

No. 32868 – *State of West Virginia ex rel. City of Martinsburg, a municipal corporation v. Honorable David H. Sanders, Judge of the Circuit Court of Berkeley County; Christopher W. Beard, Mark Stroop, Steven T. Canby, Scott W. Stroop, Daniel M. Thomas, Donna Harmison, Derrick Crawford, Michael A. Johnson, Fred Pearrell, R. A. Talbott, Jr., Anthony Sirna, John Glen Holben, Jonathan Fink, Jason Gochenour and Jason E. Hoover*

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Starcher, J., dissenting:

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The common law – which is constitutionally a creature within the domain of the courts – has evolved over the centuries. The common law is not written in stone. It grows to meet the demands of the times. Inscribed inside the Jefferson Memorial in Washington, D.C., we find these words of Thomas Jefferson:

I am not an advocate for frequent changes in laws and constitutions. But laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors.

In the last few decades, science has found that horrific diseases like cancer can be caused by exposure to toxic substances – like asbestos or Agent Orange. But those diseases will often not appear until many years or decades later. Doctors have found that the earlier these diseases are diagnosed and treated, the greater the likelihood of survival. To achieve an early diagnosis, a person who has been exposed to a toxic substance and has an increased likelihood of developing a disease, must routinely go to a doctor for tests – blood

work, x-rays, CT scans, general poking and prodding by the doctor, and so on. And for each visit, the doctor sends the person a bill.

In the last few years, courts have begun to recognize that these people – if exposed to the toxic substance as a result of someone else’s negligence – have sustained a “loss” or “damages” every time they were required to pay a doctor’s bill. These people have an economic “injury:” the cost of the medical tests required to monitor their medical condition. In *Bower v. Westinghouse Elec. Corp.*, 206 W.Va. 133, 522 S.E.2d 424 (1999), this Court acknowledged the science of the times, and allowed the common law to evolve to allow those people to collect damages from a wrongdoer to pay the costs of their “medical monitoring.”

I dissent because this opinion retreats from *Bower* and creates a judicial purgatory for medical monitoring claims, but only those of government employees against their government employer. Government employees are left in a judicially-created netherworld, bereft of any remedy for the wrong committed upon them by their employer. The majority opinion has essentially abandoned its centuries-old role in advancing the common law, crafted a rule which ignores the reality of the modern world, and dumped the issue of compensation for injured government employees squarely in the lap of the Legislature.

The opinion explicitly precludes these employees from receiving payment from the employer for the costs of their medical monitoring. Government employees who are exposed to toxic substances as a result of their employer’s carelessness must pay for their

medical tests out of their own pocket as a result of the majority's opinion.

The opinion also acknowledges that government employees cannot pursue an action against their employer, even if the employer acted with "deliberate intent" and intended to cause them injury. *See W.Va. Code, 23-4-2; Syllabus Point 4, Michael v. Marion County Bd. of Educ.*, 198 W.Va. 523, 482 S.E.2d 140 (1996).

The opinion generously avoids the question, in footnote 4, regarding whether government employees may be entitled to medical benefits under the Workers' Compensation Act. But, in today's political climate, I believe that workers' compensation insurers will steadfastly decline to pay for medical monitoring benefits, preferring instead to gamble with the worker's life and wait to see if the worker develops a disease in the future.

This Court is on a path to abdicate its role as the third branch in our constitutional government, and this case is but one step on that path. The Court has chosen to dump government employees into a no-man's-land with no remedy for their out-of-pocket losses. The baton is therefore passed to the Legislature, in hopes that the elected members of that body will recognize the statutory need for a remedy for the injury sustained by the citizens.

I decline to join my colleagues in the decimation of the constitutional role of the courts as caretakers of the common law. I therefore respectfully dissent.