating a medical monitoring action and the subsequent flood of litigation the tort may inspire. Additional complexities in proving causation in toxic torts and Oregon's ultimate repose statute also present obstacles to the claim's success. Finally, recent case law suggests that the lack of uniformity among courts regarding medical monitoring necessitates

[4] *See* In re Paoli R.R. Yard PCB Litig., 916 F.2d 829, 849-50 (3d Cir. 1990).

[5] *See id*. at 852.

[6] Victor E. Schwartz et al., *Medical Monitoring—Should Tort Law Say Yes?*, 34 WAKE FOREST L. REV. 1057, 1059 (1999).

[7] Diane P. Wood, *Commentary on the Futures Problem, By Geoffrey C. Hazard, Jr.*, 148 U. PA. L. REV. 1933, 1933 (2000).

[8] *See* James M. Garner et al., *Medical Monitoring: The Evolution of a Cause of Action*, 30 ENVTL. L. REP. 10,024 n.68 (2000) (citing Thomas v. FAG Bearings Corp., 846 F. Supp. 1400 (W.D. Mo. 1994); Ball v. Joy Tech., Inc., 940 F.2d 651 (4th Cir. 1991) (Virginia); Bowerman v. United Illuminating, 23 CONN. L. RPTR. 589 (Conn. Super. Ct. 1998); Mergenthaler v. Asbestos Corp. of Am., 480 A.2d 647 (Del. 1984)); *see also* Wood v. Wyeth-Ayerst Labs., 82 S.W.3d 849 (Ky. 2002); Hinton *ex rel.* Hinton v. Monsanto Co., 813 So. 2d 827 (Ala. 2001).

rejection of the proposed tort until decided otherwise by the legislature. Noting no controlling precedent in Oregon for the viability of medical monitoring as a cause of action or remedy, this Comment concludes that the Oregon courts should recognize medical monitoring solely as an item of damages and leave the creation of a new tort to the wisdom of the Oregon legislature.

I

DEVELOPMENT OF THE MEDICAL MONITORING CLAIM

Twenty years ago medical monitoring was generally unheard of. Today, however, tort litigants seeking recovery from toxic exposure are increasingly utilizing such claims. Medical monitoring claims, also known as medical surveillance claims, seek recovery for the costs of periodic, long-term diagnostic testing used to detect the onset of latent injuries or diseases caused by exposure to toxins or other tortious acts.[9] Such claims are meant to reimburse the cost of future, periodic medical examinations,[10] but do not provide recovery for actual treatment expenses. Medical monitoring actions have been brought in various contexts, including pharmaceuticals,[11] medical devices,[12] asbestos,[13] secondhand smoke,[14] and real property contamination.[15]

To date, more than twenty states have addressed the issue of medical monitoring.[16] In those states, courts are divided on

[9] Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424, 429 (W. Va. 1999).

[10] *Id.*

[11] *See*, *e.g.*, Petito v. A.H. Robins Co., 750 So. 2d 103 (Fla. Dist. Ct. App. 1999).

[12] *See*, *e.g.*, Gillett v. Sofamor, S.N.C., No. 96-7554, 2001 WL 1135304 (E.D. Mich. Sept. 13, 2001).

[13] *See*, *e.g.*, Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 424 (1997).

[14] *See*, *e.g.*, Badillo v. Am. Brands, Inc., 16 P.3d 435 (Nev. 2001).

[15] *See*, *e.g.*, Ayers v. Township of Jackson, 525 A.2d 287 (N.J. 1987).

[16] *See Badillo*, 16 P.3d at 438-39 nn.1-2 (citing *Petito*, 750 So. 2d at 103; Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424 (W. Va. 1999)); Bourgeois v. A.P. Green Indus., Inc., 716 So. 2d 355 (La. 1998); Redland Soccer Club, Inc. v. Dep't of the Army, 696 A.2d 137 (Pa. 1997); Potter v. Firestone Tire & Rubber Co., 863 P.2d 795 (Cal. 1993); Hansen v. Mountain Fuel Supply Co., 858 P.2d 970 (Utah 1993); Meyerhoff v. Turner Constr. Co., 534 N.W.2d 204 (Mich. 1995); Burns v. Jaquays Mining Corp., 752 P.2d 28 (Az. Ct. App. 1987); *Ayers*, 525 A.2d at 287; Elam v. Alcolac, Inc., 765 S.W.2d 42 (Mo. Ct. App. 1988); Carey v. Kerr-McGee Chem. Corp., 999 F. Supp. 1109 (N.D. Ill. 1998) (applying Illinois law); Witherspoon v. Philip Morris Inc., 964 F. Supp. 455 (D.D.C. 1997) (applying District of Columbia law); Burton v. R.J. Reynolds Tobacco Co., 884 F. Supp. 1515 (D. Kan. 1995) (applying Kansas law); Day v. NLO, 851 F. Supp. 869 (S.D. Ohio 1994) (applying Ohio law); Bocook v. Ashland Oil, Inc., 819 F. Supp. 530 (S.D. W. Va. 1993) (applying

whether to recognize medical monitoring as a separate cause of action or only as a remedy.[17] However, while the majority of decisions find medical monitoring solely an item of damages,[18] there is clearly a lack of consensus on this issue and in many other issues involved in medical monitoring.[19]

One of the earliest cases analyzing medical monitoring is *Friends for All Children, Inc. v. Lockheed Aircraft Corp*.[20] There, suit was brought on behalf of 149 Vietnamese orphans who were aboard a plane bound for the United States that crashed in Vietnam.[21] Although the children displayed no physical symptoms, the plaintiffs alleged that, as a result of decompression in the cabin or the crash itself, the children suffered from a neurological development disorder known as Minimal Brain Dysfunction.[22] The plaintiffs sought, among other damages, compensation from the aircraft manufacturer for the expense of diagnostic examinations and continued medical monitoring.[23]

The U.S. Court of Appeals for the District of Columbia allowed the action for medical monitoring damages, holding that medical surveillance expenses are recoverable without proof of present physical injury.[24] The court used its now often quoted hypothetical to illustrate:

> 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

Kentucky law); Cook v. Rockwell Int'l Corp., 755 F. Supp. 1468 (D. Colo. 1991) (applying Colorado law); Ball v. Joy Techs., 958 F.2d 36 (4th Cir. 1991) (applying West Virginia and Virginia law); Stead v. F.E. Myers Co., 785 F. Supp. 56 (D. Vt. 1990) (applying Vermont law)); *see also* Wood v. Wyeth-Ayerst Labs., 82 S.W.3d 849 (Ky. 2002); Duncan v. Northwest Airlines, Inc., 203 F.R.D. 601 (W.D. Wash. 2001) (applying Washington law); Hinton *ex rel.* Hinton v. Monsanto Co., 813 So.2d 827 (Ala. 2001).

17 *Badillo*, 16 P.3d at 438, 440.

18 *Id.* at 440.

19 Courts diverge on many medical monitoring issues, including: whether an actual, present injury is required, the necessary elements to establish a medical monitoring claim, the level of certainty that a disease or illness will be contracted, the necessity that treatment for the disease be currently available, the proper distribution of medical monitoring awards, and class certification.

20 746 F.2d 816 (D.C. Cir. 1984).

21 *Id.* at 819.

22 *Id.*

23 *Id.* at 818-19.

24 *Id.* at 824-25.

> whether he has suffered any internal head injuries. The tests prove negative, but Jones sues Smith solely for what turns out to be the substantial cost of the diagnostic examinations.[25]

The court concluded that even in the absence of physical injury, Jones should be able to recover the costs for all diagnostic examinations proximately caused by Smith.[26] The court explained:

> The motorbike rider, through his negligence, caused the plaintiff, in the opinion of medical experts, to need specific medical services—a cost that is neither inconsequential nor of a kind the community generally accepts as part of the wear and tear of daily life. Under these principles of tort law, the motorbiker should pay.[27]

Likewise, the court found that the plane crash exposed the orphans to a risk of serious brain damage.[28] Accordingly, because "comprehensive diagnostic examinations [were] needed to determine whether and to what extent treatment [was] necessary,"[29] the court ordered the defendant to pay the costs of the tests.[30]

In another early case, *Ayers v. Township of Jackson*,[31] 339 residents of a New Jersey community alleged that toxic pollutants leached from a municipal landfill contaminating local well water.[32] Although the plaintiffs did not claim a present physical injury from exposure to the toxins, the Supreme Court of New Jersey reinstated a jury award of $8,204,500 to cover medical monitoring expenses.[33] In addition, the decision constituted the first attempt by the judiciary to identify factors in deciding whether to award medical monitoring costs. The court stated:

> [T]he cost of medical surveillance is a compensable item of damages where the proofs demonstrate, through reliable expert testimony predicated upon the significance and extent of exposure to chemicals, the toxicity of the chemicals, the seriousness of the diseases for which individuals are at risk, the relative increase in the chance of onset of disease in those exposed, and the value of early diagnosis, that such surveillance to monitor the effect of exposure to toxic chemicals is reasona-

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[25] *Id*. at 825.
[26] *Id*.
[27] *Id*.
[28] *Id*.
[29] *Id*. (quoting the district court's Memorandum of Opinion).
[30] *Id*. at 819.
[31] 525 A.2d 287 (N.J. 1987).
[32] *Id.* at 291.
[33] *Id*. at 315.

ble and necessary.[34]

To support its holding, the court reasoned that recognizing medical monitoring as an item of damages is in the public interest because it will deter polluters, facilitate early detection and treatment of disease, and shift the economic burden of monitoring costs from innocent plaintiffs to negligent defendants.[35]

Similar policy interests were considered by the U.S. Third Circuit Court of Appeals in *In re Paoli Railroad Yard PCB Litigation*.[36] In *Paoli*, plaintiffs who either worked or lived adjacent to the Paoli railroad yard alleged that they suffered from various illnesses as a result of exposure to polychlorinated biphenyls, also known as PCBs.[37] PCBs were found in dangerously high concentration in the railroad yard's surrounding air and soil.[38] After considering various cases, including *Friends for All Children* and *Ayers*, the court predicted that Pennsylvania state courts would recognize an independent action for medical monitoring, stating the following:

> Medical monitoring claims acknowledge that, in a toxic age, significant harm can be done to an individual by a tortfeasor, notwithstanding latent manifestation of that harm. Moreover, as we have explained, recognizing this tort does not require courts to speculate about the probability of future injury. It merely requires courts to ascertain the probability that the far less costly remedy of medical supervision is appropriate. Allowing plaintiffs to recover the cost of this care deters irresponsible discharge of toxic chemicals by defendants and encourages plaintiffs to detect and treat their injuries as soon as possible. These are conventional goals of the tort system as it has long existed in Pennsylvania.[39]

In reaching its decision, the Third Circuit modified New Jersey's approach in *Ayers* by establishing a four-element standard to raise a medical monitoring claim:

> 1. Plaintiff 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.

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[34] *Id*. at 312.
[35] *Id*. at 311-12.
[36] 916 F.2d 829, 852 (3d Cir. 1990).
[37] *Id*. at 835.
[38] *Id.*
[39] *Id.* at 852.

> 4. Monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial.[40]

Three years later, the Supreme Court of Utah announced a similar test to recover medical monitoring expenses in that state.[41] In *Hansen v. Mountain Fuel Supply Co.*, the plaintiffs brought concurrent claims for personal injury, negligent infliction of emotional distress, and medical monitoring after being exposed to asbestos while performing renovation work in defendant's office building.[42] After upholding the dismissal of the personal injury and emotional distress claims for lack of present physical and mental illnesses, the court refused to reject the medical monitoring claim.[43] The court found that, although there was not a present *physical* injury, medical monitoring was still appropriate because "the exposure itself and the concomitant need for medical testing constitute[d] the injury."[44] Like *Paoli*, *Hansen* concluded that medical monitoring does not require the plaintiff to prove that there is a reasonable medical probability that an injury will occur. Rather, it is enough if the exposure simply *increases* the plaintiff's risk of contracting a disease.[45]

However, in the same year as *Hansen*, the Supreme Court of California held in *Potter v. Firestone & Rubber Co.* that a mere showing of increased risk is not enough.[46] Rather, the proof must demonstrate "through reliable medical expert testimony, that the need for future monitoring is a *reasonably certain* consequence of the plaintiff's toxic exposure and that the recommended monitoring is reasonable."[47] The more demanding

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[40] *Id.*

[41] Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 979 (Utah 1993) (requiring a plaintiff to prove eight elements to recover medical monitoring damages: (1) exposure; (2) to a toxic substance; (3) which exposure was caused by the defendant's negligence; (4) resulting in an increased risk; (5) of a serious disease, illness, or injury; (6) for which a medical test for early detection exists; (7) and for which early detection is beneficial, meaning that a treatment exists that can alter the course of the illness; (8) and which test has been prescribed by a qualified physician according to contemporary scientific principles).

[42] *Id*. at 972.

[43] *Id*. at 978 (holding that "[a] plaintiff forced to incur the cost of medical monitoring as a result of a defendant's negligent conduct should be entitled to compensation for those expenses").

[44] *Id.* at 977.

[45] *Id.* at 979.

[46] 863 P.2d 795 (Cal. 1993).

[47] *Id.* at 800 (emphasis added).

"reasonably certain" standard adopted in *Potter* is utilized in other jurisdictions as well.[48]

Potter relied on several public policy considerations in reaching its decision. In addition to the deterrence value of recognizing such a claim, the court recognized that medical monitoring would also serve "an important public health interest in fostering access to medical testing for individuals whose exposure to toxic chemicals creates an enhanced risk of diseases . . . ."[49] Furthermore, "[t]he availability of a substantial remedy before the consequences of the plaintiff's exposure are manifest may also have the beneficial effect of preventing or mitigating serious future illnesses and thus reduce the overall costs to the responsible parties."[50] Finally, the court restated an argument initially made in *Friends for All Children*,[51] that failure to permit recovery of medical monitoring would disserve "societal notions of fairness and elemental justice" by requiring innocent exposure victims to pay examination costs when such expenses are reasonable and necessary.[52]

Despite the prevalence of court decisions discarding the need for a present, physical injury, at least six courts still demand satisfaction of this requirement in order to state a medical monitoring claim.[53] In *Metro-North Commuter Railroad Co. v. Buckley*,[54] the U.S. Supreme Court explicitly rejected medical monitoring when the plaintiff presented no symptoms or injury of any kind. *Buckley* concerned the viability of a medical monitoring tort

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[48] *See* Susan L. Martin & Jonathan D. Martin, *Tort Actions for Medical Monitoring: Warranted or Wasteful?*, 20 COLUM. J. ENVTL. L. 121, 128 n.42 (1995) (citing Hagerty v. L & L Marine Servs., Inc., 788 F.2d 315, 319 (5th Cir. 1986); Schweitzer v. Consol. Rail Corp., 758 F.2d 936 (3d Cir. 1985); DeStories v. City of Phoenix, 744 P.2d 705, 707 (Ariz. Ct. App. 1987); Askey v. Occidental Chem. Corp., 477 N.Y.S.2d 242, 247 (N.Y. App. Div. 1984)).

[49] *Potter*, 863 P.2d at 824.

[50] *Id*. (citations omitted).

[51] 746 F.2d at 816, 825 (D.C. Cir. 1984).

[52] *Potter*, 863 P.2d at 824.

[53] *See* Garner et al., *supra* note 8, at 10,024 n.68 (citing Thomas v. FAG Bearings Corp., 846 F. Supp. 1400 (W.D. Mo. 1994); Ball v. Joy Tech., Inc., 940 F.2d 651 (4th Cir. 1991) (Virginia); Bowerman v. United Illuminating, 23 CONN. L. RPTR. 589 (Conn. Super. Ct. 1998); Mergenthaler v. Asbestos Corp. of Am., 480 A.2d 647 (Del. 1984)); *see also* Wood v. Wyeth-Ayerst Labs., 82 S.W.3d 849 (Ky. 2002); Hinton *ex rel.* Hinton v. Monsanto Co., 813 So. 2d 827 (Ala. 2001).

[54] 521 U.S. 424 (1997). *Buckley* still is good law following Norfolk & Western Railway Co. v. Ayers, 583 U.S. 135 (2003), which addressed only emotional distress damages, and not medical monitoring, in FELA claims.

under the Federal Employers' Liability Act (FELA).[55] Buckley, a pipefitter for the Metro-North railroad, alleged that his employer negligently exposed him to asbestos for approximately one hour each working day for three years.[56]

In dicta, the Court expressed several policy considerations against creating an independent cause of action for medical monitoring.[57] Specifically, the Court addressed its concern that a medical monitoring tort could produce an overflow of litigation that would deplete the funds necessary to compensate those who actually suffer injuries.[58] The Court said "tens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure-related medical monitoring. . . . And that fact, along with uncertainty as to the amount of liability, could threaten . . . a 'flood' of less important cases."[59] The Court continued:

> [W]e are . . . troubled . . . by the potential systemic effects of creating a new, full-blown, tort law cause of action—for example, the effects upon interests of other potential plaintiffs who are not before the court and who depend on a tort system that can distinguish between reliable and serious claims on the one hand, and unreliable and relatively trivial claims on the other. The reality is that competing interests are at stake—and those interests sometimes can be reconciled in ways other than simply through the creation of a full-blown, traditional, tort law cause of action.[60]

In concluding that an exposed plaintiff can recover "related reasonable medical monitoring costs if and when he *develops* symptoms,"[61] the Court suggested, at least in FELA actions,[62] a

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[55] 45 U.S.C. §§ 51-60 (2002).

[56] *Buckley*, 521 U.S. at 427. Buckley's job required the removal of insulation from pipes in the steam tunnels of Grand Central Station. Upon completion of such work, pipefitters like Buckley would be "covered from head to toe with" asbestos and, for that reason, "were dubbed 'the snowmen of Grand Central.'" *Id*. at 446 (Ginsburg, J., concurring in the judgment in part and dissenting in part).

[57] *Id.* at 442-44.

[58] *Id.* at 442.

[59] *Id.*

[60] *Id.* at 443-44.

[61] *Id.* at 438 (emphasis added).

[62] Court application of *Buckley* beyond FELA actions, however, has had an unexpected awakening recently—particularly in state courts. *See*, *e.g.*, Wood v. Wyeth-Ayerst Labs., 82 S.W.3d 849 (Ky. 2002); Hinton *ex rel.* Hinton v. Monsanto Co., 813 So. 2d 827 (Ala. 2001); *Cf.* Donald L. DeVries & Ian Gallacher, *Medical Monitoring in Drug and Medical Device Cases: Taking the Temperature of a New Theory*, 68 DEF. COUNS. J. 163, 176 (2001) (describing that "[i]t is unclear, at best, that the state

present physical injury still is required.

The Pennsylvania Supreme Court added another twist to medical monitoring in *Redland Soccer Club, Inc. v. Department of the Army*,[63] decided one month before *Buckley*. In that case, the U.S. Army sold a piece of property that was formerly a landfill to a municipality.[64] The municipality then converted the property into a soccer field.[65] After learning that the field had been previously contaminated with toxic materials, a local soccer club filed suit against the Army and the U.S. Department of Defense seeking the creation of a medical monitoring trust fund.[66] Even though none of the plaintiffs suffered an actual injury, the court maintained that, on remand, diagnostic monitoring expenses are recoverable and may be properly borne by the defendants.[67]

Interestingly, the Pennsylvania Supreme Court departed from the previous standard utilized in *Paoli* and *Hansen*[68] and held that a medical monitoring claim is *not* contingent on a showing that a treatment currently exists for the disease that is the subject of medical monitoring.[69] Such a requirement, the court reasoned, "would unfairly prevent a plaintiff from taking advantage of advances in medical science."[70]

The West Virginia Supreme Court agreed with *Redland Soccer Club* and also eliminated the requirement that medical monitor-

courts, considering state law causes of action, will be particularly swayed by the opinion of the Supreme Court in a decision limited solely to federal common law").

[63] 696 A.2d 137 (Pa. 1997).

[64] *Id*. at 139.

[65] *Id.*

[66] *Id.* at 139-40.

[67] *Id.* at 145 (holding that a plaintiff must prove seven elements to prevail on a medical monitoring claim:

> (1) exposure greater than normal background levels; (2) to a proven hazardous substance; (3) caused by the defendant's negligence; (4) as a proximate result of the exposure, plaintiff has a significantly increased risk of contracting a serious latent disease; (5) a monitoring procedure exists that makes the early detection of the disease possible; (6) the prescribed monitoring regime is different from that normally recommended in the absence of the exposure; and (7) the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles).

[68] Both *Paoli* and *Hansen* required that in order to recover the cost of medical monitoring, there must be a currently available treatment method for the disease that is the subject of medical monitoring.

[69] *Redland Soccer Club*, 696 A.2d at 146 n.8 ("[W]e do not require a plaintiff to show that a treatment currently exists for the disease that is the subject of medical monitoring.").

[70] *Id.*

ing be contingent on existing treatment protocol.[71] In *Bower v. Westinghouse Electric Corp.*, the court said "[w]e agree with the Pennsylvania Supreme Court that a plaintiff should not be required to show that a treatment currently exists for the disease that is the subject of medical monitoring. In this age of rapidly advancing medical science, we are hesitant to impose such a static requirement."[72]

To support its decision, *Bower* relied on the Louisiana Supreme Court decision in *Bourgeois v. A.P. Green Industries, Inc.*[73] To justify compensability even when a treatment for the disease does not exist, *Bourgeois* said:

> One thing that . . . a plaintiff might gain [even in the absence of available treatment] is certainty as to his fate, whatever it might be. If a plaintiff has been placed at an increased risk for a latent disease through exposure to a hazardous substance, absent medical monitoring, he must live each day with the uncertainty of whether the disease is present in his body. If, however, he is able to take advantage of medical monitoring and the monitoring detects no evidence of disease, then, at least for the time being, the plaintiff can receive the comfort of peace of mind. Moreover, even if medical monitoring did detect evidence of an irreversible and untreatable disease, the plaintiff might still achieve some peace of mind through this knowledge by getting his financial affairs in order, making lifestyle changes, and, even perhaps, making peace with estranged loved ones or with his religion. Certainly, those options should be available to the innocent plaintiff who finds himself at an increased risk for a serious latent disease through no fault of his own.[74]

Bower came to the state supreme court as a certified question from the District Court for the Northern District of West Virginia.[75] The plaintiffs maintained that they were exposed to toxic substances from defendants' two-acre "cullet pile," which contained debris from the manufacture of light bulbs.[76]

In recognizing medical monitoring as an independent claim even in the absence of a physical injury,[77] *Bower* made clear that

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[71] Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424 (W. Va. 1999).

[72] *Id.* at 433-34 (citation omitted).

[73] 716 So. 2d 355 (La. 1998).

[74] *Bower*, 522 S.E.2d at 434 (quoting *Bourgeois*, 716 So. 2d at 363 (Calogero, C.J., concurring)).

[75] *Id*. at 426.

[76] *Id*. at 426-27.

[77] *Id*. at 430 ("We now reject the contention that a claim for future medical expenses must rest upon the existence of present physical harm.").

toxic exposure plaintiffs still suffer a compensable injury sufficient to state a cause of action.[78] Citing the *Restatement*, the court said "[t]he 'injury' that underlies a claim for medical monitoring–just as with any other cause of action sounding in tort–is 'the invasion of any legally protected interest,'" which includes one's interest in avoiding medical testing.[79] The *Restatement*'s definition of "injury" was first used in the medical monitoring context by the Circuit Court for the District of Columbia in *Friends for All Children*, previously discussed.[80] There the court said:

> It is difficult to dispute that an individual has an interest in avoiding expensive diagnostic examinations just as he or she has an interest in avoiding physical injury. When a defendant negligently invades this interest, the injury to which is neither speculative nor resistant to proof, it is elementary that the defendant should make the plaintiff whole by paying for the examinations.[81]

Accordingly, *Bower* concluded that a physical injury is not required to recover in medical monitoring cases.[82] In aligning itself with other jurisdictions that considered the claim, the court concluded "a cause of action exists under West Virginia law for the recovery of medical monitoring costs, where it can be proven that such expenses are necessary and reasonably certain to be incurred as a proximate result of a defendant's tortious conduct."[83]

A cause of action for medical monitoring was also recognized in Florida in *Petito v. A.H. Robins Co.*[84] Users of Fenfluramine and Phentermine (Fen-Phen) pharmaceutical weight loss products filed a state-wide class action against the manufacturers and sellers.[85] Although none of the plaintiffs suffered a physical injury, they claimed that ingestion of the two drugs placed them at increased risk of developing cardiac and circulatory ailments.[86]

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[78] *Id.*

[79] *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 7(1) (1965)).

[80] Friends for All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 826 (C.A.D.C. 1984). Similar reasoning was also utilized in Bourgeois v. A.P. Green Indus., Inc., 716 So. 2d 355, 359 (La. 1998), Potter v. Firestone Tire & Rubber Co., 863 P.2d 795, 822-23 (Cal. 1993), and Ayers v. Township of Jackson, 525 A.2d 287, 308 (N.J. 1987).

[81] *Friends for All Children*, 746 F.2d at 826.

[82] *Bower*, 522 S.E.2d at 430.

[83] *Id.* at 431.

[84] 750 So. 2d 103 (Fla. Dist. Ct. App. 1999).

[85] *Id.* at 104.

[86] *Id.*

They sought a court supervised medical monitoring program to avoid and mitigate damages.[87]

The court authorized the medical monitoring fund, finding that, although the claimants did not sustain physical injury, the expense of future diagnostic testing constituted an "injury" within the meaning of the *Restatement*.[88] A different result, the court warned, would unfairly impact many of society's most underprivileged members:

> One can hardly dispute that an individual has just as great an interest in avoiding expensive diagnostic examinations as in avoiding physical injury. Although one might suggest that plaintiffs should wait until after the expenses of monitoring have been incurred before a cognizable claim arises, such a holding would foreclose countless economically disadvantaged individuals from obtaining the supervision that they need, and, regardless of financial need, simply force the victims, rather than the wrongdoers, to initially bear these great expenses. Such a result is untenable in a court of equity.[89]

After adopting the seven-prong medical monitoring test used in *Redland Soccer Club*,[90] the *Petito* court concluded "[w]e find nothing in Florida law barring [a medical monitoring] claim and caselaw, equity, common sense, and the decisions of courts around the country persuade us that under . . . limited and appropriate circumstances . . . such a claim is viable and necessary to do justice."[91]

Finally, *Hinton v. Monsanto Co.*[92] and *Wood v. Wyeth-Ayerst*

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[87] *Id*. at 104-05. *Petito* provides a detailed discussion on the supervision of medical monitoring funds. Specifically, the court found that once the elements of a medical monitoring claim are established, the trial court should: (1) appoint a plan administrator; (2) approve an advisory panel to establish the qualifications for participation, the tests, and procedures to be performed, and the physicians who will perform the tests; (3) establish a notification process sufficient to bring the opportunity for monitoring to the attention of those who have used the medication; (4) establish a time frame for those eligible to obtain the monitoring; and (5) implement procedures whereby the monitoring physicians submit their reports and findings to the plan administrator who then pays the reasonable amount of the claims. *Id*. at 106-08.

[88] *Id*. at 105. As noted in the discussion of *Friends for All Children* and *Bower*, the *Restatement* defines "injury" as "the invasion of any legally protected interest of another." *Id*. (citing RESTATEMENT (SECOND) OF TORTS § 7 (1965)).

[89] *Petito*, 750 So. 2d at 105 (citation omitted).

[90] *Id*. at 106-07. The elements necessary to establish a medical monitoring claim under *Redland Soccer Club* are provided, *supra*, in note 67.

[91] *Id.* at 108 (citations omitted).

[92] Hinton *ex rel.* Hinton v. Monsanto Co., 813 So. 2d 827 (Ala. 2001).

Laboratories,[93] two of the most recent decisions, suggest a relatively unexpected trend may be developing in medical monitoring. There, the supreme courts of Alabama and Kentucky refused to recognize medical monitoring as an independent cause of action where a present physical injury did not exist. Both decisions also marked an awakening of *Buckley* in *state court* proceedings, long thought to be applicable only to FELA and federal common law claims.

Hinton, another hazardous contamination case, involved the environmental release of PCBs by a defendant chemical company.[94] Relying on the state's long-standing commitment to the physical injury requirement, the Alabama Supreme Court summarily rejected the claim for medical monitoring costs. The court said:

> Although we acknowledge that other jurisdictions have recognized medical monitoring as a distinct cause of action or as a remedy under other tort causes of action, even in the absence of a present physical injury, we do not and need not know how such jurisdictions coordinated that recognition with the traditional tort-law requirement of a present injury. Here, the plaintiff has not alleged a present injury. He seeks simply to recover the costs of monitoring his health to detect whether he develops an illness or an injury in the future as a result of his exposure to PCBs. He has not alleged a cause of action under our long-standing tort law, and we find insufficient justification to expand Alabama law in the direction urged by plaintiff.[95]

The Supreme Court of Kentucky reached the same conclusion:[96]

> Courts in some states, however, are venturing into uncharted territory as they create medical monitoring causes of action and make available medical monitoring remedies that do not require a showing of present physical injury. In these states, the costs of diagnostic testing can be recovered before they are actually incurred on a mere showing of exposure coupled with increased risk of injury. In the name of sound policy, we decline to depart from well-settled principles of tort law.[97]

Hinton and *Wood* also recognized the significant public policy problems medical monitoring would likely produce. For example, *Wood* noted that due to the administrative difficulties courts

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[93] 82 S.W.3d 849 (Ky. 2002).
[94] *Hinton*, 813 So. 2d at 828.
[95] *Id*. at 829.
[96] *Wood*, 82 S.W.3d at 852.
[97] *Id.* at 856.

would face in coordinating large victim classes, many toxic claimants may not actually receive necessary diagnostic testing, while others, if given a lump sum award, may not use the money for medical costs.[98] The court also noted that due to constraints on defendants' financial resources, providing for medical monitoring expenses would, unfortunately, "impair [the defendants'] ability to fully compensate victims who emerge years later with actual injuries that require immediate attention."[99]

Finally, both courts also recognized the fear, as discussed by the U.S. Supreme Court in *Buckley*, that medical monitoring makes virtually *everyone* a potential claimant.[100] While acknowledging that *Buckley* was based on the FELA and federal common law, the Alabama Supreme Court in *Hinton* adopted the Court's counter-arguments, and concluded:

> [W]e find it inappropriate . . . to stand Alabama tort law on its head in an attempt to alleviate . . . concerns about what *might* occur in the future. We believe that Alabama law, as it currently exists, must be applied to balance the delicate and competing policy considerations presented here. That law provides no redress for a plaintiff who has no present injury or illness.[101]

II

Arguments Favoring Medical Monitoring as an Independent Cause of Action in Oregon

Many of the arguments in favor of medical monitoring are self-evident. First, in *Potter v. Firestone Tire & Rubber Co.*,[102] discussed above, the California Supreme Court identified the four primary public policy considerations supporting medical monitoring:

> First, there is an important public health interest in fostering access to medical testing for individuals whose exposure to toxic chemicals creates an enhanced risk of disease, particularly in light of the value of early diagnosis and treatment for

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[98] *Id*. at 857.

[99] *Id*.

[100] Both *Hinton* and *Wood* cited *Buckley* for the proposition that "tens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure-related medical monitoring." *Buckley*, 521 U.S. at 442. *See Wood*, 82 S.W.3d at 857; *Hinton*, 813 So. 2d at 831.

[101] *Hinton*, 813 So. 2d at 831-32 (emphasis in original).

[102] 863 P.2d 795 (Cal. 1993).

> many cancer patients. Second, there is a deterrence value in recognizing medical surveillance claims . . . . Third, the availability of a substantial remedy before the consequences of the plaintiffs' exposure are manifest may also have the beneficial effect of preventing or mitigating serious future illnesses and thus reduce the overall costs to the responsible parties . . . . Finally, societal notions of fairness and elemental justice are better served by allowing recovery of medical monitoring costs. That is, it would be inequitable for an individual wrongfully exposed to dangerous toxins, but unable to prove that cancer or disease is likely, to have to pay the expense of medical monitoring when such intervention is clearly reasonable and necessary.[103]

Second, medical monitoring is considered to be injunctive and equitable in nature,[104] which gives courts broad discretion in determining whether and to what extent relief should be granted. In *Hickman v. Six Dimension Custom Homes, Inc.*,[105] the Oregon Supreme Court noted that "[i]njunctive relief depends upon broad principles of equity and may, in the discretion of the court, be granted or denied in accordance with the justice and equity of the case. Courts balance the equities between the parties in determining what, if any, relief to give."[106] Because medical monitoring is not monetary in nature, Oregon courts would be less constrained by traditional tort theories of recovery, and therefore, at least in theory, better able to tailor remedies to the specific circumstances of its cases.

Third, while Oregon courts have yet to address whether a plaintiff is entitled to recover *medical monitoring* costs, the courts have traditionally allowed plaintiffs to recover future medical expenses.[107] In *Harris v. Kissling*, the plaintiff sought damages for future medical expenses after a hospital failed to conduct proper blood tests and to inoculate her following the

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[103] *Id.* at 824 (citations omitted).

[104] *See*, *e.g.*, Friends For All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816 (D.C. Cir. 1984) (upholding the district court's mandatory preliminary injunction compelling defendants to create a medical monitoring fund); Hansen v. Mountain Supply Co., 858 P.2d 970, 982 (Utah 1993) (stating that use of a court supervised fund to administer medical monitoring "is a highly appropriate use of the Court's equitable powers").

[105] 543 P.2d 1043 (Or. 1975).

[106] *Id.* at 1045 (citations omitted).

[107] *See*, *e.g.*, Barrett v. Landis, 575 P.2d 154, 157 (Or. 1978) ("We find evidence supporting a claim for damages for impairment of future earning capacity, future medical expenses and permanent disability."); Harris v. Kissling, 721 P.2d 838 (Or. App. 1986).

birth of her first child.[108] The failure caused Rh antibodies to develop in her bloodstream.[109] While the antibodies did not compromise the plaintiff's health specifically, they did greatly increase the likelihood that she would suffer complications requiring diagnostic testing and other preventative measures in a future pregnancy.[110]

The Oregon Court of Appeals affirmed the award for future medical expenses and concluded that "[b]oth the Supreme Court and this court have held that a jury can consider future possibilities in determining damages and that evidence of the degree of likelihood should be admitted for the jury's determination."[111]

Finally, the Oregon appellate courts have the power to decide whether to create a new cause of action. In *Nees v. Hocks*,[112] the Oregon Supreme Court announced its willingness, in appropriate cases, to create new causes of action. The court explained: "This court has not felt unduly restricted by the boundaries of pre-existing common-law remedies. We have not hesitated to create or recognize new torts when confronted with conduct causing injuries which we feel should be compensable."[113]

III

Arguments Rejecting Medical Monitoring as an Independent Cause of Action in Oregon

Whether Oregon will recognize the viability of medical monitoring in tort or remedy depends on its willingness to grant recovery when no physical injury is present. "[M]edical monitoring relief fundamentally alters one of the cornerstones of the civil justice system, because it allows recovery on behalf of one who has, by definition, sustained no injury and might not sustain an injury in the future."[114]

However, proponents of a medical monitoring tort argue that an injury does in fact exist, albeit not physical in nature. The "injury" has been characterized as both "the exposure itself and

[108] *Harris*, 721 P.2d at 839.
[109] *Id*.
[110] *Id*. at 841.
[111] *Id*.
[112] 536 P.2d 512 (Or. 1975).
[113] *Id*. at 514; *see also* Hinish v. Meier & Frank Co., 113 P.2d 438 (Or. 1941).
[114] DeVries & Gallacher, *supra* note 62, at 163.

the concomitant need for medical testing,"[115] and "the invasion of any legally protected interest."[116] As illustrated in Part I, many courts are amenable to these characterizations, but will either be enough in Oregon?

In *Barrett* and *Harris*, the future medical expenses cases identified in Part II, the Oregon courts faced plaintiffs who suffered from *actual, existing injuries* at the time they sought recovery. For example, in *Barrett*, the plaintiff was awarded future medical expenses as part of a verdict for *personal injuries* arising out of an automobile collision.[117] And, in *Harris*, the Oregon Court of Appeals concluded that the plaintiff was injured as a result of the hospital's failure to immunize her, which "resulted in an irreversible physical change in her blood, which [had] permanently impaired her ability to have a normal pregnancy."[118]

In contrast, plaintiffs in the *Mead* class action, summarized in the introduction, *do not* allege an identifiable injury in their complaint, nor do they seek to show one. The complaint reads: "This lawsuit seeks equitable relief for children exposed to doses of toxic ethyl mercury via injection with thimerosal, but *who have so far not manifested any signs or symptoms of mercury induced injury* . . . ."[119]

Moreover, Oregon's products liability statute[120] requires a plaintiff to prove a present, existing physical harm as an element of recovery in a product liability action.[121] The statute, Oregon Revised Statute section 30.900, limits product liability claims to circumstances of "personal injury, death or property damage" and imposes liability only for "physical harm or damage to property."[122]

The following materials argue that the creation of a medical monitoring tort by the Oregon courts is not appropriate. Instead,

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115 Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 977 (Utah 1993); *see also* Amy B. Blumenberg, Note, *Medical Monitoring Funds: The Periodic Payment of Future Medical Surveillance Expenses in Toxic Exposure Litigation*, 43 HASTINGS L.J. 661, 675 (1992) ("[A]n individual who is forced to undergo medical testing as a result of a defendant's conduct has suffered a present, compensable injury, i.e., exposure to a level necessitating medical surveillance.").

116 RESTATEMENT (SECOND) OF TORTS § 7(1) (1965).

117 Barrett v. Landis, 575 P.2d 154, 155 (Or. 1978).

118 Harris v. Kissling, 721 P.2d 838 (Or. App. 1986).

119 First Amended Complaint, *supra* note 1, at 2 (emphasis added).

120 OR. REV. STAT. § 30.900 (2001).

121 *See*, *e.g.*, Sealey v. Hicks, 768 P.2d 428, 430 (Or. App. 1989).

122 § 30.920(1).

this decision should be left to the wisdom of the legislature, which can carefully balance the need for a new cause of action against the potential flood of litigation the tort will likely initiate. In addition, while Oregon courts have the authority to create a new tort, such action is inappropriate for the majority of toxic exposure cases because of the inherent difficulties in proving causation. Moreover, even if causation can be established, Oregon's ultimate repose statute will bar many claimants who suffer from latent onset of a particular disease or illness. Finally, the refusal to create a medical monitoring tort is consistent with recent decisions rejecting the claim based on lack of uniformity among courts that have considered the claim.

A. The Oregon Legislature is Better Suited Than the Courts to Consider the Issues Involved in Medical Monitoring

The Oregon Legislative Assembly is better suited than the courts to revise our tort system by eliminating the physical injury requirement. Legislatures "are well-equipped to reach fully informed decisions about the need for widespread changes in the law. They have more complete access to information, including the ability to receive comments from persons representing a multiplicity of perspectives."[123] In contrast, courts are limited to the inconsistencies presented in expert testimony, which often consists of "confusing, highly technical presentations of scientific evidence."[124] This, expectedly, can result in expert witnesses leading "factfinders astray by tangling them in a web of statistical uncertainties and standards of persuasion."[125]

In another recent medical monitoring decision, *Duncan v. Northwest Airlines, Inc.*, the U.S. District Court for the Western District of Washington refused to create a medical monitoring tort finding that, under the circumstances, such action would be more appropriately settled by the legislature.[126] In deferring the

123 Schwartz et al., *supra* note 6, at 1072.

124 Patricia E. Lin, Note, *Opening the Gates to Scientific Evidence in Toxic Exposure Cases: Medical Monitoring and Daubert*, 17 REV. LITIG. 551, 568 (1998).

125 *Id*.

126 Duncan v. Northwest Airlines, Inc., 203 F.R.D. 601, 608-09 (W.D. Wash. 2001); *see also* Wood v. Wyeth-Ayerst Labs., 82 S.W.3d 849, 859 (Ky. 2002) ("Traditional tort law militates against recognition of [medical monitoring] claims, and we are not prepared to step into the legislative role and mutate otherwise sound principles."); Badillo v. Am. Brands, Inc., 16 P.3d 435, 440 (Nev. 2001) (creating a new cause of action is "generally a legislative, not a judicial, function"); Ayers v. Township of Jackson, 525 A.2d 287, 299 (N.J. 1987) (stating

decision, the court concluded "[t]he legislature has a 'greater ability to fully explore the spectrum of competing societal interests,' while the judiciary 'is the least capable of receiving public input and resolving broad public policy questions based on a societal consensus.'"[127]

In *Duncan*, the plaintiff brought suit against her employer, Northwest Airlines, Inc., for injuries caused by an airline policy that permitted smoking on international flights, thereby exposing her and other flight attendants to second-hand smoke.[128] In addition, Duncan asserted a separate cause of action for medical monitoring.[129]

While the Washington Supreme Court traditionally yields to the legislature to create new torts, *Duncan* found that the state judiciary can create independent actions on its own when no other remedy is available.[130] There, because Duncan actually suffered a present physical injury, the court found that medical monitoring was already available as a *remedy* to a negligence cause of action, and therefore, the creation of a new medical monitoring tort was unnecessary.[131]

Such reasoning appears consistent with Oregon case law.[132] In *Gross-Haentjens v. Leckenby*,[133] the Oregon Court of Appeals considered a claim brought under Oregon's consumer fraud stat-

> "[t]he overwhelming conclusion of the commentators who have evaluated [toxic tort litigation] is that the accommodation has failed, that common-law tort doctrines are ill-suited to the resolution of such injury claims, and that some form of statutorily-authorized compensation procedure is required if the injuries sustained by victims of chemical contamination are to be fairly redressed")

(citations omitted); *see also* Ball v. Joy Techs., Inc., 958 F.2d 36, 39 (4th Cir. 1991) (holding that expansion of state law on public policy grounds is "better left to the respective legislatures and highest courts").

127 *Duncan*, 203 F.R.D. at 606 (quoting Burkhart v. Harrod, 755 P.2d 759, 761 (Wash. 1988)).

128 *Id.* at 603. Note that a primary difference between *Duncan* and the cases examined in Part I, is that Duncan actually suffered from a present physical injury. Duncan alleged that she "currently suffers injuries from exposure to the second-hand smoke, including irritated eyes, sinus problems, breathing problems, sore throats, and other present complaints." *Id*.

129 *Id.* Specifically, Duncan sought "funding for diagnosis and treatment of resulting injuries and illnesses," including, lung cancer and heart and respiratory disease. *Id.* at 603-04.

130 *Id.* at 605-06.

131 *Id.* at 606.

132 *See*, *e.g.*, Gross-Haentjens v. Leckenby, 589 P.2d 1209 (Or. App. 1979).

133 *Id*. at 1211.

ute, the Unlawful Trade Practices Act.[134] The court rejected plaintiff's invitation to create a new personal injury tort emphasizing that *other* remedies were already available to purchasers of defective goods.[135] The court said "[t]his is not a case in which a plaintiff with no remedy or an inadequate remedy asks this court to recognize a new common law cause of action."[136] Rather, "[p]ersons suffering personal injuries as the result of defective goods, including defective brakes on automobiles, already have remedies against the manufacturers and sellers of such goods in causes of action for negligence, breach of warranty and 'strict liability.'"[137]

Likewise, in the *Mead* amended complaint, claims for negligence, negligent failure to warn, common law fraud, unjust enrichment, and strict products liability are all asserted against the vaccine manufacturers, in addition to medical monitoring.[138] Any one of these traditional tort theories could conceivably serve as the basis for collection of medical surveillance damages. Like many exposure cases, the *Mead* class action does not appear dependent on the creation of a medical monitoring tort. Rather, future medical testing and diagnostic examination expenses are recoverable under existing tort theories (e.g., negligence).

Finally, as discussed in Part II, the creation of a medical monitoring tort is based largely, if not exclusively, on public policy considerations. Oregon case law suggests that public policy considerations should not be the foundation for a *court's* creation of a new tort. The Oregon Supreme Court stated recently in *Bennett v. Farmers Insurance Co.*[139] that "ordinarily, the creation of law for reasons of public policy . . . is a task assigned to the legislature, not to the courts."

In sum, the significant public policy concerns inherent in the creation of a medical monitoring tort suggest that the issue should be decided by the Oregon legislature. The legislature not only has the ability to resolve the broad public policy issues raised by medical monitoring, but also has better access than the

134 OR. REV. STAT. § 646.638 (2001).

135 *Gross-Haentjens*, 589 P.2d at 1211.

136 *Id*.

137 *Id.*

138 *See* First Amended Complaint, *supra* note 1, at 22-36.

139 26 P.3d 785, 792-93 (Or. 2001); *see also* DeMedoza v. Huffman, 51 P.3d 1232, 1243 (Or. 2002) (citing *Bennett* with approval).

courts to information indispensable to making such far-reaching decisions.

B. The Medical Monitoring Tort Could Produce a "Flood" of Litigation

The creation of a medical monitoring tort could lead to potential abuse through a rash of meritless litigation. As the Supreme Court acknowledged in *Buckley*, creating a medical monitoring cause of action without proof of a present physical injury may spur an overflow of unsubstantiated cases.[140]

Such a wave of actions by less-deserving claimants could "clog" the courts, thereby preventing the efforts of the more seriously injured.[141] One commentator, Victor E. Schwartz, wrote:

> [O]n a daily basis, almost everyone comes into contact with a potentially limitless number of materials that, arguably, may warrant a medical monitoring remedy. Indeed, people are "exposed to potential health hazards each day through the air they breathe, water they drink, food and drugs they ingest, and on the land on which they live."[142]

Such pedestrian exposure led to Justice Maynard's oft-quoted dissent in *Bower v. Westinghouse Electric Corp*.[143] Arguing that the majority "exercised no caution whatsoever" in recognizing the medical monitoring tort, Justice Maynard recognized that a medical surveillance tort had the effect of making "almost every West Virginian a potential plaintiff in a medical monitoring cause of action."[144] He said:

> Those who work in heavy industries such as coal, oil, gas, timber, steel, and chemicals as well as those who work in older office buildings, or handle ink in newspaper offices, or launder the linens in hotels have, no doubt, come into contact with hazardous substances. Now all of these people may be able to collect money as victorious plaintiffs without any showing of injury at all.[145]

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140 *Buckley*, 521 U.S. at 442.

141 Schwartz et al., *supra* note 6, at 1080 (stating "[c]ourts could become clogged, and persons with serious physical injuries would be delayed in having their cases heard").

142 *Id.* at 1072 (quoting Terry C. Gay & Paige F. Rosato, *Combatting Fear of Future Injury and Medical Monitoring Claims*, 61 DEF. COUNS. J. 554, 562 (1994)); *see also Buckley*, 521 U.S. at 434 (stating "contacts, even extensive contacts, with serious carcinogens are common").

143 522 S.E.2d 424, 434-36 (W. Va. 1999) (Maynard, J., dissenting).

144 *Id.* at 435.

145 *Id.*

The Supreme Court of Texas also recognized the pervasiveness of toxic substance exposure, while warning of the inherent difficulties such exposure cases would present:

> The difficulty in predicting whether exposure will cause any disease and if so, what disease, and the long latency period characteristic of asbestos-related diseases, make it very difficult for judges and juries to evaluate which exposure claims are serious and which are not. This difficulty in turn makes liability unpredictable, with some claims resulting in significant recovery while virtually indistinguishable claims are denied altogether. Some claimants would inevitably be overcompensated when, in the course of time, it happens that they never develop the disease they feared, and others would be undercompensated when it turns out that they developed a disease more serious even than they feared.[146]

The court concluded that "[i]n a nation already overflowing with lawsuits, careful consideration must be paid to the risks inherent in waiving one of the most fundamental rules of tort law by allowing medical monitoring claims to proceed without a showing of present physical injury."[147]

In our industrial society, there is an alarming potential for human contact with toxic substances. While a plaintiff will still face the rigors of satisfying each of the basic elements of a medical monitoring claim, an "exposure to a toxic substance"[148] has become a small hurdle for most claimants to bear. The availability of an independent action could promote the filing of many meritless claims, thereby delaying the efforts of legitimate exposure plaintiffs. The U.S. Supreme Court's warning of a "flood" of unsubstantiated claims is too real for Oregon to dismiss through the judicial process.

C. A Judicially-Created Medical Monitoring Tort May be Improper Because of the Complexities in Proving Causation

One of the most difficult issues in environmental and toxic tort litigation is "'whether the exposure to a toxic substance is the cause in fact of a plaintiff's harm.'"[149] In traditional tort actions,

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[146] Temple-Inland Forest Prods. Corp. v. Carter, 993 S.W.2d 88, 93 (Tex. 1999).

[147] Schwartz et al., *supra* note 6, at 1081 (discussing *Temple-Inland*).

[148] *See* Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 979 (Utah 1993) (identifying the first element in its test to establish a medical monitoring claim).

[149] *See* Danielle Conway-Jones, *Factual Causation in Toxic Tort Litigation: A Philosophical View of Proof and Certainty in Uncertain Disciplines*, 35 U. RICH. L.

the plaintiff bears the burden of demonstrating that a causal connection exists between the defendant's conduct and the plaintiff's injury.[150] But, due to the latent onset of many toxic torts and the multiplicity of factors involved, this burden is rarely more trying than in the context of toxic exposure claims.[151] A delayed onset permits "intervening causes" to alter and even destroy viable links between the defendant's conduct and the plaintiff's injury.[152] As a result, many toxic tort plaintiffs cannot establish a prima facie case for want of a direct relationship between exposure and injury.[153]

Such complexity in proving causation recently led the Nevada Supreme Court to reject medical monitoring as a cause of action in a second-hand smoke exposure case.[154] In *Badillo v. American Brands, Inc.*, smokers and casino employees brought class action suits against cigarette manufacturers and others, seeking judicial recognition of a medical monitoring cause of action and the establishment of a court-supervised medical monitoring program.[155]

In denying the medical monitoring claim, the court concluded that creating a new tort required a less tenuous and "more clear cut" cause in fact than that presented in a smoke inhalation case.[156] Finding the creation of a tort inappropriate under the facts of the case, the court said:

> Exposure to environmental tobacco smoke raises many complex issues of legal causality and proof, such as the length and intensity of exposure necessary to create a significant increased risk or harm. In addition, causality and proof are complicated by potential mitigating factors, such as individual medical history and other co-existing adverse health behaviors. The defendants' contribution to harm is also not clear-

REV. 875, 886 (2002) (citing GERALD W. BOSTON & M. STUART MADDEN, LAW OF ENVIRONMENTAL AND TOXIC TORTS 4-20, 339 (1994)).

150 *See id.* (citing KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 266).

151 Allen T. Slagel, Note, *Medical Surveillance Damages: A Solution to the Inadequate Compensation of Toxic Tort Victims*, 63 IND. L.J. 849, 853 (1988) ("Proving causation is often the toxic tort plaintiff's most formidable task.").

152 Ann Taylor, Comment, *Public Health Funds: The Next Step in the Evolution of Tort Law*, 21 B.C. ENVTL. AFF. L. REV. 753, 765-66 (1994) (citation omitted).

153 *See* Slagel, *supra* note 151, at 854 (stating that often a "plaintiff cannot meet her legal burden of proving causation because she cannot demonstrate a cause-in-fact, or a substantial relationship between her injuries and the toxic substance").

154 Badillo v. Am. Brands, Inc., 16 P.3d 435 (Nev. 2001).

155 *Id.* at 438.

156 *Id.* at 440.

> cut. Defendant manufacturers made hundreds of different products containing different ingredients. *A toxic exposure that is discrete and more ascertainable would be less problematic*.[157]

But finding a toxic exposure that is "discrete" and "ascertainable" is a formidable task. Cancer and other exposure-related diseases are widely recognized as having ambiguous etiology, which complicates "identify[ing] the exact factors causing the disease."[158] For example, asbestos exposure, ionizing radiation, and tobacco inhalation have all been implicated in causing lung cancer alone.[159]

Likewise, in the *Mead* class action, while mercury exposure may be a contributing cause of childhood autism,[160] countless other factors may also be responsible, including chromosomal abnormalities, intrauterine rubella, tuberous sclerosis, Cornelia de Lange's syndrome, hydrocephalus, untreated phenylketonuria, infantile spasms, herpes simplex encephalitis, focal brain lesions and genetic predisposition.[161]

This complexity in identifying the cause in fact of an injury and the potential for wrongfully imposing liability on a defendant may help to explain the legal system's traditionally narrow construction of causation. For example, in Oregon, to establish a cause in fact:

> [T]he causal connection between defendant's acts or omissions and the plaintiff's injuries must not be left to surmise or conjecture. The proof of the material issue must have the quality of reasonable probability, and a mere possibility that the alleged negligence of the defendant was the proximate cause of plaintiff's injuries is not sufficient.[162]

The Oregon Supreme Court has further explained that "[w]hen the evidence shows two or more equally probable causes

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157 *Id.* at 441 (emphasis added; citations omitted).

158 Carey C. Jordan, Comment, *Medical Monitoring in Toxic Tort Cases: Another Windfall for Texas Plaintiffs?*, 33 HOUS. L. REV. 473, 480 (1996) (citing Taylor, *supra* note 152, at 758 n.61).

159 *Id*. (citing *Taylor*, *supra* note 152, at 758).

160 Mercury Vaccine Alliance, *at* http://www.mercvacalliance.com (last visited Jan. 15, 2004) ("Current clinical and epidemiological research suggests that the mercury-laden thimerosal so widely given to children by the drug companies in the 1990s might cause a range of neurological and neurodevelopmental injuries, including autism.").

161 Isabelle Rapin, *Autism*, 337 NEW ENG. J. MED. 97 (1997), http://www.unc. edu/~cory/autism-info/autism.html#Causes.

162 Sims v. Dixon, 355 P.2d 478, 480 (Or. 1960).

of injury, for not all of which the defendant is responsible, no action for negligence can be maintained."[163] Oregon's strict construction of causation imposes a heavy burden in toxic exposure cases in general, and specifically, in the *Mead* class action.

In general, courts hold toxic plaintiffs to the same level as traditional tort claimants, requiring "direct traceability" between cause and injury.[164] But establishing such a close nexus is daunting. To satisfy this burden, toxic plaintiffs must merge "epidemiology, toxicology, medical and clinical sciences, quantitative and qualitative probabilities, physical causation, efficient causation, legal causation, and legal persuasion" into one coherent product to state a claim.[165] Consequently, in the majority of cases, the toxic plaintiff will not be able to establish a substantial relationship—let alone a cause in fact—between her alleged injuries and the defendant's conduct.[166]

Nonetheless, the inherent difficulty in proving causation in toxic tort cases should not discourage claims for medical monitoring. Instead, this reality merely suggests that judicial creation of the tort, subject to the existing burdens of proof, may be inappropriate. Judicial application of Oregon's customary causation standard will likely prove prohibitively difficult for most toxic claimants, resulting in little, if any, benefit for victims.[167] Accordingly, until action is taken by the state legislature, Oregon courts should encourage medical monitoring exclusively as a remedy for existing causes of action. Such a response will still serve plaintiff needs of early detection and treatment of latent disease while preventing the potential for directed verdicts and other summary dispositions.

D. Oregon's Ultimate Repose Statute Will Preclude the Claims of Many Toxic Tort Plaintiffs

Many cancers and diseases caused by hazardous substances have extremely long latency periods and will not develop until many years, or even decades, after exposure occurs. This is in-

163 Simpson v. Hillman, 97 P.2d 527, 529 (Or. 1940).

164 Conway-Jones, *supra* note 149, at 878.

165 *Id*. at 880-81.

166 Jordan, *supra* note 158, at 480.

167 *See* Myra Paiewonsky Mulcahy, Note, *Proving Causation in Toxic Torts Litigation*, 11 HOFSTRA L. REV. 1299, 1326 (1983) (providing that "Applying [traditional notions of causation] to toxic tort cases is analogous to placing a square peg into a round hole–it just will not fit.").

herently problematic to the typical toxic plaintiff who, by awaiting manifestation, is often left without recourse because the statute of limitations has expired.[168]

Oregon has accounted for this inequity by applying the so-called "discovery rule" to negligence actions.[169] In general, a cause of action will not accrue under the discovery rule until the claim has been discovered, or in the exercise of reasonable care, should have been discovered.[170] To determine when a negligence claim is "discovered," the court will determine whether the plaintiff knew or reasonably should have known facts which would make a reasonable person aware that a cause of action likely exists.[171]

As such, potential toxic tort plaintiffs benefit from the delayed accrual supplied by Oregon's discovery rule. However, because many prevalent toxic exposure injuries take years to manifest, often between fifteen and forty years,[172] Oregon's ultimate repose limitation could still bar a bulk of claims otherwise made available under the discovery rule.

Statutes of ultimate repose set a maximum upper time limit in which a plaintiff may file a claim, regardless of the date of discovery or other circumstances that may affect the expiration of a statute of limitations.[173] An ultimate repose period "provides a deadline for the initiation of an action whether or not the injury has been discovered or has even occurred."[174] This period "can-

168 See Taylor, *supra* note 152, at 762 ("The application of the traditional view of statutes of limitations virtually prohibits recovery in toxic torts.").

169 *See* Berry v. Branner, 421 P.2d 996, 997 (Or. 1996) (applying the discovery rule to Oregon Revised Statute section 12.110(1)).

170 Gaston v. Parsons, 864 P.2d 1319, 1324 (Or. 1994); *see also* Hutchison v. Semler, 361 P.2d 803, 807 (Or. 1961) (explaining that "the statute of limitations began to run . . . when the plaintiff became apprised, or as a reasonable man should have known, that his health was being undermined by the dust which he was breathing").

171 *Gaston*, 864 P.2d at 1324.

172 Shelly Brinker, Comment, *Opening the Door to the Indeterminate Plaintiff: An Analysis of the Causation Barriers Facing Environmental Toxic Tort Plaintiffs*, 46 UCLA L. REV. 1289, 1293-94 (1999) (explaining that cancer, one of the most prevalent toxic exposure injuries, has a latent onset because of the interaction of a variety of factors, including age, sex, socioeconomic status, and nutritional level).

173 *See* Josephs v. Burns & Bear, 491 P.2d 203, 205 (Or. 1971) *overruled in part on other grounds by* Smothers v. Gresham Transfer, Inc., 23 P.3d 333 (Or. 2001) (providing that the statute of ultimate repose in Oregon Revised Statute section 12.155(1) is intended to provide overall maximum time limitation).

174 Sealey v. Hicks, 788 P.2d 435, 438 n.7 (Or. 1990).

not be extended regardless of unfairness to the plaintiff."[175]

Oregon's ultimate repose statute for negligent injuries provides "[i]n no event shall any action for negligent injury to person or property of another be commenced more than 10 years from the date of the act or omission complained of."[176] In *Withers v. Milbank*, the Oregon Court of Appeals explained "[i]n drafting ORS 12.115(1), the legislature considered the problem of long-delayed tort litigation brought about by delayed discovery and endeavored to prescribe an ultimate cutoff date beyond which a specific act or omission is no longer actionable."[177] The Oregon Supreme Court has strictly construed the words, "in no event shall any action . . . be commenced more than 10 years" to clearly indicate that all claims filed after ten years are prohibited "regardless of circumstances."[178]

While the discovery rule will undoubtedly preserve some toxic tort claims, Oregon's present statutory scheme is not an effective safeguard for many of the most prevalent toxic tort claims.

E. The Lack of Uniformity Among Jurisdictions Having Considered Medical Monitoring Should Deter Oregon Courts From Creating a New Action

Approximately thirty states have not yet addressed the issue of medical monitoring.[179] But of those that have, lack of consensus and uniformity in the decision-making suggests that Oregon should exercise caution in deciding whether to enter the fray.

Two decisions previously discussed, *Badillo* and *Duncan*, both decided in 2001, rejected medical monitoring as an independent tort after citing the inconsistencies among jurisdictions.[180] In particular, *Badillo* pointed to disagreements in defining the proper test to establish medical monitoring,[181] and whether a

175 DeLay v. Marathon Le Tourneau Sales & Serv. Co., 630 P.2d 836, 839 (Or. 1981).

176 OR. REV. STAT. § 12.115(1) (2001).

177 678 P.2d 770, 771 (Or. Ct. App. 1984).

178 *Josephs*, 491 P.2d at 206.

179 Duncan v. Northwest Airlines, Inc., 203 F.R.D. 601, 607 (W.D. Wash. 2001); Badillo v. Am. Brands, Inc., 16 P.3d 435, 438-39 (Nev. 2001).

180 *Badillo*, 16 P.3d at 441 (rejecting the medical monitoring claim "[i]n light of the lack of consensus in other jurisdictions"); *Duncan*, 203 F.R.D. at 608 (noting "the ambiguity in case law from other states").

181 *Badillo*, 16 P.3d at 441 (identifying five courts that differ from one another in the elements necessary to state a claim for medical monitoring).

present physical injury is required.[182]

The disagreement among courts, though, extends beyond the disparities identified in *Badillo*. First, to establish a medical monitoring claim, some courts require a reasonable medical probability that a toxic injury will occur,[183] while other courts demand only an increased risk.[184] Second, courts split on whether recovery is contingent on the existence of a present treatment for a disease that is the subject of medical monitoring.[185] Third, some courts still diverge on whether successful medical monitoring plaintiffs should receive their payments periodically or in lump sum form.[186]

Because state legislatures have "superior access to information"[187] and because judicial efforts to provide certainty to potential claimants in medical monitoring disputes have largely failed, Oregon courts should reject medical monitoring as a new cause of action. By following the lead of *Badillo* and *Duncan*, Oregon courts will encourage legislative resolution of the matter, while serving the grand purpose of *not* contributing to this already muddled area of the law.

Conclusion

While there are obvious public policy reasons in favor of creating a medical monitoring tort, such action is not warranted at this time by Oregon courts.

Since the 1980s, the legal profession has seen over two hundred years of tort law unravel substantially through judicial abandonment of the physical injury requirement. Only recently have we witnessed a renewed commitment to this basic principle. Oregon, like Alabama and Kentucky, appears to require a present physical injury in order to recover future medical expenses, including diagnostic testing and other preventative measures. This result is consistent, not only with Oregon's products liability laws, but also with the nation's long-standing tort principles of recovery.

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182 *Id.* (comparing eleven courts that do or do not require a present physical injury).

183 *See*, *e.g.*, Potter v. Firestone Tire & Rubber Co., 863 P.2d 795, 823 (Cal. 1993).

184 *See*, *e.g.*, Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 979 (Utah 1993).

185 *Compare In re* Paoli R.R. Yard PCB Litigation, 916 F.2d 829 (3d Cir. 1990), *with* Redland Soccer Club, Inc. v. Dep't of the Army, 696 A.2d 137 (Pa. 1997).

186 *See* Garner et al., *supra* note 8, at 10,024 n.73.

187 *See* Schwartz et al., *supra* note 6, at 1073.

The *Mead* class action signifies that Oregon will soon be in a position to influence the nationwide viability of the medical monitoring claim. While our courts should not shy from this role, careful consideration should be given to the following factors before abandoning the physical injury requirement: the flood of claims medical monitoring will likely produce, the difficulties in proving causation, Oregon's statutes of ultimate repose, inconsistencies in the national case law, and perhaps most importantly, our state legislature's role in the decision.

The refusal to judicially create a medical monitoring cause of action does not mean that the traditional goals of tort law (e.g., deterrence of tortious conduct and compensation for injured claimants) will go unsatisfied. Rather, these objectives can still be met through judicial recognition of medical monitoring as an item of damages to existing causes of action.

While this end will undoubtedly result in inequity for exposure victims that are unable to establish a claim under a traditional tort theory, such injustice may be the impetus needed for legislative resolution of the medical monitoring dispute here in Oregon, and nationwide.