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.

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
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.

We may soon see Massachusetts become a destination
jurisdiction for toxic torts plaintiffs ineligible for
recompense elsewhere. This development would
benefit no one except attorneys and doctors.

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.

Finally, 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
of money serves 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.