

## Medical Monitoring in Louisiana

In *Bourgeois v. A. P. Green Industries, Inc.*<sup>1</sup> the Louisiana Supreme Court held asymptomatic plaintiffs, who have had significant occupational exposure to asbestos may recover the costs of medical monitoring to detect the effects of that exposure if certain criteria are met. The court of appeal affirmed the trial court's finding that plaintiffs, who did not allege any present physical ailments attributable to asbestos exposure, failed to allege damage pursuant to Louisiana Civil Code Article 2315 and thus had no cause of action. The Supreme Court held that a plaintiff who can demonstrate a need for medical monitoring abased on seven factors<sup>2</sup> which provide "substantial evidentiary burdens" has suffered damage in the form of costs required to pay for this care, and thus remanded the case to permit plaintiffs the opportunity to amend their petition to allege facts sufficient to state a cause of action.<sup>3</sup> *Bourgeois*<sup>4</sup> shows that medical monitoring claims, along with increased risk claims, can accompany more traditional remedies as plaintiffs injured by toxins access our courts.<sup>5</sup>

Courts have long recognized the right to be awarded damages for diagnostic testing, usually as an element of future medical damages, when trauma occurred and a physician testified it was recommended.<sup>6</sup> Louisiana courts have also allowed medical monitoring damages in toxic suits, without holding medical monitoring was an independent legal right, when competent expert testimony has shown the plaintiff to be at an increased risk for contracting leukemia or cancer.<sup>7</sup> In these cases the plaintiffs had an underlying physical injury which accompanied the increased risk.

But what of the case where there is no present physical injury but an increased risk of disease or damage as a result of trauma or toxic exposure? This is what *Bourgeois* addresses. The keystone case authorizing recovery for medical monitoring without physical injury is *Friends For All Children, Inc. v. Lockheed Aircraft Corp.*<sup>8</sup> The suit was filed on behalf of over 100 Vietnamese orphans who survived a plane crash and claimed neurological developmental disorders but displayed no symptoms of the disorder. The court recognized their increased risk of brain damage as a result of the crash created a need for diagnostic testing and approved the establishment of a fund for diagnostic testing. The court posed the following hypothetical to illustrate the need for medical monitoring:

"Jones is knocked down by a motorbike when Smith is riding through a red light. Jones lands on his head with some force . . . Jones enters a hospital where doctors recommend that he undergo a battery of tests to determine whether he has suffered any internal head injuries. The tests prove negative, but Jones sues Smith . . . for . . . the substantial cost of the diagnostic examinations. . . The motorbike rider, through his negligence, caused the plaintiff, in the opinion of medical experts, to need specific medical services . . .

The court reasoned that a plaintiff's liability for medical bills will be the same regardless of whether a physical injury manifests itself, thus, it makes little sense to compensate one plaintiff and not the other. So as long as a plaintiff can demonstrate the need for medical testing arising from defendant's tortious conduct, it logically follows that the defendant should make the plaintiff whole by paying the cost of these examinations.

Louisiana joined other state supreme courts that have faced this issue since *Friends For All Children* authorized recovery for medical monitoring in the absence of physical injury, albeit with varying conditions for recovery.<sup>9</sup>

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<sup>1</sup> 716 So.2d. 355, 1997-3188 (La. 7/8/98), *rehearing denied*, 783 So.2d 1251, 2000-1528 (La. 4/3/01).

<sup>2</sup> (1) Significant exposure to a proven hazardous substance. (2) As a proximate result of this exposure, plaintiff suffers a significant increased risk of contracting a serious latent disease. (3) Plaintiff's risk of contracting a serious latent disease is greater than (a) the risk of contracting the same disease had he or she not been exposed and (b) the chances of members of the public at large of developing the disease. (4) A monitoring procedure exists that makes the early detection of the disease possible. (5) The monitoring procedure has been prescribed by a qualified physician and is reasonably necessary according to contemporary scientific principles. (6) The prescribed monitoring regime is different from that normally recommended in the absence of exposure. (7) There is some demonstrated clinical value in the early detection and diagnosis of the disease.

<sup>3</sup> The factors upon which the cause of action may be based were cobbled together from common law claims for monitoring recognized in *Redland Soccer Club, Inc. v. Department of the Army*, 548 Pa. 178, 696 A.2d 137 (Pa. 1997); *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4<sup>th</sup> 965, 25 Cal.Rptr.2d 550, 863 P.2d 795 (cal. 1993); and *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970 (Utah 1993).

<sup>4</sup> *Bourgeois* may not be that helpful a paradigm for plaintiff recovery of medical monitoring if the seventh factor ("There is some demonstrated clinical value in the early detection and diagnosis of the disease") is maintained and strictly construed. See Chief Justice Calogero, occurring at \*\*6, and *Redland Soccer Club, Inc. v. Department of the Army*, 548 Pa. 178, 696 A.2d 137, 146 n.8 (Pa. 1997). Why should plaintiff bear the burden to keep abreast of advances in medical science?

<sup>5</sup> An overview of policies and purposes behind these remedies is provided in Keith W. Lapeze, *Recovery For Increased Risk of Disease in Louisiana*, 58 Louisiana Law Review 249 (Fall 1997).

<sup>6</sup> *Davis v. Sewerage and Water Board of New Orleans*, 555 So.2d 664 (La.App. 4<sup>th</sup> Cir. 1989); *Lanclos v. Hartford Accident & Indemnity Co.*, 366 So.2d 621 9La.App. 3<sup>rd</sup> Cir. 1978).

<sup>7</sup> *Manuel v. Shell Oil Co.*, 94-590 (La.App. 5<sup>th</sup> Cir. 10/18/95), 664 So.2d 47; *Jeffery v. Thibaut Oil Co.*, 94-851 (La.App. 5<sup>th</sup> Cir. 3/1/95), 652 So.2d 1021.

<sup>8</sup> 746 F.2d 816 (D.C. Cir. 1984).

<sup>9</sup> *Redland Soccer Club, Inc. v. Department of the Army*, 548 Pa. 178, 696 A.2d 137 (Pa. 1997); *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4<sup>th</sup> 965, 25 Cal.Rptr. 2d 550, 863 P.2d 795 (Cal. 1993); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970 (Utah 1993); *Ayers v. Township of Jackson*, 106 N.J. 557, 525 A.2d 287 (N.J. 1987).

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