

Medical Monitoring Questions

First Question:

- Should the State allow a claim for medical monitoring damages as an independent cause of action for equitable relief?
- Or are medical monitoring damages allowable as a claim for consequential damage under a tort claim for some other quantifiable injury

Stated another way: Are medical monitoring damages an injury themselves—i.e. but for the exposure the person would not have incurred costs—or are they one or more of the damages inflicted from an injury.

If Independent Cause of Action

- If the answer to the first question is Yes, medical monitoring damages should be an independent cause of action, look to Pennsylvania and other states that allow it for the elements of a test. See criteria in S.197—the following questions may also need answers.

If Only Consequential Damages

- If the answer to the first question is No, it is not an independent cause of action, but consequential damages, look to New York and other states for application of law.

What if it is In-between

- Medical monitoring damages suit can go forward if the plaintiff can show a subcellular change or other physiological change. No presentation of actual injury, but physiological change. See Massachusetts

If Not an Independent Cause of Action—What is Standard for Consequential Damage

- If not an independent cause of action, what type of injury must a person endure?
- Must the injury be attendant to a tort? What kind of torts? Just negligence or any tort?
- Must the injury giving rise to the tort be a physical injury or injury to property or some other tortious injury?
- What is the degree of exposure required?
 - Simple exposure
 - Significant exposure
 - Exposure above background levels
 - Exposure that cause subcellular change

- What is the likelihood of damage
 - The need for future medical monitoring is reasonably foreseeable consequence of exposure to toxic chemicals and the recommended monitoring is reasonable
 - Whether persons faced a significant, but necessarily likely, risk of serious disease.

What is the nature of the substance exposed to?

- Proven hazardous substance
- Toxic substance
- Must claimant show that due to proximate cause of exposure, claimant has increased risk of contracting disease.

What is risk of contracting serious latent disease?

- Don't need to speculate on probability of future injury, merely must ascertain the probability that the far less costly remedy of medical supervision is appropriate
- Just a risk
- Significant
- Or greater than the risk had he or she not been exposed
- Greater than the risk of the public at large

Expert Testimony

- Claims caused by exposure will require competent expert testimony on each element of a claim *Donovan v. Philip Morris USA*, 455 Mass 215 (2009)

Class Action

- Should the statute expressly authorize class action? Or do you leave the decision on class action status to the courts under existing court rules for class action?