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OPINION

'Donovan': practical implications and ominous portents

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Justice Oliver Wendell Holmes wrote that hard cases make bad law "because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment." The Supreme Judicial Court's recent unanimous opinion, *Donovan v. Philip Morris USA, Inc.,* SJC-10409 (Oct. 19, 2009), illustrates this maxim perfectly.

Donovan is, as the court admits, an attempt to reinterpret Massachusetts tort law to reflect modern life and to ensure just results. The opinion does not realize its ambitions and, in fact, enlists courts to exert control over scarce medical resources, a task to which they are ill-suited.

The opinion places Massachusetts among the small number of jurisdictions that recognize "medical monitoring" claims. Such claims seek recompense for the cost of regular medical screening necessitated by exposure to substances that cause disease.

To be sure, medical monitoring plaintiffs, including the specific plaintiffs in *Donovan,* have serious factual and procedural hurdles to surmount before they can recover. Nonetheless, the court set these plaintiffs' pleading burdens low enough to force defendants to expend significant moneys litigating the issues.

As Massachusetts now apparently allows some form of recovery for plaintiffs exposed to substances but not demonstrably injured, we may soon see the state become a destination jurisdiction for toxic torts plaintiffs ineligible for recompense elsewhere. This development would benefit no one except attorneys and doctors.

Focus

About the case

A putative class of Massachusetts smokers at least 50 years old who have smoked Marlboro cigarettes for at least 20 "pack-years" sued cigarette manufacturer Philip Morris in the U.S. District Court.

The plaintiffs sought an order requiring Philip Morris to administer to them a program of regular low-dose computer tomography (LDCT) testing they claimed would detect lung cancer early. None of the plaintiffs had contracted lung cancer at the time of filing.

Without certifying the class, Judge Nancy Gertner reported questions of Massachusetts law to the SJC. Among the reported questions, she asked whether so-called medical monitoring causes of action were cognizable under Massachusetts law. Per the SJC, Massachusetts recognizes such causes of action.

The *Donovan* plaintiffs seek to recoup the costs of diagnostic tests in the future; Massachusetts law has for 100 years allowed recovery of future damages.

That the plaintiffs in this case had not yet developed lung cancer did not impede their claims. The plaintiffs' injuries need not have outwardly manifested at the time of the lawsuit, the court held, because the plaintiffs presented sufficient allegations of "impact." That is, the plaintiffs alleged physiological changes, that those changes were caused by smoking, and that those changes increased their risk of developing lung cancer.

Interestingly, while characterizing its decision to recognize medical monitoring claims as couched in Massachusetts precedent, the court discussed at length the need for tort law to adjust to the needs of a new century.

Tort law now fails to recognize that "[i]llness and disease from exposure to [toxic] substances are often latent, not manifesting themselves for years or even decades after the exposure." Consequently, "we must adapt to the growing recognition that exposure to toxic substances and radiation may cause substantial injury which should be compensable even if the full effects are not immediately apparent."

In concluding, the court enunciated the prima facie showing plaintiffs seeking medical monitoring must make:

(1) The defendant's negligence (2) caused (3) the plaintiff to become exposed to a hazardous substance that produced, at least, subcellular changes that substantially increased the risk of serious disease, illness or injury (4) for which an effective medical test for reliable early detection exists, (5) and early detection, combined with prompt and effective treatment, will significantly decrease the risk of death or the severity of the disease, illness or injury, and (6) such diagnostic medical examinations are reasonably (and periodically) necessary, conformably with the standard of care, and (7) the present value of the

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reasonable cost of such tests and care, as of the date of the filing of the complaint.

The road ahead for the 'Donovan' plaintiffs

The SJC merely answered abstract legal questions. Before the *Donovan* plaintiffs can recover, they must prove their case in federal District Court.

As a preliminary matter, these plaintiffs have not yet had their class certified. Whether they will is unclear. The plaintiffs' putative class is strikingly large, meaning that questions of commonality are bound to arise.

Next, the plaintiffs must prove that Philip Morris was negligent in manufacturing the cigarettes they have smoked. This claim has been made with some success in other jurisdictions, though not in the context of medical monitoring actions.

Assuming the plaintiffs can so prove, they must also establish that a monitoring program of LDCT will result in early detection of lung cancer. The science regarding the efficacy of LDCT is decidedly mixed.

All told, even if the plaintiffs eventually recover in court, they are unlikely to do so for some years.

The potential impacts of 'Donovan'

Donovan marks the advent of medical monitoring as a cause of action in Massachusetts. For several reasons, this development should give pause.

First, Massachusetts now shines as a beacon attracting toxic torts plaintiffs whose claims are not cognizable elsewhere. Most jurisdictions that have considered medical monitoring as a cause of action have rejected it.

Consider asbestos litigation. Historically, tens of thousands of claims were filed annually in jurisdictions across America. Most of the claims involved people without disease or impairment but whose chest X-rays showed some damage to the lining of the lungs from asbestos exposure.

Per *Donovan*, each time new technology emerges that can, purportedly, detect asbestos-related disease sooner than existing screening methods, the plaintiffs can maintain actions, and perhaps recover, for medical monitoring (the fact that the technology was not previously available would likely resolve any potential statute of limitations issues).

Once new screening technology emerges, strict enforcement of forum non conveniens laws would be all that stands between Massachusetts and an onslaught of these lawsuits.

Second, litigating medical monitoring claims will likely prove expensive, and these claims will usurp resources better allocated to the truly injured. While many medical monitoring plaintiffs would probably have trouble proving that particular treatments are necessitated by the alleged exposures, any defense win will be pyrrhic.

Donovan essentially calls for a battle of the experts: "no particular level or quantification of increase in risk of harm [from exposure to a hazardous substance] is necessary, so long as it is substantial[.]"

Defendants can therefore expect to spend considerable sums hiring and challenging experts regarding each medical monitoring technique at issue. Further, when the costs of litigation reach a certain point, it becomes financially prudent to settle, rewarding non-meritorious claims and encouraging continued filings of claims of their ilk.

Third, *Donovan* could prove a boon to peddlers of junk medicine. Each new medical test for early detection of a disease associated with exposure to a substance is now an opportunity to bring a new medical monitoring claim.

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Defendants can therefore expect a cottage industry of doctors developing "new and improved" testing methods to arise. Many of these tests likely will not be worthwhile. As stated earlier, though, the costs of litigating these claims may become high enough to cause defendants to settle cases they should, by right, win. Doubtless, some unworthy tests will be rewarded for this reason.

Fourth, *Donovan* could lead to liability for even de minimus exposures. In terms of injury, a medical monitoring plaintiff must show only that exposure to chemicals for which the defendant is responsible has resulted in "subcellular changes that substantially increased the risk of serious disease, illness, or injury[.]" As science and technology progress, subcellular changes will undoubtedly become easier to detect and their causes easier to ascertain.

Similarly, the future will certainly see ever more links established between specific subcellular changes and risks of serious disease. Taken to a logical extreme, then, *Donovan* could lead to multiple causes of action for every breath. After all, every breath of Boston air can expose one to trace amounts of numerous agents that may prove toxic — chemical fumes, car emissions, ambient asbestos, second-hand smoke, etc.

Fifth, adjudicating and administering claims for medical monitoring will present serious administrative challenges for the courts. The factfinder in a medical monitoring claim must now distinguish between testing that would be done regardless of the negligent exposures and that necessitated by them. Said factfinder must also weigh conflicting testimony from medical professionals regarding the benefit and appropriate timing of particular tests.

Structuring awards will also prove problematic. On the one hand, courts are ill-equipped to administer ongoing, far-reaching programs. On the other, awarding plaintiffs sums certain provides no guarantee that they will use those moneys on the testing they sought.

Courts will also have the arduous task of determining offsets: splitting medical monitoring costs among multiple parties that caused the exposures while taking into account plaintiffs' present and, possibly, future insurance.

Finally, the Legislature is the preferable avenue for determining whether and how to compensate people exposed to toxins but who have not yet developed disease. The Legislature is better equipped than the courts to allocate medical resources and to weigh competing testimony from medical experts regarding the potential benefits and drawbacks of particular modes of testing. In addition, the Legislature's prospective treatment of medical monitoring awards would provide fair notice to potential tortfeasors.

The shape of things to come

Donovan promises to alter toxic torts practice to some extent. Going forward, the number of filings in Massachusetts by unimpaired plaintiffs will likely rise, and many living plaintiffs will probably include medical monitoring counts with their claims.

The costs of litigating toxic torts cases can be expected to rise. Many of the tests the plaintiffs will seek will not pass muster. Still, proving that could be a very expensive proposition, given the necessity and cost of expert testimony for these claims.

Donovan was, without question, a hard case for the SJC. Presented with the abstract question of whether Massachusetts would allow recovery for testing necessitated by negligent exposures, the court reached a result some may deem compassionate.

However, some would say, the court overreached in crafting its response. *Donovan* will force toxic torts defendants to endure great expense in litigating unworthy claims, perhaps depriving plaintiffs who are demonstrably injured of their full recovery.

As Justice Holmes noted, compassion can sometimes cloud judgment. MLW