Implications of Amending Civil Code Article 2315 on Toxic Torts in Louisiana

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I. INTRODUCTION

During its 1999 session, the Louisiana Legislature amended and re-enacted Civil Code article 2315, which is sometimes referred to as the "fountainhead" of tort law in Louisiana. The revised article contains a new provision, which states:

"Damages do not include costs for future medical treatment, services, surveillance, or procedures of any kind unless such treatment, services, surveillance, or procedures are directly related to a manifest physical or mental injury or disease."

The legislature explained its intent in passing the amended article by stating that the Act is "interpretative of Civil Code article 2315" and explains its "original intent," notwithstanding the Louisiana Supreme Court's decision in Bourgeois v. A.P. Green Industries, Inc. In Bourgeois, the court recognized medical monitoring as a type of damages recoverable under Civil Code article 2315. The revision seems clearly aimed at eliminating medical monitoring as a viable element of damages recoverable in Louisiana. The legislature's anticipated ends, however, may not match its perceivable means.

This comment will focus on the development of medical monitoring claims, specifically in toxic tort law, nationally and in Louisiana under the previous Civil Code article 2315. Further, it will discuss the actual language of the amended article and the future impact of the 1999 revision on medical monitoring claims under Louisiana law. Finally, it will show that under certain circumstances, a claim for medical monitoring is still possible despite the legislature's attempt to exclude it as a form of recovery for plaintiffs.

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1. The prior version of Louisiana Civil Code Article 2315 (1986) states:
   Every act whatever of man that causes damage to another obliges him by whose fault it happens to repair it.
   Damages may include loss of consortium, service, and society, and shall be recoverable by the same respective categories of persons who would have a cause of action for wrongful death of an injured person.
4. Id.
5. 716 So. 2d 355 (La. 1998).
6. Id. at 360.
Generally, "toxic tort" litigation encompasses a broad array of cases that stem from the release of and exposure to substances containing harmful toxins. Damages may consist of personal injuries, both physical and mental, and property damage caused by exposure to substances such as asbestos, pesticides, hazardous waste, radiation, and chemical compounds. A unique characteristic of toxic tort personal injury cases is the absence of traumatic injury to the victim. Instead, exposure to toxins generally leads to diseases of "uncertain etiology," often associated with long latency periods and various symptomatic difficulties such as allergies, fatigue, dizziness, cramping, learning disabilities, and cardiac problems.

The toxic tort arena is replete with potential problems for attorneys and the courts. Issues such as proof problems (including lost evidence and background disease), class certification in class action suits, and admission of expert or medical testimony are common. The most difficult of these problems is that of proving causation.

A. Causation

In an ordinary tort case, the plaintiff has the burden of proving the causal connection between the defendant's product and the resulting injury. However, in toxic tort cases, proof of causation rarely consists of a "direct explanation of a causal process." The scientific community does not yet fully comprehend the biological mechanisms that produce birth defects and illnesses, such as the cancers and auto-immune diseases for which plaintiffs seek compensation after exposure. In addition, exposure to the defendant's products often cannot be shown to be a necessary cause of the particular disease. In most instances, the adverse health effects for which plaintiffs seek compensation are also found in others who have not been exposed to the substance or product in question. Because this "background" rate exists, it is almost impossible to tell whether any individual

8. Id.
13. Id. at 2121.
14. Id.
plaintiff's injury is attributable to the exposure or whether it would have manifested itself even absent the exposure. Therefore, plaintiffs are often required to produce scientific evidence from which a probability based inference can be drawn. They attempt to show the substance in question is capable of causing the health effects suffered and then establish that the exposure to the defendant's product is the cause of their injury.

B. Evidentiary Problems

"Because causation is an essential element of liability, evidentiary disputes relating to proof of general causation are often the most hotly contested issues in toxic tort litigation." Plaintiffs often have to rely on scientific evidence to prove a causal connection between the exposure and injury. Epidemiological and non-traditional evidence have become the primary sources of proof by plaintiffs and defendants trying to prove, or refute, a "legally cognizable relationship between the substance and the injury claimed." Statistical comparisons between exposed and unexposed populations having a particular disease, or comparisons of characteristics of persons having a particular disease with those of persons without that disease, are commonly employed evidentiary techniques in toxic tort litigation. This confluence of law and science led to some debate over the admissibility of what some call "junk science," a phrase used to describe novel or unsubstantiated scientific theories often used to confuse courts and persuade juries. This issue was addressed by the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc. In Daubert, the Court articulated the standard for the admissibility of scientific expert testimony. The Court listed several factors that a trial court should examine to determine whether a scientific expert's testimony rests on a reliable foundation. The Court emphasized that the inquiry envisioned by Federal Rule of Evidence 702 is a "flexible one." However, in a phrase commonly repeated by courts in the wake of Daubert, the Supreme Court stated that federal trial courts are to serve as "gatekeepers" to

17. Id.
18. Id.
19. Id.
20. Id.
22. These factors included empirical testing of the scientific theory or technique, subjecting the scientific theory or technique to peer review and publication, the known or potential error rate of the particular scientific technique, and the acceptability of the technique in the relevant scientific community. Id. at 593-94, 113 S. Ct. at 2796-97.
23. Fed. R. Evid. 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.
ensure that scientific evidence is both relevant and reliable.25 Louisiana has followed the Supreme Court’s lead by adopting this test as the appropriate standard for admitting such evidence at the state level.26

III. MEDICAL MONITORING

The problems in developing a toxic tort case under a traditional tort analysis, along with the significant number of claims that appear in this area as well as the legislative silence on these issues, have forced courts in the United States to develop and utilize new, novel causes of action.27 The remainder of this comment will focus on these alternatives, specifically medical monitoring claims, a jurisprudential creation which has gained wide acceptance during the past two decades.

A. The Development of Medical Monitoring

A claim for “medical monitoring”28 can be defined as a remedial mechanism awarded to plaintiffs for recovery of periodic medical examinations used to detect latent disease or disorder caused by the defendant’s negligent conduct.29 The objective is to foster early diagnosis and treatment for such diseases or disorders, thus mitigating any possible damage to victims of exposure.30 This judicially-created solution has gained wide acceptance over the past two decades, and many courts are recognizing it as a valid, separate cause of action.31

Although medical monitoring had been mentioned in several cases,32 the seminal case explicitly laying out the basis for recovery was Friends For All

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25. See Dinkins & Murphy, supra note 7.
27. The main theories of recovery cited by the courts are medical monitoring, increased risk of disease, and fear of contracting disease, including "cancerphobia."
28. This section will focus on medical monitoring claims being brought under state, not federal, law. Toxic tort cases sometimes include claims under CERCLA, FELA, RCRA, OSHA, OPA, CWA, CAA, or other federal statutes. There have been some federal court decisions that would allow for recovery of medical monitoring costs in limited situations. See, e.g., Cook v. Rockwell Int'l Corp., 755 F. Supp. 1468, 1474 (D. Colo. 1991); Brewer v. Raven, 680 F. Supp. 1176, 1179 (M.D. Tenn. 1988). However, recent decisions have not recognized a cause of action to recover these costs for private citizens under these laws. See, e.g., Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 424, 117 S. Ct. 2113 (1997); Hanford Downwinders Coalition, Inc. v. Dowdle, 71 F.3d 1469 (9th Cir. 1995); Durfee v. E.I. du Pont de Nemours Co., 59 F.3d 121 (9th Cir. 1995); Pritikin v. U.S. Dep't of Energy, 47 F. Supp. 2d 1225 (E.D. Wash. 1999).
30. Id.
Children, Inc. v. Lockheed Aircraft Corp. Interestingly, this case did not involve a toxic tort. Instead, the litigation arose out of the crash of a Lockheed aircraft attempting to evacuate Vietnamese orphans from Saigon in 1975. Although the court denied recovery for the victims' increased risk of serious brain damage, it did recognize medical monitoring as a valid theory of recovery in the District of Columbia. The court required the defendants to pay money into a court-supervised fund that was to be used to pay for future diagnostic examinations for the plaintiffs. The decision was grounded on "equitable principles," thus failing to articulate a workable standard for subsequent cases to follow.

Numerous jurisdictions, both state and federal, have followed the groundwork laid by Lockheed Aircraft. Despite the widespread acceptance of medical monitoring as a valid theory of recovery, courts around the country have varied as to the requisite degree of injury needed before recovery is allowed. Some courts have required a showing of actual and present injury, while others have only required proof of exposure before awarding damages. Likewise, a distinct set of criteria that could be used to determine when recovery of monitoring costs is proper remained absent following Lockheed Aircraft.

In 1987, the New Jersey Supreme Court became the first court to articulate a workable standard in awarding medical monitoring damages in the case of Ayers v. Township of Jackson. In Ayers, the plaintiffs brought suit to recover damages for injuries sustained from drinking well water that was contaminated by pollutants from the defendant's landfill. No specific illness or disease resulting from the exposure was alleged, but the plaintiffs did seek recovery for medical monitoring expenses. In granting the plaintiffs a substantial recovery for medical surveillance costs, the court identified criteria that needed to be met before this compensation could be awarded. These requirements included: (1) a significant and extended exposure to chemicals, (2) toxicity of the chemicals, (3) seriousness of the health problem, (4) cost of monitoring, and (5) lack of other compensatory mechanisms.

33. 746 F.2d 816 (D.C. Cir. 1984).
34. Id. at 818. The plaintiffs in this case were a group claiming to be the legal guardians of the Vietnamese orphans injured in the accident. They alleged that, as a result of the crash and decompression of the troop compartment, the children suffered from a neurological disorder referred to as Minimal Brain Dysfunction ("MBD"). Id. at 819.
35. Id. at 826.
36. Id. at 838.
37. Id.
38. See supra note 31.
40. See, e.g., Ball v. Joy Technologies, Inc., 958 F.2d 36 (4th Cir. 1991). The Fourth Circuit, applying West Virginia and Virginia state law, held that exposure without a physical injury is insufficient to recover medical monitoring damages. Id. at 39. See also, Mergenthaler v. Asbestos Corp. of Am., 480 A.2d 647 (Del. 1984).
42. 525 A.2d 287 (N.J. 1987).
43. Id. at 291.
44. Id. at 292.
45. The court awarded $15,854,392 in damages, including a court-supervised fund of $8,200,000 for medical monitoring.
of the disease for which the plaintiffs are at risk, (4) a relative increase in chance of onset of the disease in those exposed, and (5) a showing of the value of early detection.\(^{46}\)

Six years later, the Utah Supreme Court added to the Ayers factors in Hansen v. Mountain Fuel Supply Co.\(^{47}\) In Hansen, the court listed eight requirements that a plaintiff must prove to recover monitoring costs:

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 contemporary scientific principles.\(^{48}\)

Furthermore, the court stated that proof of these elements usually requires expert testimony.\(^{49}\) The sole difference between this test and the Ayers test is the requirement of an increased risk of contracting a disease or illness.

### B. Medical Monitoring Under Louisiana Law

Louisiana was relatively late in joining other states in recognizing medical monitoring as a valid theory of recovery. Although some appellate courts allowed for this type of recovery in certain cases,\(^{50}\) it remained unclear if the medical monitoring was an independent legal harm or merely an element of damages. This potential dichotomy was eradicated in 1998 with the Louisiana Supreme Court's ruling in Bourgeois v. A.P. Green Industries, Inc.\(^{51}\) In Bourgeois, the plaintiffs filed a class action in which they alleged that the defendants had negligently exposed them to products containing asbestos.\(^{52}\) They sought a judgment to establish a judicially-administered fund to cover the costs of periodic medical monitoring.\(^{53}\) The court, after reviewing the law in Louisiana and other states, held that the reasonable costs of medical monitoring was a "compensable item under Civil Code article 2315."\(^{54}\) Relying heavily on the Utah Supreme Court's decision

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46. Ayers, 525 A.2d at 312.
47. 858 P.2d 970 (Utah 1993).
48. Id. at 979.
49. Id. at 979 n.10.
50. See, e.g., Manuel v. Shell Oil Co., 664 So. 2d 470 (La. App. 5th Cir. 1995); Jeffery v. Thibaut Oil Co., 652 So. 2d 1021 (La. App. 5th Cir. 1995).
51. 716 So. 2d 355 (La. 1998).
52. Id. at 356.
53. Id. at 357.
54. Id. at 360.
in *Hansen*, the court articulated seven criteria that must be met in order for a plaintiff to recover monitoring costs. These requirements include:

1. Significant exposure to a proven hazardous substance;
2. As a proximate result of this exposure, plaintiff suffers a significantly 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; and
7. There is some demonstrated clinical value in the early detection and diagnosis of the disease.56

In following the national trend to recognize medical monitoring as an independent, compensable harm, the court made a clear policy decision in line with that expressed in *Lockheed Aircraft* and *Hansen*.

C. Policy Concerns in Awarding Medical Monitoring Damages

Despite their growing acceptance throughout the country, medical monitoring claims have been the subject of some criticism in both the courts and legal commentaries. In 1997, the United States Supreme Court expressed its concern in recognizing tort actions in the form of medical monitoring in *Metro-North Commuter Railroad Co. v. Buckley*.56 In *Buckley*, the Court rejected the plaintiff's claim for medical monitoring damages under the Federal Employers' Liability Act (FELA). It held that these claims were premature until the plaintiff manifests symptoms of a disease or injury.57 In the opinion, the Court addressed several policy concerns which accompany medical monitoring claims. First, the Court articulated the difficulty for judges and juries in identifying which medical tests are needed to detect exposure related diseases.58 Second, it noted the possibility of a flood of litigation and "unlimited and unpredictable liability" for defendants if medical monitoring claims are allowed without proof of an injury.59 Finally, the Court expressed the need to explore alternative sources of payment, so-called

55. Id. at 360-62.
57. It should be noted that the plaintiff in this case was seeking a lump-sum award for future medical costs, a possibility criticized by many courts which allowed medical monitoring claims without a present injury. See id. at 440-41, 117 S. Ct. at 2122.
58. Id. at 441, 117 S. Ct. at 2123.
59. Id. at 442, 117 S. Ct. at 2123.
"collateral sources" from employers or insurance, instead of recognizing a "traditional, full-blown ordinary tort liability rule."\(^{60}\)

Although the Louisiana standard articulated in the Bourgeois decision addressed some of these concerns, several questions remained unanswered. The first of these problems was the method of awarding medical monitoring damages under Louisiana law.\(^{61}\) Generally, medical monitoring damages can be recovered in several ways. The two most common types of awards are lump-sum payments to offset future medical costs, and judicially-administered funds which compensate plaintiffs only for those costs actually incurred. Each of these awards does have potential problems. With a lump sum award, plaintiffs can spend their award as they see fit, without any obligation that it be used for its intended purpose.\(^{62}\) "Mass exposure toxic tort cases involve public interests not present in conventional tort litigation," namely the encouragement of regular monitoring for victims of toxic exposure.\(^{63}\) Some restrictions on the use of money paid to plaintiffs seem necessary to help achieve this goal.\(^{64}\) A possible solution to this problem is judicially administered or supervised funds. Under this system, courts would be responsible for administering medical surveillance payments to compensate for medical examinations and tests actually administered.\(^{65}\) The drawback to this method of disbursement is that it could potentially require the courts to perform a much more active role in the litigation, even years after the conflict has been settled.

Another potential problem left unresolved after the Bourgeois decision was the quantification of the criteria listed by the court. For example, the court required "significant exposure to a proven hazardous substance." This begs the question: How much exposure is "significant"? Furthermore, how much of an increase is a "significantly increased risk"? The opinion does not offer any workable standards or solutions. It seems self-evident that the vagueness of the word "significant," in either context, would lead to a great deal of litigation. Some sort of objective criteria is needed to aid courts in determining what "significant" entails.

Finally, as a practical matter, insurance coverage for persons producing or handling potentially harmful substances becomes extremely difficult to calculate if one must factor in the possibility of paying future medical bills of potential plaintiffs for years to come. One commentator writes,

> The number of persons who may be exposed to the risk of injury or property damage by an environmental hazard is far less determinable than the number that actually suffer injury; the amount of compensation that

\(^{60}\) The Court cited 29 CFR §1910.1001(1)(1996), which requires employers to provide medical monitoring for workers exposed to asbestos, as an example. \textit{Id.} at 443, 117 S. Ct. at 2123.

\(^{61}\) Although the Buckley court addressed this problem directly, the Bourgeois court avoided this issue because the plaintiffs asked specifically for a court-supervised fund. It chose not address whether a lump-sum award of damages is recoverable under Louisiana law. \textit{Bourgeois}, 716 So. 2d at 357 n.3.


\(^{63}\) \textit{Ayers v. Township of Jackson}, 525 A.2d. 287, 314 (N.J. 1987).

\(^{64}\) \textit{Id.}

\(^{65}\) \textit{Id.} at 313-14.
would be awarded on a risk-only basis would be uncertain and probably unstable for a long period; and refuting claims of risk exposure would be difficult and expensive for insurers defending against such claims.\textsuperscript{66}

Potential liability for medical monitoring costs may be sufficiently "open-ended" to further uncertainty in this market.\textsuperscript{67}

On the same token, some commentators have suggested that medical monitoring costs may be unnecessary for plaintiffs with adequate health coverage.\textsuperscript{68}

If a plaintiff's monitoring costs are already covered by an individual or employer's health plan, there is a question of whether the "collateral source rule" will apply.\textsuperscript{69}

Under this rule, plaintiffs receiving benefits from health or medical insurance, disability insurance, workers' compensation, or government benefits are not deducted from the amount owed by the tortfeasor because these payments were not supplied by that party.\textsuperscript{70} This may allow for double recovery in some circumstances.\textsuperscript{71}

IV. REVISI\textbf{NG LOUISIANA LAW WITH REGARD TO MEDICAL MONITORING}

Only one year after the Louisiana Supreme Court's decision in Bourgeois, the Louisiana Legislature felt it necessary to address the issue of medical monitoring directly. The policy concerns, seen in Part III of this comment, certainly seem to be the controlling factors leading to amending Louisiana Civil Code article 2315. In order to analyze how the amended article will affect the rulings of Louisiana courts in this area, a detailed examination of the added language is necessary.

A. The Revised Language of Louisiana Civil Code Article 2315

The new provision of Article 2315 addresses only the award of a specific type of damages. The added language to the statute reads:

\begin{quote}
Damages do not include costs for future medical treatment, services, surveillance, or procedures of any kind unless such treatment, services, surveillance, or procedures are directly related to a manifest physical or mental injury or disease.\textsuperscript{72}
\end{quote}

\begin{itemize}
\item \textsuperscript{66} Kenneth S. Abraham, \textit{Environmental Liability and the Limits of Insurance}, 88 Colum. L. Rev. 942, 973 (1988).
\item \textsuperscript{67} Id.
\item \textsuperscript{69} Victor E. Schwartz et al., \textit{Medical Monitoring: Should Tort Law Say Yes?}, 34 Wake Forest L. Rev. 1057, 1078 (1999).
\item \textsuperscript{70} Id.
\item \textsuperscript{71} Double recovery can be avoided by health insurers in some cases by providing that the insurer is to be subrogated to the insured's tort claim. See John W. Wade et al., \textit{Prosser, Wade, and Schwartz's Cases and Materials on Torts} 522 (9th ed. 1994).
\item \textsuperscript{72} See 1999 La. Acts No. 989.
\end{itemize}
Therefore, the issues of causation, admission of expert or medical testimony, and problems of proof including long latency periods, lost evidence, and background disease, remain in accordance with prior jurisprudence. The amendment only excludes recovery of costs for “future medical treatment, services, surveillance, or procedures.” This language seems to be referring to a pure medical monitoring recovery, one that does not include any actual injury. In Bourgeois, the supreme court did not require any physical or mental injury to be present in order for a plaintiff to recover medical monitoring costs. Plaintiffs were required to show an “increased risk of contracting a serious latent disease,” but not actual injury.\(^7\) Furthermore, the court failed to define this increased risk requirement with any specificity.\(^7\) The wording of the new provision seems to be speaking directly to this decision, barring medical monitoring as a separate theory of recovery in the absence of manifest physical or mental injury.

However, the second part of the article does provide an exception to this general rule. Future monitoring costs can still be recovered if plaintiffs can show that these costs are “directly related to a manifest physical or mental injury or disease.”\(^7\) The main issue in these cases now becomes: What must plaintiffs show to satisfy the requirement of a “manifest physical or mental injury or disease”? One possible interpretation of the statute is to construe the language strictly, limiting recovery only to injuries that physically “manifest” themselves immediately after exposure. Physical harm, such as dermal, muscular, neurological, or circulatory damage, would be sufficient to allow for future monitoring. A factual scenario, as seen in Anderson v. Welding Testing Laboratory, Inc.,\(^7\) helps to illustrate this result. In Anderson, the plaintiff suffered burns from handling a radioactive “pill” on the defendant’s premises.\(^7\) At the time of suit, Mr. Anderson did not have any sickness that could be attributed to his injury. Under the Bourgeois rationale, he would be able to recover for future medical costs to monitor his condition because the material he handled was known to cause cancer.\(^7\) Likewise, under the revision, this exposure and the resulting injury would allow him to recover these costs. Without an actual physical injury, however, the anxiety, mental anguish, or symptomatic problems suffered by the plaintiff might be inadequate to allow for recovery of future monitoring expenses.\(^7\)

This conclusion leads to harsh results.

\(^73\). Bourgeois v. A. P. Green Indus., Inc., 716 So. 2d 355, 360 (La. 1998).
\(^74\). Id.
\(^75\). It is interesting to note that in the original version of the bill, the word “reasonably” was used instead of “directly.” See H.B. 1784, Reg. Sess. (La. 1999).
\(^76\). 304 So. 2d 351 (La. 1974).
\(^77\). Id. at 352.
\(^78\). Id. at 353.
\(^79\). This interpretation would be consistent with the Fourth Circuit’s decision in Ball v. Joy Technologies, Inc., 958 F.2d 36 (4th Cir. 1991). See supra text accompanying note 39. It should be noted that the West Virginia Supreme Court declined to follow this interpretation of West Virginia law by the Fourth Circuit. See Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424 (W.Va. 1999).
B. Alternative Causes of Action to Mitigate a Narrow Interpretation of the Revised Article

Diseases such as cancer, which may result from exposure to toxic substances, often have long latency periods and may not develop until years after exposure. Under a narrow interpretation of the revision, a victim who is exposed to potential toxins, without developing any immediate disease or injury from the exposure, will have no recourse against the malefactor until he suffers an injury or manifests an illness. At that time, it is often too late to abate the disease or injury. In order to monitor for such disease or injury, the victim in these cases would be forced to pay for expensive diagnostic examinations, leading to potential injustice for economically disadvantaged persons. These tests could ensue for many years and cost the victim thousands of dollars before any disease is actually found. The lack of reimbursement would certainly deter some individuals from seeking regular medical surveillance, eliminating the beneficial effects of early detection and mitigation of serious future disease.

One might also inquire into problems with statutes of limitation. Generally, the plaintiff has a time limit in which to bring suit for his or her exposure caused by the negligence of the defendant. However, the Louisiana Supreme Court has adopted the “discovery” rule in Corsey v. State Department of Corrections. This doctrine delays the commencement of prescription until the plaintiff discovers or should discover his injury. Therefore, plaintiffs can wait until they actually contract a disease or injury before filing suit. Again, this does not offer much of a solution for exposure victims. First, the time period between exposure and disease may be many years, leading to evidentiary difficulties and possibly insolvent defendants. Second, as previously discussed, interim medical costs will have to be borne by victims, not the malefactors. Equity would seem to mandate that the negligent defendants be the ones to pay for these expenses, rather than the victims of the exposure.

Another consequence from a limited interpretation of the revised article is the possibility of courts recognizing and utilizing more novel causes of action to equitably compensate plaintiffs for exposure to potentially harmful substances. The two leading candidates to replace medical monitoring as the preferred method of recovery are increased risk of disease and fear of contraction.

1. Increased Risk of Disease

In increased risk cases, “plaintiffs who have no physical symptoms of disease, or who suffer from illness that may be the precursor to a second, more serious illness, seek to recover for the future risk of contracting the illness or disease.”

81. Ayers, 525 A.2d. at 311-12.
82. 375 So. 2d 1319 (La. 1979).
83. Id. at 1328.
84. Eggen, supra note 15, at 905.
Recovery for enhanced risk of disease is permitted in many states. However, the general rule is that a plaintiff must prove that the toxic exposure more probably than not will lead to the disease. In rejecting the plaintiffs' claim for increased risk of disease, the Rabb court noted that the plaintiffs had failed to "offer testimony precisely identifying the diseases for which they were allegedly at risk." Furthermore, citing South Carolina law, the court ruled that the plaintiffs failed to establish that they "most probably" would suffer from any of the unspecified diseases that they claimed might be suffered from in the future.

Consistent with Rabb, other courts have denied relief for the increased risk of contracting future injuries that have less than a reasonable probability of occurring, but they have enunciated the standard in different ways. Some courts require plaintiffs to show a "reasonable certainty" that the plaintiff will develop the illness. Others require a showing of a "reasonable medical probability" that they will develop the illness. These standards all seem to require that the plaintiff must present expert testimony that he has more than a fifty-percent chance of contracting the particular disease.

The Louisiana Supreme Court has remained silent on the subject of whether increased risk is a valid, independent harm under Louisiana law. However, the court did use increased risk as a prerequisite before awarding medical monitoring under Bourgeois. Several Fifth Circuit cases have indicated that recovery for increased risk is possible, but have set a very high burden of proof for such claims.

85. See Dinkins & Murphy, supra note 7.
87. Id. at 426 n.1.
88. Id.
92. But see, e.g., McCall v. United States, 206 F. Supp. 421, 426 (E.D. Va. 1962) (three to twenty-five percent chance of future epilepsy); Feist v. Sears, Roebuck & Co., 517 F.2d 675, 679 (Or. 1973) (chance of future meningitis "no more than a possibility"); Schwengel v. Goldberg, 228 A.2d 405, 409 (Pa. Super. Ct. 1967) (five percent chance of future epilepsy). It should be noted that each of these cases dealt with increased risk of injuries resulting from physical trauma, e.g. head injuries, not exposure to toxic materials. Their application may be limited to their facts in that respect.
94. See, e.g., Hagerty v. L & L Marine Serv., Inc., 788 F.2d 315, 318 (5th Cir. 1986) (a plaintiff can recover only where he can show that the toxic exposure more probably than not will lead to cancer); Adams v. Johns-Manville Sales Corp., 783 F.2d 589, 591-92 (5th Cir. 1986) (damages can be awarded only when sufficient evidence is presented that the plaintiff will develop cancer within a reasonable probability).
Commentators have heavily debated both sides of the issue, but the decision to recognize increased risk still remains to be determined by the high court of Louisiana.

2. Fear of Contracting Disease

Under this theory of recovery, the plaintiff seeks compensation for the emotional distress caused by the fear or knowledge that he or she may some day contract disease as a result of the exposure to toxic substances. Many courts characterize claims of this type as claims for either negligent or intentional infliction of emotional distress. Furthermore, as is the case with increased risk claims, courts differ on the applicable criteria in granting this type of relief. Most courts require some variation of the following:

1. Plaintiff was exposed to a disease-causing agent or substance;
2. Defendant is legally responsible for plaintiff’s exposure to the disease-causing agent or substance;
3. Plaintiff is currently suffering, or has suffered, from emotional distress associated with the fear of contracting a future disease;
4. The fear was proximately caused by exposure to a disease-causing agent or substance; and
5. Plaintiff’s fear of contracting the disease from the exposure is reasonable.

In addressing fear of contraction claims, some jurisdictions apply a “rational basis” test, in which the plaintiff must prove the existence of real danger of contracting the disease as a prerequisite for recovering mental distress damages. The rational basis test is more favorable to the defendant because the plaintiff has the burden of proving that the environmental exposure in question poses an actual risk to his or her health.

95. See Keith W. Lapeze, Comment, Recovery for Increased Risk of Disease in Louisiana, 58 La. L. Rev. 249 (1997) (advocating increased risk as a separate, compensable harm in Louisiana). But see also, David P. C. Ashton, Comment, Decreasing the Risks Inherent in Claims for Increased Risk of Future Disease, 43 U. Miami L. Rev. 1081 (1989) (calling increased risk a “phantom remedy” because of the difficulty of proving causation by a preponderance of the evidence).

96. Carol E. Dinkins & Lewis C. Sutherland, Overview: Recent Trends and Developments in Environmental and Toxic Tort Litigation, SB73 ALI-ABA 261, 280 (1997).


98. See, e.g., Sterling v. Velsicol Chemical Corp., 855 F.2d 1188 (6th Cir. 1988); Hagerty v. L&L Marine Services, Inc. 788 F.2d 315 (5th Cir. 1986); Plummer v. United States, 580 F.2d 72 (3d Cir. 1978); Howard v. Mt. Sinai Hospital, Inc., 217 N.W.2d 383 (Wis. 1974), aff’d on reh’g, 219 N.W.2d 576 (Wis. 1974).

Another test used in some jurisdictions is the “reasonable fear” test. The “reasonable fear” test is based on community standards rather than scientific reality. The plaintiff’s fear is considered reasonable so long as the jurors, as representatives of the community, perceive the danger as legitimate. The “reasonable fear” test is advantageous to the plaintiff since it does not require proof of an actual risk.

Although the Louisiana Supreme Court has found that the fear of contracting a disease is a compensable harm under Louisiana law, it has yet to offer a definitive standard by which these damages can be recovered. Lower courts have followed modifications of both the “rational basis” and “reasonable fear” tests. The Fifth Circuit, however, delineated a standard for these claims in Hagerty v. L & L Marine Services, Inc. In Hagerty, the court listed three elements required to recover for fear of contracting a disease: (1) a fear that is causally related to the defendant’s negligence; (2) the fear must be reasonable; and (3) there must be an actionable injury. Although this was a federal question, decided by the Fifth Circuit, it has been cited with approval by numerous Louisiana courts.

In its opinion in Vallier v. Louisiana Health Systems, the Louisiana Third Circuit Court of Appeal applied a fact-based test to see if a victim exposed to HIV could recover for emotional distress without a physical injury. The court applied Moresi v. State Department of Wildlife & Fisheries, which held that an emotional distress action without physical injury must present the “especial likelihood of genuine and serious mental distress, arising from special circumstances, which serves as a guarantee that the claims is not spurious.” Because the factual circumstances in the case were such that the plaintiff’s distress was reasonable, she was able to proceed with her suit on remand. This case, in utilizing Moresi, presents somewhat of an objective standard in deciding the validity of emotional distress actions, and could be extended to most fear of disease cases by courts in the future.

100. See Ferrara v. Galluchio, 152 N.E.2d 249 (N.Y. 1958) (reasonable to fear cancer because of trauma despite lack of testimony to prove that point); Johnson v. West Virginia Univ. Hosp., Inc., 413 S.E.2d 889 (W. Va. 1991) (reasonable to fear AIDS without proving likelihood of infection).
102. Id.
104. 788 F.2d 315 (5th Cir. 1986).
105. Id. at 318.
108. 567 So. 2d 1081 (La. 1990).
109. Vallier, 722 So. 2d at 420.
3. Lilley v. Board of Supervisors of Louisiana State University

As stated above, Louisiana courts have begun to allow recovery for such claims as fear of contraction and increased risk of disease. The lack of clear standards seems to render these causes of action attractive to sympathetic courts and juries. Recently, the Louisiana Third Circuit Court of Appeal decided the case of *Lilley v. Board of Supervisors of Louisiana State University.* The plaintiffs, a group of firemen exposed to asbestosis at the defendants' facility, sued to recover for the fear of contracting cancer as a result of their exposure, as well as future costs of medical monitoring. The defendant was found liable, and the trial court awarded both damages for emotional distress related to the exposure and future medical monitoring expenses.

On appeal, the third circuit upheld the award of compensatory damages for fear of contracting asbestosis or other related diseases, but reversed the award of medical monitoring damages. In the decision, the court held that the exposure itself, along with an "increased concern" about their health, was a sufficient injury suffered by the firemen to justify damages for fear of contraction. However, it overturned the medical monitoring award because of the plaintiff's failure to show a "significantly increased risk of contracting a serious latent disease," a requirement under *Bourgeois.* The court, as it did in *Vallier,* stated that even without a showing of physical injury, a claim for mental distress arising from asbestos exposure is "one that carries an especial likelihood of genuine and serious mental distress. . . ." However, the medical monitoring claim was reversed because the plaintiffs failed to show evidence that there was a significant increase in their risk of contracting a disease. The court noted that, "compensable mental injuries do not necessarily have to coexist with a proven need for medical monitoring."

The *Lilley* decision is significant because it was decided when medical monitoring costs were available under *Bourgeois* without the requirement of showing a "manifest physical or mental injury or disease." The *Lilley* court had little problem in awarding damages for the plaintiffs' emotional distress caused by their exposure to asbestos, but it felt compelled to strictly construe the requirements of *Bourgeois* before allowing medical monitoring expenses. If the revision to Article 2315 is interpreted narrowly, Louisiana courts possibly will begin to follow this model and award monetary damages more liberally for causes of action such as fear of contraction and increased risk of disease.

110. 735 So. 2d 696 (La. App. 3d Cir.), writ denied, 744 So. 2d 629 (1999).
111. The trial court divided the plaintiffs into three categories, depending on the amount of exposure to which each individual plaintiff was subjected. Those plaintiffs with significant exposure received $30,000 in compensatory damages, followed by $15,000 for plaintiffs with moderate exposure. The plaintiffs with no direct contact with the defendants' contaminated facility received no damages. Plaintiffs in the first two groups received an additional $12,000 for future medical monitoring expenses. *Lilley,* 735 So. 2d at 699.
112. *Id.* at 702.
113. *Id.* at 706, citing *Bourgeois v. A. P. Green Indus., Inc.,* 716 So. 2d 355, 360 (La. 1998).
114. *Lilley,* 735 So. 2d at 703.
115. *Id.* at 706.
as fear of contraction and increased risk of disease. Although these claims are more subjective and present multiple problems of proof, this result is probable for two reasons. First, it will allow plaintiffs a form of recovery for the harm sustained by the defendant's negligence. Second, it will promote the "deterrent function of the tort system by compelling those who expose others to toxic substances to minimize risks and costs of exposure." The potential for abuse in allowing recovery for these damages certainly exists and should be avoided by the courts.

C. A Viable Solution

A more attractive interpretation of revised Article 2315 would be to construe broadly "a manifest physical or mental injury or disease," thereby giving courts a greater opportunity to award medical monitoring damages. In doing so, courts may have to refine their definition of "disease or injury," at least in the toxic tort context. The Restatement (Second) of Torts defines "injury" as "the invasion of any legally protected interest of another." This definition seems to allow for a broad interpretation of the revision to include damages other than actual, physical harm to victims.

The "invasion" in these cases is the negligent, or possibly intentional, exposure of victims to potentially harmful toxins. In some cases, this exposure causes some degree of loss or detriment to victims in a form other than immediate, physical harm. The injuries in these cases are often not traditional bruises, scrapes, or fractures as seen in many personal injury cases.

The exposure itself, when accompanied by a reasonable showing of emotional distress or anxiety, should be sufficient to qualify for an actionable injury under the statute. These are real injuries, although they may not seem as such externally. The difficulty lies in deciding if the exposure is "significant" enough, and if the emotional distress is "genuine" enough, to justify medical monitoring damages. This determination is a function of the court, which, with the aid of pre-trial motions, can eliminate frivolous claims before litigation costs become too high.

This equitable solution would reap benefits for both victims of exposure and negligent defendants. For victims, it satisfies the compensation and deterrence goals of tort litigation. For defendants, it may actually limit the damage awards that courts might be willing to grant plaintiffs for their emotional injuries, since other options would exist. These options would consist of monetary compensation for the medical costs actually incurred by plaintiffs. Instead of awarding lump-sum damages to victims of exposure who do not yet present physical symptoms of disease, courts could administer funds on a need-only basis to pay for the medical costs of exposure victims. If they limit the interpretation of Article 2315, courts may be forced into awarding speculative monetary damages for a subjective fear of contraction of disease, or perhaps even an increased risk. By giving the revision a broader interpretation, courts could recognize the same injuries that have been

117. Restatement (Second) of Torts §7 (1977).
allowed under the old law and award medical monitoring to plaintiffs in place of large, suspect monetary damages.

A sound approach for the courts of Louisiana to adopt when deciding these cases consists of a two-step process. First, the court should look at the alleged harm or injury to the victim. If the plaintiff can show a sufficient exposure along with reasonable emotional distress, such a showing should be adequate to warrant an exception to allow for the possibility of medical monitoring. Second, the court should look to the criteria listed in Bourgeois to see if the plaintiff satisfies the seven prerequisites listed. If so, then the court should consider granting recovery for medical monitoring damages.118

Under the new law, an award of medical monitoring costs should not be seen as an alternative for courts in lieu of claims for fear of contraction of disease, or possibly increased risk. The wording of the statute clearly intends to eliminate medical monitoring as a separate theory of recovery under Louisiana law. Instead, it is an alternative remedy for plaintiffs. In other words, courts can award damages in the form of future medical costs to supplement or to replace monetary damages in fear of contraction or increased risk cases. In light of the policy concerns discussed above, courts should consider this option favorably when calculating the appropriate damages for plaintiffs.

D. Putting the Solution to Work

Although it seems medical monitoring costs can still be recovered by Louisiana plaintiffs, the possibility of making these awards may be suspect for several practical reasons. Chief among them is the lack of incentive for plaintiffs to seek medical monitoring costs under the new law, especially in light of the recent changes to class action certification in Louisiana. In the past, medical monitoring cases could be brought as class action suits without the need to prove any type of present injury to the victims.119 These cases were attractive to plaintiffs' attorneys for a very simple reason. Article 595 of the Louisiana Code of Civil Procedure allows courts to award attorneys' fees when a recovery is made for the benefit of the class. Louisiana court decisions addressing attorneys' fees in class actions

118. If the exposure did lead to subsequent contraction of a disease or injury, the plaintiff generally would be barred by res judicata from asserting a claim arising out of the same transaction or occurrence. Louisiana Revised Statutes 13:4232 (2000) does provide exceptions to this general rule. It states:
A judgment does not bar another action by the plaintiff:
(1) When exceptional circumstances justify relief from the res judicata effect of the judgment;
(2) When the judgment dismissed the first action without prejudice; or
(3) When the judgment reserved the right of the plaintiff to bring another action.
These exceptions allow for a plaintiff to "split the cause of action" over a period of time in cases like those seen in toxic tort litigation. Therefore, a victim of exposure might be allowed to sue for medical monitoring costs, and later sue again for the disease or illness contracted as a result of the exposure.

uniformly have awarded these fees by a percentage of the fund recovered.\textsuperscript{120} This, of course, would give attorneys an incentive to sign up as many potential class members as possible in order to increase the size of the fund, and thereby increase their fees if the class received any recovery.

Two events have occurred which may end this trend. First, the Louisiana Legislature amended Civil Code article 2315 to require an actionable injury before any surveillance costs could be recovered. This requirement will make it much more difficult for attorneys to attain class status for large groups of exposed persons under Article 591 of the Code of Civil Procedure, primarily because of hardships in showing commonality of injury in exposure cases.\textsuperscript{121} Differing levels of exposure, time of exposure, type of injury, and possible exposure to other toxins make it very troublesome for attorneys to find victims with similar symptoms to fulfill the commonality requirement of Article 591(A)(1). Another related problem is the recent retreat by Louisiana courts from the practice of sanctioning class actions in virtually any type of mass tort.\textsuperscript{122} In 1997, the Louisiana Legislature passed an act which significantly modified the prior statutory class action design.\textsuperscript{123} The new statutory language tracks the types of liability cases seen under Rule 23(b) of the Federal Rules of Civil Procedure.\textsuperscript{124} Also, it implicitly overruled the "err if favor" presumption for class actions articulated by the Louisiana Supreme Court.\textsuperscript{125}

Aligning the Louisiana standard for granting class status with the federal law may not bode well for toxic tort plaintiffs. The United States Supreme Court has shown a growing resistance in recent years to recognize classes in mass tort cases. In \textit{Amchem Products, Inc. v. Windsor}, the Court de-certified a settlement class which sought to settle all unfiled present and future asbestos-related claims against

\textsuperscript{120} Donald C. Massey et al., \textit{Curtailing the Tidal Surge: Current Reforms in Louisiana Class Action Law}, 44 Loy. L. Rev. 7, 75 (1998). For cases, see Bruno \textit{v. City of New Orleans}, 639 So. 2d 1201 (La. App. 4th Cir.), \textit{writ denied}, 644 So. 2d 391 (1994) (addressing trial court award of attorneys' fees and costs of twenty percent of judgment in class action); Pillow \textit{v. Board of Com'rs}, 425 So. 2d 1267 (La. App. 2d Cir. 1982) (affirming award of attorneys' fees of one-third of judgment in suit originally filed as class action but later amended to be individual action); Alexander \textit{v. Lindsay}, 152 So. 2d 261, 267 (La. App. 4th Cir. 1963)("[A]n attorney's fee of 20\% of the corporation's recovery hereunder would be reasonable.").

\textsuperscript{121} \textit{La. Code Civ. P. art. 591(A)} provides:

One or more members of a class may sue or be sued as representative parties on behalf of all, only if:

(1) The class is so numerous that joinder of all members is impracticable.

(2) There are questions of law or fact common to the class.

(3) The claims or defenses of the representative parties are typical of the claims or defenses of the class.

(4) The representative parties will fairly and adequately protect the interests of the class.

(5) The class is or may be defined objectively in terms of ascertainable criteria, such that the court may determine the constituency of the class for purposes of the conclusiveness of any judgment that may be rendered in the case.

\textsuperscript{122} Massey, supra note 120, at 58.

\textsuperscript{123} \textit{Id}. at 62.

\textsuperscript{124} \textit{Id}. This presumption was articulated in \textit{McCastle v. Rollins Environmental Sevices of La. Inc.}, 456 So. 2d 612 (La. 1984).
the defendants. The Court's concerns included the lack of adequate representation of all possible victims of exposure and the inadequacy of notice to future claimants who were bound by the settlement. The Court reiterated its Amchem Products holding last year in Ortiz v. Fibreboard Corp. Once again, the Court de-certified a settlement class action against a manufacturer of asbestos-containing products. An overriding concern with the adequacy of representation for all possible plaintiffs again was expressed, as well as the impracticality of distributing the funds to the plaintiffs. These two cases in particular may sound as a warning to courts faced with class certification questions, especially those jurisdictions utilizing procedural rules identical or similar to Federal Rule 23. Louisiana appears to be such a jurisdiction after the legislative changes in 1997.

The first indication of the trend to scrutinize class actions more heavily in Louisiana is seen in Ford v. Murphy Oil U.S.A., Inc. In Ford, the Louisiana Supreme Court de-certified a class of residents from St. Bernard and Orleans Parishes that alleged long-term exposure to emissions from oil refineries and other facilities caused them injury. In its opinion, the court held that "only mass torts 'arising from a common cause or disaster' may be appropriate for class certification. . .". It relied heavily on the Amchem Products holding that mass tort claims must comply strictly with the predominance test for common character of claims.

Putting this trend into the medical monitoring perspective, one can see the lack of incentive for plaintiffs, or more specifically plaintiffs' attorneys, to bring a suit in which medical monitoring expenses are sought. After Ford, there is a high likelihood that courts will be unwilling to allow a class to be certified when the injury alleged is only one of emotional distress from exposure. The issue of commonality certainly seems to be a roadblock for attorneys trying to certify a class under Article 591(A) of the Louisiana Code of Civil Procedure. Under the rationale of Lilley and Ford, attorneys would be better served to sue for the emotional distress from exposure through individual clients, without seeking class status or medical monitoring as a form of recovery. A monetary sum for the victim's emotional distress would ensure the attorney of his pro rata share under a contingency fee contract without any assurance that the victim will get the proper treatment necessary to expunge possible disease or injury resulting from the exposure. Moreover, these claims will likely come as individual suits, leading to

127. Id. at 617-22, 117 S. Ct. at 2246-2249.
129. The court in Amchem Products was deciding the appropriateness of certification of a class under Federal Rule 23(b)(3), whereas it using Rule 23(b)(1)(B) in Ortiz. Although each of these provisions has different elements that plaintiffs must meet in order to by class certified, the policies in doing so are almost identical. See Ortiz, 527 U.S. at 856, 119 S. Ct. at 2319 n.31.
130. Ortiz, 527 U.S. 832, 119 S. Ct. at 2308.
131. 703 So. 2d 542 (La. 1997).
132. Id. at 543.
133. Id. at 550.
134. Id.
a litany of litigation which may cost defendants enormous amounts of money. This is a possibility that should be avoided.

A solution to this problem will be difficult to formulate. A balance between the policy concerns implicated in mass tort class actions, the need for medical surveillance to abate disease in exposure victims, and the need for incentives for attorneys to bring these suits must be struck. Until such a balance is met, the courts should consider supplementing, or in some cases substituting, large monetary awards in emotional distress claims due to exposure with medical monitoring costs under some sort of voucher system. The most effective way to accomplish this goal is to establish court-supervised funds to pay for the victims' monitoring costs as they are incurred. The utility of monitoring, as discussed above, is clearly beneficial. However, simultaneously satisfying plaintiffs, defendants, and attorneys in these cases is a monumental challenge which should be addressed by appropriate legislation.

V. CONCLUSION

The choice to amend Civil Code article 2315 was clearly a policy decision by the Louisiana Legislature to eliminate a pure medical monitoring theory of recovery. However, the wording of the revision seems to allow courts to continue to award medical monitoring damages so long as they are linked to an actual injury. Injuries under the new statute should include significant exposure which is accompanied by reasonable emotional distress or anxiety caused by that exposure. Limiting medical monitoring damages to persons who have actual, physical injuries from their exposure defeats the purpose of medical surveillance. If medical monitoring is used to detect the symptoms of exposure-related diseases, or find them in their early development, it can mitigate the hazards caused by the exposure. Restricting awards for medical monitoring to victims who have already contracted a disease makes little, if any, sense. By that point, treatment is necessary.

Although the legislature explicitly cited Bourgeois in the act amending Louisiana Civil Code article 2315, one can perceive this citation as only excluding a pure medical monitoring theory of recovery from exposure alone. There is a clear exception allowing for the award of monitoring expenses that should be utilized by the courts liberally. The alternatives are not attractive, and may lead to greater expense on the part of defendants. Despite its shortcomings, the medical monitoring standard announced by the court in Bourgeois does offer a manageable solution that lends itself to modification if necessary. If the monitoring does nothing other than ease the minds of victims, then it may be justified. As Chief Justice Calogero stated in his concurring opinion in Bourgeois:

One thing that such a plaintiff might gain is certainty as to his fate, whatever it may be. If a plaintiff has been placed at an increased risk for a latent disease through exposure to a hazardous substance, absent medical monitoring, he must live each day with the uncertainty of whether the disease is present in his body. If, however, he is able to take advantage of medical monitoring and the monitoring detects no evidence
of the disease, then, at least for the time being, the plaintiff can receive the comfort of peace of mind. ... Certainly, these options should be available to the innocent plaintiff who finds himself at an increased risk for a serious latent disease through no fault of his own.135

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