

## Comparison of Medical Monitoring Elements

- In *Sullivan v. San Gobain* (D. Vt Dec. 27, 2019), Judge Crawford addressed whether Vermont law permits the remedy of medical monitoring, including whether a plaintiff must first suffer physical injury or illness before seeking medical monitoring as a remedy.
- “The court follows the *Bower* [West Virginia] and *Paoli* [Pennsylvania] line of decisions in identifying six elements” for determining if medical monitoring should be awarded as a remedy, but “[i]t is premature to define the exact requirements.” *Sullivan v Saint Gobain*, p.30.
- “Trial evidence will be significant. The court and the parties have not yet resolved the issue of which questions are for the court and which will be decided by jury verdict.” *Id.* at 30-31.
- The list of factors [below] provides a clear guide to the plaintiffs’ burden of proof.” *Id.* at 31.
- “The choice between permitting and excluding a medical monitoring remedy for potential future illness is a choice between competing values. . . jurisdictions that do not permit the remedy do so on the basis of concerns about unforeseen economic consequences to the defendant . . . jurisdictions that allow the remedy value the potential saving of lives that may be achieved through early detection and treatment.” *Id.* at 29.
- The court rejected the argument that medical monitoring is unavailable to asymptomatic individuals. *Id.* at 33.

| <b>Elements Plaintiffs Must Demonstrate for the Remedy of Medical Monitoring</b>   |   |
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| <b>Sullivan, et al. v Saint-Gobain Performance Plastics Corp.</b>  | <b>S.37. As Passed by General Assembly and Vetoed by Governor</b>   |
| Exposure to a proven hazardous substance.  | The person was exposed to a toxic substance.  |
| As the result of tortious conduct of the defendant.  | As a result of tortious conduct by the owner or operator of a large facility, or persons under the control of the owner or operator of a large facility, who released the toxic substance.  |
| Exposure at a rate significantly greater than the general population.  |   |
| As a proximate result of the exposure, plaintiffs have suffered an increased risk of contracting a serious disease.  | As a proximate result of the tortious exposure, the person has a greater risk of contracting a latent disease.  |
| The increased risk makes it medically necessary for the plaintiffs to undergo periodic medical examination different from that prescribed for the general population in the absence of the exposure. | Diagnostic testing is reasonably necessary. Testing is reasonably necessary if, shown by expert testimony, a physician would prescribe diagnostic testing because the person’s increased risk of contracting the disease due to the exposure makes it reasonably necessary to undergo diagnostic testing different from what would normally be prescribed in the absence of the exposure. |
| Monitoring procedures exist which are reasonable in cost and safe for use.   | Medical tests or procedures exist to detect the latent disease.   |

## A. Key Differences in Elements for Demonstration: S. 37 vs. Crawford Decision

### 1. Hazardous Substance vs. Toxic Substance

- The decision requires exposure to a proven hazardous substance, but does not define “hazardous substance,” which is consistent with court decisions in other jurisdictions.
  - Consequently, whether the substance is hazardous becomes an issue in litigation.
- S.37 requires exposure to a toxic substance, and defines what is a toxic substance by referencing existing lists of substances.
  - The S.37 definition of “toxic substance” does include a category of substances where “exposure to the substance is shown by expert testimony to increase the risk of developing a latent disease.”
- The S37 definition of “toxic substance” also excludes pesticides application and ammunition and its components. The decision does not provide for either exclusion.

### 2. Exposure by Any Defendant vs. Exposure by Owner or Operator of a Large Facility

- The decision provides that medical monitoring may be sought from any person/defendant who exposed the plaintiff to the hazardous substance.
- S.37 provides that medical monitoring may be sought under the statute only against the owner or operator of a large facility from which the toxic substance was released.
  - A “large facility” is defined to mean certain SIC coded industries or businesses that have 10 or more full-time employees at a facility or are owned by a person who, when all facilities owned by the person are aggregated, has employed 500 employees at any one time.
- The S.37 definition of “facility” excludes municipally owned properties. The decision does not.

### 3. Exposure Rate

- The decision provides that one of the elements to recover medical monitoring is to demonstrate “exposure at a rate significantly greater than the general population.”
- S.37 does not contain a similar requirement.

### 4. Necessity of Testing

- The decision provides that the increased risk of contracting a disease makes it medically necessary for a plaintiff to undergo medical examination different from that prescribed by the general population in the absence of exposure.
- S.37 provides that diagnostic testing must be found to be reasonably necessary.
  - Testing is reasonably necessary if, shown by expert testimony, a physician would prescribe diagnostic testing because the increased risk of contracting the disease due to exposure makes it reasonably necessary to undergo diagnostic testing different from what would normally be prescribed in the absence of exposure.

### 5. Standard for Availability of Monitoring Tests or Procedures

- Under the decision, monitoring procedures must exist that are reasonable in cost and safe in use.
- S.37 provides that medical tests or procedures must exist to detect the latent disease.

## **B. Controlling Nature or Weight of Decision**

- Generally, federal district court decisions addressing State law are not binding on State courts. “It is axiomatic that the decision of the federal district court is not binding precedent upon [the Vermont Supreme Court.]” *State v. Austin*, 165 Vt 389, 394 (1996).
- “Nonetheless, a state court for prudential and policy reasons, should give due respect to the decisions of lower federal courts, particularly on questions involving the U.S. Constitution.” *Id.*
- The General Assembly, the Vermont Supreme Court, and the lower Vermont courts have not previously addressed medical monitoring damages as a form of relief for asymptomatic plaintiffs.
- Consequently, Vermont courts could issue a decision in conflict, in whole or in part, with the decision in *Sullivan v. Saint Gobain*. Similarly, the General Assembly can legislate in a manner inconsistent with the decision.