FITTING THE SQUARE PEG OF ALTERNATIVE TOXIC TORT REMEDIES INTO THE ROUND HOLE OF TRADITIONAL TORT LAW.[1]

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I. INTRODUCTION

> "When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not operate to ban the remedy."[2]

As the United States makes advances in the fields of technology, manufacturing, and production, so develops a unique and unanticipated spectrum of

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1. D. Alan Rudlin & Lindsey W. Stravitz, *Innovative Remedies and Damages Theories, in* TOXIC TORT CASE ESSENTIALS: STRATEGIES, EXPERTS, MOTIONS, AND ADR 1992, 73, 76 (PLI Litig. & Admin. Practice Course Handbook Series No. 446, 1992).

2. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 1, at 4 (5th ed. 1984).

environmental risks.[3] Although farmers reap the benefits of such technology, they must be aware of the environmental risks that accompany the use of pesticides, herbicides, insecticides, or fungicides. Modern forms of manufacturing and production create health risks that virtually went unheard of until the 1970s, and judicially went unrecognized until the 1980s. Practitioners, judges and jurists created a label for this type of environmental injury: the "toxic tort."[4] These environmental risks not only initiated the development of a new area of tort law for academic discussion, but also initiated a phenomena in courtroom toxic tort litigation based upon chemical or environmental exposure to toxic substances.[5] Courts, of course, struggled to address these novel toxic tort claims under the rubric of traditional principles.[6] The traditional tort elements of causation, injury, and damages[7] were formulated at a time when mass exposure to environmental toxins was unforeseen.[8] The traditional yet antiquated rules were unworkable in toxic tort litigation. Thus, a plaintiff was likely to lose.

To break down the obstacles to recovery, plaintiffs have proposed and initiated major changes to the tort system, the alternative compensation systems, new administrative programs, and engaged in legislative action.[9] These changes open the door to new liabilities for those creating or using toxic chemicals in manufacturing, agriculture, and technological operations. In the interest of fairness, exposed victims deserve the opportunity to present their novel theories of recovery.

Alternative damage theories have received the most notice and recognition.[10] The novel measures of damage, such as medical monitoring, enhanced risk of future disease, and emotional distress, were developed in response to the difficulty of establishing injury and causation where exposure to a chemical was in less than

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3. *See* Kristen Chapin, Comment, *Toxic Torts, Public Health Data, and the Evolving Common Law: Compensation for Increased Risk of Future Injury*, 13 J.OF ENERGY NAT. RESOURCES & ENVTL. L. 129 (1993).

4. Rudlin & Stravitz, *supra* note 1, at 75.

5. Toxic substances are any chemical, biological, biochemical, or radioactive materials that cause an immediate or long-term harm to people, animals, or the environment. Examples of toxic substances include: ". . . Asbestos, Agent Orange, Benzene, Diethyestibestrol (DES), Dioxin, Formaldehyde, Radiation, and Vinyl Chloride." *See* Francis E. McGovern, *Toxic Substance Litigation in the Fourth Circuit*, 16 U. RICH. L. REV. 247,(1982). These chemicals are present in every facet of American life, from the asbestos in our schools to the pesticides in our fields.

6. The principles of tort law are "(1) to provide a peaceful means for adjusting the rights of parties who might otherwise 'take the law into their own hands'; (2) to deter wrongful conduct; (3) to encourage socially responsible behavior; and (4) to restore injured parties...by compensating them for their injury." WILLIAM L. PROSSER ET AL., CASES AND MATERIALS ON TORTS 1 (8th ed. 1988).

7. Rudlin & Stravitz, *supra* note 1, at 446.

8. Chapin, *supra* note 3.

9. *See* William R. Ginsberg & Lois Weiss, *Common Law Liability for Toxic Torts: A Phantom Remedy*, 9 HOFSTRA L. REV. 859 (1981); Victor E. Schwartz & Thomas C. Means, *The Need for Federal Product Liability and Toxic Tort Legislation: A Current Assessment*, 28 VILL. L. REV. 1088 (1983).

10. Toxic tort damages still include traditional tort damages, such as lost wages, past and future medical expenses, and emotional distress, including pain and suffering. MICHAEL DORE, THE LAW OF TOXIC TORTS § 2.02 (1996).

acutely toxic amounts.[11] The common law, with its ability to continually adapt to changing circumstances, has taken the first step toward resolving the problem.[12] Following a decade of attempts to force the "square peg [of toxic torts theories] into the traditional tort round hole using novel claims such as increased risk[13] and fear of future disease,[14] courts have begun to accept and define what may be the novel toxic tort claim--medical monitoring."[15]

This note evaluates the utility of awarding medical monitoring damages as a method of adequately compensating the victims of environmental toxic exposure. As background, it discusses what constitutes a toxic tort and the reasons for creating alternative damage theories. In addition, this note examines the unique characteristics of toxic torts and the barriers to recovery encountered by the exposure victim. In light of the barriers to future recovery, this note recommends that courts recognize a pre-manifestation cause of action. Finally, the paper examines various jurisdictions that have recognized medical monitoring as a cause of action, comparing the varying threshold requirements for an award of damages. This note concludes that medical monitoring damages are a pragmatic and manageable solution to the dilemma of compensation for the toxic exposure victim.

A. *Special Characteristics of Toxic Torts and the Causation Problems They Create*

A "toxic tort" is a tort claim resulting from a plaintiff's exposure to a toxic substance, whether chemical or radioactive, as a consequence of a defendant's

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11. Bill Charles Wells, *The Grin Without the Cat: Claims For Damages From Toxic Exposure Without Present Injury*, 18 WM. & MARY J. ENVTL. L. 285, 287 (1994).

12. Allen T. Slagel, *Medical Surveillance Damages: A Solution to the Inadequate Compensation of Toxic Tort Victims*, 63 IND. L.J. 849, 852-54 (1988).

13. "Pursuant to this novel theory, the present injury is the enhanced risk of future disease. If awarded, the remedy compensates the plaintiff now for the later manifestation of the disease or illness." Thomas v. FAG Bearing Corp, 846 F. Supp. 1400, 1410 (W.D. Mo. 1994).

14. This theory is essentially a claim for emotional distress where the plaintiff seeks to recover for current fears of contracting future illness. The Iowa Court of Appeals addressed this issue in *Kosmacek*, where property owners brought suit against a co-op of farm chemical companies for negligence in allowing chemical herbicides to seep onto the plaintiff's land. Kosmacek v. Farm Service Co-op of Persia, 485 N.W.2d 99, 100 (Iowa Ct. App. 1992). The court agreed that the companies were negligent. *Id.* at 101. The plaintiff's were awarded payment for past medical expenses, but were denied recovery for mental anguish for fear of future serious illness. *Id.* at 103-105. Under Iowa law, the mere possibility of future harm is not enough. *Id*. at 104. To compensate for the problem, the plaintiffs needed to show they were aware they possessed an increased statistical likelihood of developing cancer, and from this knowledge must "spring a reasonable apprehension which manifests itself in mental distress." *Id*. at 105 (citing LaVelle v. Owens-Corning Fiberglass Corp., 507 N.E.2d 476, 481 (Ohio C.P. 1987). The plaintiff's evidence failed to meet this threshold. *Id*.

15. Rudlin & Stravitz, *supra* note 1, at 76 (internal citations ommitted).

action.[16] Toxic tort claims arise from a wide variety of factual situations under differing legal theories.[17] Normally, a claim is predicated upon a theory of negligence on the part of the defendant.[18] Typical hallmarks of an environmental toxic exposure action include: (1) uncertainty about medical causation; (2) a rudimentary understanding of the etiology[19] of cancer and other insidious diseases; (3) long latency period between exposure and disease manifestation in the toxic exposure victim, therefore, barring many claims because of the statute of limitations; (4) the lack of identifiable present injury, traditionally required under tort rules; and (5) large numbers of plaintiffs, claiming similar or related exposure.[20] These characteristics are important not only to academics, but also to practitioners because they suggest and support additional theories of liability and defense.[21] For example, most cases of environmental exposure involve large numbers of people alleging exposure to the same chemical.[22] A community with a groundwater table exposed and polluted by a neighboring chemical plant or agricultural operation, is a common example. The possibility of mass exposure is significant to the lawyer because it affects the way an environmental exposure action is, or should be, litigated. Practitioners may pursue a class action[23] or consolidated action[24] depending upon the facts surrounding the exposure and the benefits of either approach.[25]

Unequivocally, the most definitive and problematic attribute of the toxic tort claim is the latency period involved. A latency period is the interval of time between a person's exposure to the toxic substance responsible for the manifestations of a disease and the first signs of that disease, whether by definitive symptoms or actual detection.[26] This latency period is the basis for a plaintiff's inability to show a

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16. *See* Steve Gold, *Causation in Toxic Torts: Burdens of Proof, Standards of Persuasion, and Statistical Evidence*, 96 YALE L.J. 376 (1986).

17. For example, toxic torts may involve exposure through air, water or soil contamination. These torts may involve chemicals or radioactive substances, and may be founded in either negligence or strict liability, or a combination of both. *See,* Allan Kanner, *Emerging Conceptions of Latent Personal Injuries in Toxic Tort Litigation*, 18 Rutgers L.J. 343 (1987).

18. Wells, *supra* note 11, at 287.

19. Etiology is defined as the science and study of the causes of disease and its mode of operation. STEDMAN'S MEDICAL DICTIONARY 542 (25th ed. 1990).

20. Wells, *supra* note 11, at 288.

21. *Id.*

22. *Id.* at 289. Exceptions do exist. *See, e.g.*, Hagerty v. L & L Marine Services, 788 F.2d 315 (5th Cir. 1986) (involving a single individual and a single large scale exposure).

23. FED. R. CIV. P. 23. To maintain a class action, a proposed class must meet the prerequisites of numerosity, commonality, typicality, and adequate representation as provided for in Federal Rules of Civil Procedure 23(a). However, those elements are "necessary, but not sufficient conditions for a class action." Thomas v. FAG Bearing Corp., 846 F. Supp. 1403 (W.D. Mo. 1994). In addition to satisfying the four elements of Rule 23(a), the court must find that a class is an appropriate vehicle to resolve the dispute. *Id.*

24. FED. R. CIV. P. 42.

25. *See* Allen v. United States, 588 F. Supp. 247 (D. Utah 1984).

26. *See* FREDDY HOMBURGER ET AL., A Guide to General Toxicology 203 (1983).

present, identifiable injury.[27] When a victim forms a cause of action based upon her exposure to environmental toxins, the full repercussions of the exposure are not usually immediately evident.[28] Notwithstanding these barriers, a plaintiff has the burden of proving a causal nexus between a defendant's actions or omissions and the damage a plaintiff has suffered.[29] Proving causation is an environmental exposure plaintiff's most formidable task.[30]

In addition to the latency problem involved, "[s]cientific uncertainty about the etiology of cancer and other latent toxic-exposure maladies makes it virtually impossible for the plaintiff to establish a cause-in-fact, or a substantial relationship between her injury and her exposure to a certain toxic substance."[31] The uncertain etiology of diseases caused by toxic environmental exposure limits scientific expert testimony to statistical relationships correlating disease incidence and exposure to suspected carcinogens.[32] As a result, most experts are unable to testify that a defendant "more likely than not" caused a plaintiff's injuries.[33] Therefore, a victim 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. The inability of a plaintiff to establish the requisite elements for recovery, coupled with the unlikelihood that she would be successful in a future action, should raise a judicial eyebrow whereby a pre-manifestation theory of recovery should be recognized.

B. *The Barriers of Traditional Tort Law*

A traditional negligence cause of action has four parts: (1) duty; (2) breach of that duty; (3) proximate cause between a defendant's action and the alleged outcome; and (4) the resulting injury.[34] The term "injury," as defined by the Restatement (Second) of Torts, is the "invasion of any legally protected interest."[35] Unfortunately, society has been slow to legitimize the right to be free from toxic

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27. *See* Building and Construction Dept. of AFL-CIO v. Rockwell International Corp., 7 F.3d 1487 (10th Cir. 1993).

28. *See* Kanner, *supra* note 15, at 346-48.

29. KEETON ET AL., *supra* note 2, § 41, at 263.

30. Slagel, *supra* note 12, at 853.

31. *Id.*

32. McElveen & Eddy, *Cancer and Toxic Substances: The Problem of Causation and the Use of Epidemiology*, 33 CLEV. ST. L. REV. 29, 39-40 (1984).

33. "A plaintiff's expert witness may be able to testify that exposure to a particular amount of substance X is capable of causing an increased amount of cancer in the exposed population. The expert witness, however, can rarely testify that the individual plaintiff's disease was caused by the defendant's toxic substance." Jeffrey Trauberman, *Statutory Reform of "Toxic Torts": Relieving Legal, Scientific, and Economic Burdens on the Chemical Victim*, 7 HARV. ENVTL. L. REV. 177, n. 200 (1983).

34. RESTATEMENT (SECOND) OF TORTS § 281 (1991).

35. RESTATEMENT (SECOND) OF TORTS § 7 (1965).

exposure resulting from an environmental wrong.[36] Although the scope of one's legally protected interests has increased over time,[37] courts continue to employ antiquated, unyielding standards to safeguard a defendant from extreme damages based upon speculative injuries.[38] For example, many courts view allegations of injury based upon hazardous chemical exposure as too uncertain. These courts seek to protect against this uncertainty by requiring a plaintiff to demonstrate the existence of a recognizable, present physical injury. This is known as the "present injury rule."[39]

This traditional tort rule, when rigidly applied in toxic exposure cases, unfairly denies compensation to many victims of toxic exposure who cannot prove a present, discernible, and physical injury. Therefore, individuals exposed to toxic substances confront almost insurmountable barriers in their attempt to recover for their injuries resulting from exposure.[40] For example, if a plaintiff sues immediately after exposure, she faces the nearly impossible task of proving the exact nature and extent of the injury suffered and the certainty of developing the feared disease in the distant future.[41] Conversely, if a plaintiff waits until visible manifestation of the disease, the long latency period between exposure and manifestation creates the problem of identifying the source of the exposure.[42]

Moreover, the passage of time allows for loss of evidence and intervening causes.[43] The victim must "be able to locate a defendant who is not insolvent or

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[36]. An interest is afforded this legal protection only if society recognizes it "as so far legitimate as to make one who interferes with its realization civily liable." *See Id.* at § 1 cmt. d (1977). The interest in "bodily security" has traditionally been protected against intentional invasion, "negligent invasion,...[and] invasion by the mischances inseparable from an abnormally dangerous activity." *Id.*

[37]. *Id.* at § 1 cmt. e (1965). "The entire history of the development of tort law shows a continuous tendency to recognize as worthy of legal protection interests which previously were not protected at all." *Id.*

[38]. Chapin, *supra* note 3, at 133.

[39]. *See* Schweitzer v. Consolidated Rail Corp., 758 F.2d 936, 943 (3d Cir. 1985) ("[U]ntil injury manifests itself, it follows that there [is] no legal relationship between plaintiffs and defendants relevant to plaintiffs' future causes of action in tort from which an 'interest' could flow."); Morrissy v. Eli Lilly & Co., 394 N.E.2d 1369, 1375 (Ill. App. Ct. 1979) ("The fact that plaintiff's daughter may suffer injury in the future does not satisfy the present injury requirement of injury or damage..."); KEETON, ET AL., *supra* note 2, § 30, at 165 ("The threat of future harm, not yet realized, is not enough.")

[40]. Slagel, *supra* note 12, at 849.

[41]. KEETON, ET AL., *supra* note 2, at § 20, 25-26. Some commentators note that to the extent a plaintiff's claim for damages is recognized without sufficient evidence of a present injury, the four tradition elements of a negligence cause of action are reduced to two. *Id.* Where a court does not require the plaintiff to prove the fourth element of a present injury, it does not require the plaintiff to prove that the environmental exposure was the proximate cause of the injury. This leaves only the duty element and the breach of that duty.) Wells, *supra* note 11, at 287. Other commentators note that the traditional four factors are not obtrusive, because there is indeed an "injury" in environmental toxic tort litigation because the injury does not need to be a "current, physical harm." 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, 273 (1988).

[42]. Wells, *supra* note 11, at 290.

[43]. *See* Troyen A. Brennan, *Causal Chains and Statistical Links: The Role of Scientific Uncertainty in Hazardous Substance Litigation*, 73 CORNELL L. REV. 469 (1988).

defunct by the time the latent disease manifests itself and litigation commences."[44] Even if a plaintiff locates a viable defendant, because of the large potential liability, it is likely that the defendant will not have the financial ability or the insurance coverage to pay the victim's damages.[45] Requiring the toxic tort plaintiff to postpone litigation until a latent disease actually manifests itself is not a viable alternative.[46]

Even if a plaintiff overcomes the barriers of causation and the other practical hurdles involved, a statutory time limitation may still bar her recovery.[47] Statutes of limitation prescribe the time period in which a lawsuit must be filed after the cause of action has accrued.[48] Statutes of repose run independent of any manifestation of injury and place an absolute time limit during which the plaintiff may bring a toxic tort action.[49] The special characteristics of an environmental exposure injury do not fit within the realm of possible recovery. These tort law obstacles can only be overcome if courts are willing to accept a pre-manifestation theory of recovery.

II. THE INNOVATIVE REMEDY: MEDICAL MONITORING

The victim of a tortious actor's hazardous activity should not be denied relief merely because the wrongdoer "succeeds" in afflicting her with the peril of a latent injury rather than with a tangible physical injury.[50] The judicial solution thus far has been to award toxic tort plaintiffs the cost of the medical testing necessary to facilitate the early detection of diseases caused by toxic substances.[51] Medical monitoring is a suitable form of relief in toxic substance exposure cases because physicians often can diagnose warning signs of diseases and other medical problems associated with toxic substance exposure through such surveillance.[52]

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44. Slagel, *supra* note 12, at 855.

45. *Id.*

46. *Id.* at 849.

47. *Id*. at 855. For those individuals exposed to "any hazardous substance, or pollutant or contaminant, released into the environment from a facility" Congress has preempted state statutes of limitations and enacted a discovery rule. 42 U.S.C. § 9658 (Supp. 1987). This removes the statute of limitation obstacle only for those individuals exposed to toxic substances through hazardous waste sites. *See* 42 U.S.C. § 9601 (1983).

48. Slagel, *supra* note 12, at 854.

49. *Id.*

50. Gara, *supra* note 41, at 270.

51. *See, e.g.*, Hansen v. Mountain Fuel Supply, 858 P.2d 970 (Utah 1993); Ayers v. Township of Jackson, 525 A.2d 287 (N.J. 1987); Durfey v. E.I. DuPont de Nemours Co., 59 F.3d 121 (9th Cir. 1995).

52. In re Orthopedic Bone Screw Products Liability Litigation, No. Civ. A. 93-7074, 1995 WL 273597 * 9 (E.D. Pa.).

A. *What is Medical Monitoring?*

Medical monitoring is the process of conducting a test or series of tests to observe changes in a patient's condition.[53] Medical monitoring is not a claim for future health damages, but rather it is a claim for the recovery of the expenses of future medical examinations and testing.[54] The courts have rejected other theories of pre-manifestation recovery, such as increased risk of future illness and negligent infliction of emotional distress, because of the uncertainty of their occurrence and the ease with which they can be fabricated.[55] A claim of medical monitoring damages, however, does not present either of these concerns. This form of surveillance damages is predicated on objectively determinable matters of medical necessity.[56]

"Medical monitoring damages consist of the present dollar value of the reasonable costs of future periodic medical examinations and related care."[57] This remedy is intended to "facilitate early diagnosis and treatment of disease or illness caused by a plaintiff's exposure to toxic substances as a result of a defendant's culpable conduct."[58] Although those jurisdictions faced with the issue of whether to award medical monitoring have established different requirements for recovery, one element continues to distinguish medical monitoring from any other remedy in toxic exposure cases: the absence of the traditional requirement where a plaintiff must establish a present injury.[59]

Generally, the foundation for the cause of action for medical monitoring requires, in one form or another, a showing that: (1) a plaintiff was exposed to hazardous substances; (2) a defendant was the likely source of the hazardous substances;[60] and (3) some form of expanded medical expense is reasonably certain to be incurred in the future.[61] Although, without a strict causation and injury

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53. Myrton F. Beller & Robert Sappenfield, *Medical Monitoring, What it is, How Can it Be Improved?*, 87 AM. J. CLINICAL PATHOLOGY 285 (1987).

54. Rudlin & Stravitz, *supra* note 1, at 76.

55. Slagel, *supra* note 12, at 876.

56. *Id.*

57. Miranda v. Shell Oil Co., 26 Cal. Rptr.2d 655, 657 (Cal. Ct. App. 1993).

58. *Id.*

59. Wells, *supra* note 11, at 294.

60. Some jurisdictions require a "more likely than not" standard for this element. *Id.* Others require a showing that the defendant's negligence caused the exposure. The more likely than not standard is required in more jurisdictions before a plaintiff will be allowed to recover for increased risk of future injury or emotional distress. *Id.*

61. *See* Thomas v. FAG Bearing Corp., 846 F. Supp. 1400 (W.D. Mo. 1994); Askey v. Occidental Chem. Corp., 477 N.Y.S.2d 242 (N.Y. App. Div. 1984). A number of courts have faced the issue of whether medical monitoring costs due to environmental exposure constitute "response costs" under the Comprehensive, Environmental, Response, Compensation and Liability Act of 1980 ("CERCLA"). 42 U.S.C. §§ 9601-9675 (1988 & Supp. V) 1993. In *Daigle*, the plaintiffs sought a private right of recovery for "response costs" under § 107(a) of CERCLA. Daigle v. Shell Oil Co., 972 F.2d 1527 (10th Cir. 1992). The court examined the purpose and structure of CERCLA and found the medical monitoring expenses sought were not recoverable under the federal statute. *Id.* at 1537. In *Price*, the court examined the plain language of CERCLA, the definition of "response costs," and the legislative history, and also determined the plaintiff was not entitled to recover medical monitoring costs

requirement, the remedy of medical monitoring carries a reduced evidentiary burden from traditional tort remedies, a balance exists because recovery under a medical monitoring theory is limited only to the expected cost of the future monitoring.[62]

Courts' recognition of the right of toxic tort victims to recover pre-manifestation medical monitoring expenses is a logical extension of two common law doctrines.[63] "First, the doctrine of 'avoidable consequences' mandates that the plaintiff submit to medically advisable treatment."[64] A plaintiff should always attempt to mitigate her damages. As a necessary corollary to this doctrine, a tort victim who incurs an expense in attempting to minimize her damages can recover the expense incurred.[65] Accordingly, in the case of an environmental exposure victim, the doctrine of avoidable consequences requires a plaintiff to seek the necessary medical monitoring for the diagnosis or treatment of the disease or other ailment. Failure to do so could destroy the victim's right to recover for a condition that she could have thereby avoided or alleviated.[66]

Second, the principle allowing prospective medical damages supports a plaintiff's right to recover for reasonable anticipated medical expenses, including periodic diagnostic examinations.[67] It is well established that a traditional tort victim "ordinarily may recover reasonable medical expenses, past and future, which [s]he incurs as a result of a demonstrated injury."[68] In awarding medical monitoring damages, courts have slightly altered the reasonable probability standard.[69] The test for recovery of medical monitoring expenses is whether future testing is necessary to detect the early warning signs of latent ailments.[70]

In addition to being a logical extension of common law doctrine, damages for medical monitoring are in accord with public policy concerns. Although the physical manifestations of an "injury" may not appear for years, the reality is that many of those exposed have indeed suffered a legal detriment: the exposure itself and the

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as a "response cost" under CERCLA. Price v. United States Navy, 39 F.3d 1011, 1014 (9th Cir. 1994). Federal Statutes, like CERCLA, are not the solution for environmental exposure victim. Such statutes are regulatory and focus on prevention rather than compensation. The solution lies within the common law remedy of medical monitoring.

62. MICHAEL DORE, THE LAW OF TOXIC TORTS § 7.05[1] (1992).

63. Slagel, *supra* note 12, at 863.

64. Hansen v. Mountain Fuel Supply, 858 P.2d 970, 976 (Utah 1993).

65. *See* F. HARPER, ET AL., 4 THE LAW OF TORTS § 25.9, at 557-58 (2d ed. 1986).

66. *Hansen*, 858 P.2d at 976.

67. *Id*.

68. Ayers v. Township of Jackson, 525 A.2d 287, 310 (N.J. 1987) (citing C. MCCORMICK, THE LAW OF DAMAGES § 90 (1935)).

69. *See* Friends For All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 825-26 (D.C. Cir. 1984); *Ayers,* 525 A.2d at 311-12.

70. *See Friends For All Children*, 746 F.2d at 825-26; *Ayers*, 525 A.2d at 311-12.

concomitant need for medical testing.[71] Denying a person medical monitoring damages in effect denies that victim access to a potential lifesaving treatment.[72] Moreover, such damages further the deterrent function of the tort system by compelling those who expose others to toxic substances to minimize risks and costs of exposure.[73] Recovery for such expenses avoids the potential injustice of forcing an economically disadvantaged person to pay for an expensive diagnostic examination necessitated by another's negligence.[74] Allowing such recovery is also in accord with the "important public health interest in fostering access to medical testing for individuals whose exposure to toxic chemicals creates an enhanced risk of disease."[75]

Despite these public policy concerns, some courts require that medical monitoring only be allowed for those able to show actual physical injuries.[76] Once again, the latent nature of most diseases caused by environmental exposure to toxic substances prevents a victim from demonstrating an immediate physical injury of the type contemplated in traditional tort actions.[77] Thus, in light of sound policy concerns, medical monitoring is the proper remedy because it promotes early diagnosis and treatment of disease resulting from the defendant's negligence.

B. *Case Law Examining Medical Monitoring*

Analysis of medical monitoring case law illustrates not only the courts' slow and less than steady acceptance of an alternative tort theory, but also their reasoning behind allowing or avoiding such an acceptance.

1. Ayers v. Township of Jackson[78]

The *Ayers* decision is the seminal decision on the remedy of medical monitoring. An analysis of the decision reveals the overall significance of the decision and why the New Jersey Supreme Court accepted the claim for medical monitoring.[79]

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71. This conclusion is consistent with the definition of "injury" in the Restatement of Torts. *See, e.g.*, *Friends For All Children*, 746 F.2d at 826. "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." *Id.*

72. *Hansen*, 858 P.2d at 976.

73. Slagel, *supra* note 12, at 869.

74. *Hansen*, 858 P.2d at 976.

75. *Ayers*, 525 A.2d at 311.

76. *See* Thomas v. FAG Bearings Corp., 846 F. Supp. 1400 (W.D. Mo. 1994).

77. Chapin, *supra* note 3, at 134.

78. Ayers v. Township of Jackson, 525 A.2d 287 (N.J. 1987).

79. Rudlin & Stravitz, *supra* note 1, at 446. Future cases relied on the thorough research and sound reasoning of the New Jersey Supreme Court. *See* Hansen v. Mountain Fuel Supply Co., 858 P.2d 970 (Utah 1993); *Thomas*, 846 F. Supp. 1400 (W.D. Mo. 1994); Askey v. Occidental Chem Corp., 477 N.Y.S.2d 242 (N.Y. App. Div. 1984).

a. Background and Holding of Ayers

Ayers involved a statutory claim for damages under the New Jersey Tort Claims Act[80] against a defendant municipality.[81] The plaintiffs' complaint alleged contamination of their well water by seepage of pollutants into the common aquifer from a landfill owned and operated by the township.[82] The plaintiffs pursued four claims: (1) emotional distress for fear of ingesting the polluted water; (2) enhanced risk of future disease; (3) the need for annual medical monitoring; and (4) diminished quality of life for the twenty months they were deprived of running water.[83] The plaintiffs' testimony did not show they suffered from any physical symptoms or that they required current medical treatment.[84] Furthermore, the plaintiffs' expert witnesses stated they could not quantify the extent of the plaintiffs' increased risk of future disease. Yet, the court held that recognition of a medical monitoring claim should not depend on the recognition of any increased risk.[85]

Finding damages for medical monitoring appropriate, the court observed that in other areas of the law, the "compensation for reasonable and necessary medical expenses was well accepted."[86] The court then recognized the important public health interest in fostering access to medical testing for people whose toxic exposures put them at an increased risk and the well documented value of early diagnosis and treatment for cancer.[87] The New Jersey Supreme Court determined "post-injury, pre-symptom" recovery was not only consistent with public concerns of early diagnosis, but that it also could mitigate serious future illnesses.[88] The "[r]ecognition of [post-injury] pre-symptom claims for medical surveillance serves other important public interests."[89] If plaintiffs were forced to prove medical causation, tort law would be unable to deter polluters.[90] Permitting recovery for reasonable pre-symptom medical surveillance expenses subjects polluters to significant liability when proof of a causal connection between the tortious conduct and a plaintiff's exposure is readily available.[91]

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80. N.J. REV. STAT. § 59:1-1 et seq. (1996).
81. *Ayers*, 525 A.2d at 291.
82. *Id.*
83. *Id.*
84. *Id*. at 292.
85. *Id*. at 300.
86. *Id*. at 309-11. *See* Friends For All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816 (D.C. Cir. 1984); Hagerty v. L. & L. Marine Services, 788 F.2d 315 (5th Cir. 1986).
87. *Ayers*, 525 A.2d at 311.
88. *Id.*
89. *Id.*
90. *Id*. at 312.
91. *Id*.

In addition to compensation for medical monitoring, quality of life damages were awarded as compensation for the losses associated with damages to the plaintiffs' property. The court, however, declined to award damages for enhanced risk of future disease because they "expose[d] the tort system, and the public it serves, to the task of litigating . . . claims for compensation based upon threats of injuries that may never occur."[92] Awarding compensation for medical monitoring, however, exposes neither the public nor the tort system to such tasks. Accordingly, the New Jersey Supreme Court determined a pre-manifestation theory of medical monitoring was the appropriate remedy in light of the injuries suffered and the policy concerns raised.

b. The Ayers Requirements for Compensable Medical Monitoring

Based upon the policy concerns of environmental toxic exposure, the Supreme Court of New Jersey enumerated the factors to determine whether medical monitoring compensation was appropriate. According to *Ayers*, expert evidence must show: (1) the extent and significance of exposure; (2) the toxicity of the pollutants; (3) the seriousness of diseases for which plaintiffs are at risk; (4) the relative increase in the chance of the onset of disease; and (5) the value of early diagnosis.[93] Based upon these factors and the sound reasoning upon which they are founded, several other jurisdictions have fallen in line and recognized this alternative remedy.

2. Hansen v. Mountain Fuel Supply Co.[94]

In 1993, the Supreme Court of Utah relied on the *Ayers* reasoning to establish its own set of factors. Based upon similar public policy concerns, the *Hansen* factors require an evidentiary showing beyond that required by the *Ayers* court.

a. Background and Holding of Hansen

Renovation workers brought suit against the owner of an office building for personal injury, negligent infliction of emotional distress, and the cost of medical monitoring arising from alleged exposure to asbestos while performing renovation at a building.[95] The plaintiffs alleged they were forced to undergo periodic medical tests to facilitate the early diagnosis and treatment of disease stemming from their exposure.[96] Relying on the reasoning of the courts in New Jersey[97] and on other

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92. *Id*. at 307. The court opined, "[i]t is clear that the recognition of an 'enhanced risk' cause of action . . . would generate substantial litigation that would be difficult to manage and resolve." *Id.* Based upon the New Jersey Tort Claims Act, the court declined to award damages for emotional distress as a matter of law. *Id.* at 297.

93. *Id*. at 312-13.

94. Hansen v. Mountain Fuel Supply, 858 P.2d 970 (Utah 1993).

95. *Id*. at 972.

96. *Id*. at 975-76.

97. *Id*. at 978; *See Ayers*, 525 P.2d at 287.

federal court decisions,[98] the Utah Supreme Court enumerated an eight-part test to determine whether medical monitoring damages were appropriate.[99]

Based upon the facts presented and the eight factors enumerated, the court recognized medical monitoring was an available form of recovery for the exposure victim.[100] Notwithstanding, the court declined to award damages for negligent infliction of emotional distress because the plaintiffs failed to present sufficient evidence of "severe" emotional distress.[101] Resting in the middle of the spectrum between the analysis of *Ayers* and the rigid traditional tort rules, the *Hansen* court set forth a test that balances the interests of victim and defendant.

b. The Hansen Requirements for Compensable Medical Monitoring

A plaintiff must prove the following to recover medical monitoring damages under Utah law:

> (1) exposure; (2) to a toxic substance; (3) which exposure was caused by the defendant's negligence; (4) resulting from 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.[102]

First, the court requires a plaintiff to prove exposure which the court defined as the ingestion, inhalation, injection, or otherwise absorption of the substance into the body.[103] Second, a plaintiff must prove the substance was "toxic."[104] Thus, a victim must show that she was environmentally exposed to a "[s]ubstance that through its chemical action usually kills, injures or impairs an organism."[105] Third, a victim must demonstrate that a defendant's negligence caused the exposure to the toxic substance.[106] The element of negligence is absent from the *Ayers*

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98. *Hansen*, 858 P.2d at 978; *See* Merry v. Westinghouse Electric Corp., 684 F. Supp. 847 (M.D. Pa. 1988) (establishing a three part test where the plaintiff must establish (1) exposure to hazardous substances; (2) the potential for injury; and (3) the need for early detection and treatment to recover medical monitoring expenses). *See also*, In re Paoli R.R. Yard PCB Litigation, 916 F.2d 829, 852 (3d Cir. 1990) (outlining medical monitoring criteria).

99. *Hansen*, 858 P.2d at 979.

100. *Id*.

101. *Id*. at 975.

102. *Id*. at 979. Proof of these elements usually requires expert testimony. *Id*.

103. *Id*.

104 *Id*.

105. *Id*.

106. *Id*.

requirements. This heightens the evidentiary standard by requiring, prior to recovery, a traditional showing of the defendants breach of a duty owed to the plaintiff prior to recovery.[107]

Fourth, a plaintiff must then show the exposure was of sufficient duration and/or intensity to increase the risk of the anticipated harm significantly over the risk of harm prior to exposure.[108] The court emphasized that no particular level of quantification need be proven to satisfy the requirement of "significantly increased risk."

> Because the injury in question is the increase in risk that requires one to incur the cost of monitoring, the plaintiff need not prove that he or she has a probability of actually experiencing the toxic consequence of the exposure. It is sufficient that the plaintiff show the requisite increased risk.[109]

Fifth, a plaintiff must prove the illness or disease, for which the exposure to the toxin has increased the risk, is a serious one.[110] More specifically, the court required the affliction be "serious" by showing the illness "[i]n its ordinary course may result in significant impairment or death."[111] Sixth, "[t]he plaintiff must [establish] a test [even] exists for detecting the onset of the illness before [the disease] would be apparent to [a] layperson" or someone other than a physician.[112]

"Seventh, the plaintiff must prove that the periodic administration of the existing test would be beneficial."[113] More specifically, she must show a ". . . treatment exists that is more effective in curing or ameliorating the consequences of the illness if administered before the onset of the illness becomes apparent to the layperson."[114] The medical treatment available must be more beneficial to the victim when administered before the illness actually becomes evident.[115] Otherwise, there would be no cause of action and no remedy because the medical monitoring could not fulfill its purpose.[116] Unlike any of the *Ayers* factors, this element requires

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107. *Id*.
108. *Id*.
109. *Id*.
110. *Id*.
111. *Id*.
112. *Id*. If no such test existed, then periodic monitoring would be pointless and no cause of action for monitoring would exist. *Id*. If a test is later developed that would detect the disease, however, a plaintiff retains the right to demonstrate at some later date the effectiveness of the test and be compensated for utilizing it, if all other elements of the cause of action are present. *Id*. at 979 n. 12. In such a situation, the potential plaintiff is not harmed until the onset of the actual illness. *Id*. At that time, she may bring an action for actual injury. *Id*. Under Utah law, the statute of limitations certainly would not run on a cause of action when a critical element of that cause, actual injury, has yet to become evident. *See* Klingler v. Kightly, 791 P.2d 868, 869 (Utah 1990).
113. *Hansen*, 858 P.2d at 979.
114. *Id*. at 979-80.
115. *Id*. at 980.
116. *Id*.

substantial medical evidence to show that such medical monitoring would indeed be beneficial. Such a requirement balances a defendant's concern over paying for speculative damages with a plaintiff's need for medical surveillance to mitigate damages.

Eighth, it is not enough that early detection and treatment are shown to be theoretically beneficial. The toxic exposure plaintiff must prove that administration of the monitoring is medically advisable for that particular plaintiff.[117] The plaintiff must demonstrate that because of the exposure to the toxic substance, a physician would prescribe a monitoring regime different than one that would have been prescribed prior to, or in the absence of, the particular exposure.[118]

Again, based upon policy concerns like those addressed in *Ayers*, the court emphasized that the advisable medical testing for a specific plaintiff must be "consistent with contemporary scientific principles" and "reasonably necessary."[119] By requiring this analysis prior to an award of medical monitoring expenses, the court seriously addressed the policy concerns of both a plaintiff and a defendant when immersed in toxic exposure litigation. The factors safeguard a defendant from having to pay for speculative injuries, while allowing a victim to mitigate future illnesses and disease.

3. Thomas v. FAG Bearings Corp. [120]

Although it prohibited recovery based on the specific facts involved, a federal district court in Missouri relied on *Ayers* and its progeny[121] to enumerate its own set of factors for compensable medical monitoring. Bound by Missouri tort law, the court set forth a test that leans toward traditional tort law and away from the flexible analysis of *Ayers*. Unlike *Ayers*, the *Thomas* court required substantial evidence of traditional tort elements that barred recovery without a showing of a present, identifiable injury.[122]

a. Background and Holding of Thomas

In *Thomas*, a group of plaintiffs sought class certification in an effort to sue the corporation which allegedly caused the victims' exposure to groundwater contamination.[123] In addition, the plaintiffs sought damages for mental anguish,

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117. *Id*.
118. *Id*.
119. *Id*. (citing Ayers v. Township of Jackson, 525 A.2d 287, 309 (N.J. 1987)).
120. Thomas v. FAG Bearings Corp., 846 F. Supp. 1400 (W.D. Mo. 1994).
121. *See* Potter v. Firestone Tire and Rubber Co., 863 P.2d 795 (Cal. 1993); Miranda v. Shell Oil Co., 26 Cal. Rptr.2d 655, 657 (Cal. Ct. App. 1993); Day v. NLO, 851 F. Supp. 869 (S.D. Ohio 1994).
122. *See Thomas*, 846 F. Supp. at 1400.
123. *Id*. at 1403.

increased risk of cancer, and medical monitoring.[124] Although the court judicially recognized each type of remedy, the plaintiffs were denied all forms of recovery for lack of evidence.[125] Under Missouri law, entitlement to the costs of future medical monitoring rests upon whether a plaintiff can "prove an actual present injury and an increased risk of future harm."[126]

b. The Thomas Requirements for Compensable Medical Monitoring

As compared to *Ayers*, the court in *Thomas* established a rigid set of factors to prove medical necessity. Plaintiffs must show, by individual proof:

> (1) the nature and extent of their exposure; (2) the seriousness of their present injury; (3) the increased risk of disease; (4) the seriousness of the diseases that are possible; and (5) the value of early diagnosis of those diseases which dictates that medical surveillance, beyond that which is normal, would be necessary in the future.[127]

The court, in keeping with Missouri's standard of proof for future damages, held the monitoring must be "probably," not just "possibly," necessary.[128] By applying a strict analysis before awarding medical monitoring expenses, the *Thomas* court addressed serious policy concerns of both a plaintiff and a defendant when involved in toxic tort litigation. The analysis, like traditional tort law, safeguards a defendant from having to pay for the mere speculation of future injury, while allowing a plaintiff to mitigate future illness and disease.

The courts in *Ayers* and *Hansen*, however, also addressed serious concerns of the parties involved and created a more malleable analysis that allowed a victim to recover without delay. As noted earlier, waiting until the present injury becomes manifest presents serious barriers to recovery.[129] A victim may be unable to locate a viable defendant and is likely to have difficulty proving causation. Moreover, the *Hansen* court determined the analysis promoted the underlying policies of tort law--deterrence and compensation.[130] Likewise, the court in *Ayers* determined the pre-manifestation remedy of medical monitoring promoted such policies.[131] Although the Missouri court did recognize a theory of recovery prior to the manifestation of any disease, the factors enumerated make it almost impossible for an environmental

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124. *Id*.

125. *Id*. at 1400.

126. *Id*. at 1410.

127. *Id*. (following the reasoning of Ayers v. Township of Jackson, 525 A.2d 287, 312 (N.J. 1987)).

128. *Thomas*, 846 F. Supp. at 1410. Cf. Bennett v. Mallinckrodt, Inc., 698 S.W.2d 854, 867 (Mo. Ct. App. 1985) (examining fear of cancer claim arising out of radiation exposure), *cert. denied*, 476 U.S. 1176 (1986); *See also* In re Paoli R.R. Yard PCB Litig., 916 F.2d 829, 852 (3d Cir. 1990) (outlining medical monitoring criteria).

129. Slagel, *supra* note 12, at 849.

130. Hansen v. Mountain Fuel Supply, 858 P.2d 970, 979-80 (Utah 1993).

131. *Ayers*, 525 A.2d at 309-311.

exposure victim to recover. More jurisdictions should take heed to the reasoning of *Ayers* and its progeny[132] to award the remedy of medical monitoring without a present, discernible injury.

III. CONCLUSION

The ailments resulting from environmental exposure, because of their unique attributes, do not fit into the traditional model of tort law injuries. The inability of the toxic exposure tort to fit within the common law model of tort law erects insurmountable barriers for a victim in her attempt to receive adequate compensation for her injuries. The pragmatic solution is not through legislative tort reform or administrative remedies, but rather through the common law solution of medical monitoring damages. Medical monitoring damages provide the environmental exposure victim with a pre-manifestation recovery for her injuries. Medical monitoring does not pose the problems of uncertainty or risk of fabrication like other pre-manifestation recoveries, namely increased risk of future illness and negligent infliction of emotional distress. Medical monitoring damages are predicated on the necessity for medical testing and examination. The sound legal, medical and public policy considerations support the recovery of such damages. These considerations justify allowing an exposure victim to recover for the medical expenses she will incur to facilitate the early detection of disease.

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132. *See* Potter v. Firestone Tire and Rubber Co., 863 P.2d 795 (Cal. 1993); Miranda v. Shell Oil Co., 26 Cal. Rptr. 2d 655, 657 (Cal. Ct. App. 1993); Day v. NLO, 851 F. Supp. 869 (S.D. Ohio 1994).