



Jurisprudence Section – 2006

E28 Causation Issues in Fear of Cancer and Medical Monitoring Cases

Chris Johnson, JD, Shook, Hardy & Bacon, LLP, 333 Bush Street, Suite 600, San Francisco, CA 94104; and Mohan Nair, MD, 5212 Katella Avenue, Suite 106, Los Alamitos, CA 90720*

After attending this presentation, attendees will understand some of scope and complexity of fear based liability and medical monitoring. This presentation will provide an understanding of the scope and complexity of fear based liability and medical monitoring through an exploration of the issues and the case law surrounding same.

The potential scope of such litigation is vast: Environmental/Occupational Toxic exposures (perchlorate/heavy metals/solvents) radiation, mold, medications/vaccines (Thimeresol/Gulf War Syndrome/Hormone Therapy), HIV AIDS exposure/needle stick, breast injury, risk of developing depression from using medications used to treat ADHD, risk of developing tardive dyskinesia/diabetes/infertility from using antipsychotics/mood stabilizers, noise exposure, and hearing loss.

An action to recover damages for fear of future disease is based on theories of intentional infliction of emotional distress, negligent infliction of emotional distress, or as an element of damages based on some independent underlying liability. The most important elements of proof for both parties in such cases is the reasonableness of the plaintiff's fear, which, depend primarily on the degree of certainty that the plaintiff was actually exposed to a disease causing agent, and the probability that the plaintiff will actually contract the feared disease. Jurisdictions have used "more likely than not" standard even while acknowledging that individuals may have reasonable fear below such a standard. In a fear-of-AIDS case, the court held that a plaintiff who had tested HIV-negative had not met the "more likely than not" standard. (As opposed to the scientific evidence that there is a high probability that a person infected with HIV will eventually develop AIDS or ARC if HIV-positive plaintiff).

Medical monitoring may represent a substantial portion of compensable damages. Factors that determine such awards include increases in the degree of risk of contracting disease; seriousness of the disease; severity of the exposure; and the diagnostic value of the medical monitoring.

Causation, Exposure, Medical Monitoring