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Recovery of Medical Monitoring Costs: An Argument for the Fund Mechanism in the Wake of Bower v. Westinghouse

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THE RECOVERY OF MEDICAL MONITORING COSTS: AN ARGUMENT FOR THE FUND MECHANISM IN THE WAKE OF *BOWER V. WESTINGHOUSE*

I. INTRODUCTION

The West Virginia Supreme Court of Appeals recently decided a case that may change the face of tort damages in West Virginia forever. In *Bower v. Westinghouse*, the court held that a plaintiff may recover the cost of future medical testing "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."[1] With this decision, the court recognized the right to recover damages for medical monitoring. The concept of medical monitoring damages is contrary to the longstanding tort tradition that requires a present injury for recovery of damages.[2] "[A]n action for medical monitoring seeks to recover only the quantifiable costs of periodic medical examinations necessary to detect the onset of physical harm . . . [that may occur in the future]."[3]

1 Syl. Pt. 2 , Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424 (W. Va. 1999).

2 In re Paoli R.R. Yard PCB Litigation, 916 F.2d 829, 850 (3rd Cir. 1990).

3 *See Paoli*, 916 F.2d at 850.

The court was faced with the question of "[w]hether, under West Virginia law, a plaintiff who does not allege a present physical injury can assert a claim for the recovery of future medical monitoring costs where such damages are the proximate result of the defendant's tortious conduct."[4] Although this question is straightforward on its face, the answer includes several complex issues of law, policy, and equity. This note addresses those issues. First, this note surveys the evolution of tort damages, including the evolution of medical expense damages. Second, the recognition of medical monitoring as a form of damages in other jurisdictions is addressed. Next, the decision in *Bower v. Westinghouse* is analyzed. This note also addresses the argument for the adoption of a fund mechanism approach for medical monitoring recovery. Finally, the unanswered questions left by the court's decision in Bower are discussed.

II. EVOLUTION OF TOXIC TORT DAMAGES

Tort law has historically followed the legal doctrine that "[t]he threat of future harm, not yet realized, is not enough."[5] Thus, under traditional tort law, plaintiffs are only able to recover for actual present injuries caused by others not the possibility of future injures.[6] However, the world has evolved and environmental science now provides us with the knowledge that certain chemicals cause disease. As a result, the legal profession is forced to grapple with the ramifications of toxic torts.

A toxic tort is defined as an alleged personal injury and related harm resulting from exposure to a toxic substance, usually a chemical, but perhaps a biological or radiological agent.[7] Generally, in toxic tort litigation, the plaintiff is injured through multiple exposures to a toxic substance over a long period of time.[8] An injury from the exposure, if it appears at all, generally manifests itself only after a latency period, sometimes up to 20 years after the exposure.[9] This latency period, where no actual injury has manifested, causes ambiguity and difficulty in assessing damages.

Therefore, medical monitoring, as a form of recovery, developed to compensate those plaintiffs exposed to toxic substances who had not yet developed an actual injury.[10] Medical monitoring is a form of recovery in which plaintiffs may be compensated for the reasonable costs of periodic diagnostic examinations

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4 *Id.*

5 W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 165 (5th ed. 1984).

6 *See* George W. C. McCarter, *Medical Sue-Veillance: A History and Critique of the Medical Monitoring Remedy in Toxic Tort Litigation*, 45 RUTGERS L. REV. 227, 229 (1993).

7 *See id.* n.2.

8 *See id.*

9 *See id.* n.4.

10 *See id.* at 230.

throughout the latency period of a disease.[11] The Third Circuit Court of Appeals in *In re Paoli Railroad PCB Litigation (Paoli I),* clearly summarized the issue:

> 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 . . . .[12]

In the first toxic tort case to address the remedy of medical monitoring, *Morrissy v. Eli Lilly & Co.*, the plaintiffs asked the court to provide them with adequate medical management or the opportunity to obtain adequate medical management of their medical conditions for life.[13] The plaintiffs alleged that the existence of a latent disease was a present injury.[14] In this case, daughters of women who had used the drug Diethylstibestrol (DES) during pregnancy brought a class action suit to recover for alleged injuries received as a result of prenatal exposure.[15] "[A]ll members of the proposed class [had] developed cancerous lesions, adenocarcinoma, adenosis, or certain tumors or cytological abnormalities which in time [would] generate adenocarcinoma or other cancerous conditions."[16] A latent period of unknown length existed between the start of carcinoma and the appearance of observable symptoms which can be diagnosed and treated.[17] In fact, "many members of the proposed class [did] not know they [were] DES daughters or, knowing this, that they [were] within a latent period."[18] *Morrissy* set the stage for many more medical monitoring cases to come.

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11 *See* Janet H. Smith, *Increasing Fear of Future Injury Claims: Where Speculation Carries the Day*, 64 DEF. COUNS. J. 547, 553 (1997).

12 In re Paoli Railroad Yard PCB Litigation, 916 F.2d 829, 852 (3rd Cir.1990).

13 Morrissy v. Eli Lilly & Co., 394 N.E.2d 1369, 1372 (Ill. App. Ct. 1979).

14 *See id.* at 1376.

15 *See id.* at 1371.

16 *Id.* at 1372.

17 *See id.*

18 *Morrissy*, 394 N.E.2d at 1372.

III. RECOGNITION OF MEDICAL MONITORING DAMAGES

Since *Morrissy*, many more courts have been faced with the issue of medical monitoring. In *Morrissy*'s wake, the United States Court of Appeals for the District of Columbia Circuit addressed medical monitoring in the case of *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*[19] In 1975,[20] "Operation Babylift," a rescue mission for Vietnamese orphans, was conducted in the last days of the United States's presence in South Vietnam.[21] A plane, loaded with 301 passengers, mostly orphans, took off from Saigon.[22] "Fifteen minutes after takeoff a locking system failed, causing the aft ramp and cargo doors to fall off the aircraft."[23] The interior of the plane "suffered an explosive decompression and loss of oxygen."[24] The plane subsequently crashed and only 149 of the orphans survived.[25]

An organization, Friends for All Children, filed a complaint alleging that Lockheed negligently manufactured the aircraft, thus causing the accident.[26] The group also alleged that "as a result both of the decompression of the troop compartment and the crash itself, these survivors suffered, *inter alia*, from a neurological development disorder generically classified as Minimal Brain Dysfunction."[27] The court was asked to determine whether District of Columbia tort law provided "a cause of action for diagnostic examinations in absence of proof of actual injury."[28] The court found:

> 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 invade 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.[29]

The court in *Friends for All Children* drafted a hypothetical to illustrate the

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19 Friends for All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816 (D.C. Cir. 1984).

20 *See id.* at 818.

21 *See id.* at 819.

22 *See id.*

23 *Id.*

24 *Friends for All Children*, 746 F.2d at 819.

25 *See id.*

26 *See id.*

27 *Id.*

28 *Id.* at 819.

29 *Id.* at 826.

reasoning used in its decision:

> Jones is knocked down by a motorbike which Smith is riding through a red light. Jones lands on his head with some force. Understandably shaken, Jones enters a hospital where doctors recommend that he undergo a battery of tests to determine whether he has suffered any internal head injuries. The tests prove negative, but Jones sues Smith solely for what turns out to be the substantial cost of the diagnostic examinations. From our example, it is clear that even in the absence of physical injury Jones ought to be able to recover the cost for the various diagnostic examinations proximately caused by Smith's negligent action . . . . 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.[30]

Thus, *Friends for All Children* paved the way for the recovery of medical monitoring costs.

In 1984, the same year as the *Friends for All Children* decision, the New York Supreme Court Appellate Division decided the medical monitoring case *Askey v. Occidential Chemical Corp.*[31] In this case, the plaintiffs brought a class action suit for personal injuries caused by the alleged discharge of toxic substances from a landfill.[32] "The novel issue presented [was] whether those persons who have an increased risk of cancer, genetic damage and other illnesses by reason of their exposure to the toxic chemicals emanating from the landfill, but whose physical injuries are not evident, should be certified as a class for the purpose of determining their right to recover the costs of future medical monitoring services."[33] The court concluded that "[d]amages for the prospective consequences of a tortious injury are recoverable only if the prospective consequences may with reasonable probability be expected to flow from the past harm."[34] The court concluded further, a plaintiff may include future medical expenses in his claim if it is proven by expert testimony to a reasonable degree of medical certainty that such medical expenses will be incurred.[35] Consequently, the New York Supreme Court Appellate Division also recognized the right of recovery for medical monitoring costs.

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30 Friends for All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 825 (D.C. Cir. 1984).

31 *See* Askey v. Occidental Chemical Corp., 102 A.D.2d 130 (N.Y. 1984).

32 *See id.* at 131.

33 *Id.*

34 *Id.* at 136.

35 *See id.* at 137.

IV. MEDICAL MONITORING RECOVERY IN OTHER JURISDICTIONS

Today, twenty-three jurisdictions recognize medical monitoring as a basis for recovery.[36] In a few states, medical monitoring is a separate cause of action.[37] However, the majority of jurisdictions recognize it simply as an element of damages.[38]

Courts recognizing medical monitoring as a form of damages have wrestled with two primary issues: 1) whether the plaintiff must have a physical injury; and 2) whether the plaintiff needs to show through expert testimony that there is a reasonable probability of contracting a disease through the exposure.[39] In addressing these issues, courts have developed three approaches in making their decisions.[40]

The first approach permits the plaintiff to recover without showing a present injury.[41] Under this approach, the plaintiff claims the "alleged fear of future injury seek[ing] damages for the emotional distress suffered because of the claimants' concern that injury will occur in the future."[42] The New Jersey Supreme Court, in *Ayers v. Township of Jackson*, was the first court to approach the issue in this manner.[43] In *Ayers*, the residents of the Township of Jackson brought suit against the township for its contamination of water with toxic pollutants.[44]

The contamination came from a landfill owned and operated by the township.[45] The township owned and operated a landfill which seeped pollutants into an aquifer.[46] The jury found that the township created a nuisance and a dangerous condition by operating the landfill.[47] The jury determined that the plaintiffs should receive $8,204,500 to cover the future costs of annual medical surveillance based upon the plaintiffs' increased susceptibility to cancer and other diseases.[48]

Of the 339 plaintiffs in *Ayers*, not one asserted a present exposure-related

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36 *See* Smith, *supra* note 11, at 553. The 23 jurisdictions do not include West Virginia.

37 *See id.*

38 *See id.*

39 *See id.* at 554.

40 *See id.* at 548.

41 *See* Smith, *supra* note 11, at 548.

42 *See id.*

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

44 *See id.* at 291.

45 *See id.*

46 *See id.*

47 *See id.*

48 *See Ayers*, 525 A.2d at 291.

illness.[49] The court held, based upon expert testimony showing the toxic effects of exposure, that the risk of disease was a sufficient injury.[50] The court held that the relevant factors to be considered were: 1) the significance of exposure, 2) the toxicity of the chemicals, 3) the seriousness of the disease for which the plaintiffs are at risk, 4) the relative increased risk of contracting the disease, and 5) the value of early diagnosis.[51] As a result, the plaintiff may recover without showing that he suffers from a present injury.

The second approach, developed by the Utah Supreme Court in *Hansen v. Mountain Fuel Supply Co.*, does not require that a plaintiff show a probability of developing the disease, but instead, only requires that he show the exposure caused an increased risk of contracting a serious injury.[52] The plaintiff is not seeking compensation for his fear of contracting a disease, but instead, is looking to recover for the full value of future disease.[53] His recovery is not based upon whether or not he will contract the disease, but rather the fact that he can show that he has an increased risk of doing so.[54] In *Hansen*, the plaintiffs were exposed to asbestos while performing renovation work.[55] After expressing their concerns to the defendant about the composition of the insulation removed, the plaintiffs were told by the defendant's representative that it did not contain asbestos.[56] Thus, the plaintiff's continued with their work.[57] As part of the renovation, insulation was crushed, tracked through the work site, and particles of the insulation became airborne.[58] Testing later showed that the material was indeed asbestos.[59] Consequently, during the renovation, the plaintiffs experienced "coughing, wheezing, shortness of breath, chest tightness, headaches, and severe eye irritation as a result of their exposure."[60] However, at the time of the suit, none of the plaintiffs suffered from any asbestos-related disease.[61]

The court held that in order to recover medical monitoring costs, the

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49 *See id.* at 297.

50 *See id.* at 308.

51 *See id.* at 312.

52 Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 979 (Utah 1993); *see* Smith, *supra* note 11, at 548.

53 *See* Smith, *supra* note 11, at 553.

54 *See id.*

55 *See Hansen*, 858 P.2d at 972.

56 *See id.*

57 *See id.*

58 *See id.* at 972-73.

59 *See id.* at 973.

60 Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 973 (Utah 1993).

61 *See id.*

plaintiff must prove: 1) exposure to a toxic substance; 2) that the exposure was caused by the defendant's negligence; 3) that the exposure resulted in an increased risk of serious injury, disease, or illness; 4) that a medical test for early detection of the disease exists; 5) that early detection is beneficial (treatment exists that can alter the course of the illness); and 6) that the testing has been prescribed by a qualified physician according to contemporary scientific principles.[62] Additionally, the court permitted medical monitoring costs only for the duration of the latency period of the disease, if known.[63] Thus, the Utah court in *Hansen*, by only requiring that the plaintiff show an increased risk of serious injury,[64] created a lower burden for a plaintiff to meet than the New Jersey court did in *Ayers*. Some courts have followed the *Hansen* approach, yet have required that the plaintiff show a reasonable certainty that she will develop the disease, instead of a mere increased risk of developing a disease.[65]

Finally, the third approach, used by a minority of jurisdictions,[66] requires an even higher burden be met. These jurisdictions follow traditional tort law. Consequently, these more traditional jurisdictions require that an actual physical injury be present before the plaintiff may recover damages.[67]

V. *BOWER V. WESTINGHOUSE*

A. Case Background

The West Virginia case that addresses medical monitoring is *Bower v. Westinghouse*.[68] The plaintiffs in this case claimed that they were exposed to toxic substances in a "cullet pile" adjacent to their property.[69] The plaintiffs asserted that the "cullet pile" consisted of various waste materials, including broken light bulbs, light bulb parts, and other materials from the manufacturing process.[70] The cullet pile covered an area of approximately two acres and varied in depth from about forty-two feet to two feet.[71] Westinghouse Electric Corporation owned and operated

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62 *See id.* at 979.

63 *See id.* at 981.

64 *See id.* at 979.

65 *See* Potter v. Firestone Tire and Rubber Co., 863 P.2d 795 (Cal. 1993).

66 *See* Smith, *supra* note 11, at 555.

67 *See* Ball v. Joy Mfg. Co., 755 F. Supp. 1344, 1366 (S.D.W.Va. 1990).

68 *See* Bower v. Westinghouse, 522 S.E.2d 424 (W. Va. 1999).

69 *See id.* at 426.

70 *See Bower*, 522 S.E.2d at 426-27; Defendant North American Phillips' Response to Plaintiff's Brief at 2 n. 1, *Bower* (No. 99-25338).

71 *See Bower*, 522 S.E.2d at 427; Defendant North American Philips' Response to Plaintiff's Brief at 4, *Bower* (No. 99-25338).

the land on which the pile was located.[72] Westinghouse subsequently sold the property to the Philips Corporation in 1983.[73] In 1994, Philips voluntarily initiated testing on the pile to determine its contents and has since begun clean-up of the site.[74] Testing revealed the presence of thirty potentially noxious substances.[75]

The plaintiffs asserted five causes of action against the defendants.[76] They were: "(1) negligent maintenance and operation of the refuse pile; (2) nuisance; (3) trespass; (4) negligent infliction of emotional distress; and (5) intentional disregard for the health and safety of plaintiffs."[77] As a part of the damages, the plaintiffs claimed the costs of future medical monitoring.[78] However, the plaintiffs did not allege a present physical injury,[79] nor did they exhibit symptoms of any disease related to the alleged exposure.[80] The plaintiffs claimed that "exposure to the hazardous waste has impaired and will impair their health and may cause death . . . [and that] . . . plaintiffs must incur the future expenses of medical monitoring to detect the presence of any disease or defect caused by the exposure to the toxic substances dumped by the Defendants."[81]

B. The Decision

Bower came to the court as a certified question from the United States District Court for the Northern District of West Virginia. The district court posed the question: "[i]n a case of negligent infliction of emotional distress absent physical injury, may a party assert a claim for expenses related to future medical monitoring necessitated solely by the fear of contracting a disease from exposure to toxic chemicals?"[82] However, the West Virginia Supreme Court of Appeals felt that the District Court did not intend such a narrowly drawn question.[83] Therefore, the

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72 *See* Defendant North American Philips' Response to Plaintiff's Brief at 4, *Bower* (No. 99-25338).

73 *See id.*

74 *See id.*

75 *See Bower*, 522 S.E.2d at 427. The substances discovered include: 4, 4-DDD; aluminum; antimony; arsenic; barium; benzo(a)pyrene; benzo(b)fluoranthene; beryllium; cadmium; carbon disulfide; chromium; cobalt; copper; dibenzo(9,h)anthracene; ethbenzene; ideno(1,2,3-cd)pyrene; iron; lead; m & p-xylenes; magnesium; manganese; mercury; methyl-t-butyl ether (MTBE); nickel; o-xylene; PCB compounds; touene; tricholorofluoramethane; vanadium; and zinc.

76 *See id.*

77 *Id.*

78 *See id.* at 427; Defendant North American Philips' Response to Plaintiff's Brief at 2, *Bower* (No. 99-25338).

79 *See* Defendant North American Philips' Response to Plaintiff's Brief at 2, *Bower* (No. 99-25338).

80 *See Bower*, 522 S.E.2d 424, 427.

81 Plaintiffs' Brief at 3, *Bower*, (No. 99-25338).

82 *Bower*, 522 S.E.2d at 428.

83 *See id.* The court felt that the question was narrowly drawn because it framed the issue of medical

court exercised its power to reformulate the question.[84] Ultimately, the court determined that the true question was "[w]hether, under West Virginia law, a plaintiff who does not allege a present physical injury can assert a claim for the recovery of future medical monitoring costs where such damages are the proximate result of the defendant's tortious conduct."[85]

After reviewing the question, the West Virginia Supreme Court of Appeals held that "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."[86] The court rejected the idea that a claim for future medical expenses must rely on the existence of a present physical injury.[87] The court stated "[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.'"[88] The court recognized its past holding, which required that the "future effect of an injury must be proven with reasonable certainty in order to permit a jury to award an injured party damages."[89] However, the court in *Bower* expounded upon this previous holding by declaring the plaintiff does not need to demonstrate the probable likelihood that a serious disease will result from the exposure.[90] The court agreed with the Third Circuit's decision *In re Railroad Yard PCB Litigation* (*Paoli I*) and stated that the appropriate inquiry is "whether medical monitoring is, to a reasonable degree of medical certainty, necessary in order to diagnose properly the warning signs of disease."[91] Furthermore, the court noted that "[p]roof of future medical expenses is insufficient as a matter of law in the absence of any evidence

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monitoring damages in terms of "solely by the fear of contracting the disease."

84 *See id.* The power for the court to reformulate a certified question is derived from the West Virginia Uniform Certification of Questions of Law Act, W.Va. Code §§ 51-1A-1 through 13. Justice Maynard disagreed with how the court reformulated the certified question. *See* discussion *infra* Part V.C.

85 *Id.*

86 Syl. Pt. 2., *Bower*, 522 S.E.2d 424, 431.

87 *See id.* at 430.

88 *Id.* (citing RESTATEMENT (SECOND) OF TORTS §7(1) (1964)).

89 *Id.* at 431 (citing in part Syl. Pt. 9, Jordan v. Bero, 210 S.E.2d 618 (1974)).

90 *Id.* at 433

91 *Bower*, 522 S.E.2d 424, 431 (citing In re Paoli Railroad Yard PCB Litigation, 916 F.2d 829, 851 (3rd Cir. 1990)). In *Paoli I*, 38 plaintiffs who had worked in or lived beside the Paoli railyard brought a toxic tort suit to recover damages for illnesses contracted as a result of exposure to polycholorinated biphenyls (PCBs). *See* Paoli I, 916 F.2d at 835. The PCBs were found on the railway property. *See id.* The plaintiffs sought to recover the costs of periodic medical testing that they contended was necessary to protect against the exacerbation of latent diseases caused by their exposure to PCBs. *See id.* at 849. The court held that the plaintiffs could recover medical monitoring costs by proving that "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. 4. Monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial." *Id.* at 852.

as to the necessity and cost of such future medical expenses."[92] Accordingly, the court specified the requisite elements that the plaintiff must prove to recover the costs of medical monitoring:

> In order to sustain a claim for medical monitoring expenses under West Virginia law, the plaintiff must prove that (1) he or she, relative to the general population, has been significantly exposed; (2) to a proven hazardous substance; (3) through the tortious conduct of the defendant; (4) as a proximate result of the exposure, plaintiff has suffered an increased risk of contracting a serious latent disease; (5) the increased risk of disease makes it reasonably necessary for the plaintiff to undergo periodic diagnostic medical examinations different from what would be prescribed in the absence of the exposure; and (6) monitoring procedures exist that make the early detection of a disease possible.[93]

1. Requisite Elements

The court stated in its decision the six elements to be considered in medical monitoring cases but was somewhat ambiguous in defining some of the elements of a medical monitoring claim. However, because the court chose to substantially adopt the Third Circuit's holding in *Paoli I*,[94] analysis of *Paoli* I may lead to an understanding of the elements for a medical monitoring claim under West Virginia law. Also, the *Bower* court cited other cases which provide further insight. Therefore, the text below analyzes the West Virginia claim to include when necessary the court's possible future reliance on *Paoli I* and other cases cited in the *Bower* decision. Furthermore, the discussion identifies issues the court has left open for interpretation.

a. Significant Exposure. The court acknowledged the element of "significant exposure" in one sentence. Prior to the attachment of any liability for the cost of medical monitoring, the plaintiff must be exposed to a hazardous substance.[95] Thus, the court merely specified that the plaintiff be exposed. However, the court failed to define or quantify significant exposure. Even so, in the future, the court may choose to define "significant exposure" based upon a recent Third Circuit opinion.

The Third Circuit has defined significant exposure under a Federal Tort

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92 *Id.* at 432 (citing Syl. Pt. 16 *Jordan*, 210 S.E.2d 618).

93 Syl. Pt. 3 *Id.*.

94 *See id.* at 432.

95 *See id.* at 433; *cf.* Johnson v. West Virginia Univ. Hosp., Inc., 413 S.E.2d 889, 893 (W. Va. 1991)("before a recovery for emotional distress damages may be made due to a fear of contracting a disease . . . there must first be *exposure* to the disease.")(emphasis in original).

Claims Act action where medical monitoring damages were sought.[96] In *Redland Soccer Club, Inc. v. Department of the Army of the United States*, the Army sold property, which was formerly a landfill, to a township.[97] The township then transformed it into a soccer field.[98] The majority of the plaintiffs were seeking medical monitoring damages.[99] The plaintiff was required to show a significant exposure to a proven hazardous substance.[100] The Third Circuit acknowledged that in its previous holding, in *Paoli I*, significant exposure was not defined.[101] Therefore, the court took this opportunity to define the term and stated that "'[s]ignificant exposure,' . . . refers to an exposure which, either by duration or harm, is sufficient to cause a significantly increased risk, which in turn is sufficient to require a monitoring regime different from that normally required in the absence of such an exposure."[102] In other words,

> [A] plaintiff must not only show exposure, but must prove that he was exposed beyond what would normally be encountered by a person in everyday life, so that the plaintiff's risk of being injured from the exposure is greater, in some way, than the normal risks all of us encounter in our everyday lives.[103]

b. Proven Hazardous Substance. The court was short in its explanation of "proven hazardous substance." The court requires the plaintiff to prove through scientific evidence that there is a probable link between exposure to a particular compound and human disease.[104] However, the court did not choose to elaborate upon what constitutes a "probable link." Additionally, the court did not expound upon the definition of "human disease." Thus, the court's brevity creates room for broad interpretation. For example, will a disease of mild severity with a low probable link to exposure suffice?

c. Tortious Conduct. The court stated that the underlying liability for medical monitoring costs "must be established based upon a recognized tort – *e.g.*, negligence, strict liability, trespass, intentional conduct, etc."[105] The defendant must

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96 *See* Redland Soccer Club, Inc. v. Department of the Army of the United States, 55 F.3d 827 (3rd Cir 1995).

97 *See id.* at 834-35.

98 *See id.* at 835.

99 *See id.* at 834.

100 *See id.* at 845.

101 *See Redland Soccer*, 55 F.3d at 845.

102 *See id.* at 846.

103 *Id.*

104 *See Bower*, 522 S.E.2d at 433.

105 *Id.*

be at fault in exposing the plaintiff to a hazardous substance.[106] Additionally, the fault must be established through the application of existing theories of tort liability.[107] The court quoted the *Potter v. Firestone Tire and Rubber Co.*[108] decision of the California Supreme Court, stating: "[r]ecognition that a defendant's conduct has created the need for future medical monitoring does not create a new tort. It is simply a compensable item of damage when liability is established under traditional theories of recovery."[109] Under this analysis, the plaintiff must prove the elements of an established tort.

However, the court left open a wide door. The court went on to state, "[t]his is not to say that a plaintiff may not, as a matter of pleading, assert a separate cause of action based upon medical monitoring; rather, it means that underlying liability must be established based upon a recognized tort."[110] Consequently, not only has the court recognized the availability of medical monitoring damages, but the court has set the stage for a separate medical monitoring cause of action, as long as the liability for the claim rests in a recognized tort. Furthermore, this statement indicates the court's willingness to entertain medical monitoring claims for any type of tort.

d. Increased Risk. A plaintiff need not show that a particular disease is certain or even likely to occur as a result of exposure to a hazardous substance.[111] The plaintiff need only show that his/her risk of contracting a particular disease has significantly increased when compared to the risk of contracting the disease absent the exposure.[112] The court stated that "[n]o particular level of quantification is necessary to satisfy this requirement."[113] Therefore, if taken literally, any increase in risk, even 0.000001 percent would satisfy this element. Thus, the discretion of the individual trial court will be very important in analyzing this element.

e. Necessity of Diagnostic Testing. The court found that in order for diagnostic testing to be necessary, it must be "reasonably necessary" in that "it must be something that a qualified physician would prescribe based upon the demonstrated exposure to a particular toxic agent."[114] The court states that the financial cost and frequency of testing should not be given significant weight in determining the reasonable basis for undergoing medical testing.[115] Additionally,

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106 *See id.*

107 *See id.*

108 Potter v. Firestone Tire and Rubber Co., 863 P.2d 795 (Cal. 1993)(en banc).

109 *Bower*, 522 S.E.2d at 433 (citing *Potter*, 863 P.2d at 823).

110 *Id.*

111 *See id.* (citing *Potter*, 863 P.2d at 824).

112 *See id.*

113 *Id.* (citing *Hansen*, 858 P.2d at 979).

114 *Id.* at 433.

115 *See Bower*, 522 S.E.2d at 433.

the court expresses the idea that the subjective desires of the plaintiff for information concerning the state of his or her health can be considered as part of the decision making process by the trial court.[116]

f. Existence of Monitoring Procedure. In order for a plaintiff to recover the cost of medical monitoring, there must first be a monitoring test available.[117] The court reasoned: "[i]f no such test exists, then periodic monitoring is of no assistance and the cost of such monitoring is not available."[118] The court determined that when there is no medical testing currently available, the plaintiff will have a future right at such later time when a test is developed to demonstrate the effectiveness of the test.[119] Therefore, the plaintiff will be compensated for using the new test, so long as all of the other five elements of the cause of action are satisfied.[120]

However, in defining the existence of monitoring procedures, the court did not address the timeframe in which all six elements must be met. For example, if a plaintiff was able to fulfill elements one through five, but was unable to show the existence of monitoring procedures at the present time, could the court order recovery ten years from now when a procedure was developed? Furthermore, when would a plaintiff need to prove the elements? If she knew there was no monitoring procedure available at the present time, should she bring her suit now in order to preserve her claim or should she wait until a procedure was developed, running the risk of lost evidence, the bad memories of witnesses, etc.? The fairness of this issue requires that some sort of statute of limitation or repose be implemented. If not, defendants could conceivably be on the hook for many years, not knowing when or how they will be held liable. Therefore, the timing for meeting all of the elements for the claim must be clarified.

2. Current Treatment

It is important to note that the court rejected the idea that there must be a current treatment for the disease that is the subject of medical monitoring. Some jurisdictions have required that in order to recover the cost of medical monitoring, there must be a way to treat the patient's illness once it is discovered,[121] otherwise "there is no cause of action because medical monitoring cannot fulfill its purpose."[122] In its reasoning, the court stated that "[i]n this age of advancing medical science, we are hesitant to impose such a static requirement."[123]

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116 *See id.*

117 *See id.*

118 *Id.* (citing Bourgeois v. A.P. Green Indus., Inc., 716 So.2d 355, 361 (La. 1998)).

119 *See id.* (citing *Hansen*, 858 P.2d at 979 n.12).

120 *See Bower*, 522 S.E.2d at 433 (citing *Hansen*, 858 P.2d at 979 n.12).

121 *See Hansen*, 858 P.2d at 979.

122 *Id.* at 980.

123 *Bower*, 522 S.E.2d at 434.

The court looked to the Louisiana Supreme Court's decision in *Bourgeois v. A.P. Green Indus., Inc.* to justify its decision:

> 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.[124]

3. Form of Payment

Following its decision permitting the recovery of medical monitoring costs, the West Virginia Supreme Court of Appeals briefly addressed the form which such recovery should take. Although the defendant CBS Corporation, along with several *amici curiae*, argued that the plaintiffs should only be compensated for costs through a court administered fund,[125] the court determined that there was no need to "constrain the discretion of the trial courts" in developing appropriate remedies in such cases.[126]

Notwithstanding, the court did note that there may be situations where a court administered fund would be beneficial.[127] However, the court made no indication of when it deemed the fund mechanism appropriate. The only hint given in the *Bower* decision appears in a quote from *Ayers v. Township of Jackson*: "the use of a court-supervised fund to administer medical-surveillance payments *in mass exposure cases* . . . is a highly appropriate exercise of the Court's equitable

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124 *Id.* (citing Bourgeois v. A.P. Green Indus., Inc., 716 So.2d 355, 363 (La. 1998) (Calogero, C.J., concurring)).

125 *See id.* at 434.

126 *Id.*

127 *See id.*

powers."[128] Thus, the court's discussion of lump-sum awards and fund awards leaves much to be desired. The court's vagueness will create great debate on this issue.

C. *Justice Maynard's Dissent*

Justice Maynard dissented to the majority's opinion stating, "I believe that West Virginia law does not permit an independent cause of action to recover future medical monitoring costs absent physical injury, and this Court has no authority to create such a cause of action."[129] He argues that the court overstepped its authority to reformulate the certified question presented by the District Court.[130] "The District Court set forth a clear, concise, and limited question."[131] Next, he asserts that the court violated the separation of powers by usurping the Legislature's authority to enact laws.[132] The court has exceeded the right of the Legislature to create new causes of action.[133] Lastly, Justice Maynard contends that even if the court has the authority to create causes of action, the decision in *Bower* is wrong because it overturns the "200 year old tort principle that a plaintiff may not recover damages unless he or she has a present injury . . . ."[134]

The court originally focused on the certified question of whether medical monitoring damages could be recovered in negligent infliction of emotional distress cases.[135] If the court had stayed the course with the original certified question and granted the recovery of medical monitoring costs, the next logical step in the evolution of tort law would have been the expansion of the remedy to all torts. The equities involved here are key. A plaintiff who has the fear of contracting a disease has access to the medical monitoring remedy. Yet, a person who has also been exposed but does not exhibit the fear of contracting the disease is not afforded the same remedy, even though the risk of contracting the disease is the same. The decision to permit medical monitoring recovery in negligent infliction of emotional distress claims would give rise to this sort of equities question. Thus in the future, the courts would have to deal with the possible expansion of this remedy to other causes of action.

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128 *Bower*, 522 S.E.2d at 434 (emphasis added by court) (citing Ayers v. Township of Jackson, 525 A.2d 287, 314 (1987)).

129 *Id.* at 434. The author agrees with Justice Maynard in his argument that the Court overstepped its powers in determining that there is a separate cause of action for medical monitoring costs. However, this article deals with the state of the law as it is in West Virginia following the Court's decision in *Bower v. Westinghouse*.

130 *See id.*

131 *Id.*

132 *See Bower*, 522 S.E.2d at 435.

133 *See id.*

134 *Id.*

135 *See id.* at 428.

When the court reformulated the District Court's question,[136] it took the opportunity to not only provide for medical monitoring recovery in cases like *Bower*, but also to expand the form of recovery to all types of tort cases.[137] Therefore, the court jumped ahead in the natural process of tort law evolution and granted recovery of medical monitoring in all types of torts, thus perhaps saving years of litigation and expense to reach the same desired effect. The impact of this portion of the decision will perhaps have the most profound effect on West Virginia tort law. Now, plaintiffs who do not meet the requirements of a negligent infliction of emotional distress claim, will have an avenue of recovery if they are able to fit their claim into the constructs of any recognized tort action under West Virginia law.

VI. THE FUND V. LUMP-SUM PAYMENT: THE ARGUMENT FOR THE FUND SYSTEM APPROACH IN WEST VIRGINIA

After a plaintiff has met the requirements for medical monitoring recovery, the court must then determine the form of the relief: whether to award money damages at law or under equity require the defendant to pay for the medical examinations the plaintiff chooses to undergo.[138] The form of recovery the court chooses primarily depends upon what it considers to be the purpose of the remedy.[139]

If the court's purpose in making the award is to deter defendants or to encourage the filing of the maximum number of claims, a lump-sum payment should be used.[140] A lump-sum system permits an expeditious recovery by the plaintiff. However, there will be no guarantee that the money awarded will be used to pay for medical monitoring or that the plaintiff will submit to the testing.[141]

On the other hand, if the court wants to protect public health and encourage those exposed to hazardous materials to submit to testing, the court should create a fund mechanism to reimburse plaintiffs for their actual medical expenses.[142] The fund system provides specific relief for the plaintiff, not damages.[143] Nevertheless, the burden on the court and the defendant would be greater due to the administration tasks associated with a fund.[144] Additionally, the court must specify the duration of the fund and how to handle any unclaimed

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136 *See id.* at 428-29.

137 *See Bower*, 252 S.E.2d at 433.

138 *See* McCarter, *supra* note 6, at 253.

139 *See id.*

140 *See id.*

141 *See id.* at 256.

142 *See id.* at 253.

143 *See* McCarter, *supra* note 6, at 262.

144 *See id.* at 260-62.

monies after the fund is terminated.[145]

Because of the concerns the court enumerated in *Bowers*, West Virginia should adopt the fund mechanism for disbursing medical monitoring damages. In order to address the merits of a fund system, it is first important to recognize the policy issues behind medical monitoring recovery in West Virginia. The court gave a detailed account of policy considerations in the *Bowers* decision.[146] "First, there is an important public health interest in fostering access to medical testing for individuals whose exposure to toxic chemicals creates enhanced risk of disease, particularly in light of the value of early diagnosis and treatment for many cancer patients."[147] Second, the court acknowledged the deterrence value of recognizing medical monitoring claims.[148] Granting plaintiffs the opportunity to recover deters defendants from the irresponsible discharge of toxins.[149] Third, permitting plaintiffs to recover for medical monitoring provides for a "substantial remedy before the consequences of the plaintiffs' exposure are manifest."[150] Additionally, the plaintiff may also have the chance to mitigate or prevent the future illness and "thus reduce the overall costs to the responsible parties."[151] "Finally, societal notions of fairness and elemental justice are better served by allowing recovery of medical monitoring costs."[152] It is inequitable for a plaintiff who was wrongfully exposed to dangerous toxic substances to have to pay the expenses of his own monitoring tests when the tests are a result of the exposure.[153]

These policy issues focus on public health concerns and the deterrence of defendant behavior.[154] In relating its policy concerns, the court spoke of the "societal notions of fairness and elemental justice" which are better served by permitting the recovery of medical monitoring costs.[155] This statement lays the foundation to argue for the use of the fund system to disperse medical monitoring costs.

Fairness and justice are the cornerstones of the fund system because the system provides payment to the plaintiff for medical monitoring services he received. The plaintiff receives needed medical services and just compensation, while the defendant makes its restitution. Furthermore, the plaintiff, in exchange

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145 *See id.* at 260-61.

146 *See* Bower v. Westinghouse, 522 S.E.2d 424, 431 (W. Va. 1999)(citing *Potter*, 863 P.2d at 824).

147 *Id.*

148 *See id.* (citing *Potter*, 863 P.2d at 824).

149 *See id.*

150 *Id.* (quoting *Ayers*, 525 A.2d at 312).

151 *Bower*, 522 S.E.2d at 431 (W. Va. 1999) (quoting *Potter*, 863 P.2d at 824).

152 *Bower*, 522 S.E.2d at 431 (quoting *Potter*, 863 P.2d at 824).

153 *See id.*

154 *See id.*

155 *Id.*

for receiving his compensation, is required to seek the medical attention he needs. All the while, the exchange is done in a manner fair and just to all parties involved. Both plaintiffs and defendants are better served by the use of court administered funds in medical monitoring cases. Neither is unjustly burdened or enriched. Additionally, the public as a whole will reap the rewards because as a result of plaintiffs obtaining medical monitoring services public health is promoted.

A. The Benefits

The fund mechanism possesses many benefits, which support the following underlying premise. "Anyone who has undergone rigorous medical examinations will acknowledge that they often involve inconvenience, discomfort and some degree of risk."[156] George McCarter suggests there are two policy considerations which follow this assumption: "(1) a person will not lightly submit to such procedures and so should not be lightly compensated for them, and (2) when such procedures are indeed 'medically necessary,' a person should be encouraged to undergo them, despite the associated risk and inconvenience."[157] He suggests that awarding unrestricted money damages for medical monitoring is to ignore these policy considerations.[158]

The court administered fund has the advantage of limiting the liability of the defendants to the actual expenses incurred.[159] "A lump-sum verdict attempts to estimate future expenses, but cannot predict the amounts that actually will be expended for medical purposes."[160] Additionally, the fund approach will encourage plaintiffs to "safeguard their health by not allowing them the option of spending the money for other purposes."[161] Moreover, the mechanism prevents plaintiffs who are not concerned with their health and fail to undergo treatment from receiving windfall profits from the award.[162] Furthermore, the fund mechanism provides a way for offsetting the defendant's liability by payments from collateral sources, primarily the insurance benefits available to some plaintiffs.[163]

The fund mechanism helps to ensure that monetary resources will be available to plaintiffs when they need them.[164] "[E]nabling courts to determine liability and issue a final judgment as soon as the excess risk became apparent rather than only after victims [become] ill, insurance fund judgments could

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156 *See* McCarter, *supra* note 6, at 255.

157 *Id.* at 255-56.

158 *See id.* at 256.

159 *See* Ayers v. Township of Jackson, 525 A.2d 287, 314 (N.J. 1987).

160 *Id.*

161 *Id.*

162 *See* McCarter, *supra* note 6, at 256.

163 *See id.*

164 *See id.* at 256.

significantly reduce the danger that the responsible firm would lack the assets to compensate victims."[165] Likewise, the fund approach prevents defendants from using latency periods to evade claims that come in at a later time.[166]

"The public health interest is served by a fund mechanism that encourages regular medical monitoring for victims of toxic exposure."[167] At least one court, the *Ayers* court, has recognized that this public interest is best served when public entities are defendants and fund mechanisms are used.[168] In these public entity cases, the use of a fund which limits liability to amounts actually incurred tends to reduce insurance costs and taxes.[169] The court in *Ayers* stated that "[i]n litigation involving public-entity defendants, we conclude that the use of a fund to administer medical-surveillance payments should be the general rule, in the absence of factors that render it impractical or inappropriate."[170]

It stands to reason that this rationale should be extended beyond public entities and to its logical conclusion: The fund mechanism is the appropriate means to provide medical monitoring recovery in all cases. Public entity defendants are not the only defendants held liable for medical monitoring costs, nor should they be the only defendants with the ability to utilize the fund system to meet their liabilities. Even if the defendant is not a public entity, the benefits of using the fund mechanism are the same: Defendants meet their liability and plaintiffs receive their needed medical testing. All defendants in medical monitoring cases should be subject to the fund mechanism of payment. West Virginia should embrace the fund mechanism approach in medical monitoring claims. The benefits of the fund approach are such that the court's interest in "societal notions of fairness and elemental justice"[171] is fulfilled.

B. The Costs

A fund system is not without its costs. There are both administrative and procedural issues that must be addressed.[172] These decisions must be made by the trial courts, not juries.[173] The court in *Ayers* addressed this concern by stating:

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165 *Id.* at 259 (quoting David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 851, 921-22 (1984)).

166 *Id.*

167 *Ayers*, 525 A.2d at 314.

168 *See id.*

169 *See id.*

170 *Id.*

171 Bower v. Westinghouse, 522 S.E.2d 424, 431 (W. Va. 1999) (citing Potter v. Firestone Tire and Rubber Co., 863 P.2d 795, 824).

172 *See Ayers*, 525 A.2d at 314.

173 *See id.* at 314 n.14.

> [i]t is beyond the scope of this opinion to set down guidelines for trial courts in establishing and administering such funds. A court-appointed administrator will be required. The cost of administration should be borne by defendants. A procedure should be established for the submission and review of claims for payment, and to determine the availability of collateral source benefits. We are confident that satisfactory procedures can be developed by trial courts on a case-by-case basis.[174]

The adoption of a fund approach to medical monitoring damages would require the trial courts in West Virginia to take on the responsibility of providing oversight to fund administration. This oversight would place an additional burden on the court system. However, the equities and benefits of the fund system far outweigh the additional responsibility placed upon the courts. Promoting societal fairness and justice is an important function of the court system and a stated policy goal of allowing damages for medical monitoring costs. Therefore, accepting the duty of administration would further the courts' function and the policy considerations of medical monitoring.

VII. THE MITIGATION OF DAMAGES

Another issue of concern arising out of the recovery of medical monitoring costs deals with the issue of damage mitigation. If a plaintiff is awarded medical monitoring costs, but fails to submit to medical testing, could he return and sue the defendant for actual damages when an injury occurs?

One of the policy reasons for granting medical monitoring awards is to foster access to medical tests, especially with the possibility for the plaintiff to take advantage of the value of early diagnosis and treatment.[175] Additionally, permitting plaintiffs to recover for medical monitoring provides for a "substantial remedy before the consequences of the plaintiffs' exposure are manifest."[176] Consequently, the plaintiff may also have the chance to mitigate or prevent the future illness and "thus reduce the overall costs to the responsible parties."[177]

Based on the policy issues behind medical monitoring recovery, it is logical that a plaintiff who receives a medical monitoring award and subsequently fails to submit to testing, should not be able to recover damages when and if a disease develops. Damages should at least be limited to the extent to which he failed to mitigate his damages. By awarding damages for medical monitoring the court is not just providing money to the plaintiff, it is granting an opportunity for early detection and treatment. A plaintiff who fails to take advantage of this chance

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174 *Id.*

175 *See Bower*, 522 S.E.2d at 431 (citing *Potter*, 863 P.2d at 824).

176 *Id.*

177 *Id.*

after he has sought it, should not have the opportunity to force the defendant to pay more. Understandably, it would be difficult to quantify the extent to which the plaintiff has failed to mitigate his damages. However, the judicial system has a history of quantifying the unquantifiable. Here too, it should be done.

VIII. CONCLUSION

West Virginia has followed the lead of many other jurisdictions by recognizing medical monitoring as a form of recovery under tort law. Although the court has left some unanswered questions with its decision in *Bower v. Westinghouse*, the fairness and justice of the decision should be appreciated. Providing plaintiffs who have been wrongly exposed to toxic substances the opportunity to continuously monitor their health for early detection of diseases, such as cancer, is logical. Tort law has long recognized that the wrong-doer should pay for his wrong, and now he can be held accountable for monitoring the health of those he wronged.

Although the court failed to reach this conclusion, a review of the court's policy considerations suggests that the fund mechanism is the appropriate means of recovery to the plaintiff. This system makes sure that the defendant pays for the medical monitoring costs which are actually incurred and encourages plaintiffs to undergo medical testing. It removes the temptation for the plaintiff of spending a lump-sum award on something other than medical monitoring costs. Thus, by recognizing medical monitoring costs, the court's goals of societal notions of fairness and elemental justice are better served.

The West Virginia Supreme Court of Appeals has changed the face of tort damages. However, the questions left unanswered by the court in *Bower* will generate debate and further litigation in the years to come.

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