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THE MEDICAL MONITORING REMEDY: ONGOING
CONTROVERSY AND A PROPOSED SOLUTION

ADAM P. JOFFE*

INTRODUCTION

For decades, a central tenet of tort law has been that a plaintiff may not recover damages for negligence absent physical injury.1 In 1984, however, a landmark case seemed to fly in the face of this principle by holding a defendant liable to provide medical examinations to determine if there were, in fact, injuries to the plaintiffs.2 In the twenty-five years since *Friends for All Children v. Lockheed Aircraft Corp. recognized such a claim,3 states have been sharply divided on the appropriateness of remedies based on so-called “medical monitoring.”4

A recent, high profile toy recall has once again placed a spotlight on the issue of medical monitoring.5 In August 2007, Mattel, Inc. recalled hundreds of thousands of toys after high levels of lead were found in the paint used on the toys’ surfaces.6 Although no injuries have been reported among the children exposed to the tainted toys, some parents responded to the recall by filing lawsuits against Mattel and other toy manufacturers responsible for the placement of these toys in the American marketplace.7 These lawsuits seek medical monitoring for the children.8 A medical moni-

* J.D., Chicago-Kent College of Law, Illinois Institute of Technology, May 2009; B.A., Psychology, Washington University in St. Louis, 2003. I would like to thank my parents, Susan and Julian, and my brother, Andrew, for their constant support. I am also particularly grateful to Professor Mickie Piatt for her enthusiasm and insight.

3. Id. at 826.
4. Medical monitoring damages generally involve in a defendant establishing a fund for ongoing testing of individuals who were exposed to potentially toxic agents. As will become clear below, various jurisdictions look at the issue of medical monitoring quite differently. A number of jurisdictions disallow medical monitoring awards. See infra notes 61–62 and 71–76. Other jurisdictions allow medical monitoring awards with relatively few restrictions. See infra notes 15, 43, 77–79, and 81. Still other jurisdictions permit medical monitoring if fairly strict requirements are met. See infra notes 35–37.
6. Id.
7. Id.
8. Id.
toring award could require Mattel to pay a lump sum or to set aside a special fund to pay for ongoing medical examinations for the exposed children.9

Washington, D.C., attorney Victor Schwartz places medical monitoring “among the greatest divisions in all of tort law among judges.”10 At present, approximately half of the states that have addressed the issue of medical monitoring would permit the Mattel litigation, while the other half would reject such lawsuits.11

In Metro-North Commuter R.R. Co. v. Buckley,12 the United States Supreme Court held that a medical monitoring remedy would not be permitted in a lawsuit arising under the Federal Employers’ Liability Act (FELA).13 However, Metro-North does not bind state courts because the majority of cases in which plaintiffs seek medical monitoring are based on state laws regarding “toxic torts.”14 Therefore, the results of cases in which plaintiffs sue for medical monitoring have varied widely from state to state, and a number of post-Metro-North cases illustrate that certain states remain committed to maintaining medical monitoring as a legitimate remedy.15

Further, as the American Law Institute (ALI) continues its work on the Restatement (Third) of Torts, it seems prepared to endorse medical monitoring awards.16 With this potential endorsement of medical monitoring, however, numerous questions arise about what limitations should be required to ensure proper use of medical monitoring awards and how funds should be distributed when medical monitoring is awarded.17

In light of the Mattel litigation and the ALI’s discussion surrounding the Restatement (Third) of Torts, it is apparent that the issue of medical

9. Id.
10. Id.
11. Id.
17. See infra part II.
monitoring will likely remain at the forefront of legal dialogue. If medical monitoring is to be recognized as a legitimate remedy, it is vital to the preservation of judicial resources that courts set appropriate standards such that deserving plaintiffs can seek medical monitoring, while courts can easily identify and dismiss frivolous lawsuits. Further, it is imperative that the judicial approach for awarding medical monitoring avoids plaintiff windfalls by establishing a strict system to ensure that any monetary awards earmarked for medical monitoring are actually spent on medical examinations.

Part I of this note defines medical monitoring and discusses the judicial history relevant to medical monitoring. Part II discusses some common criticisms of medical monitoring. Part III proposes strict standards that a plaintiff must meet to become eligible for a medical monitoring award. Part IV proposes a system for effectively distributing funds for medical monitoring in order to prevent windfalls for plaintiffs and financial calamity for defendants.

I. MEDICAL MONITORING AND ASSOCIATED JUDICIAL HISTORY

A. What Is Medical Monitoring?

In the legal context, “medical monitoring” is a remedy seeking to recover the cost of future medical examinations aimed at detecting an illness or illnesses not present at the time of the lawsuit. This remedy is rooted in a desire to promote the public health benefits of early detection and the lower medical costs that come with early detection. Further, proponents of the medical monitoring remedy argue that it prevents plaintiffs from having to pay for examinations that they would not need but for the actions of a defendant, and, therefore, “better serving societal notions of fairness and justice.”

Plaintiffs frequently seek medical monitoring in “toxic tort” cases. One commentator describes medical monitoring as “a remedy designed to provide healthy plaintiffs with the means to undergo periodic medical testing deemed necessarily [sic] to facilitate the early detection of diseases caused by toxic substances.” This reasoning relies on the idea that early

19. Id. at 709.
20. Id.
21. See McCall, supra note 14, at 969–70.
detection of many illnesses lowers the cost of fighting those illnesses and increases a plaintiff's chance of survival.23

B. Friends for All Children and the Birth of a New Remedy

Until the mid 1980s, the legal concept of medical monitoring was only mentioned in dicta.24 During this time, tort law followed the traditional concept that "[t]he threat of future harm, not yet realized, is not enough" to pursue a claim in tort.25

Then, in 1984, the United States Court of Appeals for the District of Columbia heard arguments for Friends for All Children.26 In this case, a plane carrying Vietnamese orphans crashed on its way from South Vietnam to the United States.27 During the crash, the cabin experienced violent decompression and a loss of oxygen.28 The plaintiffs alleged that the surviving orphans were likely to suffer from a specific brain impairment.29 The court determined that a remedy of medical monitoring should be awarded to determine if the orphans had suffered this neurological damage.30 However, the court placed a number of limitations on its holding, distinguishing Friends for All Children from the approaches to medical monitoring that many jurisdictions use today.31 The Friends for All Children Court held that the orphans' injuries were not speculative because they arose from a specific, traumatic event32 in which the orphans had been injured at the moment of the crash.33 The court set out three requirements for the disbursement of its medical monitoring award.34 First, rather than awarding the money for medical monitoring in one lump sum, the court created a voucher system in which Lockheed, the defendant, distributed money from a fund after the orphans' guardians completed a voucher detailing specific

23. See Elert, supra note 18, at 708.
25. KEETON, supra note 1, at 165.
27. Id. at 819.
28. Id.
29. This specific neurological disorder was generically described in the complaint as Minimal Brain Dysfunction ("MBD"). Id.
30. Id. at 835.
31. See, e.g., the Ayers standard, discussed in depth infra part I, § C.
32. Compare this to medical monitoring awards in sundry "toxic tort" cases. See, e.g., supra note 15 and infra part I, § C.
33. 746 F.2d at 825–826.
34. These requirements are laid out and discussed further in Schwartz et al., supra note 13, at 360.
medical expenses. Second, the court established a panel of medical experts to determine whether to give a specific test to a specific child. Third, the court specified that money remaining in the fund would be returned to Lockheed in order to prevent a windfall for the plaintiffs.

*Friends for All Children* presented the court with the "perfect storm" of sympathetic plaintiffs, present and quantifiable injuries to accompany the possible undiscovered injuries that would be monitored, a defendant that would not collapse financially with an adverse judgment, a situation where early detection would greatly improve the prognosis for the plaintiffs, and a reasonable monetary disbursement system. Limitations aside, a new remedy, incubated in 1970s dicta, had been born.

C. *Ayers v. Township of Jackson and Theer v. Phillip Carey Co.*: One State, Two Differing Holdings

If medical monitoring was born in *Friends for All Children*, then it is safe to say that it reached adulthood in *Ayers v. Township of Jackson*. In *Ayers*, residents of a New Jersey town sought money for medical monitoring after a landfill operated by the town began leaking potentially hazardous pollutants into their well. Despite the fact that none of the residents displayed any ill effects from the pollutants at the time of the trial, the Supreme Court of New Jersey awarded medical monitoring to the plaintiffs. This awarding of medical monitoring absent physical injury represented a sharp departure from the measured language and strict limitations that the *Friends for All Children* Court used when announcing its decision.

*Ayers* is also relevant because it represented the first time that a court attempted to lay out elements that a plaintiff must meet in order to win a medical monitoring award. The *Ayers* Court held that a plaintiff must

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35. *Friends for All Children*, 746 F.2d at 823.
36. Id.
37. *Id.* at 823 n.10.
38. It is difficult to imagine a more sympathetic class of plaintiffs than approximately 150 refugee orphans.
39. Quantifiable and present injuries varied from plaintiff to plaintiff, but most suffered physical injuries from the impact of the crash in addition to the potential MBD.
40. As a major corporation, Lockheed certainly had the money to establish a fund for medical monitoring of the plaintiffs.
41. "[I]f the underlying neurological disorders, if any, remain undiagnosed . . . much longer, the prognosis for these children . . . is poor." *Id.* at 823.
42. Discussed *infra* part IV, § B.
43. 525 A.2d 287 (N.J. 1987).
44. *Id.* at 291.
45. *Id.* at 320.
46. Carey C. Jordan, Comment, *Medical Monitoring in Toxic Tort Cases: Another Windfall for*
address the following factors through expert testimony: (1) the significance and extent of exposure to chemicals; (2) the toxicity of the chemicals; (3) the seriousness of diseases for which individuals are at risk; (4) the relative increase in the chance of onset of disease in those exposed; and (5) the value of early diagnosis. This early attempt at creating a multi-factor test has been widely decried as creating subjective and unquantifiable factors that would be difficult for courts to apply consistently.

As subjective and unquantifiable as those factors might have been, however, they acted as a foundation for tests developed by a large number of states that have accepted the medical monitoring remedy. On the heels of Ayers, a federal district court (applying Colorado law) permitted an award of medical monitoring in a case involving exposure to hazardous waste from a nuclear weapons facility where no illness was present prior to or during the time of trial. Pennsylvania followed by awarding medical monitoring absent illness in a case involving exposure to private hazardous materials. Shortly thereafter, West Virginia held that it could award medical monitoring even if a plaintiff was not able “to show that a particular disease is certain or even likely to occur as a result of exposure.” Around this time, Florida also granted an award of medical monitoring to individuals who had used the weight loss drug Fenfluramine and Phentermine (“Fen-Phen”).

However, in a plot twist, the Supreme Court of New Jersey (the same court that had heard Ayers just seven years earlier) heard Theer v. Philip Carey Co. In Theer, the plaintiff was the wife of a deceased asbestos

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47. *Ayers*, 525 A.2d at 312.

48. See, e.g., McCarter, supra note 24, at 239 (describing the elements as “an amalgam of subjective criteria”); Jordan, supra note 56, at 489 (describing the elements as “unquantifiable generalities” and providing an illuminating discussion of each element).


53. *Petito v. A.H. Robins Co.*, 750 So. 2d 103, 106–07 (Fla. Dist. Ct. App. 1999) (plaintiffs seeking medical monitoring had to meet the following elements:

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

Id.

She sought, among other things, an award of medical monitoring because she frequently handled her husband’s asbestos-laden clothing during the time of his employment.\textsuperscript{56} Strictly following the \textit{Ayers} elements, the plaintiff would seemingly be able make a strong argument in favor of being awarded medical monitoring.\textsuperscript{57} However, this time, the Supreme Court of New Jersey ruled the other way.\textsuperscript{58} In doing so, the court made an important distinction between \textit{Theer} and \textit{Ayers}, reasoning that “[i]f a plaintiff is exposed to a product in an indirect manner, and, further, has not suffered from any injury or condition relating to that exposure, it becomes increasingly difficult for courts and juries to determine the direct correlation between the indirect exposure and any future risk of injury.”\textsuperscript{59} This distinction between direct and indirect exposure to hazardous materials is an important limitation and could be interpreted as the New Jersey court partially “reigning in” its previous holding that might have otherwise led to a flood of cases.

\textbf{D. Not Every State Followed the Lead of Friends for All Children and Ayers in Awarding Medical Monitoring Absent Injury}

Although \textit{Friends for All Children} and \textit{Ayers} provided the impetus for states that chose to award medical monitoring absent injury, a number of states chose to follow traditional tort law, requiring a present injury in order to pursue a negligence claim.\textsuperscript{60} In \textit{Ball v. Joy Technologies, Inc.}, for example, the United States Court of Appeals for the Fourth Circuit (applying Virginia law) rejected the notion that medical monitoring could be awarded absent physical injury in a toxic materials case.\textsuperscript{61} In \textit{Baker v. Westinghouse Elec. Corp.}, the United States District Court for the Southern District of Indiana (applying Indiana law) failed to award medical monitoring in a

\textsuperscript{55} Id. at 726.  
\textsuperscript{56} Id.  
\textsuperscript{57} Applying each of the \textit{Ayers} elements might yield an analysis as follows: the plaintiff handled her husband’s asbestos-covered clothes on an almost daily basis, leading to significant exposure to the chemicals and fulfilling element one. Asbestos was the same substance that led to her husband’s death from cancer, strongly implying that asbestos has a high level of toxicity and leads to serious illness, therefore fulfilling elements two and three. Studies have shown that exposure to asbestos increases the risk of various forms of cancer significantly, therefore fulfilling element four. Finally, early detection of cancer results in an increased likelihood of successful treatment. Therefore, the \textit{Theer} plaintiff would seemingly fulfill each of the \textit{Ayers} elements and would be entitled to an award of medical monitoring.  
\textsuperscript{58} \textit{Theer}, 628 A.2d at 733.  
\textsuperscript{59} Id.  
\textsuperscript{60} States that require physical injury for awards in torts cases include: Alabama, Indiana, Kentucky, Michigan, Missouri, Nebraska, Nevada, New York, North Carolina, Oregon, South Carolina, Virginia, and Washington.  
\textsuperscript{61} 958 F.2d 36 (4th Cir. 1991).
case of exposure to polychlorinated biphenyls ("PCBs"), a known hazardous substance.62

E. The United States Supreme Court Weighs in: Metro-North and the Change of Momentum Against Medical Monitoring

In 1997, a full thirteen years after Friends for All Children had become the first case to award medical monitoring absent a traditional injury, the United States Supreme Court took its first look at the issue.63 Metro-North involved a railroad worker who frequently handled asbestos (and, in fact, was often covered in asbestos) yet did not suffer any symptoms of diseases related to the asbestos.64 After attending an "asbestos awareness" class, the plaintiff began to fear that he would develop cancer.65 The plaintiff sued for the cost of future medical examinations.66

In refusing to award the plaintiff the cost of future medical examinations by a seven-to-two vote, the Court made a number of important points. First, the Court distinguished Metro-North from Friends for All Children by pointing to the fact that Friends for All Children involved "the presence of a traumatic physical impact" that was clearly absent in Metro-North.67 Second, the Court expressed a fear that permitting medical monitoring absent physical symptoms could open up the floodgates to unmanageable levels of litigation, draining judicial resources and harming businesses in the process.68 Third, the Court expressed concern about a possible inability among medical professionals to agree on what tests would be useful and what tests would be wasteful in medical monitoring cases.69 Finally, the Court expressed concern that medical monitoring awards could potentially result in windfalls for plaintiffs who are covered by insurance and therefore have alternative sources of payment for medical examinations.70

Though Metro-North does not require the states to disallow medical monitoring awards, examining state cases before and after Metro-North suggests that the Court’s holding might have marked the beginning of a sea of change, with momentum moving away from medical monitoring claims.

62. 70 F.3d 951, 954 (7th Cir. 1995).
64. Id. at 427.
65. Id.
66. Id.
67. Id. at 440.
68. Id. at 442–43.
69. Id. at 441.
70. Id. at 442–43.
For example, in *Trimble v. Asarco, Inc.*, the United States Court of Appeals for the Eighth Circuit noted that Nebraska does not recognize common law liability for medical monitoring. In *Badillo v. Am. Brands, Inc.*, the Supreme Court of Nevada noted that the state would recognize medical monitoring, if at all, only as a remedy and not as an independent cause of action. In *Wood v. Wyeth-Ayerst Labs.*, the Supreme Court of Kentucky held that a plaintiff must show a present physical injury to support a medical monitoring award. In *Hinton v. Monsanto Co.*, the Supreme Court of Alabama found “insufficient justification” to expand Alabama tort law to encompass a remedy for medical monitoring absent present physical injury. Finally, in *Paz v. Brush Engineered Materials, Inc.*, the Supreme Court of Mississippi recently held that Mississippi law does not permit medical monitoring awards absent present physical injury.

However, just as some states stayed committed to traditional tort law even in the heyday of *Ayers*, other states have remained committed to allowing medical monitoring absent a present physical injury after *Metro-North*. A notable example is *Lewis v. Lead Indus. Ass’n, Inc.*, where the plaintiffs sought medical monitoring after their children were exposed to high levels of lead pigment used in paint. In holding the paint manufacturer liable to provide medical monitoring, an Illinois appellate court relied on a line of reasoning that had been used since *Friends for All Children*: “[t]he injury which is alleged... in a claim seeking damages for a medical examination to detect possible physical injury is the cost of the examination.” In other words, in cases where the plaintiff seeks medical monitoring, the injury is not the increased risk of future harm but the violation of an individual’s interest in not having to pay for expensive medical testing. *Lewis* is an important case in that it highlights the fact that many states—indeed, approximately half of the states that have addressed the issue—allow medical monitoring awards absent present injury even in a post-*Metro-North* world.

71. 232 F.3d 946, (8th Cir. 2000) (involving a class action suit against a lead smelter and refinery for exposing nearby residents to pollutants).
72. Id. at 963.
73. 16 P.3d 435, 441 (Nev. 2001) (involving exposure to cigarette smoke).
74. 82 S.W.3d 849, 852 (Ky. 2002) (involving heart disease associated with the weight loss drug Fen-Phen).
75. 813 So. 2d 827, 829 (Ala. 2001) (involving exposure to PCBs).
76. 949 So. 2d 1, 3 (Miss. 2007) (involving exposure to airborne beryllium).
78. Id. at 871.
79. Id. at 874.
Also relevant in illustrating that point is the United States District Court for the Eastern District of Pennsylvania's recent holding in Gates v. Rohm & Haas, Co. In Gates, residents of an Illinois town claimed that ground water contamination caused high rates of brain cancer in their community. In denying a motion to dismiss, the judge held that “[g]iven the apparent trend of the federal and appellate courts in Illinois, the cost of diagnostic testing, even if periodic or ongoing, likely is a compensable injury under Illinois law.”

**F. Will the Restatement (Third) of Torts Advocate Recognition of the Medical Monitoring Remedy Absent Physical Injury?**

In 2004, the ALI began work on the Restatement (Third) of Torts. Section 21 of the current version of the council draft discusses preventive expenses. At this stage, the ALI seems prepared to endorse medical monitoring awards absent present injury, albeit with limitations similar to those in *Friends for All Children*. For instance, Comment C of the council draft imposes two limitations on the medical monitoring remedy. First, “a defendant is liable for the expense only when its conduct places the claimant in a position where monitoring is medically warranted by the prospect that early diagnosis of a latent condition will improve the chance of beneficial medical intervention.” Second, “the expense cannot provide a material benefit to the claimant other than preventing or mitigating the risk of bodily harm created by the defendant.”

Also similar to the *Friends for All Children* approach, the ALI supports the disbursement of monetary awards through a fund as opposed to a lump sum. Stating that “[w]hen a claimant seeks to recover the cost of future medical monitoring, rather than give a lump sum award of the cost of the monitoring a court should require the damages be placed in a fund or to be used to procure insurance coverage for future medical monitoring,” the ALI recognizes that there are risks associated with awarding money directly to victims with the hope that the money will actually be used for

83. *Id.* at *4.
84. *Id.* at *16.
86. See *Friends for All Children v. Lockheed Aircraft Corp.*, 746 F.2d 816, 826 (D.C. Cir. 1984).
87. RESTATEMENT (THIRD) OF TORTS, supra note 16, § 21 cmt c.
88. *Id.*
89. *Id.*
90. *Id.* § 21 cmt. d.
Finally, the ALI suggests disallowing medical monitoring awards when it is “uncertain whether the exposure necessitates the expense or whether the expense provides some other benefit and the affected individuals can be fairly expected to bear the expense because the expense is small . . . or it will be borne by their health insurers or employers.” With its tacit acceptance of medical monitoring, subject to a variety of specific limitations, the ALI appears prepared to return the medical monitoring remedy to its specific and limited origins.

II. COMMON CRITICISMS OF THE MEDICAL MONITORING REMEDY

Though medical monitoring awards absent physical injury remain permitted in nearly half the states whose courts have addressed the issue, the remedy is not without its critics. Some detractors fear that permitting a medical monitoring remedy absent physical injury would place undue stress on the courts, while others fear that permitting a medical monitoring remedy could place undue stress on medical resources. Additionally, several medical monitoring opponents contend that tests like the Ayers factors are judicially unmanageable. Other critics, while not objecting to the medical monitoring remedy per se, fear that medical monitoring awards could lead to plaintiff windfalls and financial disaster for defendants.

A. Medical Monitoring Could Lead to a Flood of Litigation, Severely Stressing the Courts

In Wood v. Wyeth-Ayerst Labs, the Supreme Court of Kentucky recognized the “potential flood of litigation stemming from unsubstantiated or fabricated prospective harms” if a medical monitoring remedy was recognized absent present physical injury. This language echoed the majority’s concern in Metro-North. Commentators have taken this concern and ex-
pounded upon it, recognizing that unhealthy and potentially dangerous pollutants exist in virtually every community. Permitting lawsuits seeking medical monitoring for every individual who lives near one of these potential dangers could inundate the courts with thousands of tort lawsuits filed by individuals who are currently in perfect health.

Consider the following example. A metropolitan area has 450,000 residents. Of these residents, 50,000 live within fifty yards of high voltage power lines. Another 50,000 live in older apartment buildings with lead paint on the walls. Still another 50,000 live near the city’s paper mill, which emits smoke into the air and chemical runoff into a lake. Now assume that this metropolitan area follows the medical monitoring standard that the Supreme Court of West Virginia set out in Bower. Suddenly, one-third of the residents of this metropolitan area would be able to sue for medical monitoring, regardless of whether they have any illness at the time they file suit. Clearly, these suits would place an enormous burden on the courts in this jurisdiction, and permitting such suits would be an ineffective use of judicial resources.

B. Medical Monitoring Could Put Stress on Limited Medical Resources

Not only could permitting medical monitoring awards absent present injury put an undue burden on the judicial system, but some critics contend that it could place an undue burden on medical resources, thereby hurting public health. The Alabama Supreme Court in Hinton was among the most explicit in expressing its concern about “vast testing liability adversely affecting the allocation of scarce medical resources.”

Other commentators have focused on negative effects that would result from an increase in demand for medical examinations stemming from an over-awarded medical monitoring remedy. In Canada, for example, where demand for medical examinations is extremely high due to national-


100. Id.

101. As explained supra, the Bower standard states that a plaintiff may be entitled to medical monitoring even if that plaintiff is not able “to show that a particular disease is certain or even likely to occur as a result of exposure.” Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424, 433 (W. Va. 1999).

102. See, e.g., McCarter, supra note 24, at 281.


104. See, e.g., McCarter, supra note 24, at 281–82. Such commentators argue that awards of medical monitoring increase the likelihood that plaintiffs will seek medical examinations that they would not seek if they were forced to pay for these examinations out of their own pockets. Therefore, medical resources would be more highly burdened.
ized healthcare, the government has resorted to discouraging the general population from seeking yearly check-ups because it would place too great of a burden on the nation's medical resources.\textsuperscript{105} This argument contends that lenient standards for lawsuits seeking medical monitoring would increase demand for healthcare to the point that the healthcare system would suffer.\textsuperscript{106} These critics argue that for a medical monitoring remedy to be feasible, medical professionals should carefully analyze which examinations are an appropriate use of medical resources and which examinations are wasteful.\textsuperscript{107}

While concern about the effect of lenient standards for medical monitoring awards on the healthcare system may seem merely academic, the consequences potentially could be very real. Consider, for example, a patient with a condition such as severely clogged arteries or potentially treatable cancer. In such cases, a matter of days or even hours is frequently the deciding factor between life and death.\textsuperscript{108} It is alarming to consider the possibility that such a patient could face a potentially-fatal delay in seeing a physician. It is conceivable that such delays could occur if a sudden influx of uninjured plaintiffs emerge in doctors' offices in search of court-ordered medical examinations.

\textbf{C. As Currently Constituted in Many Jurisdictions, Legal Tests for the Appropriateness of Medical Monitoring Are Judicially Unmanageable}

Detractors contend that the legal tests used by some jurisdictions in cases seeking medical monitoring lead to situations that are judicially unmanageable.\textsuperscript{109} Claiming judicial unmanageability, critics note three important problems with the medical monitoring remedy. First, in claims based on injuries that have not yet been realized, it becomes virtually impossible to prove causation.\textsuperscript{110} Second, many legal tests used to determine the appropriateness of medical monitoring awards in specific instances are vague, leading to unpredictability and inconsistency in medical monitoring awards.\textsuperscript{111} Third, appropriate medical examinations vary among individu-

\begin{itemize}
\item \textsuperscript{105} \textit{Id.} at 281.
\item \textsuperscript{106} \textit{Id.} at 281–82.
\item \textsuperscript{107} Schwartz et al., \textit{supra} note 13, at 355.
\item \textsuperscript{109} See, e.g., Schwartz et al., \textit{supra} note 13, at 378 (arguing that whether or not medical monitoring should be a recognized cause of action should be the job of legislatures as opposed to courts).
\item \textsuperscript{110} Jordan, \textit{supra} note 46, at 479–80.
\item \textsuperscript{111} Schwartz et al., \textit{supra} note 13, at 380.
\end{itemize}
als, even after exposure to the same substance, and Courts frequently lack the expertise to determine if the costs of medical monitoring outweigh the benefits in specific cases.\textsuperscript{112}

1. The Problem of Causation

Medical monitoring awards absent present, physical injury face a difficult hurdle in the issue of causation. In cases where there is no present injury at the time of the claim, courts must manipulate the definition of "injury" before they can even tackle causation. Further, even in potential medical monitoring cases in which an injury arises prior to filing, causation remains a prickly topic.

How can a plaintiff show that a defendant caused an injury if no physical injury has manifested itself? This was an important issue addressed in \textit{Friends for All Children}.\textsuperscript{113} The \textit{Friends for All Children} Court made it clear that the plaintiffs' injuries were not their increased risk of neurological impairments but the necessity of undergoing comprehensive diagnostic examinations.\textsuperscript{114} These diagnostic examinations, the court reasoned, would not have been necessary "but for the fact that these children endured explosive decompression and hypoxia aboard a plane which subsequently crashed."\textsuperscript{115} In considering this reasoning, it is important to remember that the plane crash was a specific, traumatic occurrence, as opposed to toxic tort cases, which are rooted in environmental exposure to toxins.\textsuperscript{116} This distinction was later considered important by the \textit{Metro-North} Court when it found that no decisions filed under the FELA have held a defendant liable to provide medical monitoring in cases of "negligent exposure to a toxic substance."\textsuperscript{117}

In fact, showing causation is difficult in toxic tort claims even when physical injury is present at the time of the filing.\textsuperscript{118} In toxic exposure cases, there is generally a period of latency between exposure to the harmful substance and the onset of illness.\textsuperscript{119} Depending on how long this latency extends, a number of intervening causes could theoretically bring about the illness.\textsuperscript{120} For example, consider a suit seeking medical monitor-

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\textsuperscript{112} \textit{Id.} at 377.
\textsuperscript{113} \textit{Friends for All Children v. Lockheed Aircraft Corp.}, 746 F.2d 816, 825 (D.C. Cir. 1984).
\textsuperscript{114} \textit{Id.}
\textsuperscript{115} \textit{Id.}
\textsuperscript{116} \textit{See supra} note 14.
\textsuperscript{118} \textit{Jordan, supra} note 46, at 480.
\textsuperscript{119} \textit{Id.}
\textsuperscript{120} \textit{Id.}
ing filed against a drug manufacturer by a hypothetical plaintiff. This plaintiff claims that he developed a heart condition two years after taking the drug manufacturer's prescription diet pills. While expert witnesses may testify that taking the drug manufacturer's pills increased the plaintiff's susceptibility to heart disease, the defendant could argue that the court needs to consider a number of intervening factors, including diet, exercise habits, gender, and stress, all of which might have contributed to the plaintiff's heart disease. With this in mind, it could become difficult for a court to hold that the drug manufacturer's diet pills were the proximate cause of the plaintiff's heart ailment.\(^{121}\)

2. The Problem of Vague Standards Used by Courts in Determining if They Should Award Medical Monitoring

A common critique of medical monitoring awards absent present injury is that courts use vague standards that lead to inconsistency and unpredictability in the adjudication of cases in which the plaintiff seeks medical monitoring.\(^{122}\) As Schwartz, Lorber, and Laird explain, "[a] lack of consistency and specificity in judicially-created eligibility standards has proved disastrous" in certain actions seeking medical monitoring awards, resulting in trials that "essentially have become 'games of chance' because of the lack of clearly delineated standards for recovery."\(^{123}\)

A prime example of this vagueness is the *Ayers* test.\(^{124}\) The *Ayers* test established five factors that courts should consider in determining whether to award medical monitoring absent present injury.\(^{125}\) An analysis of the *Ayers* factors leads to an appreciation of the critics' concerns about the test. The first factor, "the significance and extent of exposure to chemicals,"\(^{126}\) fails to quantify just how much exposure is too much. Must the plaintiff be exposed to toxins on a daily basis? Must the plaintiff be within a certain distance of the harmful substance? In considering the second factor, "the toxicity of the chemicals,"\(^{127}\) the court again remains vague and fails to identify how toxic a chemical must be in order to deem plaintiffs worthy of medical monitoring. Must the chemical be likely to cause disease or death?

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121. See also id. (considering lung cancer, an illness that could be caused by, *inter alia*, asbestos exposure or tobacco inhalation, therefore creating a question of causation).

122. Id. at 489. See also Schwartz et al., *supra* note 13, at 380.

123. Schwartz et al., *supra* note 13, at 380 n.186.


125. Id. While *Theer* reigned in the *Ayers* holding by requiring direct exposure to harmful substances, analyzing the *Ayers* factors is still illustrative of the problem of vagueness of factors currently considered in New Jersey as well as other jurisdictions. See *Theer*, 628 A.2d 724, 733 (N.J. 1993).

126. *Ayers*, 525 A.2d at 312.

127. Id.
within a specific period of time? By what standard should courts evaluate toxicity? The third factor, "the seriousness of diseases for which individuals are at risk," appears to give courts the ability to make value judgments on what constitutes "serious." Must the disease cause imminent death? What if the exposure may cause ailments such as blindness or loss of taste? The fourth factor, "the relative increase in the chance of onset of disease in those exposed," comes closest to some semblance of objectivity, yet it still fails to answer the question of how much of an enhanced risk of illness must be present before medical monitoring should be awarded. The fifth factor, "the value of early diagnosis," again places the court in the uncomfortable position of having to make a moral judgment. Should "value" be defined as giving a terminally ill plaintiff the ability to live out her life in less pain, or should medical monitoring awards be limited to situations in which early detection is likely to prevent death or debilitation? The Ayers test, in essence, creates more questions than answers.

Subsequent legal tests used in other jurisdictions do not fare much better in laying out objective standards by which courts should make determinations about the appropriateness of medical monitoring awards absent present injury. By way of example, in Hansen v. Mountain Fuel Supply Co., the Supreme Court of Utah developed an eight element test. While this element test at least attempts to define terms such as "beneficial" and specifies that physicians must make determinations regarding appropriate examinations, the test still lacks quantifiable standards by which courts could establish to precisely what extent a plaintiff must be exposed to harmful substances, how much a plaintiff's risk of illness must be enhanced by such exposure, and what constitutes "serious." Problems like these are prevalent in virtually every jurisdiction that has attempted to create a multifactor test.

128. Id.
129. Many have argued that this value judgment would be more appropriately considered by legislatures. See, e.g., Victor E. Schwartz, Mark A. Behrens, Emma K. Burton & Jennifer L. Groninger, Medical Monitoring—Should Tort Law Say Yes?, 34 WAKE FOREST L. REV. 1057, 1076 (1999).
130. Ayers, 525 A.2d at 312.
131. Id.
132. 858 P.2d 970, 979 (Utah 1993). This test is one that I personally consider one of the most viable of any jurisdiction, yet it still has clear deficiencies. The eight-element test is:

To recover medical monitoring damages under Utah law, a plaintiff must prove the following:
(1) exposure (2) to a toxic substance, (3) which exposure was caused by the defendant's negligence, (4) resulting in an increased risk (5) of a serious disease, illness or injury (6) for which a medical test for early detection exists (7) and for which early detection is beneficial, meaning that a treatment exists that can alter the course of the illness, (8) and which test has been prescribed by a qualified physician according to contemporary scientific principles.

Id.
133. See, e.g., the Petito test, supra note 53, which would be found similarly deficient when placed
3. The Problem That Courts Are Not Properly Suited to Determine if Medical Monitoring Is Appropriate for Specific Individuals

In its holding, the *Friends for All Children* court established expert panels consisting of a pediatrician, a psychologist, a psychiatrist, and a neurologist to determine whether specific diagnostic examinations should be given to specific plaintiffs. In doing so, the court recognized the need to provide examinations customized to the individual rather than issuing a sweeping proclamation that the same battery of tests would be administered on every plaintiff. This policy not only recognized that individualized examinations best serve the interests of injured parties but that individualized examinations also benefit the defendant by not forcing it to pay for unnecessary examinations.

As critics have pointed out, just because a class of plaintiffs has been exposed to the same harmful substance does not mean that every member of that class should be entitled to the same comprehensive diagnostic scheme. For example, exposure to a specific toxic substance may increase the risk of cancer for an entire population, but courts, through experts, must determine which individual members of the population are especially at risk and which members of the population are only minutely affected by their exposure. Individual characteristics including, among other things, genes, habits, and age, could play significant roles in determining how rigorous of a diagnostic course of action should be pursued.

Some critics contend that courts are not properly suited to weigh the costs and benefits associated with individualized medical monitoring decisions because courts lack a critical understanding of medicine and science. These critics point to a number of rationales in support of this contention. First, they argue that courts lack the scientific knowledge to determine if the risks of a particular test outweigh its potential benefits for the plaintiff. Second, some commentators feel that the judiciary is not the proper venue to bring together a panel of experts to make the determi-
nation as to what types of illnesses will be eligible for medical monitoring absent present injury.\textsuperscript{141} Third, some analysts assert that courts are not suited to determine if the benefits of medical monitoring absent injury for individual plaintiffs outweighs the cost to the American health system.\textsuperscript{142} Finally, some critics argue that courts are not the proper venue to determine the prudence of continuing an individual’s program of periodic medical examinations as that individual’s medical circumstances change over time.\textsuperscript{143}

\textbf{D. The Medical Monitoring Remedy Could Be a Breeding Ground for Plaintiff Windfalls and Misuse of Funds}

Even many proponents of the medical monitoring remedy acknowledge that potential plaintiff windfalls and the misuse of medical monitoring awards are serious issues, especially if awards are distributed directly to plaintiffs in the form of lump sum payments.\textsuperscript{144} The \textit{Friends for All Children} court recognized this risk when it mandated that all money to be used for medical monitoring would be drawn from an interest-bearing fund that the defendants established.\textsuperscript{145} Plaintiffs were only allowed to draw money from the fund via a voucher system in which the plaintiffs would obtain approval to receive a specific medical test from a panel of experts.\textsuperscript{146} The court also required that unused funds would be returned, with interest, to the defendant.\textsuperscript{147}

Observers have found that medical monitoring awards distributed in lump sum payments have resulted in staggering levels of misuse.\textsuperscript{148} For example, one \textit{Ayers} plaintiff stated that he spent his medical monitoring award on a new home, and other \textit{Ayers} plaintiffs reported that they never even visited the doctor after being awarded a lump sum for medical monitoring.\textsuperscript{149} Similarly, the majority of the \textit{Hansen} plaintiffs had failed to submit to anything more than cursory medical examinations more than seven years after their award of a lump sum to be used for medical monitoring.\textsuperscript{150}

The potential for plaintiff windfalls is also ever-present when plain-

\textsuperscript{141} \textit{Id.} at 382–83.
\textsuperscript{142} \textit{Id.} at 355.
\textsuperscript{143} \textit{Id.} at 378.
\textsuperscript{144} See, e.g., McCarter, \textit{supra} note 24, at 257 n.158.
\textsuperscript{145} \textit{Friends for All Children} v. Lockheed Aircraft Corp., 746 F.2d 816, 823 n.10 (D.C. Cir. 1984).
\textsuperscript{146} \textit{Id.} at 823.
\textsuperscript{147} \textit{Id.} at 823 n.10.
\textsuperscript{148} Schwartz et al., \textit{supra} note 13, at 370–72.
\textsuperscript{149} McCarter, \textit{supra} note 24, at 257 n.158.
\textsuperscript{150} Schwartz et al., \textit{supra} note 13, at 372.
tiffs are able to collect payment for medical monitoring through collateral sources, such as insurance policies. Where plaintiffs are eligible to collect money for medical monitoring through insurance, any additional money granted by the courts will lead to double-recovery by the plaintiff. Such double-recovery flies in the face of the goals of tort law and traditional notions of equity.

Many commentators suggest that the trust fund model laid out in *Friends for All Children* is the most effective way to prevent plaintiff windfalls and the misuse of funds. Such funds stress the importance of accountability and oversight in the distribution of medical monitoring awards. With the addition of a voucher system requiring expert approval for disbursement of funds, as advocated in *Friends for All Children*, courts could also reduce the frequency of wasteful and unnecessary diagnostic examinations as the panel would have the ability to veto the use of specific examinations in specific instances.

### III. A Proposed Model to Determine Whether Medical Monitoring Awards Are Appropriate on a Case-By-Case Basis

Critics of medical monitoring correctly point to a number of real and potential shortcomings that accompany the recognition of medical monitoring as a valid award. The potential placement of undue burden on judicial and medical resources highlights the importance of devising a system to prevent unjust medical monitoring awards. Further, unspecific and unquantifiable legal tests are likely to lead to inconsistent and unpredictable awards of medical monitoring.

However, smart public policy dictates that medical monitoring should not be entirely condemned. The mere existence of medical monitoring awards could act as a deterrent against tortious conduct that could lead to potential injury and could provide a remedy to those who have been legitimately harmed by such conduct.

Recognizing the benefits and risks of medical monitoring, it becomes clear that uniform standards should be established to determine whether

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152. Schwartz et al., *supra* note 13, at 384.
153. *Id.*
155. *Id.*
156. See *supra* part II.
157. See *supra* part II, §§ A–B.
158. See *supra* part II, § C.
medical monitoring awards are appropriate in specific instances. These standards must be strict enough to help courts easily identify and dismiss frivolous claims and must be specific and objective enough to be judicially manageable. Therefore, I propose a five-element test for courts to use when determining whether a medical monitoring award is appropriate.

As will be discussed below, a defendant should be liable to provide medical monitoring expenses when: (1) the potential injury results from a specific and traumatic occurrence; (2) scientific evidence suggests that the defendant’s tortious conduct (where “conduct” could entail manufacturing of goods or exposing the plaintiff to a harmful substance) results in a statistically significant increase in likelihood that the plaintiff will develop a specific illness; (3) early detection of the specific illness is possible and can lead to the prevention of death or debilitation; (4) causation can be shown such that the plaintiff would not reasonably require a specific medical examination but for the defendant’s tortious conduct; and (5) the benefits of medical monitoring outweigh the costs. The determination of whether each element is fulfilled should be established by expert testimony conforming to the standards established in Daubert v. Merrell Dow Pharms., Inc.159

A. The Potential Injury Results From a Specific and Traumatic Occurrence

The Friends for All Children Court justified its medical monitoring award, in part, by establishing that the potential injuries to the plaintiffs were not merely speculative because they stemmed from a specific and traumatic occurrence—an airplane crash.160 Wariness of situations involving speculative injury is also one of the reasons that the Supreme Court did not sanction a medical monitoring award in Metro-North.161 The reasoning used by these courts was sound, and medical monitoring awards absent physical injury must not be merely speculative. Rather, they must stem from specific, traumatic occurrences.

The “specific, traumatic occurrence” element has the added benefit of making the “direct versus indirect” distinction discussed in Theer162 moot. If a potential injury results from a specific event, then, by definition, it is a result of direct contact. Therefore, the “direct contact” requirement is encapsulated and made more stringent by the “specific, traumatic occurrence” requirement.

It should be noted that it is possible for a plaintiff to fulfill this element in toxic tort cases as long as the exposure to a harmful substance results from a concrete and identifiable occurrence. For example, the element may be fulfilled as a result of a chemical spill that exposes a plaintiff to close contact with large amounts of a harmful substance. The element may not, however, be fulfilled by prolonged contact with low levels of a harmful substance.

B. Scientific Evidence Links the Defendant’s Conduct to a Statistically Significant Increase in Likelihood that the Plaintiff Will Develop a Specific Illness

The Ayers standard considers factors such as “the significance and extent of exposure to chemicals,” the “toxicity of the chemicals,” and “the relative increase in the chance of onset of disease in those exposed.”


164. 509 U.S. 579, 592-94 (1993). There are four Daubert elements: (1) general acceptance in the scientific community, (2) findings subjected to peer review and/or publication, (3) findings that have been tested using the scientific method, and (4) an acceptable rate of error.

165. Id.

166. As in, for example, Gates v. Rohm & Haas Co., No. 06-1743, 2007 U.S. Dist. LEXIS 54210,
must point to scientific studies verifying a link between the specific pollut-
ant and brain cancer. By pointing to scientific evidence, courts would
counter the speculative nature of many frivolous claims.

C. Early Detection of the Specific Illness is Possible and Can Lead to the
Prevention of Death or Debilitation

The Restatement (Third) of Torts suggests that medical monitoring is
“warranted by the prospect that early diagnosis of a latent condition will
improve the chance of beneficial medical intervention.”167 While this con-
dition makes theoretical sense, it requires an objective legal test to encour-
age consistent and predictable enforcement. Specifically, the term
“beneficial medical intervention” is unnecessarily broad and is left unde-
fin.

To fulfill this proposed element, a plaintiff must be able to show that:
(a) medical tests currently exist to detect the presence of the potential ill-
ness prior to the appearance of symptoms, and (b) early detection can lead
to the prevention of death or debilitation. Here, “debilitation” should be
defined as “a physical or mental impairment that substantially limits one or
more major life activities.”168 For example, if a plaintiff seeks medical
monitoring because she fears that her exposure to large quantities of asbes-
tos will cause her to develop lung cancer, she must show that medical tests
exist that can detect lung cancer before symptoms manifest and that early
detection of lung cancer will improve her chances of survival or at least
prevent substantial physical impairment. Again, this element must be
proven through the testimony of an expert witness who fulfills the Daubert
elements.169

D. Causation Can be Shown Such That the Plaintiff Would Not
Reasonably Require a Specific Medical Examination But For the
Defendant’s Tortious Conduct

When awarding medical monitoring for the first time in the history of
tort law, the Friends for All Children Court recognized that the issue of
causation was controversial.170 After all, it is difficult to prove that a de-
fendant caused an injury if there is no present physical injury. The Friends


168. This language is borrowed from the definition of “disability” in the Americans With Disabili-
169. See supra note 164.
Court answered this critique by holding that the actual injury in a claim seeking medical monitoring is the expense and necessity of having to undergo comprehensive diagnostic tests. This reasoning is sound, and it should be applied to current claims seeking medical monitoring.

To fulfill this proposed element, a plaintiff must show causation by proving that a specific medical examination would not have been reasonably necessary but for the defendant's tortious conduct. This element must be proven through the testimony of expert witnesses fulfilling the Daubert elements. For example, a plaintiff seeking medical monitoring because he fears that his exposure to large quantities of asbestos will cause him to develop lung cancer should be disqualified from receiving a medical monitoring award if he is a habitual cigarette smoker. The reasoning behind this disqualification is that a reasonable smoker is aware that smoking increases one's chances of developing cancer. Therefore, even if the plaintiff had never been exposed to asbestos, it is reasonable to believe that he would undergo periodic examinations for lung cancer.

E. The Benefits of Medical Monitoring Outweigh the Costs

In what he calls the "common-sense concept of appropriate medical monitoring," Schwartz, Lorber, and Laird argue that when medical monitoring is appropriate, its potential benefits outweigh its costs. While this concept certainly makes theoretical sense, it too requires an objective legal test to promote consistent and predictable results when applied by the courts.

To fulfill this element, a court must consider such factors as the benefit that specific diagnostic examinations would confer on the plaintiff as far as promoting an accurate diagnosis, the likelihood that the examination will reveal the plaintiff's illness, and the likelihood that the plaintiff actually has the illness. These factors should be weighed against alternative ways that the medical resource in question could be used. In balancing these factors, the element is not satisfied unless the court determines that the potential benefit for the plaintiff outweighs the cost to the general public. For example, consider an expert who testifies that a plaintiff's exposure to a particular pollutant increased her chances of developing a particular disease by ten percent but puts the overall likelihood that she actually has the disease at

171. Id.
172. See supra note 164.
173. Schwartz et al., supra note 13, at 352.
only two percent. The expert also testifies that there are very few physicians capable of diagnosing the disorder, and those physicians are currently treating trauma victims returning from a war zone. In this case, medical monitoring should not be awarded. The societal cost of preventing the physicians from treating trauma victims returning from a war zone is not outweighed by the plaintiff's benefit of being tested for a disease that she is not likely to have.

IV. A PROPOSED METHOD FOR DISBURSING MEDICAL MONITORING AWARDS WHEN THEY ARE DEEMED APPROPRIATE

Medical monitoring detractors frequently call attention to problems associated with the disbursement of medical monitoring awards. To be sure, the potential for waste and plaintiff windfalls is omnipresent when medical monitoring is awarded. Further, plaintiff misuse of medical monitoring funds is common when the funds are awarded in a lump sum. However, by following the lead of the Friends for All Children Court and implementing an effective disbursement procedure, these problems can be avoided.

As will be discussed below, when a medical monitoring award is granted by the courts, a panel of experts should always determine what diagnostic examinations are necessary for each plaintiff, even if those plaintiffs are members of the same class. Second, medical monitoring awards should never be distributed in a lump sum but should always be paid out of a fund established by the defendant. Third, if a plaintiff fails to utilize his medical monitoring award within a reasonable period of time, the funds designated for medical monitoring should be returned to the defendant.

A. An Expert Panel Should Determine What Medical Examinations are Necessary for Each Plaintiff

In granting the first medical monitoring award in the history of tort law, the Friends for All Children Court set a number of limitations. One of these limitations involved establishing a panel of experts to determine

174. See, e.g., McCarter, supra note 24, at 257 n.158.
175. See Schwartz et al., supra note 13, at 357.
177. See McCarter, supra note 24, at 257 n.158.
179. Id.
whether to give a specific diagnostic examination to a specific plaintiff.\textsuperscript{180} In establishing such a panel, the court recognized that appropriate diagnostic examinations vary from individual to individual, even when those individuals were exposed to the same environment.\textsuperscript{181} By instructing the panel to customize individual diagnostic schemes for each plaintiff, the court avoided the waste of resources that would have resulted if the court had held that each plaintiff would receive every diagnostic examination.

Following the model of \textit{Friends for All Children}, courts awarding medical monitoring to a class of plaintiffs should convene a special panel to establish individualized diagnostic plans for each member of the class. Panels should consist of physicians and other experts who specialize in the type of ailment that the plaintiffs could potentially develop. The panel should consider the individual characteristics of each plaintiff in order to create a diagnostic scheme that is appropriate for that individual and that does not involve unnecessary and wasteful examinations. The result will be the preservation of resources as well as an easier and safer diagnostic regimen for the plaintiff.

Convening a panel of experts is likely to raise questions about cost, but the cost is justified for a number of reasons. First, once the five-factor test laid out in part III is instituted, medical monitoring is likely to be uncommon and awarded only in instances of severe misconduct. Therefore, defendants should be forced to endure the expense of convening the panel. Forcing defendants to bear this extra cost will provide further deterrence against misconduct, thereby reinforcing a goal of tort law. Second, the cost of establishing a panel of experts will partially pay for itself by preventing individual plaintiffs from obtaining costly examinations that the panel considers unnecessary. The panel will also protect defendants by ensuring that funds designated for medical monitoring are not misused.

\textbf{B. Medical Monitoring Payments Should Be Distributed Out of a Fund Created by the Defendant}

Potential plaintiff windfalls and the misuse of medical monitoring funds are serious issues when medical monitoring is awarded.\textsuperscript{182} The \textit{Friends for All Children} Court dealt with this issue by ordering the defendant to create a fund out of which medical monitoring payments would be disbursed.\textsuperscript{183} When a plaintiff sought a specific diagnostic examination, she

\begin{itemize}
\item \textsuperscript{180} \textit{Id.}
\item \textsuperscript{181} \textit{See id.}
\item \textsuperscript{182} \textit{See McCarter, supra note 24, at 257 n.158.}
\item \textsuperscript{183} 746 F.2d at 823.
\end{itemize}
would confer with the panel of experts. The panel would provide her with a voucher if it deemed the medical examination necessary. The plaintiff then showed the defendant the voucher and collected payment for that medical examination. In establishing a fund to be held in trust, the court ensured that money earmarked for medical monitoring would not be used for anything other than medical monitoring.

Following the *Friends for All Children* model, medical monitoring awards should never be paid to plaintiffs in a lump sum. Awarding lump sums provides no oversight or control over how the plaintiffs use funds intended to be used for medical monitoring. Rather, the court should order the defendant to create a fund to be held in trust solely for the purpose of medical monitoring. Incorporating the panel of experts described above, a voucher system should be established, whereby plaintiffs may withdraw money from the fund only if the panel deems a particular diagnostic examination necessary. All money left in the fund at the termination of the medical monitoring period should be returned to the defendant.

### C. Incorporating a "Use It or Lose It" Provision

Critics point out that recipients of medical monitoring awards frequently fail to use their awards in a timely manner. Allowing money to sit unused in a fund benefits neither the plaintiff nor the defendant and is therefore an issue that must be addressed in a medical monitoring disbursement scheme. An appropriate solution is the institution of a "use it or lose it" provision in medical monitoring awards. In such a provision, the panel of experts described above will specify a reasonable period of time during which medical monitoring recipients should receive their diagnostic examinations. If a recipient fails to utilize this opportunity, the money earmarked for his examination will be returned to the defendant. The purpose of this provision is twofold. First, medical monitoring recipients will be encouraged to pursue the award to which they are entitled in a timely manner. Second, the provision will prevent money from sitting idly in an account for an extended period of time. Instead, the money will be injected back into the economy, either by a payment to a physician or by a refund to the defendant.

184. *Id.*
185. *Id.*
186. See McCarter, *supra* note 24, at 257 n.158.
187. See *id.*
CONCLUSION

Recent lawsuits against Mattel, Inc. have brought the issue of medical monitoring into the public spotlight. As the ALI continues its work on the Restatement (Third) of Torts, the issue of medical monitoring is likely to remain a contentious one within the legal community. In tracing the evolution of medical monitoring from 1970s dicta to the present, support for it has ebbed and flowed. Detractors have noted their fears that medical monitoring awards could wreak havoc on judicial and medical resources. Others have argued that standards used to award medical monitoring are judicially unmanageable. Still others fear that medical monitoring leads to plaintiff windfalls and misuse of funds.

However, by establishing specific and judicially manageable standards by which courts should award medical monitoring, the benefits of medical monitoring could be garnered while the risks could be mitigated. The five-element test discussed in this paper provides an objective method for courts to analyze the appropriateness of medical monitoring on a case by case basis. Further, the disbursement model discussed in this paper provides a method for preventing plaintiff windfalls while preserving plaintiff rights.

188. See Efrati, supra note 5, at A7.
189. See Schwartz et al., supra note 13, at 369.
190. See Jordan, supra note 46, at 489.
191. See Schwartz et al., supra note 13, at 371.