LIABILITY FOR MEDICAL MONITORING AND THE PROBLEM OF LIMITS

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SETTING limits on the scope of liability has long been a problem for tort law. The logic of expanding forms of liability—such as liability in negligence for "pure" emotional distress—often does not dictate any particular limit on the scope of liability, though limits are always imposed.¹ And to the post-realist mind, the established methods of placing limits on many existing forms of liability—no-duty and proximate cause, for example—sometimes seem unduly formalistic or utterly conclusory.² Yet, in a sense, tort law (perhaps law in general) is all about limits. Virtually every rule that specifies a form of liability necessarily carries within it an explicit or implicit limit on the scope of that liability. The very purpose of the rules of tort law is to trace the boundaries between the domains where liability is imposed and where it is limited or precluded.

This Essay will explore the limit-setting problems generated by the rise of liability for medical monitoring costs. These problems have not always been given sufficient attention by the courts, which have instead ventured into new ground without laying the necessary conceptual foundation for developing this form of liability. By considering the proper limits on the scope of liability for medical monitoring costs, we may not only identify the points at which such liability should be cut off, but also gain a better understanding of the core purpose served by imposing liability for this form of loss.

Uncertainty about the proper limits of this form of liability arises, in my view, because there is as yet no coherent and devel-

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¹ See, e.g., Dillon v. Legg, 441 P.2d 912, 919–20 (Cal. 1968) (imposing liability for negligent infliction of emotional distress resulting from fear that another will be injured, but limiting liability based on proximity, visibility, and relationship between the plaintiff and victim).
² See, e.g., W. Page Keeton et al., Prosser and Keeton on The Law of Torts § 53, at 358 (W. Page Keeton ed., 5th ed. 1984) ("But it should be recognized that 'duty' is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection.").

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oped notion of what this form of liability is or what it is designed to accomplish. In fact, there are two very different conceptions of medical monitoring liability; each conception leads to a different way of thinking about the appropriate limits on this form of liability.

I. TWO CONCEPTIONS OF LIABILITY FOR MEDICAL MONITORING

"Medical monitoring" has become a legal term of art, meaning diagnostic and other pre-therapeutic measures designed to determine whether an individual exposed to the risk of contracting a disease or other unhealthy condition has in fact done so. Plaintiffs who are already injured have always had a claim not only for past, but also for future medical expenses, including the reasonable cost of medical monitoring. Liability for medical monitoring costs is a distinct and new form of liability only for plaintiffs who have as yet suffered no physical harm.

In recent years the courts that have considered claims for this latter, distinct form of liability for medical monitoring have almost universally agreed that such liability may be imposed under the proper circumstances. However, such liability stands as an exception to the general rule that liability for negligently inflicted economic loss is not imposed in the absence of existing physical injury. Because imposing such liability is exceptional, the courts have offered vague justifications and distinctions to explain what they are doing. In almost defensive recognition of the fact that they have not satisfactorily justified their actions, the courts set out a series of prerequisites to the imposition of liability that then serve as limits on its scope. What results is a new form of liability in search of a principle to support it.

Clearly the core principle on which the courts rely in medical monitoring cases involves something analogous to rescue or an eq-

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5 See, e.g., Hansen, 858 P.2d at 976-78; Bower, 522 S.E.2d at 430-31.
6 See, e.g., Hansen, 858 P.2d at 979; Bower, 522 S.E.2d at 432-33.
uitable duty to repair. Ordinarily, of course, there is no affirmative
duty to rescue or repair. When the defendant has tortiously placed
the plaintiff in a position of danger, however, a duty to take af-
firmative, remedial action is sometimes imposed.\(^7\) In medical moni-
toring cases, the defendant has tortiously exposed the plaintiff or
plaintiffs to a risk of suffering harm in the future. Liability for
medical monitoring costs can therefore be understood as a form of
affirmative duty analogous to the duty created by an injunction re-
quiring the defendant to take remedial action. The duty is imposed
on the defendant who has placed another in a position of danger.
So understood, liability for medical monitoring is an exception to
the no duty to rescue rule.

But is such liability a preliminary step in an eventual effort at
rescue or a unique and new form of remedy? I shall try to show
why the answer matters, since in fact two very different concep-
tions are available to support different versions of this new form of
liability. Because these two conceptions lead to very different lim-
its, understanding their differences is critically important to the de-
velopment of the law in this field.

A. Medical Monitoring as Mitigation

The first conception of medical monitoring sees this form of li-
ability as a special form of mitigation of damages, designed to de-
tect future loss, as distinguished from more conventional forms of
mitigation that repaired or reduce the scope of present injury or
loss. The very idea behind this view of medical monitoring is that
early detection of disease will facilitate treatment and promote the
reduction of loss.\(^8\)

When considering the appropriate scope and limits of liability
under this “mitigation conception” of medical monitoring, we
should be asking questions about loss reduction: In what situations
are efforts at mitigation sensible or not? Who should pay for miti-
gation and under what circumstances? And how should the an-
swers to these questions influence the rules that govern the prob-

\(^7\) See Abraham, supra note 4, at 225.

\(^8\) See, e.g., In re Paoli R.R. Yard PCB Litig., 916 F.2d 829, 852 (3d Cir. 1990); Potter
v. Firestone Tire & Rubber Co., 863 P.2d 795, 824 (Cal. 1993); Hansen, 858 P.2d at
976, Bower, 522 S.E.2d at 431.
lem? These are very different questions from those that a different conception generates.

B. Medical Monitoring as Evidentiary Development

A second, and quite different, conception of medical monitoring does not see it as a distinct form of liability for the tortiously inflicted economic cost of mitigation, but as a step in the development of evidence for use in any subsequent action by plaintiffs seeking recovery for actual harm from the defendant. Thus, the imposition of liability is sometimes justified on the ground that the uncertainty created by the defendant’s tortious conduct requires medical investigation that would not otherwise be necessary, not merely for purposes of mitigation but in order to develop evidence.9

Here the underlying rationale for the imposition of liability is not preventative or remedial, but informational and evidentiary. The core of the action is aimed at identifying the effects of the defendant’s conduct. Carrying this rationale to its logical conclusion, some courts have held that, even if there is no treatment for the disease or condition that the defendant has risked causing the plaintiff to suffer, liability may be imposed for medical monitoring.10 This is information-seeking and evidentiary development in the extreme, since in such a situation there can be no mitigation resulting from monitoring because there can be no treatment.

II. Toward Coherent Limits

Obviously the two different conceptions of the purpose of medical monitoring are not mutually exclusive. Many rules of law have dual or even multiple purposes. It would be quite plausible for courts to conclude that this form of liability is justified on two grounds rather than only one. The scope and limits of liability for

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9 See Leslie S. Gara, Medical Surveillance Damages: Using Common Sense and the Common Law to Mitigate the Dangers Posed by Environmental Hazards, 12 Harv. Envtl. L. Rev. 265, 270 (1988) (“[P]eriodic testing will produce needed evidence in instances where latent injuries do develop. This progressive evidence will be of great value to a factfinder in determining whether a resulting injury ... is causally linked to the defendant’s hazard.”).

10 See Bower, 522 S.E.2d at 434 (quoting Bourgeois v. A.P. Green Industries, 716 So. 2d 355, 363 (La. 1998) (Calogero, C.J., concurring)).
medical monitoring should be related in a coherent way to the aims of this form of liability, however. The fact that such liability has more than one aim is no warrant for confusion or incoherence. If the scope and limits of liability are to make sense, it must be in relation to these aims. In what follows I examine features of the different possible kinds of limits on the scope of liability for medical monitoring and relate them to these aims.

A. A Significant Increase of Risk to a Significant Level: Absolute and Relative Risk

The courts that have permitted the imposition of liability for medical monitoring each have developed multi-factored tests that must be satisfied before such liability may be imposed.\textsuperscript{11} The requirement that stands out in most of these tests is that the defendant's tortious conduct must have significantly increased the risk that the plaintiff will suffer harm as a result of that conduct. Virtually every court that has permitted the imposition of liability for medical monitoring costs has adopted such a requirement.\textsuperscript{12}

This requirement makes perfect sense from both the mitigation and evidentiary development perspectives. A significant-increase requirement is designed to ensure that medical monitoring will be worthwhile. First, we are all exposed to a wide variety of risks in our lives; unless an increase of risk raises the threat faced by the plaintiff to a significant level, it is not an appropriate occasion for monitoring in order to mitigate possible future loss. Thus, the risk must be significant in an “absolute” sense. Second, the very idea of an “increase” of risk presupposes a baseline—some background risk of suffering harm against which the change in risk level brought about by the defendant’s conduct can be measured. The

\textsuperscript{11} See id. at 432–33; \textit{Hanson}, 858 P.2d at 979.

\textsuperscript{12} See, e.g., \textit{In Re Paoli}, 916 F.2d at 852 (holding that a plaintiff must prove a significantly increased risk of contracting a serious latent disease); \textit{Miranda v. Shell Oil Co.}, 15 Cal. Rptr. 2d 569, 572–73 (Ct. App. 1993) (finding that a plaintiff’s relative increased risk of suffering future disease, although not the sole determining factor, is an important factor in assessing the need for medical monitoring); \textit{Ayers v. Township of Jackson}, 525 A.2d 287, 312 (N.J. 1987) (establishing five criteria for a successful medical monitoring claim, including a relative increase in the chance of onset of disease in those exposed); \textit{Hanson}, 858 P.2d at 979 (holding that a plaintiff must prove an increased risk of a serious disease, illness, or injury); \textit{Bower}, 522 S.E.2d at 432 (finding that a plaintiff must suffer an increased risk of contracting a serious latent disease).
less "significant" that increase is, the less likely any harm that does materialize was in fact caused by the defendant's conduct. So the risk must also be significant in the "relative" sense. Unless the defendant's conduct would have caused the harm risked if it did materialize, imposing liability on the defendant for the cost of medically monitoring for the occurrence of the harm would be inappropriate. Therefore, imposing liability on the defendant for the cost of gathering evidence regarding causation is also inappropriate.

It is worth emphasizing that a significant level of risk (in the absolute sense) and a significant increase of risk (in the relative sense) are analytically distinct and independent notions. There may be a significant increase of risk, but not to a significant level. For example, an individual may face a background risk of one chance in five million of contracting a certain form of cancer. As a result of exposure to a hazardous substance due to the negligence of the defendant, that risk may increase to three chances in five million for each of ten exposed individuals. This is a significant increase of risk—the defendant's conduct has increased each individual's risk level by three hundred percent.

It seems unlikely, however, that medical monitoring for the purpose of mitigation would make sense in this setting. Because the risk to the group in question is still extraordinarily low (thirty chances out of five million, or one out of 166,000), the benefits of monitoring probably would not be worth their costs. But in specific cases this will depend on a number of factors: the cost of the monitoring; the benefit to be derived from the monitoring, including the reliability of the tests that would be done and the treatability of the form of cancer in question; and the particular values of the exposed population. For example, some people would be willing to pay for their own monitoring in some situations involving a small absolute risk and not in others, depending on the extent of their risk aversion. Something like a reasonable-expenditure standard could be employed to get at this issue.

No doubt some courts would hold the defendant liable to any of the ten exposed individuals who contracted the form of cancer in question, on the ground that the defendant's tortious conduct was more probably than not the cause of the plaintiff's harm. Other

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See, e.g., In re Joint E. & S. Dist. Asbestos Litig., 52 F.3d 1124, 1133–34 (2d Cir. 1995); DeLuca v. Merrell Dow Pharm., 911 F.2d 941, 958–59 (3d Cir. 1990); Sander-
courts would not permit the imposition of liability based only on statistical evidence such as this. For the former courts, imposing liability for medical monitoring in this situation would make sense from an evidentiary development perspective. But it is arguable at the very least that, although there has been a significant increase of relative risk in this situation, even the elevated level of risk that each exposed individual now faces as a result of the defendant’s conduct is not itself significant in the absolute sense. A three in five million chance of contracting a particular form of cancer ordinarily would not be viewed as a significant risk. Thus, from the evidentiary development perspective it is the prospect that the defendant will bear liability for any actual harm that occurs, rather than the absolute level of risk itself, that is crucial to the medical monitoring issue.

Conversely, although a background level of risk may already be significant, the defendant may not have significantly increased that risk. If an individual faces a risk of one in one thousand of suffering a particular disease, that ordinarily would be viewed as a significant risk in the absolute sense. Suppose that the defendant’s tortious conduct increases that risk to 1.01 chances in one thousand. Obviously, this elevated level of risk is also significant in the absolute sense. But in relative-risk terms the defendant has not significantly increased that risk level, having caused it to rise only one percent above the background level of risk. Neither the mitigation nor evidentiary development perspectives would warrant imposing liability for medical monitoring in this situation.

These are straightforward and, I think, uncontroversial points. But although most of the case law is not necessarily inconsistent with these points, neither have they emerged clearly in the decisions upholding the imposition of liability for medical monitoring.

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son v. Int’l Flavors & Fragrances, 950 F. Supp. 981, 1000 (C.D. Cal. 1996); Merrell Dow Pharm. v. Havner, 953 S.W.2d 706, 715–18 (Tex. 1997); see also David L. Faigman et al., 4 Modern Scientific Evidence § 35-1.4.1, at 155–56 (2d ed. 2002) (explaining that a majority of courts allow a claim to reach the jury when there exists a relative risk of 2.0 or greater).


Some courts have attempted to finesse this issue with a requirement of proof that medical monitoring be considered medically “necessary” under the circumstances. See Bower, 522 S.E.2d at 433. But such a requirement transforms a matter of policy into a question of medical judgment that is bound to be disputed.
To prevail on a medical monitoring claim, there should be proof of both sufficient absolute and relative risk: that the risk the plaintiff faces is significant, and that the defendant has significantly increased that risk above the background rate. First, if an absolute level of risk is not itself significant, then it will not be sensible to engage in medical monitoring. Indeed, whether it would make sense purely as a medical matter to monitor an individual for a particular risk ought to be an ingredient of the decision whether that risk level is in fact significant. But even when a risk level is significant, unless the relative increase of risk for which the defendant is responsible was itself significant, holding the defendant responsible for the cost of monitoring would be inappropriate, because the lion’s share of the risk in question was not created by the defendant’s conduct.

As to this latter question, it might be argued that liability for medical monitoring should be imposed only if the defendant’s conduct has more than doubled the risk facing the plaintiffs—that is, only if the defendant would be liable if the risk materialized in harm. This approach is both logical and principled, but it may ask more of plaintiffs than it is fair to ask. Quantifying risk levels with mathematical precision often is not possible. Part of the problem that gives rise to a need for medical monitoring is precisely that reliable data on the risk resulting from the exposure is not available. To impose an unbending doubling-risk requirement would either foreclose many deserving plaintiffs from recovering because of the impossibility of precise quantification, or encourage the production of misleadingly objective evidence in order to satisfy the plaintiff’s burden.16

16 An alternative test would permit the plaintiff to prove that the defendant’s conduct has increased the absolute level of risk from an acceptable to an unacceptable level, as judged by such external standards as those set by the Environmental Protection Agency for the risk of cancer. If the absolute background risk level was already unacceptable, then the defendant would be liable only for doubling that risk. But if the background level of risk was acceptable and the defendant’s conduct increased that risk to an unacceptable level, then the defendant could be held liable even if that increase were small in percentage terms. Under this approach, a significant increase would have occurred whenever the defendant’s conduct placed the plaintiff into a category that would theoretically be worthy of regulatory concern, even if the defendant’s conduct was only the straw that broke the camel’s back. Once again, however, the problem would sometimes be that reliable data on these risk levels is not available.
Here the difference between the mitigation and evidentiary development perspectives more clearly emerges. In the absence of the traditional quantum of proof, it may be difficult to justify medical monitoring for mitigation purposes. But as I discuss in the following Section, certain forms of monitoring may promise not only the early detection of disease, but also the development of epidemiological or other evidence that will help to clarify causal uncertainty. To the extent that this is the case, imposing liability for medical monitoring costs, even in the absence of proof that the defendant's conduct has more than doubled the background level of risk, may make sense.

B. Special Monitoring Costs

To the extent that medical monitoring consists simply of ordinary preventative health care, there is little reason to create a separate regime of liability to accomplish this task. Established private and public sources of health care coverage will already be available to cover the costs of conventional preventative care and monitoring and thereby to promote the mitigation of future loss. Although there is some argument for charging tortfeasors rather than health insurers with these costs in traditional tort actions through application of the collateral source rule, the argument is subject to criticism.\(^7\) A number of states have taken this criticism to heart and either modified or abolished the rule by statute.\(^8\)

Whatever the merits of the rule in conventional tort cases, however, the arguments against it in medical monitoring cases are stronger. In virtually all conventional personal injury actions the plaintiff seeks damages not only for health care costs, but for other costs that are less likely to implicate the rule, such as lost wages, and for general damages for pain and suffering.\(^9\) The incremental

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\(^7\) See Abraham, supra note 4, at 214–19.


\(^9\) Damages paid for lost wages are less likely to be affected by the collateral source rule because forms of insurance against this form of loss (principally disability insurance) are so much less prevalent than health insurance. See Kenneth S. Abraham, Insurance Law & Regulation 359–60 (3d ed. 2000); Kenneth S. Abraham & Lance Liebman, Private Insurance, Social Insurance, and Tort Reform: Toward a New Vision of Compensation for Illness and Injury, 93 Colum. L. Rev. 75, 81–82 (1993).
administrative cost of litigating medical-cost issues in such cases is therefore likely to be comparatively small.

In contrast, in medical monitoring cases, only health care or relating monitoring costs will be at issue. When these costs are already placed into such broad channels of distribution as health insurance, the argument for invoking the costly machinery of the legal system in order to shift these costs to another broad channel of distribution—the price structure of a commercial enterprise or its liability insurer—is far weaker.

When the costs involved are likely to fall largely outside of conventional health insurance coverage, however, the argument for liability is stronger. This is not only a matter of monetary ceilings on the cost of coverage or forms of testing that are excluded by ordinary health insurance policies, but concerns the nature of monitoring itself. For example, when large numbers of individuals have been exposed to the risk of future harm, expensive epidemiological studies or unusual forms of testing may be advisable. Liability for these forms of damages seems far more appropriate, in part because they would otherwise be unreimbursed to the plaintiffs and might well not be affordable to the plaintiffs at all in the absence of liability.

In addition, such studies or special forms of testing may actually help to develop evidence that would resolve causal uncertainties in the event that any of the plaintiffs do suffer the form of harm that the defendant's conduct risked. Indeed, this is the very purpose of epidemiological inquiry, which by its very nature involves no real treatment or diagnosis and therefore no mitigation. Consequently, although such studies are likely to have no mitigation value, they may well lead to the development of evidence that is of use to

30 In certain cases, potential defendants themselves might find it in their interest voluntarily to pay for medical monitoring in order to mitigate potential plaintiffs' losses. See David Rosenberg, Individual Justice and Collectivizing Risk-Based Claims in Mass Exposure Cases, 71 N.Y.U. L. Rev. 210, 234–35 (1996). But defendants will not do so when the probability that they will subsequently be held liable for actual harm is too low to warrant making the investment in minimizing loss through medical monitoring.

21 A more far-reaching proposal is that defendants be subject to liability prima facie, even without proof of causation, if they have negligently failed to discover or disseminate substantial adverse information about their products. See Margaret A. Berger, Eliminating General Causation: Notes Towards a New Theory of Justice and Toxic Torts, 97 Colum. L. Rev. 2117 (1997).
some of the medical monitoring plaintiffs in their subsequent suits against the defendant for actual physical harm.

C. A Critical Mass of Plaintiffs

Perhaps the most significant difference between the mitigation and evidentiary development perspectives turns on whether there must be a critical mass of plaintiffs to support a medical monitoring claim. From the mitigation perspective, there is no reason to deny even a single plaintiff a cause of action for medical monitoring, assuming the other prerequisites are satisfied.

In contrast, from an evidentiary development perspective, the issue is more complex. It follows from the discussion above that unless a critical mass of persons has been exposed to the risk of future harm, the benefits of imposing liability for medical monitoring may well not be worth the cost of doing so. Without a sizable group of plaintiffs, it is much less likely that it will even be feasible to conduct the sort of special epidemiological studies or other forms of organized group monitoring that would not already be covered by conventional health insurance. It hardly seems sensible to create a special avenue of recovery for an individual or a few plaintiffs who merely seek recovery of the cost, for example, of semi-annual x-rays or routine blood testing.

It is no answer to this argument that because much of the cost of pursuing a medical monitoring claim will be incurred by the plaintiff or plaintiffs they should be free to decide whether a lawsuit is worth bringing. Defendants and the court system also incur costs in defending such actions, and sometimes those costs will not be proportional to the size of the plaintiff group. Certain defense costs—such as the expense of securing experts on generic causation or disproving breach of the applicable standard of care—are fixed at a fairly high minimum, and increase only slightly with an increase in the number of plaintiffs.

In any event, my point here is not simply that small costs are not worth big lawsuits. Rather, there is a logical connection between the requirements that there be both special monitoring costs and a critical mass of plaintiffs, on the one hand, and the possible responsibility of the defendant in a monitoring case for any actual physical harm that these plaintiffs ultimately suffer. From an evidentiary development perspective, the kinds of medical monitoring costs for
which a cause of action will be appropriate should be diagnostic and epidemiological studies that will help to determine whether the defendant's conduct is a cause in fact of any physical harm the plaintiffs eventually suffer. It is of course possible in particular cases that medical monitoring of only one or a few plaintiffs could generate such evidence, depending on the nature of the defendant's conduct and the nature of the disease or injury that this conduct risked causing. But the greater the number of plaintiffs the more feasible these kinds of studies are likely to be.

In fact, the very character of what has come to be called "toxic causation" is that the defendant is alleged to have increased a risk to the plaintiffs above a society-wide "background" rate; only when there is a critical mass of plaintiffs will evidence regarding the incidence of disease in these plaintiffs rise to the level of statistical significance that will support an inference that the defendant is the cause of the disease suffered by some portion of these plaintiffs. Indeed, perhaps the strongest argument for medical monitoring liability, when imposing such liability is appropriate, is that the defendant has created a situation in which issues of disease or injury causation may arise in the future. Because the defendant's conduct has created the need for such evidence, the defendant should be responsible for the costs of its collection. By the same token, however, from the evidentiary development perspective the defendant's liability should extend only to the costs of collecting this evidence—where the plaintiffs merely seek recovery of the cost of conventional preventative care, the evidentiary justification for medical monitoring liability runs out.

D. A Damages "Fund"

Even from the mitigation perspective the argument for payment of lump-sum damages to medical monitoring plaintiffs is not strong. Of course, in ordinary tort cases, plaintiffs recover lump-sum compensation for all past and future losses. What plaintiffs actually do with this money is properly left up to them, especially since a sizable portion of many awards is for non-economic, general damages rather than for out-of-pocket, or economic, loss. In any event, separating from the award the portion allocable to future economic loss and paying for such loss as it occurred is in most cases administratively infeasible, although some efforts at periodic
payment and structured settlement occasionally have attempted this task.

But once again, medical monitoring liability is different. All such liability compensates for economic loss only, and in most cases the lion's share of the award will be for future economic loss. The difficulty of identifying which portion of the award is for economic loss and then segregating that portion from the remainder is therefore completely absent. In the ordinary tort case this difficulty makes paying the entire award to the plaintiff the only feasible approach.

From the evidentiary development perspective the argument for payment of lump-sum damages is even weaker. To the extent that the justification for imposing liability for medical monitoring costs is that such monitoring will help develop evidence whose existence the defendant's conduct has made necessary, then it is crucial that the damages paid by the defendant be used for this purpose. In the ordinary tort case, money paid as compensation is fungible, so to speak, across different forms of consumption and saving by the plaintiff. In contrast, in the medical monitoring context there is no such fungibility. If the plaintiffs are permitted to use damages paid to them for medical monitoring costs in order to pay college tuition or take a vacation, the very purpose behind the imposition of liability is defeated.

Consequently, rather than paying damages directly to plaintiffs, the remedy in a successful medical monitoring suit in which evidentiary development is a principal aim should be imposition of liability on the defendant for the cost of creating a fund out of which future medical monitoring costs would be paid. Many of the courts recognizing a cause of action for medical monitoring costs have either required that such a fund be created or strongly favored this approach. Liability might be capped at the jury's estimate of the future cost of monitoring, or might be open-ended, with the defen-

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22 For discussion of this issue and references to the decisions that favor creation of a fund, see Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 424, 440–41 (1997). Of course, the requirement of a fund would apply only when there is a final judgment entered in favor of the plaintiffs in a medical monitoring case. There is little the courts or the law governing this body of law can do to affect what is done with settlements of such claims. While defendants could decline to pay lump-sums to plaintiffs in settlement of medical monitoring claims, there is no way short of legislation to prohibit lump-sum settlements, and even legislative prohibition would rest on questionable foundations.
dant being subject to the continuing jurisdiction of the court for a specified period of years, in the event that new diagnostic or other investigatory tools that would reasonably be of use in monitoring were developed. Correspondingly, at the close of the monitoring period, any monies remaining in the fund might be paid over to the plaintiffs or, alternatively, returned to the defendant. But however the questions of continuing liability and ownership of the residue are resolved, the proper remedy is the creation of a fund that will be definitely available when monitoring costs are incurred.

CONCLUSION

Liability for medical monitoring is here to stay. But at this stage in the development of this form of liability, it is a cause of action still in search of a fully coherent basis. I argue that medical monitoring may have one or both of two aims: mitigation of future loss or the development of evidence for use in subsequent litigation over the defendant's responsibility for actual harm. Given the widespread availability of health insurance to cover conventional monitoring costs, the courts should not be too quick to adopt a mitigation conception of monitoring liability. Rather, the evidentiary development conception should be given more serious consideration, both as a justification for imposing such liability in appropriate cases and as a limit on it when monitoring has little or no prospect of generating evidence that will be useful in subsequent litigation.