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# When Is a Tort Complete?

Courts address whether plaintiffs can assert claims without injury

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Duty, breach, causation and injury: These are the traditional elements of a tort claim. Thus, under customary theories, a tort is inchoate unless and until the plaintiff suffers actual injury. For example, a plaintiff who has an increased risk of disease because she has been exposed to a defective product, but no manifest illness, would have no cause of action. Faced with this quandary, plaintiffs have resorted to novel claims and theories. They have argued, for instance, that recovery should be allowed for increased risk of future disease or for emotional distress.

A frequent claim by plaintiffs in these circumstances is that the defendant is liable for medical expenses necessary to monitor the plaintiff's health. The claim has been allowed by some courts, even when the plaintiff has suffered no physical injury. Other courts have rejected the claim on the ground that the mere possibility that the plaintiff will contract an illness in the future does not meet traditional requirements. Recent decisions in cases involving claims for medical monitoring by courts in Mississippi, New Jersey and Oregon illustrate different approaches to these claims.

In *Pax v. Brush Engineered Materials, Inc.*, 2007 WL 14891 (Miss.), the Mississippi Supreme Court embraced traditional

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tort principles and rejected plaintiffs' claims for medical monitoring. Plaintiffs claimed to have been exposed to beryllium, but did not suffer from any current illness. Rather, they sought to recover the costs of monitoring for the possible future development of chronic beryllium disease.

The court held that in the absence of a current physical injury, plaintiffs had no cause of action. The court declared: "The possibility of a future injury is insufficient to maintain a tort claim." It rejected plaintiffs' efforts to analogize their claim to one for emotional distress, noting that a claim for emotional distress does require a showing of injury. The court concluded that its ruling "preserves the requirement of each of the traditional tort elements ..."

Like the Mississippi Supreme Court, an Oregon appeals court also recently rejected a claim for medical monitoring. But the Oregon court stated that its holding was a narrow one. The ruling hints that a claim for medical monitoring might be allowed in different circumstances. In *Lowe v. Philip Morris*



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*USA, Inc.*, 207 Ore. App. 532 (Or. 2006), the plaintiff was a cigarette smoker who did not claim to suffer from a current illness; she alleged that she had an increased risk of developing a future injury and sought recovery medical monitoring and treatment for smoking cessation. The court affirmed the trial court's ruling dismissing the complaint. Although plaintiff claimed that she had a "significantly increased risk of developing lung cancer," the court observed that she did not claim that her risk of future harm was "all but certain" or even probable.

The court concluded that allowing a claim "for a mere increase in the possibility of future harm" would be inconsistent with the "fundamental premise" of Oregon law "that the plaintiff must have suffered actual, physical harm." According to the court, actual physical harm "is the sine qua non of negligence liability."

The court went on to express concern that allowing a claim for increased risk of future harm would create liability that was "virtually limitless," and that there would be "no basis on which to separate spurious or speculative claims from legitimate ones." Nevertheless, the court left open whether a claim based on "different allegations as to the risk of future harm" might be allowed.

Finally, a New Jersey appeals court recently ruled that it was premature to dismiss plaintiffs' claims for medical monitoring without discovery and an evidentiary hearing. In *Sinclair v. Merck*, 389 N.J. Super. 493, plaintiffs claimed that they had an increased risk of myocardial infarction due to their use of Vioxx but claimed no present injury. They sought to require the establishment of a medical screening program to provide diagnostic testing for latent injuries.

The trial court granted defendants' motion to dismiss, ruling that although claims for medical monitoring had been recognized in the toxic tort context, the claim did not extend to the current action.

The trial court also ruled that a manifest injury was a

necessary prerequisite to plaintiffs' claims.

The appellate court reversed. It ruled that the claim should not have been dismissed on the pleadings and that discovery was needed to address the merits of the claim. The court acknowledged that evidence of current injury is required in some circumstances under New Jersey law, but suggested that this requirement did not necessarily apply where the plaintiff claimed direct exposure to the product and it was possible to assess the existence, dose and duration of the exposure.

The court refused to adopt a bright-line rule requiring the existence of a manifested disease for the maintenance of plaintiffs' claims. Rather, the court said, it was necessary to determine what relief "is reasonable and necessary in the circumstances, bearing in mind that the remedy sought by plaintiffs cannot be 'easily invoked.'" That determination could not be made, the court said, on "bare pleadings." The court remanded the matter for discovery and an evidentiary hearing.

In connection with claims for medical monitoring, courts have taken a variety of approaches to the requirement that a plaintiff must exhibit an actual injury to recover on a tort claim. In some cases the requirement has been strictly applied; other courts have shown a willingness to overlook the requirement, depending on the nature of the particular case. Undoubtedly, plaintiffs will continue to attempt to make use of the claim. Thus, courts will inevitably need to consider the concerns expressed by the Oregon court in *Lowe* and others: Claims without injury have the potential to create liability that is "virtually limitless." Moreover, there may be "no basis on which to separate spurious or speculative claims from legitimate ones."

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