

# Medical Monitoring: Missouri's Welcomed Acceptance

*Meyer ex rel. Coplin v. Fluor Corp.*<sup>1</sup>

## I. INTRODUCTION

One of the fundamental principles of tort law is that a plaintiff cannot recover without a present physical injury.<sup>2</sup> As society evolved and latent injuries became more prevalent, tort law failed to provide relief because of its present injury requirement.<sup>3</sup> The consequence of this gap in recovery meant that plaintiffs who were exposed to toxic chemicals but could not afford to undergo periodic testing to detect latent injuries would have to wait until the injury manifested itself in order for plaintiffs to bring claims for recovery. Unfortunately, this passage of time can have detrimental effects on the plaintiff and result in a more severe outcome than if the injury were detected in its early stages.<sup>4</sup> Policy considerations regarding the benefit of early detection and diagnosis of disease and the deterrent effects of imposing liability on defendants convinced some states to adopt medical monitoring.<sup>5</sup> Medical monitoring allows plaintiffs to receive compensation for future diagnostic testing that is reasonably necessary to detect latent injuries that may develop after exposure to toxic substances.<sup>6</sup> Medical monitoring can be viewed as a cause of action or a form of relief.<sup>7</sup> In both instances, the goal is to allow plaintiffs who have been exposed to toxins that enhance the plaintiffs' risk of disease to be compensated for periodic diagnostic testing in order to detect disease early.<sup>8</sup>

In *Meyer v. Fluor Corp.*, the Missouri Supreme Court was the first court in Missouri to hold that medical monitoring was available as a form of damages in the state.<sup>9</sup> By allowing recovery for medical monitoring without a

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1. 220 S.W.3d 712 (Mo. 2007) (en banc).

2. Victor E. Schwartz et al., *Medical Monitoring – Should Tort Law Say Yes?*, 34 WAKE FOREST L. REV. 1057, 1059 (1999).

3. *Meyer*, 220 S.W.3d at 716; see also *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 849-850 (3d Cir. 1990).

4. *Ayers v. Jackson Twp.*, 525 A.2d 287, 311 (N.J. 1987); *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 33 (Ariz. 1987).

5. Schwartz et al., 34 WAKE FOREST L. REV. 1057, 1059 (1999).

6. See *infra* Part III.

7. Pankaj Venugopal, Note, *The Class Certification of Medical Monitoring Claims*, 102 COLUM. L. REV. 1659, 1660 (2002).

8. *Ayers*, 525 A.2d at 308; *In re Paoli*, 916 F.2d at 850; *Meyer*, 220 S.W.3d at 716.

9. *Meyer*, 220 S.W.3d at 712. The Court of Appeals for the Western District of Missouri, in addressing a cause of action for enhanced risk of disease, stated that

present injury, Missouri has joined several states in allowing for an expansion of traditional tort law.<sup>10</sup> Critics argue that this expansion of tort law will lead to a flood of litigation and should be left to the legislature.<sup>11</sup> However, the *Meyer* court correctly decided to allow relief on the basis that the underlying principles of tort law and medical monitoring are the same and plaintiffs whose interests were invaded should be able to recover.

## II. FACTS AND HOLDING

Fluor Corporation operates a lead smelter in Herculaneum, Missouri, which emits large quantities of lead into the environment.<sup>12</sup> Lani Meyer is the representative of a class of children who were exposed to the smelter's toxic emissions.<sup>13</sup> Meyer filed a petition against Fluor Corporation alleging negligence, strict liability, private nuisance, and trespass.<sup>14</sup> Due to the latent injuries that lead can cause, Meyer also requested compensatory damages in order to fund the establishment of a medical monitoring program.<sup>15</sup> The program would monitor the effects of the toxic lead and other chemicals in order to determine whether it has caused or is causing injury or illness to the members of the class.<sup>16</sup>

Meyer filed for class certification pursuant to Missouri Supreme Court Rule 52.08(b)(3) claiming that the proposed class members' common issues predominated over the individual issues, which included level of exposure

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expert testimony was admissible for the purposes of establishing damages for medical surveillance. *Elam v. Alcolac, Inc.*, 765 S.W.2d 42, 208-209 (Mo. App. W.D. 1988).

10. For states that recognize medical monitoring, see *Bourgeois v. A.P. Green Indus.*, 841 So. 2d 902, 909 (La. Ct. App. 2003); *Ayers*, 525 A.2d at 311-312 (New Jersey); *In re Paoli*, 916 F.2d at 852 (Pennsylvania); *Bowers v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 431 (W. Va. 1999); *Meyer*, 220 S.W.3d at 717 (Missouri). For states that rejected medical monitoring, see *infra* note 34.

11. *Schwartz et al.*, *supra* note 2, at 1059.

12. *Meyer*, 220 S.W.3d at 714. Lead is a toxic substance that often causes latent injuries. *Id.*

13. *Id.* The proposed class of children includes:

All minors who lived within the Class Geographic Area for at least 12 months when they were 72 months old or less and are currently 168 months or less; 2. All minors who have gone to school or day care within the Class Geographic Area for at least 12 months when they were 72 months old or less and who are not members of [number one] above, and who are currently 168 months or less; 3. All minors who were born to mothers who lived within the Class Geographic Area for more than seven months during their pregnancies and who are not members of [numbers one or two] above and who are currently 168 months or less.

*Id.* (internal citations omitted).

14. *Id.*

15. *Id.*

16. *Id.*

and age at which exposure occurred.<sup>17</sup> The Missouri Supreme Court stated, “when one or more of the central issues in the action are common to the class and can be said to predominate, the case may properly proceed as a class action, even though other important matters will have to be tried separately.”<sup>18</sup> In order to be certified as a class, the plaintiff must not only meet at least one of the requirements of 52.08(b), but must also meet all of the requirements of rule 52.08(a).<sup>19</sup> The circuit court found that the numerosity requirement of rule 52.08(a) was met, but the court did not make any determinations regarding the commonality and typicality requirements.<sup>20</sup> The circuit court denied class certification, stating that the class members’ individual issues predominated and the claim “could not be efficiently addressed on a class-wide basis.”<sup>21</sup> The Court of Appeals for the Eastern District of Missouri affirmed the circuit court’s ruling.<sup>22</sup>

On appeal, the Missouri Supreme Court reversed and remanded the denial of class certification.<sup>23</sup> The court found that the lower court improperly applied factors used to assess personal injury cases, which require a present physical injury, to a claim of medical monitoring.<sup>24</sup> The court held that in order for a class to recover under a medical monitoring claim, there was no need to show a present physical injury and that individual issues may be present so long as the common issues predominate in the action.<sup>25</sup>

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17. *Id.* Rule 52.08(b)(3) authorizes class actions where the four requirements of 52.08(a) are met and, in addition: “the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” MO. SUP. CT. R. 52.08(b)(3). For Rule 52.08(a), see *infra* note 19. Missouri Rule 52.08 is “virtually identical” to Federal Rule of Civil Procedure 23 governing class actions. Michael D. Murray, *Civil Rules Practice*, 15 MO. PRAC. § 52.08-1 (2007); see also FED. R. CIV. P. 23.

18. *Meyer*, 220 S.W.3d at 716 (quoting 7A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY K. KANE, FEDERAL PRACTICE AND PROCEDURE § 1778, at 529 (2d ed. 1986)).

19. Rule 52.08(a) states that

[o]ne 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, and (4) the representative parties will fairly and adequately protect the interests of the class.

MO. SUP. CT. R. 52.08(a).

20. *Meyer*, 220 S.W.3d at 714 n.2. See *supra* note 19 for Rule 52.08(a).

21. *Meyer*, 220 S.W.3d at 714.

22. *Meyer ex rel. Coplin v. Fluor Corp.*, No. ED 86616, 2006 WL 996540 (Mo. App. E.D. Apr. 18, 2006), *rev'd en banc*, 220 S.W.3d 712 (Mo. 2007).

23. *Meyer*, 220 S.W.3d at 720.

24. *Id.* at 719.

25. *Id.* at 720.

Judge Price's dissent in this case noted that the predominance requirement was met; however, he believed that class certification was inappropriate because Meyer was not typical of the class.<sup>26</sup> The dissent reached this conclusion because Meyer, unlike the other class members, suffered from a present physical injury.<sup>27</sup> Meyer also filed her own lawsuit, which was an "undeniable admission that the interest of the class and her own interests are not the same, but are in conflict."<sup>28</sup>

### III. LEGAL BACKGROUND

#### A. Medical Monitoring

Traditional tort law does not properly address new forms of injuries created by the industrialization of the United States.<sup>29</sup> In toxic tort cases, the plaintiffs often suffer from latent injuries that manifest years down the road. Medical monitoring is a theory of recovery designed to address the latent injuries that often occur in toxic tort cases.<sup>30</sup> Medical monitoring allows plaintiffs to receive compensation for future diagnostic testing that is reasonably necessary to detect latent injuries or diseases that may develop as a result of exposure to toxic substances.<sup>31</sup> Because medical monitoring departs from the well-founded physical injury requirement of tort law, some states refuse to recognize the claim.<sup>32</sup> States that do recognize the claim base the justification on policy considerations.<sup>33</sup>

In *In re Paoli Railroad Yard PCB Litigation*, a Pennsylvania court called the need for medical monitoring "obvious" due to the potential for

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26. *Id.* (Price, J., dissenting).

27. *Id.*

28. *Id.* at 720-721.

29. *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 850 (3d Cir.1990).

30. *Id.* at 849-50.

31. *Ayers v. Jackson Twp.*, 525 A.2d 287, 308-09 (N.J. 1987).

32. The Supreme Court of Mississippi refused to recognize a claim of medical monitoring absent a present physical injury. It stated that mere exposure to a chemical and its potential for latent injury is not enough to recover under the established principles of negligence in the state. *Paz v. Brushed Engineered Materials, Inc.*, 949 So. 2d 1 (Miss. 2007). The Supreme Court of Alabama weighed the policy arguments for and against medical monitoring and found no reason to "stand Alabama tort law on its head in an attempt to alleviate these concerns about what might occur in the future." *Hinton v. Monsanto Co.*, 813 So. 2d 827, 831 (Ala. 2001). The Michigan Supreme Court would not allow medical monitoring absent a present physical injury despite the fact that they "have from time to time allowed for the development of the common law as circumstances have required." *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 690 (Mich. 2005).

33. *See In re Paoli R.R. Yard PCB Litigation*, 916 F.2d 829, 852 (3d Cir. 1990).

toxic torts to cause latent injuries.<sup>34</sup> The court found that tort law and medical monitoring have the same root policy consideration of deterring the defendant's tortious conduct by imposing liability for the plaintiff's medical expenses.<sup>35</sup> However, the difference with medical monitoring claims is that there is generally not a cognizable present injury.<sup>36</sup> Other states have cited similar policy considerations for adopting medical monitoring claims.<sup>37</sup>

In *Ayers v. Jackson Township*, the New Jersey Supreme Court acknowledged "the difficulty that both law and science experience in attempting to deal with the emerging complexities of industrialized society and the consequent implications for human health."<sup>38</sup> In *Ayers*, medical surveillance was granted to a class of plaintiffs who were exposed to contaminated water.<sup>39</sup> The court stated that medical monitoring costs were compensable damages if plaintiffs could show through medical testimony that "monitor[ing] the effect of the exposure to the toxic chemicals was reasonable and necessary."<sup>40</sup> According to the court, tort recovery is premised on the notion that people have an interest in being free from personal injury.<sup>41</sup> Similarly, people have an interest in being free from expenses relating to medical testing and diagnostics exams.<sup>42</sup>

The court explained its reasoning by citing *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*<sup>43</sup> In *Friends for All Children*, a class of children involved in a plane crash requested funds for medical monitoring after decompression of the plane and impact of the crash allegedly caused minimal brain dysfunction to the children.<sup>44</sup> The court granted medical monitoring costs on the basis that the crash "proximately caused the need for comprehensive diagnostic examination" and the children would not need medical examinations and testing "but for the fact that these children endured explosive decompression and hypoxia."<sup>45</sup>

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34. *Id.* This was a class action brought by plaintiffs who lived near or worked for the Paoli railroad. The class claimed they required medical monitoring after being exposed to PCB, a toxic chemical used in the railway transformers. *Id.* at 835.

35. *Id.* at 852.

36. *Id.* at 849-50.

37. See *Ayers v. Jackson Twp.*, 525 A.2d 287, 311-12 (N.J. 1987); *Bowers v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 431 (W. Va. 1999); *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 33 (Ariz. Ct. App. 1987).

38. 525 A.2d at 298.

39. *Id.* at 291.

40. *Id.* at 312.

41. *Id.* at 310; see also *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 826 (D.C. Cir. 1984). The Restatement defines injury as "the invasion of any legally protected interest of another." RESTATEMENT (SECOND) OF TORTS § 7 (1965).

42. *Ayers*, 525 A.2d at 310; *Friends for All Children*, 746 F.2d at 826.

43. *Ayers*, 525 A.2d at 309-10.

44. 587 F. Supp. 180, 184 (D.D.C. 1984).

45. *Ayers*, 525 A.2d at 310 (quoting *Friends for All Children*, 746 F.2d at 825).

The policy considerations underlying the acceptance of medical monitoring appear to be consistent throughout the jurisdictions.<sup>46</sup> However, the states' views of medical monitoring vary greatly.<sup>47</sup> For example, some states require a present injury while others do not.<sup>48</sup> Also, some states view the claim as a new cause of action, while other states view it as a form of relief.<sup>49</sup> Further, some states view medical monitoring as a claim for damages while others view it as equitable relief.<sup>50</sup> The way that a state views medical monitoring impacts the procedural elements of the case.<sup>51</sup> Since medical monitoring is generally desired in mass tort cases, the plaintiffs often seek class certification.<sup>52</sup> Therefore, whether the jurisdiction views the tort as a claim for equitable relief or compensatory damages is an essential element in determining how to seek certification.

### *B. Class Certification and Medical Monitoring*

Since toxic tort cases often involve potential harm to a large class of people, plaintiffs generally have the additional hurdle of receiving class certification under Federal Rule of Civil Procedure 23 or under the state rules of civil procedure.<sup>53</sup> Under the federal rule, the class must meet the commonality, typicality, numerosity, and predominance requirements of Rule 23(a) and one of the requirements of Rule 23(b).<sup>54</sup> How a state treats medical monitoring determines how a class can satisfy the requirements of Rule 23(b). Certification under Rule 23(b)(2) requires the class to seek injunctive or declaratory relief.<sup>55</sup> Therefore, in a state that views medical monitoring as a claim for monetary damages, the plaintiff is foreclosed from certifying under this requirement and will typically file under 23(b)(3) certification. Certification under Rule 23(b)(3) requires the class to prove that the class' common issues predominate over the individual issues and that a class action is the superior method of adjudicating the dispute.<sup>56</sup>

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46. *See supra* note 37.

47. Venugopal, *supra* note 7, at 1659.

48. *Id.* at 1660.

49. *Id.*

50. *Id.*

51. *Id.* at 1659.

52. *Id.*

53. *Id.* Missouri has adopted the federal class certification rules. Missouri Rule 52.08(a) corresponds with Federal Rule 23(a) and 52.08(b) and its subparts correspond with Federal Rule 23(b) and its subparts. MO. SUP. CT. R. 52.08.

54. FED. R. CIV. P. 23.

55. "[T]he party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2).

56. FED. R. CIV. P. 23(b)(3).

It can be difficult to obtain class certification under rule 23(b)(3). For example, in *Thomas v. FAG Bearing Co.*, a Missouri court denied class certification under both rules 23(b)(2) and (b)(3).<sup>57</sup> The plaintiffs were allegedly exposed to contaminated ground water resulting from FAG Bearing Corporation's tortious conduct.<sup>58</sup> The court denied certification under 23(b)(2) in part because the request for medical monitoring was nothing but an exchange of money to cover future medical expenses and could not appropriately be labeled injunctive relief.<sup>59</sup> The court also denied certification under 23(b)(3), finding that although common issues of law and fact were present, they did not predominate over the individual issues of causation and injury.<sup>60</sup> The court made this determination after testing the wells belonging to one of the plaintiffs and found no contamination.<sup>61</sup> The court predicted that this would require testing of all of the plaintiffs' individual wells in order to require proof of causation.<sup>62</sup> The court also stated that damages could only be measured on an individualized basis because present injury was required under the theories of recovery advanced by the plaintiffs, including medical monitoring.<sup>63</sup>

However, some plaintiffs have been successful in achieving certification in mass toxic tort cases under rule 23(b)(3). In *Boggs v. Divested Atomic Corp.*, the plaintiff class filed for class certification under rule 23(b)(2) and 23(b)(3).<sup>64</sup> The class consisted of individuals living within six miles of a plant that released radioactive chemicals into the air.<sup>65</sup> The plaintiffs sought recovery for medical monitoring, claiming that they could be adversely impacted by the toxins emitted from the plant.<sup>66</sup> The District Court of Ohio found that the common issues including "the nature, timing, extent and cause of emissions, the kinds of remedies . . . appropriate to address potential future emissions, the need for medical monitoring . . . would be virtually identical in each case."<sup>67</sup> The individual plaintiffs might have suffered different amounts of harm, but the harm was of the same type and the existence of differences in plaintiffs' concerns did not defeat the typicality requirement.<sup>68</sup>

In *Doyle v. Fluor Corp.*, a class of plaintiffs sought class certification in order to recover for property damage caused by emission of lead from Fluor

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57. 846 F. Supp. 1400 (W.D. Mo. 1994).

58. *Id.* at 1404.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. 141 F.R.D. 58 (S.D. Ohio 1991).

65. *Id.* at 60.

66. *Id.*

67. *Id.* at 67.

68. *Id.* at 65 (citing *In re Asbestos School Litigation*, 104 F.R.D. 422, 430 (E.D. Pa. 1994)).

Corporation's Doe Run smelter.<sup>69</sup> The smelter in *Doyle* was the same smelter at issue in *Meyer*.<sup>70</sup> The plaintiffs sought class certification under Missouri Supreme Court Rule 52.08(b)(3), asserting that the common issues of the class predominated over the individual issues.<sup>71</sup> These common issues included whether Fluor Corporation negligently emitted toxins into the environment, which thereby contaminated the property of Herculaneum's residents.<sup>72</sup> The court found that the same evidence would suffice for each member to make out a prima facie case; therefore, class certification would be the most efficient means of adjudicating the dispute.<sup>73</sup> Individual issues particular to each plaintiff, such as the nature and extent of contamination, damages, and interference of enjoyment of the property may exist but they did not outweigh the common issues of the class members.<sup>74</sup> Therefore, the court held that class certification under rule 52.08(b)(3) was proper.<sup>75</sup>

#### IV. INSTANT DECISION

In the instant decision, the Missouri Supreme Court looked at the nature and scope of a medical monitoring claim in order to determine whether the circuit court abused its discretion by denying class certification under Missouri Supreme Court Rule 52.08(b)(3).<sup>76</sup> In order to assess the rule's predominance requirement, it was essential for the court first to determine the relevant nature of medical monitoring damages.<sup>77</sup>

Since this was the first time the court addressed whether Missouri law allows recovery for medical monitoring, the court looked to the principles of recovery formulated in other case law.<sup>78</sup> In *Elam v. Alcolac*, while addressing the admissibility of medical testimony in an enhanced risk of cancer suit, the Court of Appeals for the Western District of Missouri recognized that medical monitoring was an appropriate form of damages in order to diagnose and treat disease and prevent further harm.<sup>79</sup> This conclusion was premised on Missouri's application of tort law allowing plaintiffs to recover for present and future medical expenses resulting from the defendant's tortious conduct

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69. 199 S.W.3d 784 (Mo. App. E.D. 2006).

70. *Id.* at 787.

71. *Id.* at 788.

72. *Id.* at 789.

73. *Id.* at 789-91.

74. *Id.* at 789-90.

75. *Id.* at 792.

76. *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 716 (Mo. 2007) (en banc).

77. *Id.*

78. *Id.* at 717.

79. *Id.* (citing *Elam v. Alcolac, Inc.*, 765 S.W.2d 42, 209 (Mo. App. W.D. 1988)).

so long as the injury is reasonably certain to occur.<sup>80</sup> In *Elam*, the court noted that present physical injury was not necessary to recover for medical monitoring.<sup>81</sup> In fact, since the claim was created to address the gap created by the present injury requirement of tort law, a present physical injury requirement is inconsistent with the underlying basis of a claim for medical monitoring.<sup>82</sup>

By examining other jurisdiction's positions, the Missouri Supreme Court stated that a plaintiff can recover for medical monitoring by showing that exposure to the toxic substance led to the increased risk of developing a particular disease and that medical monitoring is reasonably necessary to "diagnose properly the warning signs of disease."<sup>83</sup> The underlying principles of Missouri tort law are consistent with a theory of recovery for medical monitoring absent any present injury; therefore, the court held that medical monitoring is a recognized form of recovery in Missouri.<sup>84</sup>

After determining that a present injury requirement is not consistent with medical monitoring, the court examined the list of factors that the circuit court used to assess the predominance requirement of rule 52.08(b)(3).<sup>85</sup> The circuit court evaluated the predominance requirement by determining the relevant issues and found that the following individual issues would predominate: age of when the child was exposed, the nature of the exposure, time period of exposure, the level of lead in the blood, the existence of any other sources of lead exposure, whether the child is presently suffering from lead injury, whether the child is currently being exposed to the lead, how long ago the exposure was terminated, and whether there is a need for one individual in particular to be monitored.<sup>86</sup> The Missouri Supreme Court found that these factors were irrelevant to a claim of medical monitoring because they are factors used to determine a claim for personal injury, which requires a present physical injury.<sup>87</sup> Furthermore, the Court concluded that the circuit court relied on authority that did not consider a medical monitoring claim, but personal injury claims requiring "individualized determinations of the nature and extent of manifested damages."<sup>88</sup>

The instant court found that the circuit court incorrectly relied on authority that did not examine a medical monitoring claim but instead personal injury actions, which require a present physical injury.<sup>89</sup> The court articulated that the predominating common factor of the plaintiff's claim is "exposure to a set of toxins from a single source" and that issues of common proof

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80. *Id.* (citing *Wilcox v. Swenson*, 324 S.W.2d 644, 673 (Mo. 1959)).

81. *Id.* at 718 n.5.

82. *Id.* at 718.

83. *Id.*

84. *Id.* at 718 n.7.

85. *Id.* at 719.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

concerning the “significance and extent of toxic exposure” satisfied the requirements of rule 52.08(b)(3). Individual questions that might remain after these predominate questions are resolved did not preclude a granting of class certification.<sup>90</sup> Finding that the lower court improperly denied class certification by incorrectly applying a personal injury standard to a medical monitoring case, the Missouri Supreme Court reversed and remanded the case.<sup>91</sup>

Judge William Ray Price Jr.’s dissenting opinion agreed that the common issues of the class predominated over the individual issues, but disagreed that Meyer, the class representative, had a claim that was typical of the class.<sup>92</sup> Meyer, who filed a separate personal injury action based on present injuries, also sought to represent a class of children who did not have present injuries. Therefore, Meyer was not “typical” of the class that she sought to represent.<sup>93</sup> The dissent argued that Meyer was not in need of medical monitoring, but damages for her injuries and the filing of a separate lawsuit was “an undeniable admission that the interest of the class and her own interests are not the same, but are in conflict.”<sup>94</sup> As a result, Judge Price concluded that since the typicality requirement was not met, the trial court was correct to deny class certification.<sup>95</sup> Judge Stephen N. Limbaugh Jr.’s dissent argued that since rule 52.08(a) was not satisfied due to lack of typicality, the court should not address rule 52.08(b)(3), which established rule 52.08(a) as a prerequisite to its application.<sup>96</sup>

The majority responded to the dissenting opinions by stating that the issue of typicality is not to be addressed on appeal because the circuit court did not make a finding on that issue.<sup>97</sup> Furthermore, the majority concluded that the circuit court could address the issue of typicality upon remand.<sup>98</sup>

## V. COMMENT

### *A. Policy Considerations of Medical Monitoring*

Medical monitoring is a much needed tool because it protects plaintiffs who have been exposed to toxins and potentially deters tortious emissions of toxins. The *Meyer* court has provided a great victory to the state by adopting medical monitoring and allowing the realm of tort law to expand. If the court refused to recognize the claim, plaintiffs risk the prospect of no recovery in

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90. *Id.*

91. *Id.* at 720.

92. *Id.* (Price, J. dissenting).

93. *Id.* at 720-21.

94. *Id.*

95. *Id.* at 721.

96. *Id.* (Limbaugh, J. dissenting).

97. *Id.* at 719 (majority opinion).

98. *Id.* at 720.

the future when their injuries manifest.<sup>99</sup> By adopting the claim, the court successfully protects plaintiffs by allowing them to recover for the defendant's tortious conduct and by providing early diagnosis to reduce the impact of the toxins. There are many critics who would argue that adoption of medical monitoring is an improper expansion of tort law resulting from sympathy towards the exposed plaintiffs. Compared to the critics, the *Meyer's* view is based on sound policy grounds.

Although sympathy and a sense of justice drive acceptance of medical monitoring, critics still argue that while, upon first glance, allowing recovery for medical monitoring is a "sensible resolution," in reality, it can lead to a flood of litigation and "unfettered recoveries."<sup>100</sup> Policy considerations associated with medical monitoring have created controversy regarding whether the claim should be recognized.<sup>101</sup> On balance, however, the policy considerations underlying acceptance of medical monitoring outweigh the considerations proposed by the critics.

In modern society, many people are exposed to chemicals that might justify a claim for medical monitoring.<sup>102</sup> However, the critics argue that many of these claims are meritless and may lead to "unlimited and unpredictable liability" that could greatly impact the allocation of medical and legal resources.<sup>103</sup> This concern is particularly potent when medical monitoring claims do not involve a present injury requirement. The present injury requirement in tort law was established to ensure that judicial resources are properly allocated to serious and reliable claims<sup>104</sup> and to ensure that defendants are held responsible for only genuine harm.<sup>105</sup> The critics assert that costs of medical monitoring, particularly for a class of plaintiffs, can be very costly for the defendant.<sup>106</sup>

Understandably, courts are concerned about allowing plaintiffs to recover when the court cannot be sure if the defendant's act will actually cause future injury. These concerns are well-founded. However, as evidenced by

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99. See *infra* note 118.

100. Schwartz et al., *supra* note 2, at 1071. "[E]motional and political appeal" and "a heightened sensitivity to environmental issues" tempts courts to accept medical monitoring. *Id.* at 1059 (quoting Susan L. Martin & Jonathan D. Martin, *Tort Actions for Medical Monitoring: Warranted or Wasteful?*, 20 COLUMB. J. ENVTL. L. 121, 121 (1995)).

101. See Schwartz et al., *supra* note 2.

102. *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 442 (1997) (addressing a claim for medical monitoring brought by a railroad worker who came into contact with asbestos as a part of his employment and refusing to allow for the creation of a new cause of action for medical monitoring fearing that it would open the floodgates of litigation).

103. *Id.* at 433 (quoting *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 556 (1994)).

104. Schwartz et al., *supra* note 2, at 1059 (citing *Metro-North*, 521 U.S. at 444).

105. *Id.*

106. *Metro-North*, 521 U.S. at 442.

*Meyer*, such fears are not significant enough to justify disallowing the claim of medical monitoring.

In *Meyer*, in order to be a member of the class, the individual plaintiff must meet a certain threshold requirement of “medically significant minimum levels of exposure to the toxins discharged from the Doe Run smelter.”<sup>107</sup> This requirement alleviates some of the critics’ concern of whether an injury will manifest in the plaintiff. States that view medical monitoring as a cause of action generally require proof that as a proximate result of exposure to the toxins, the plaintiff has an increased risk of latent injury and that medical testing is reasonably necessary to detect the injuries.<sup>108</sup> Making this prima facie showing allows the court to have some assurance that the defendant’s tortious conduct is likely to have enough of an impact on the plaintiff’s health to justify periodic medical testing. Excessive consumption of medical resources with medical monitoring will not occur because the plaintiff can only recover reasonably necessary medical costs.

However, determining what costs are reasonable can be difficult. According to the critics, doctors often offer conflicting recommendations on the type and timing of the testing required in order to properly detect latent injuries.<sup>109</sup> Critics also express concern over determining whether to limit testing to tests that are “extra,” meaning that the tests go above and beyond the recommendations of key organizations, such as the American Cancer Society.<sup>110</sup> The United States Supreme Court also voiced concern that the recognition of a new tort might overlook the existence of state and federal regulations allowing plaintiffs to recover medical monitoring costs if the plaintiffs met specific statutory guidelines.<sup>111</sup>

The issues of determining damages might be murky, but a lack of clear answers has not stopped courts from allowing recovery. One example is the move from contributory negligence to comparative fault.<sup>112</sup> The assignment of liability in comparative fault states is hardly a precise indicator of negligence that can be attributed to each party. However, courts still allow the plaintiff to recover the defendant’s portion of liability. Similarly, the courts should allow victims of toxic torts to recover reasonable costs for necessary testing (as determined by expert testimony) as a consequence of their tortious conduct even if the cost cannot be precisely deduced.

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107. *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 719 (Mo. 2007) (en banc).

108. *Arch v. Am. Tobacco Co.*, 175 F.R.D 469 (E.D. Pa. 1997); *see also In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 852 (3d Cir. 1990).

109. *Metro-North*, 521 U.S. at 452.

110. *Id.* at 441-42 (stating that periodic colon cancer screening was recommended by the American Cancer Society).

111. *Id.* at 442-43 (stating that Occupational Safety and Health Administration and federal regulations require medical monitoring to those exposed to asbestos).

112. *Schwartz et al.*, *supra* note 2, at 1074.

Critics also argue that medical monitoring cases involve a “battle of the experts,” leaving the jury to sift through technical scientific information which can be quite confusing.<sup>113</sup> Therefore, critics of medical monitoring assert that the state legislatures are better equipped to understand and review such information and have the opportunity to have issues clarified.<sup>114</sup> They also argue that legislative bodies are better able to balance the costs and benefits of medical monitoring than the judiciary.<sup>115</sup>

Legislatures might be better able to engage in a cost-benefit analysis, but, in reality, this determination should be made on a case-by-case basis. The type of toxins, general level of exposure, and the likelihood that latent injury will result is essential to weighing the costs and benefits of medical monitoring. The courts and jury are better able to make this determination.

Although these policy considerations are notable, the more pertinent question is whether the considerations outweigh the plaintiffs’ rights to obtain recovery for invasion of their legally protected interests to be free from excess medical costs. The underlying policy concern for recognizing medical monitoring is the state’s interest in early detection and treatment of disease, which not only protects the health of its citizens but also reduces medical costs.<sup>116</sup> Making plaintiffs wait until an injury is manifested could lead to greater damage to the plaintiff’s health.<sup>117</sup> Moreover, it will protect plaintiffs from a time barred claim if the statute of limitations runs by the time they manifest their injuries.<sup>118</sup> It would also allow plaintiffs who would otherwise not be able to afford periodic medical testing to be able to obtain the testing they need.

Another of the critics’ major concerns regarding medical monitoring is that it is an expansion of tort law.<sup>119</sup> The critics are correct; medical monitoring is an expansion of tort law because it allows a party to recover without a

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113. *Id.* at 1072.

114. *Id.* at 1072-73.

115. *Id.* at 1073.

116. Allan L. Schwartz, *Recovery of Damages for Expense of Medical Monitoring to Detect or Prevent Future Disease or Condition*, 17 A.L.R.5th 327 (1994).

117. For instance, the risks of a delayed cancer diagnosis are well documented. Delayed detection can increase the risk of metastasis and increase the cost of medical treatment. *Ayers v. Jackson Twp.*, 525 A.2d 287, 312 (N.J. 1987).

118. *Id.* at 299 (citing William R. Ginsberg & Lois Weiss, *Common Law Liability for Toxic Torts: A Phantom Remedy*, 9 HOFSTRA L. REV. 859, 921 (1981)); see also Palma J. Strand, *The Inapplicability of Traditional Tort Law Analysis to Environmental Risks: The Example of Toxic Waste Pollution Victim Compensation*, 35 STAN. L. REV. 575, 581 (1983) (stating “the [t]ime lag between action and harm as well as the indeterminacy of causation of the relevant injuries thus make it unlikely that the toxic waste victim could sue within the tort statute of limitations as traditionally applied”).

119. Schwartz et al., *supra* note 2, at 1059.

present injury. However, this is not the first time tort law was expanded in order to accommodate parties that would be foreclosed from recovery under traditional tort law.<sup>120</sup> In fact, “the common law was designed to change so as to accommodate unusual claims that judges (as a reflection of society) believed to be meritorious.”<sup>121</sup> It is easy to view medical monitoring claims as meritorious because of the sympathies that they invoke.

The policy considerations that influenced the *Meyer* court to adopt medical monitoring are consistent with how other jurisdictions have viewed the claim.<sup>122</sup> In *Meyer*, the court argued that the underlying basis for recovery of medical monitoring costs is consistent with the theory of recovery in tort law: compensation for invasion of a personal interest.<sup>123</sup> Just as plaintiffs can recover tort damages for future injuries that are reasonably certain to occur, plaintiffs should be able to recover future medical monitoring costs to detect latent injuries when the plaintiffs have been exposed to levels of toxins that are deemed medically significant in order to abate further harm. Imposing medical monitoring costs for releasing harmful levels of toxins into the environment will deter the defendants from engaging in such tortious conduct.<sup>124</sup>

### B. Class Certification

Allowing class certification under rule 52.08(b)(3) was also an appropriate decision by the Missouri Supreme Court in *Meyer*. Medical monitoring claims are often sought in mass tort cases where class certification is the most efficient method of adjudicating the claim.<sup>125</sup> Since Missouri accepts medical monitoring as a type of compensatory action, the claim cannot be brought under Rule 52.08(b)(2), which requires injunctive or declaratory relief.<sup>126</sup> A finding that the predominance requirement of Rule 52.08(b)(3) is satisfied based on the single source of exposure and threshold level of exposure allows plaintiffs who could not file suit on their own to be able to recover the costs of periodic diagnostic testing. This is entirely consistent with the Missouri’s interest in protecting the health of its citizens and the court’s interest in efficiently adjudicating claims.

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120. Strand, *supra* note 118, at 577-78. Courts allowed plaintiffs to recover for being deprived of a substantial probability of living without showing that the defendant “more probably than not caused the death.” *Id.* In DES cases, courts allowed plaintiffs to recover even though they could not identify a specific defendant or show causation. *Id.* at 578.

121. *Id.* at 577.

122. *See supra* Part III.

123. *See also In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 850-52 (3d Cir. 1990).

124. *Id.* at 852; *Ayers v. Jackson Twp.* 525 A.2d 287, 312 (N.J. 1987).

125. Venugopal, *supra* note 7, at 1661.

126. Mo. Sup. Ct. R. 52.08(b)(2).

## VI. CONCLUSION

The Missouri Supreme Court's decision in *Meyer* had a significant impact on tort law in Missouri by allowing plaintiffs to recover for medical monitoring. While the claim requires a departure from the traditional present injury requirement of tort law, it is still in line with tort law's fundamental goal of compensation for harm caused and deterrence. This expansion of tort law is needed in order to address new grievances formed by toxic chemicals which are prevalent in today's society and effect large numbers of people.

Due to the *Meyer* decision, Missouri plaintiffs can undergo periodic testing, detect disease early, and hopefully abate serious injury. Further, defendants will have an incentive to make sure that their actions of releasing toxins into the environment will not have a medically significant impact on others. Also, because of *Meyer*, a class of plaintiffs adversely impacted by a single source of toxins can receive class certification if the requirements are met and bring a claim for medical expenses, which they otherwise would not be able to afford.

Thankfully, the critics' concerns regarding the flood of litigation that medical monitoring could spawn has yet to be felt in Missouri. However, the standards set forth for relief in *Meyer* should abate this concern.

ANITA J. PATEL