THE EQUITY OF TORT CLAIMS FOR MEDICAL MONITORING

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I. INTRODUCTION

A medical monitoring cause of action commonly involves defective products that have exposed plaintiff-consumers to a significant risk of suffering bodily injury at some point in the future, as in the cases involving the diet-drug combination popularly known as Fen-Phen. The warnings accompanying the two drugs were each defective for not disclosing the foreseeable risk that their combination might cause heart-valve damage.[1] Due to the nature of this risk exposure, consumers of the drugs who did not yet have heart-valve damage were particularly vulnerable to suffering that injury. To protect themselves, these consumers had to undergo periodic, costly medical testing. In pursuing a claim for medical monitoring, a plaintiff-consumer sought tort recovery for these financial expenses on the ground that the defective product warnings foreseeably caused them.

Although consumers with heart-valve damage can recover for this bodily injury and the associated medical expenses, it is a separate question whether those without bodily injury can still recover for the associated medical expenses of testing for it. Courts and commentators are deeply divided about whether tort law should recognize the medical monitoring cause of action, and the "[c]ases across the country have been decided along a few identifiable fault-lines."[2] The arguments both for and against

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1. *In re* Pa. Diet Drugs Litig., No. 9709-3162, 1999 WL 962583, at *2, *17 (Pa. Com. Pl. Mar. 12, 1999).

2. Sullivan v. Saint-Gobain Performance Plastics Corp., 431 F. Supp. 3d 448, 458 (D. Vt. 2019).

permitting these tort claims have now been well rehearsed and apparently are not sufficiently powerful to tip the balance one way or the other.

To be clear, some of the issues have become sorted out over time. In rejecting claims for medical monitoring, courts have voiced concerns about excessive liabilities based on "vague standards that lead to inconsistency and unpredictability in the adjudication of cases."[3] Insofar as these problems turn on empirical questions and related issues of administrability, one can evaluate them in light of the experience of those jurisdictions which have adopted the liability rule—an approach courts have taken in related contexts.[4] These jurisdictions have not opened the floodgates, and there is now a sufficient diversity of approaches and experience with them to enable courts to craft liability rules that are not unduly vague or unpredictable in application.

But a liability rule adequately addressing these practical concerns would still not satisfy those courts which maintain that a monitoring cause of action cannot be squared with the basic principles of tort law. The viability of the medical monitoring cause of action ultimately depends on whether it can be justified as a matter of principle.

The difficult question in these cases is whether plaintiffs who have not suffered any compensable bodily injury should still be able to recover for the financial costs of medical monitoring—an economic loss. As the *Restatement (Third) of Torts* recognizes, actors ordinarily must exercise reasonable care in order to avoid physical harms—bodily injury or damage to real or tangible property.[5] By contrast, "An actor has no general duty to avoid the unintentional infliction of economic loss on another."[6] According to the *Restatement (Third),* courts limit the duty because liability for economic loss could subject defendants to "liabilities that are indeterminate and disproportionate to their culpability," and because "risks of economic loss tend to be especially well suited to allocation by contract."[7] When these rationales "are weak or absent," courts are willing to "recognize duties of

3. Adam P. Joffe, *The Medical Monitoring Remedy: Ongoing Controversy and a Proposed Solution*, 84 CHI.-KENT L. REV. 663, 667 (2009).

4. *See, e.g.,* Bifolck v. Phillip Morris, Inc., 152 A.3d 1183, 1198 (Conn. 2016) (rejecting defendant's argument that the consumer expectations test for defective design is "unworkable" in part because this claim is "contradicted by experience"); Falzone v. Busch, 214 A.2d 12, 16 (N.J. 1965) (recognizing cause of action for stand-alone emotional distress under certain conditions in part because "there is no indication of an excessive number of actions of this type in other states which" recognize this cause of action).

5. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7 (AM. L. INST. 2010) (defining duty); *see id.* § 4 (defining physical harm).

6. *Id.* § 1.

7. *Id.* § 1 cmt. c.

care to prevent economic loss."[8] On this view, the question is whether the reasons why courts ordinarily limit liability for economic loss justify such a limitation of liability for medical monitoring claims.

Though undeniably sensible, this framing of the problem is incomplete. In rejecting the medical monitoring cause of action, courts rely on the requirement that a plaintiff must suffer physical harm to recover for negligence liability.[9] "Others, however, have dispensed with the physical injury requirement and have recognized an independent medical monitoring cause of action."[10] The rationale for this approach is that the "physical injury rule is not a shibboleth to be honored without understanding its purpose and origin. . . . In applying the physical injury rule, it is important to consider why the rule exists and whether these purposes are at work in this case."[11] What are the principles that justify the requirement of physical harm, which ordinarily bars claims both for economic loss and for stand-alone emotional harms? An exclusive focus on economic loss only partially answers this question.

As I will try to respectively demonstrate in Parts II through IV below, three fundamentally different types of principles can justify the requirement of physical harm. None of them is tied to a contestable conception of tort law. For all three, a properly specified medical monitoring cause of action justifiably departs from the requirement of physical harm. Consequently, the equity of the medical monitoring cause of action can be established with the very same principles that justify the physical harm requirement.

II. UNPACKING THE REQUIREMENT OF PHYSICAL HARM: PHYSICAL HARM IS EQUALLY IMPORTANT AS OTHER TYPES OF HARMS

As a matter of principle, tort law could give equal importance to physical harms, economic losses, and stand-alone emotional harms.[12] The only

8. *Id*. § 1 cmt. d.

9. *See, e.g*., Henry v. Dow Chem. Co., 701 N.W.2d 684, 690 (Mich. 2005) (denying claim for medical monitoring based on "the principle that a plaintiff must demonstrate a present physical injury to person or property in addition to economic losses that result from that injury in order to recover under a negligence theory"); Caronia v. Philip Morris USA, Inc., 5 N.E.3d 11, 17 (N.Y. 2013) (same).

10. *Caronia*, 5 N.E.3d at 17 (citations omitted).

11. Sullivan v. Saint-Gobain Performance Plastics Corp., 431 F. Supp. 3d 448, 452 (D. Vt. 2019).

12. *Cf.* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 1 cmt. c (AM. L. INST. 2020) ("Economic injuries may be no less important than injuries of other kinds; a pure but severe economic loss might well be worse for a plaintiff than a more modest personal injury, and the difference between economic loss in itself and economic loss resulting from property damage may be negligible from the victim's standpoint.").

difference among them would then pertain to practical problems such as the potential extent of liability or difficulties of proof.

As compared to physical harms, both economic losses and stand-alone emotional harms more easily proliferate across society. A single instance of physical harm can generate multiple collateral claims, both for stand-alone emotional harms (witnesses, family members, friends, and so on) and for a distinctive set of economic losses (such as the lost wages and lost profits stemming from the premature death of a business entrepreneur). The duties governing these three different types of harm can be tailored to recognize the substantial differences in the scope of liability, even though each type of harm is equally important.

This conception of the physical harm requirement accords with its oft-stated rationale that a duty encompassing economic losses and stand-alone emotional harms would subject negligent defendants to "liabilities that are indeterminate and disproportionate to their culpability."[13] Unlike the liabilities for economic loss and stand-alone emotional harm, negligence liability for physical harms typically is not overly extensive, indeterminate, or disproportionate to culpability, thereby justifying the limitation of negligence liability to cases of physical harm. The physical harm requirement can be justified even if physical harm is not more important than economic loss or stand-alone emotional harm.

This formulation of the physical harm requirement can be easily squared with the medical monitoring cause of action. Such a claim is analogous to the obligation a plaintiff faces to mitigate damages pursuant to the avoidable consequences doctrine: "one injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort."[14] The defendant, in turn, must compensate the plaintiff for the reasonably necessary expenses of mitigating physical harm, as routinely occurs when plaintiffs recover for the medical expenses of treating their injuries. Likewise, a medical monitoring claim requires the court to decide whether the plaintiff is seeking recovery for a reasonable expenditure to avoid a bodily injury threatened by the tortious risk to which the plaintiff has been exposed. The

13. *Id.* (discussing economic loss); *see* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM 131 (Scope Note) (AM. L. INST. 2012) (explaining that courts "historically have been quite restrictive and cautious about permitting recovery for pure emotional harm" in part because "emotional harm can be widespread—a single act can affect a substantial population"); RESTATEMENT (SECOND) OF TORTS § 436A cmt. b (AM. L. INST. 1965) (identifying three reasons why courts limit negligence liability for stand-alone emotional harms, one of which is that "is that where the defendant has been merely negligent, without any element of intent to do harm, his fault is not so great that he should be required to make good a purely mental disturbance").

14. RESTATEMENT (SECOND) OF TORTS § 918(1) (AM. L. INST. 1979).

monitoring claim employs a standard of care that courts have long been applying to determine avoidable consequences and the associated availability of compensatory damages for medical expenses in treating bodily injuries.

As applied to the medical monitoring cause of action, this well-established standard would not unreasonably increase the scope of a negligent tortfeasor's liability. By definition, a reasonable expenditure on medical monitoring reasonably reduces the expected cost of the prospective physical harm in question. A negligent defendant would be liable for those bodily injuries which ultimately occur. Consequently, a negligent tortfeasor's full scope of liability—liability for physical harms plus liability for medical monitoring—would be *reasonably reduced* by the same type of reasonable expenditures on medical monitoring that the avoidable consequences doctrine and related rules already require.

To be clear, a negligent defendant would incur monitoring liability even for plaintiffs who do not ultimately suffer any bodily injury, whereas a negligent defendant incurs the cost of reasonably necessary medical expenses only for plaintiffs who are physically harmed. This difference, however, is irrelevant within the present conception of the physical harm requirement. The only relevant question concerns the potential scope and predictability of a negligent defendant's liability, not whether the liability involves one plaintiff's bodily injury or another's economic loss—each type of harm is equally important within the conception of the physical harm requirement under consideration.

It is no surprise that medical monitoring claims involve a principled exception to a formulation of the physical harm requirement that limits liability for economic losses and stand-alone emotional harms only for prudential reasons, not because they are less important than physical harms. When all types of injuries are equally important, the duty question depends only on the extent and predictability of liability that a negligent tortfeasor faces, not on the type of the harm in question. *The medical monitoring cause of action reasonably reduces in an adequately determinate manner the full scope of liability that a negligent actor would otherwise face*. By satisfying these requirements for the tort duty, the cause of action justifiably departs from this conception of physical harm requirement and permits recovery for the financial cost of the medical monitoring—an economic loss.

III. UNPACKING THE REQUIREMENT OF PHYSICAL HARM: PHYSICAL HARM IS MORE IMPORTANT THAN OTHER TYPES OF HARMS

The physical harm requirement could ordinarily preclude liability for economic loss and stand-alone emotional distress for the basic reason that physical harms are more important than these other types of harm. All merit

the protection of tort law, but economic security and emotional tranquility ultimately depend on physical security. Under this conception, physical harms are prioritized over economic and emotional harms.

A priority among the different types of harms influences the formulation of duty only when doing so is necessary to protect the more important interest in physical security by limiting liability for economic losses and stand-alone emotional harms. This attribute of the tort duty turns on questions about the limited amount of compensatory resources available for compensating any negligently caused harm and the associated issues of defendant insolvency.

A. The Problem of Scarce Compensatory Resources

The element of duty is defined in relation to the factors characteristic of the category of cases to which the duty applies: "No-duty rules are appropriate only when a court can promulgate relatively clear, categorical, bright-line rules of law applicable to a general class of cases."[15] To account for the problem of scarce compensatory resources, the duty question is defined in relation to the assets available to the ordinary duty-bearer for compensating the injuries of others.

To see why the scarcity of compensatory resources can affect the tort duty, reconsider the basic reasons why economic losses and stand-alone emotional harms are typically more extensive than physical harms: a single physical harm (wrongful death, for example) can cause a substantially larger number of other individuals to suffer stand-alone emotional harms (those family members, friends, and others who are foreseeably distressed by the premature death), and yet even more individuals to incur foreseeable economic losses (such as those who financially benefit from the physical well-being of the decedent). For example, one study recently estimated that for each COVID-related death in the United States, approximately nine close family members were left grieving.[16] This "bereavement multiplier" would be further increased once one accounts for close friends and the like. Adding an "economic-loss multiplier" for each instance of bodily harm would further increase the extent of foreseeable loss. Accounting for these multipliers shows that each severe bodily injury, on average, causes at least ten other individuals to suffer foreseeable emotional distress or economic loss.

If the tort duty encompassed all these foreseeable harms, a negligent tortfeasor would face claims from the physically harmed victim in addition

15. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7 cmt. a (AM. L. INST. 2010).

16. Ashton M. Verdery et al., *Tracking the Reach of COVID-19 Kin Loss with a Bereavement Multiplier Applied to the United States,* 117(30) PROC. NAT'L ACAD. SCIS. 17695, 17695 (2020).

to the substantially larger number of others seeking recovery for economic loss or stand-alone emotional distress. On average, for each physically harmed victim, the number of claimants would increase by at least a factor of ten. If the total amount of liability would exhaust the assets of the negligent defendant, the defendant would be rendered insolvent.

A deeply embedded principle of the modern legal system is that plaintiffs who have received a favorable liability judgment "can proceed only against property owned by" the defendant as debtor.[17] An insolvent defendant can discharge those liabilities in bankruptcy.[18]

The law of bankruptcy prioritizes among creditors to determine how the limited assets of a defendant's bankrupt estate must be distributed to satisfy a total amount of debt exceeding those assets. Within this priority scheme, no special priority attaches to tort plaintiffs who are owed money for compensatory damages from the bankrupt defendant—they are unsecured creditors who get compensated on a pro rata basis only after the secured creditors have been paid in full.[19]

The compensatory implications of bankruptcy are spelled out by the sprawling tort litigation involving asbestos-containing products that have caused widespread fatal cancers. These massive liabilities have bankrupted numerous corporations, which then set up trusts to distribute the remaining available assets to tort claimants. For trusts with assets to distribute, claimants receive from 1.1% to less than 60% of the full, liquidated value of their tort claims.[20] Many trusts distributed all their assets, leaving future tort claimants with nothing.

As the asbestos liabilities painfully illustrate, tortfeasors often do not have enough resources to fully compensate physically harmed victims. This compensatory problem would be even more pronounced if the total number of tort claimants on average increased by at least a factor of ten to account for those victims of the negligent misconduct who suffered economic losses or stand-alone emotional harms. The total liabilities owing to all these claimants would routinely exceed the assets of the ordinary defendant. In most cases, each of the tort plaintiffs—including the physically harmed victim(s)—would not be fully compensated.

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17. Lynn LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 7 (1996).

18. *Id*. at 9.

19. Luke Sperduto, *Three and A Half Rules for Tort Claims in (and out of) Chapter 11*, 95 AM. BANKR. L.J. 127, 129–30 (2021).

20. *See* LLOYD DIXON ET AL., ASBESTOS BANKRUPTCY TRUSTS: AN OVERVIEW OF TRUST STRUCTURE AND ACTIVITY WITH DETAILED REPORTS ON THE LARGEST TRUSTS 21 & 38, fig. 4.5 (Rand Corp. 2010) (identifying only one trust that pays above this amount).

B. Physical Harm and the Equitable Allocation of Scarce Compensatory Resources

The inequity of diverting the scarce compensatory resources of a negligent defendant away from physically harmed victims persuasively explains the physical harm requirement and its limited exceptions.[21] This requirement ordinarily limits the tort duty and forecloses recovery by the numerous individuals who suffer foreseeable economic losses or stand-alone emotional harms in order to give the physically harmed victims an adequate opportunity to receive full compensation for their injuries.

Invoking this equitable concern, the U.S. Supreme Court rejected the medical monitoring cause of action in part on the ground that the plaintiff in the asbestos case was seeking recovery for such damages "worth $950 annually for 36 years; by comparison, of all claims settled by . . . a group representing asbestos manufacturers, from 1988 until 1993, the average settlement for plaintiffs [physically] *injured* by asbestos was about $12,500, and the settlement for non-malignant plaintiffs among this group averaged $8,810."[22] Relying on similar reasoning, other courts have rejected a monitoring cause of action because such liability "would lead to the inequitable diversion of money away from those who have actually sustained an injury as a result of the exposure."[23] The basic idea is that the physical harm requirement implements the equitable maxim, the "worst should go first."[24]

Prioritizing the claims of physically harmed victims does not entail a complete lack of protection for other harms. If the duty in question governs a category of tort claims that do not pose a compensatory problem for

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21. Although a full defense of this proposition would take us well beyond our present concerns, the rudiments of such a defense are spelled out in MARK A. GEISTFELD, TORT LAW: THE ESSENTIALS 159–71 (2008) (discussing the analytics of duty and demonstrating how a duty formulated in terms of all foreseeable harms—physical, economic, and emotional—poses a problem of insolvency that a limitation of the duty ameliorates); Mark Geistfeld, *The Analytics of Duty: Medical Monitoring and Related Forms of Economic Loss*, 88 VA. L. REV. 1921 (2002) (same).

22. Metro-N. Commuter R.R. v. Buckley, 521 U.S. 424, 442 (1997).

23. Caronia v. Philip Morris USA, Inc., 5 N.E.3d 11, 18 (N.Y. 2013); *see* Henry v. Dow Chem. Co., 701 N.W.2d 684, 694 (Mich. 2005) (rejecting medical monitoring claims on the ground that "[l]itigation of these preinjury claims could drain resources needed to compensate those with manifest physical injuries and a more immediate need for medical care"); *see also* Hinton v. Monsanto Co., 813 So. 2d 827, 831 (Ala. 2001) (finding medical monitoring claims to be problematic due to the possibility of "vast testing liability adversely affecting the allocation of scarce medical resources").

24. *Cf.* Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541, 565 (1992) (providing conceptual and empirical support for this principle in the asbestos context to justify deferral registries that prioritize the claims of impaired plaintiffs over those who were exposed to asbestos but are not yet impaired).

physically harmed victims, courts will depart from the physical harm requirement.

For example, those who negligently handle or transfer the remains of a dead person are "subject to liability to a member of the family of the deceased" who foreseeably suffered "mental distress" as a consequence of the negligence.[25] The mishandling of human remains does not directly threaten anyone with physical harm independently of the predicate emotional distress, eliminating the equitable concern about the need to limit the duty for stand-alone emotional distress in order to protect or prioritize the interests of physically harmed victims. This same reasoning also explains why someone who was immediately threatened with physical harm while in the "zone of danger" can recover for stand-alone emotional distress in the absence of physical impact.[26] This particular duty encompasses physically harmed victims but is still circumscribed to a small set of claimants in most cases. So, too, "economic loss cases lacking [the specter of widespread tort liability for physical harms] do not receive distinctive treatment from the courts."[27]

In light of these exceptions to the physical harm requirement, it might be tempting to reformulate the tort duty so that it depends on the individual defendant's wealth. Such a duty would obligate a defendant with sufficient assets to pay for physical harms, economic losses, and emotional harms, whereas a defendant without such assets would be liable only for physical harms.

This formulation of the duty, however, raises some hard questions. The requirement of equal treatment presumably means that individual wealth should shape both the individual tort duty and its correlative right. Should wealthy individuals have both more extensive tort obligations and more robust rights than everyone else? Should poor individuals have both their tort obligations and their right to physical security diminished? These

25. RESTATEMENT (SECOND) OF TORTS § 868 & cmt. f (AM. L. INST. 1979).

26. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 47 & cmt. b (AM. L. INST. 2012).

27. Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513, 1526 (1985). Although Professor Rabin does not expressly limit his conclusion to cases that do not implicate physically harms, his examples incorporate that important condition. *See id.* at 1525 & n.39 (citing cases in support of his thesis about courts being particularly concerned about widespread liability for economic loss, all of which involved negligent conduct that actually caused or otherwise threatened physical injury to others—a manufacturer's negligent failure to warn about cancer in DES cases, a negligent driver who physically injured others in a crash, a negligent defendant responsible for a structural defect in a bridge, and the negligent driver of a truck carrying flammable liquid that crashed and caused a highway to be closed).

problems explain why a defendant's individual wealth is only relevant for determining punitive damage awards, not liability in the first instance.[28]

A tort duty formulated in terms of categorical considerations is based on ordinary wealth in the community considered in relation to the typical claim within the category of cases the duty governs. An individual defendant's wealth, like the total amount of economic loss or emotional distress in a particular case, is a case-specific fact not relevant to the categorical formulation of duty. As a categorical matter, a duty-bearer with ordinary wealth does not have sufficient financial resources to compensate the full range of harms that a breach of the duty would foreseeably cause in the typical case involving physical harm. Tort law accordingly limits the duty with the physical harm requirement in order to implement the equitable principle that the "worst should go first."

C. The Equitable Prevention of Irreparable Injuries

Equitable considerations ultimately lie at the heart of the medical monitoring question, as they do for other duty limitations based on types of harm that in principle otherwise merit tort protection. The structure of the equitable problem is well described by the New York Court of Appeals: "Tort liability of course depends on balancing competing interests . . . . [To] identify an interest deserving protection does not suffice to collect damages from anyone who causes injury to that interest. . . . Not every deplorable act . . . is redressable in damages."[29] In a world of scarce compensatory resources, an overly expansive duty can create conflicts among the interests of different individuals in their physical security, economic security, and emotional tranquility—compensation for one or more of these interests can come at the expense of the others. To resolve these conflicts, courts must prioritize some interests over the others and limit compensation accordingly, even though each type of harm would otherwise deserve tort protection in the appropriate circumstances.

For reasons previously discussed, the priority among these various interests is shaped by the equitable principle that the "worst should go first," but the medical monitoring claim also implicates another fundamental principle of equity—that the prevention of an irreparable injury is better than

28. *See* RESTATEMENT (SECOND) OF TORTS § 908 cmt. e (AM. L. INST. 1979) ("The wealth of the defendant is also relevant [for determining the amount of punitive damages], since the purposes of exemplary damages are to punish for a past event and to prevent future offenses, and the degree of punishment or deterrence resulting from a judgment is to some extent in proportion to the means of the guilty person.").

29. Madden v. Creative Servs., 646 N.E.2d 780, 784 (N.Y. 1995) (citations omitted) (quoted in *Caronia*, 5 N.E.3d at 450–51).

attempting to compensate for it after the fact with the monetary damages remedy. Accounting for this equitable principle casts the monitoring claim in a new normative light.

The common law defines an injury as being "irreparable" if it "cannot be adequately measured or compensated by money."[30] Prior to the merger of law and equity, the jurisdiction of the two courts was determined by the irreparable injury rule, pursuant to which "equity would take jurisdiction only if there were no adequate remedy at law."[31] The legal remedy of compensatory damages "was considered adequate only if it was as complete, practical, and efficient as the equitable remedy," a definition that still "prevails today."[32] For cases involving irreparable injuries, "judges have been brought to see and to acknowledge . . . that a remedy which *prevents* a threatened wrong is in its essential nature better than a remedy which permits the wrong to be done, and then attempts to pay for it."[33]

In the case of premature death or a severe bodily injury, compensatory damages do not plausibly make the plaintiff right-holder "whole," nor are they designed to do so.[34] According to the judicial conception of an irreparable injury, "[d]amages are inadequate if plaintiff cannot use them to replace the specific thing he has lost."[35] Based on this conception of irreparable injury, compensatory damages are adequate "for only one category of losses: to replace fungible goods or routine services in an orderly market."[36] Bodily injuries are not fully fungible with any other goods or services, making them the paradigmatic example of an irreparable harm.

The connection between physical harms and irreparable injuries provides an equitable rationale for negligence liability. A negligence duty

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30. *Irreparable injury*, BLACK'S LAW DICTIONARY (11th ed. 2019).

31. Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 699 (1990).

32. *Id.* at 700.

33. JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA § 1357, at 844-45 (Students' ed. 1907) (1887). In discussing this point, Professor Laycock observed:

> [A]s a description of what courts do[,] Pomeroy's statement . . . is not quite right . . . . But it captures an important insight . . . . Remedies that prevent harm altogether are better for plaintiffs, and plaintiffs should have such remedies if they want them and if there is no good reason to deny them. A general preference for damages is not a reason unless there is a reason for the preference. Judges act on these premises, whether or not they consciously acknowledge all that Pomeroy imputed to them.

Laycock, *supra* note 31, at 686 (original formatting omitted).

34. *Cf.* RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (AM. L. INST. 1965) (stating that a damages award for the loss of life's pleasures is not supposed to "restore the injured person to his previous position" but should instead only "give to the injured person some pecuniary return for what he has suffered or is likely to suffer").

35. Laycock, *supra* note 31, at 703.

36. *Id.* at 691.

limited to physical harms seeks to prevent the irreparable injury of physical harm without imposing undue hardship on the duty-bearer, the same type of approach the common law otherwise employs to address the problem of irreparable injury.[37]

So, too, a court-ordered fund that dispenses payments for reasonably necessary forms of medical monitoring is an equitable remedy that seeks to prevent or at least alleviate—through early detection and treatment—the irreparable injury of physical harm. Denying these monitoring claims and limiting recovery to those who suffer physical harm runs afoul of the equitable principle that it is better to prevent these irreparable injuries in the first instance.

D. Formulating Medical Monitoring Claims in an Equitable Manner

Medical monitoring claims implement the equitable principle concerned about the prevention of irreparable bodily injuries such as cancer. Although this form of prevention could be inequitable insofar as it unfairly diverts scarce compensatory resources away from those right-holders who now have cancer, any inequity in this regard is tempered by the requirement of equal treatment: the interests of current cancer victims cannot be prioritized over the interests of future cancer victims. Simply giving future victims an entitlement to compensatory damages once they get cancer does not satisfy the requirement of equal treatment. That remedy violates the equitable principle that it is better to prevent the irreparable bodily injury of cancer instead of trying to compensate it with the inherently inadequate damages remedy. Rather than unfairly diverting compensatory resources away from current cancer victims, the medical monitoring cause of action recognizes that those who might get cancer in the future merit protection just like those already suffering from the disease.

Framing the equitable problem in this manner provides grounds for limiting medical monitoring claims. The requirement of equal treatment helps to justify recovery for medical monitoring; it does not justify monitoring damages that exceed those available to a physically harmed victim trying to recover from a bankrupt defendant. Recall in this regard that the U.S. Supreme Court rejected the medical monitoring cause of action in part on the ground that the plaintiff in the asbestos case was seeking recovery

37. *See* Mark A. Geistfeld, *The Principle of Misalignment: Duty, Damages, and the Nature of Tort Liability*, 121 YALE L.J. 142, 157–72 (2011) (arguing that the ordinary duty to exercise reasonable care equitably responds to the problem of irreparable injury). The discussion in text involving irreparable injuries is largely drawn from this source.

for monitoring damages that exceeded the recoveries for those with cancer.[38] Rather than justifying a wholesale rejection of monitoring claims, the equitable resolution of the bankruptcy problem justifies a limitation of monitoring damages to an amount no greater than the award(s) available to the physically harmed victim(s). Such a limitation on monitoring damages would ensure that the security interest of a monitoring claimant is treated equally with the security interest of someone who already has the bodily injury in question.

These same equitable concerns also justifiably alter the traditional common-law rule that forecloses reliance on collateral sources such as health insurance when calculating damage awards.[39] Individuals whose medical monitoring expenses are otherwise covered by health insurance do not need the tort remedy to prevent the future bodily injury. The equitable rationale for the monitoring remedy does not apply to this class of right-holders, and so courts can reduce recoveries for medical monitoring by subtracting the claimant's health insurance proceeds. This abrogation of the collateral source rule minimizes the extent to which monitoring damages could divert scarce compensatory resources away from the physically harmed victims.

Although the strongest case against the medical monitoring cause of action would seem to be based on the principle that physical harms are more important than economic harms, closer analysis shows otherwise. The monitoring cases involve economic losses normatively different from lost profits and the like at issue in other tort cases. The monitoring claim satisfies the equitable principle that it is better in the first instance to prevent irreparable bodily injuries through the exercise of reasonable care, which in this context involves a negligent defendant incurring the financial expenses of reasonably necessary forms of medical monitoring. These claims would be even more equitable, however, if a plaintiff's recovery for monitoring damages could not exceed the recovery a physically harmed victim receives from a bankrupt defendant and were reduced by any health insurance proceeds covering those medical costs.

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38. Metro-N. Commuter R.R. v. Buckley, 521 U.S. 424, 442 (1997) (stating that the monitoring damages would be "worth $950 annually for 36 years; by comparison, of all claims settled by . . . a group representing asbestos manufacturers, from 1988 until 1993, the average settlement for plaintiffs [physically] *injured* by asbestos was about $12,500, and the settlement for non-malignant plaintiffs among this group averaged $8,810").

39. *Cf. id.* at 442–43 (1997) (rejecting a medical monitoring claim in part because the "traditional, full-blown ordinary tort liability rule would ignore the presence of existing alternative sources of payment, thereby leaving a court uncertain about how much of the potentially large recoveries would pay for otherwise unavailable medical testing and how much would accrue to plaintiffs for whom employers or other sources (say, insurance now or in the future) might provide monitoring in any event").

IV. UNPACKING THE REQUIREMENT OF PHYSICAL HARM: THE CONTRACTUALLY BASED ECONOMIC LOSS RULE

Regardless of how tort law prioritizes among physical, economic, and emotional harms, it is a separate question whether tort law should allocate liabilities and responsibilities when the parties could instead resolve these matters by contracting. Pursuant to the economic loss rule, "there is no liability in tort for economic loss caused by negligence in the performance or negotiation of a contract between the parties."[40] By foreclosing recovery for economic losses, this rule provides an independent rationale for the physical harm requirement: it polices the boundary between contract and tort law. For the medical monitoring cause of action to justifiably depart from the physical harm requirement in contractual settings, it must also be squared with the contractually based economic loss rule.

Despite the general bar to recovery, tort law recognizes a cause of action for economic loss in a wide variety of cases, including "negligent misrepresentation, defamation, professional malpractice, breach of fiduciary duty, nuisance, loss of consortium, wrongful death, spoliation of evidence, and unreasonable failure to settle a claim within insurance policy limits."[41] Many of these cases pit one contracting party against another. Consequently, the economic loss rule does not maintain the integrity of the tort-contract boundary by relying on the formal properties of a tort claim—is one party to a contract suing another in tort for the pure economic loss stemming from the negotiation or performance of the contract? The rule must instead be based on a substantive reason that bars most economic-loss tort claims while recognizing limited exceptions to this rule.

Whether the claim is for physical harm or economic loss, the tort duty in all these cases justifiably responds to an important limitation of contract law.[42] A fundamental premise of contract law is that the terms of a contract are based "on supposedly informed assent" of the contracting parties.[43] When buyers lack the requisite knowledge, contract law does not provide the full range of remedies that adequately protect their frustrated expectations, creating a role for tort law.

Aside from extreme cases of unconscionable terms, contract law does not address the fairness of transactions involving uninformed or

40. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 3 (AM. L. INST. 2010).

41. Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule*, 66 WASH. & LEE L. REV. 523, 529–32 (2009) (footnotes omitted).

42. The following discussion is largely drawn from MARK A. GEISTFELD, PRINCIPLES OF PRODUCTS LIABILITY 10–21 (3d ed. 2020).

43. 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.9, at 465 (3d ed. 2004).

unsophisticated buyers.[44] An unconscionable term, moreover, only renders the contract (or that particular term) unenforceable.[45] So, too, an uninformed buyer's unilateral mistake can only void the contract and perhaps generate a claim for restitution.[46] None of these remedies adequately protects the expectation interest of a poorly informed buyer across all cases.[47]

For example, the average buyer cannot determine whether a food product is fit for human consumption. Unable to inspect the product for contaminants like germs, the purchaser ordinarily does not have adequate information about this component of product quality. In most cases, a buyer discovers that the food is unwholesome only after consuming it and getting sick. Transactions of this type do not satisfy the baseline assumption of contract law that the contracting parties are adequately informed, which explains why the contractual remedies are not adequate. The seller's return of the purchase price or replacement of the defective product with wholesome food would not compensate the buyer for the sickness that the contaminated food caused.

Since medieval times, the common law has addressed this problem by protecting the purchasers of food products with the implied warranty of quality.[48] This warranty "was in its origin a matter of tort liability" that for centuries has subjected the commercial sellers of contaminated food to strict liability.[49] By assuring compensation for injuries caused by unwholesome food, the implied warranty protects consumer expectations that the food is fit for human consumption. The buyer did not expect to be made sick by the food, and the guarantee of tort compensation for that injury remedies the buyer's frustrated expectation.

Consumers are not always poorly informed, in which case the rationale for the tort duty is eliminated. This substantive contracting rationale for

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44. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. c (AM. L. INST. 1981) ("Inadequacy of consideration does not of itself invalidate a bargain, but gross disparity in the values exchanged may be an important factor in a determination that a contract is unconscionable").

45. *See id.* at § 208; *see also* U.C.C. § 2-302 (AM. L. INST. & UNIF. L. COMM'N 2003).

46. 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 9.4, at 623 (3d ed. 2004).

47. Contract law would protect the expectations of poorly informed buyers if it permitted reformation of the contract to embody the agreement that purchasers would have made if they were adequately informed. However, a "court will not reform a document to reflect an agreement that the court merely *thinks* the parties *would have decided to make* had they not been mistaken" and reformation instead requires "clear and convincing evidence" showing why the agreed-upon contract did not contain the language in question. E. ALLAN FARNSWORTH, ALLEVIATING MISTAKES: REVERSAL AND FORGIVENESS FOR FLAWED PERCEPTIONS 101 (2004).

48. Jacob E. Decker & Sons Inc. v. Capps, 164 S.W.2d 828, 830 (Tex. 1942) (tracing the rule "as far back as the year 1266 A.D.").

49. James Barr Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 10 (1888) (explaining that the implied warranty of quality "stood anciently upon the . . . footing" of tort law); *see also* Heavner v. Uniroyal, Inc., 305 A.2d 412, 424 (N.J. 1973).

limiting the tort duty justifies the economic loss rule. In most contexts, the ordinary buyer has sufficient information to adequately protect his or her economic interests (lost profits and so on) by contracting, eliminating the rationale for overriding these contractual choices with a mandatory tort duty.[50]

This substantive contracting rationale also justifies the varied exceptions to the economic loss rule. For example, the ordinary client of an accountant or lawyer cannot make informed contractual decisions about allocating responsibility for pure economic losses caused by professional malpractice.[51] The contracting rationale for the economic loss rule does not apply, justifying the exception embodied in the tort duty running between these professionals and their clients.

The substantive contracting rationale for the economic loss rule also applies to medical monitoring claims involving defective products, even though consumers do not usually have a direct contractual relationship with product manufacturers. These tort cases are situated within a web or family of contracts running from the manufacturer, through downstream sellers, to the purchaser. The manufacturer's tort obligations are impounded into the product price the consumer ultimately pays, and the manufacturer can rely on contracting (the product warranty) to disclaim any obligations for defects in the product.

Because the tort duty in product cases implicates contractual relationships, it is predicated on the inability of the ordinary consumer to rely on contracting to adequately protect his or her interest in avoiding physical harms. Disclaimers do not solve this informational problem, and so courts refuse to enforce a product seller's attempt to avoid tort liability via a disclaimer in the warranty: "It is presumed that the ordinary product user or

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50. *See* Mark A. Geistfeld, *The Contractually Based Economic Loss Rule in Tort Law: Endangered Consumers and the Error of* East River Steamship, 65 DEPAUL L. REV. 393, 401-12 (2016). Importantly, the contracting opportunities are not limited to the seller or provider of services but also include the purchase of policies from insurance companies covering the economic losses in question, such as the lost profits stemming from damage to real or tangible property.

51. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 4 cmt. b (AM. L. INST. 2010) (observing that in determining whether a tort duty exists for the provision of "professional" services, courts rely on various factors like "a need for complex discretionary judgments" that "are proxies for the policies that lie behind the rule," and "they suggest limits on the reliability of contract to effectively regulate the risks at stake"); *see also id.* § 4 cmt. a ("[M]ost clients do not know enough to protect themselves by inspecting the professional's work or by other independent means. Recognizing the tort claim therefore assigns the risk of the professional's negligence where it belongs: with the professional."); *id*. § 4 cmt. e (stating that courts will "rarely" enforce a professional's attempt to contractually disclaim the tort obligations owed to a client because the "disparity in knowledge between the parties, and the vulnerability of the client to the professional's carelessness, are too great to make such agreements trustworthy").

consumer lacks sufficient information and bargaining power to execute a fair contractual limitation of rights to recover."[52]

The rationale for the tort duty governing physical harms also justifies claims for medical monitoring, even though consumers have enough information to adequately protect their other types of economic interests with contracting. Consumers can reasonably rely on manufacturers satisfying their tort obligations, and so "[i]n general, a plaintiff has no reason to expect that a new product contains a defect and would have little reason to be on guard to discover it."[53] Unaware that the product is defective and having no reason to think otherwise, the ordinary consumer at the time of purchase does not have the requisite information or motivation for contracting over the allocation of financial responsibility to monitor any future physical harms a defect might threaten. The consumer only gains the requisite information once the unknown defect becomes manifest *after* purchase and threatens future physical harm—the point at which contracting is no longer feasible. The same informational problem which justifies the ordinary tort duty with respect to physical harms extends to the consumer's contracting decision involving unknown defects that require medical monitoring to prevent future physical harms.

This reasoning explains an important exception to the economic loss rule involving tort claims for the economic loss of asbestos abatement.[54] As in the case of medical monitoring, consumers incur the financial costs of asbestos abatement to prevent future physical harms the exposure to asbestos can otherwise cause (asbestosis and mesothelioma). At the time of purchase, consumers did not know that asbestos exposure could cause cancer—the product warning was defective for not supplying this information. This lack of information prevented consumers from fairly contracting over responsibilities for asbestos abatement. The substantive rationale for the contractually based economic loss rule does not apply to these claims, explaining why courts created an exception to that rule and permitted recovery for the economic loss of asbestos abatement.[55]

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52. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 18 cmt. a (AM. L. INST. 1998).

53. *Id*. at § 17 cmt. d.

54. *See* Geistfeld*, supra* note 50, at 412–17 (showing how the substantive contracting rationale explains why courts permit tort recovery for pure economic loss in cases of asbestos abatement and medical monitoring—two important exceptions to the economic loss rule in product cases that courts have not otherwise squared with that rule).

55. *Cf.* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 21 cmt. e (AM. L. INST. 1998) (recognizing that "the serious health threat caused by asbestos contamination has led the courts" to effectively recognize an exception to the economic loss rule); *see also* 80 S. Eighth St. Ltd. Partn. v. Carey-Canada, Inc., 486 N.W.2d 393, 397 (Minn. 1992), *amended sub nom*. 80 S. Eighth St. Ltd. Partn. v. Carey-Canada, Inc., 492 N.W.2d 256 (Minn. 1992) (finding unbelievable that plaintiff's "claim of asbestos contamination is one for economic loss" because plaintiff was

Like asbestos abatement, medical monitoring is a form of economic loss that clearly falls within the principled exceptions to the substantive contracting rationale for the economic loss rule. In product cases, consumers have no reason to contract over the financial costs of medical monitoring necessitated by a defect threatening future bodily injury, because at the time of purchase they have the right to expect that the product will not be defective in this respect. The same is true of buyers in other contractual settings subject to a tort duty. In each instance, buyers reasonably expect that the seller complied with the tort duty, thereby obviating the need for them to contract over who should incur the financial costs of monitoring in the event the seller breaches the duty and exposes the buyer to a tortious risk of suffering bodily injury in the future. Rather than barring tort recovery, the substantive contracting rationale for the economic loss rule justifies the medical monitoring cause of action.

V. CONCLUSION

The viability of the medical monitoring cause of action depends on the requirement of physical harm. Like other tort doctrines, courts have provided different rationales for this requirement.[56] As is also true of other doctrines, some of these rationales involve questions of administrability and other empirical matters that can be resolved with experience and do not turn on a difference in principle. But as a matter of principle, the physical harm

"not seeking enforcement of the benefit of their bargain regarding the fireproofing performance" of the asbestos-containing product" but instead was pursuing recovery for "the costs of maintenance, removal and replacement" of the asbestos-containing product for the purposes of "eliminating the risks of injury and of making the building safe for all those who use and occupy this property").

56. For a sampling of these rationales, see Sullivan v. Saint-Gobain Performance Plastics Corp., 431 F. Supp. 3d 448, 452–53 (D. Vt. 2019) (identifying "two primary functions" of the physical harm requirement, the first being a "means to express and enforce the rule that in most circumstances, parties to a contract have no tort duty to protect one another from economic loss," whereas the "second purpose of the physical injury rule is to limit cases of emotional distress which could otherwise become speculative and excessive in number"); Caronia v. Philip Morris USA, Inc., 5 N.E.3d 11, 14 (N.Y. 2013) (holding that the requirement that "a plaintiff sustain physical harm before being able to recover in tort is a fundamental principle of our state's tort system" and the requirement of physical harm "serves a number of important purposes: it defines the class of persons who actually possess a cause of action, provides a basis for the factfinder to determine whether a litigant actually possesses a claim, and protects court dockets from being clogged with frivolous and unfounded claims") (citations omitted); Henry v. Dow Chem. Co., 701 N.W.2d 684, 690–91 (Mich. 2005) (finding that the physical harm to a person or property requirement "serves a number of important ends for the legal system. First, such a requirement defines more clearly who actually possesses a cause of action," it "reduces the risks of fraud, by setting a clear minimum threshold—a present physical injury—before a plaintiff can proceed on a claim," and "perhaps most significantly, the requirement of a present physical injury . . . establishes a clear standard by which judges can determine which plaintiffs have stated a valid claim, and which plaintiffs have not").

requirement can be based on three distinctive rationales concerning the relative importance of physical harms, economic losses, and emotional distress, and the context—contractual or otherwise—in which they occur. Each rationale permits recovery for the economic loss of medical monitoring under certain conditions. The same equitable principles that ordinarily limit negligence liability to cases of physical harm also establish the equity of the medical monitoring cause of action.