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## RECENT CASES

TORT LAW — PROOF OF HARM IN TOBACCO CASES — SUPREME JUDICIAL COURT OF MASSACHUSETTS RECOGNIZES CAUSE OF ACTION FOR MEDICAL MONITORING OF TOBACCO USERS. — *Donovan v. Philip Morris USA, Inc.*, 914 N.E.2d 891 (Mass. 2009).

One of the basic tenets of American law is that, in order to recover in tort, a plaintiff must have suffered an injury.<sup>1</sup> While this principle for identifying cognizable claims remains, in recent years tort law has evolved in response to a world in which people regularly encounter environmental toxins, the effects of which are largely unknown.<sup>2</sup> As modern medicine continues to advance, the line between present illness and risk of future illness has blurred; prevention and early detection have become critical to the successful treatment of disease.<sup>3</sup> While prevention and early detection of disease are beneficial in the eyes of public health, courts have generally declined to expand tort law to recognize claims for increased risk of harm or to require defendants to pay for medical monitoring programs for asymptomatic plaintiffs.<sup>4</sup> In October 2009, however, in *Donovan v. Philip Morris USA, Inc.*,<sup>5</sup> the Supreme Judicial Court of Massachusetts (SJC) recognized a cause of action for medical monitoring by plaintiffs who exhibited no symptoms or precursors to disease, but faced increased risk of contracting a lung

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<sup>1</sup> See, e.g., WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 54 (4th ed. 1971).

<sup>2</sup> See Allan L. Schwartz, Annotation, *Recovery of Damages for Expense of Medical Monitoring To Detect or Prevent Future Disease or Condition*, 17 A.L.R. 5th 327, § 11 (1994).

<sup>3</sup> According to the U.S. Supreme Court, “tens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure-related medical monitoring.” *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 442 (1997); see also Susan L. Martin & Jonathan D. Martin, *Tort Actions for Medical Monitoring: Warranted or Wasteful?*, 20 COLUM. J. ENVTL. L. 121, 130 (1995) (“[W]e may all have reasonable grounds to allege that some negligent business exposed us to hazardous substances.”).

<sup>4</sup> *Ayers v. Township of Jackson*, 525 A.2d 287 (N.J. 1987), the first case to recognize a medical monitoring claim in the absence of either traumatic impact or a manifest physical injury, arose from groundwater contamination. See *id.* at 291. Following *Ayers*, a number of state laws have evolved to recognize medical monitoring claims in environmental tort actions for accidental toxic exposure. See James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. REV. 815, 839–40 (2002). Approximately fifteen U.S. jurisdictions now allow medical monitoring claims for asymptomatic plaintiffs in accidental toxic exposure cases, but most other states that have considered similar claims — either in toxic exposure or products liability — have rejected medical monitoring claims. See D. Scott Abernson, Note, *A Fifty-State Survey of Medical Monitoring and the Approach the Minnesota Supreme Court Should Take When Confronted with the Issue*, 32 WM. MITCHELL L. REV. 1095, 1114–15 (2006). Since Abernson’s survey in 2006, Massachusetts and Missouri courts have allowed medical monitoring for asymptomatic plaintiffs. *Donovan v. Philip Morris USA, Inc.*, 914 N.E.2d 891 (Mass. 2009); *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712 (Mo. 2007).

<sup>5</sup> 914 N.E.2d 891.

disease from their use of cigarettes. Though this evolution is premised on the noble pursuit of early detection of disease, *Donovan*'s recognition of a medical monitoring cause of action and the procedural allowances made for it could cause unruly and problematic effects.

Kathleen Donovan and Patricia Cawley began to smoke more than thirty years ago, continued to smoke after learning of the risks involved, and, "[b]y virtue of [their] age and prolonged and continuing use of Marlboro cigarettes, . . . [allegedly] suffered damage to [their] lungs and [were] at elevated risk for lung cancer."<sup>6</sup> They filed suit in the U.S. District Court for the District of Massachusetts in December 2006.<sup>7</sup> The plaintiffs alleged that Philip Morris USA wrongfully designed, marketed, and sold Marlboro cigarettes, and further alleged breach of implied warranty on the basis of design defects and negligent design and testing.<sup>8</sup> The plaintiffs did not seek monetary damages, but instead sought an injunction creating a court-supervised medical monitoring program consisting of low dose spiral computerized tomography (LDCT) lung cancer screening.<sup>9</sup> Philip Morris USA responded by filing a motion to dismiss pursuant to Rule 12(c) of the Federal Rules of Civil Procedure (FRCP) — on the theory that the plaintiffs' claims failed to allege an actual "present physical injury with objective symptoms" — and Rule 56 for summary judgment — on the theory that the plaintiffs' claims were untimely since the plaintiffs knew of the "increased risk of lung cancer at least four years prior to the commencement of this action."<sup>10</sup>

Because of the "untested questions of [Massachusetts] state law presented by this action," District Judge Gertner certified two questions of

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<sup>6</sup> *Id.* at 8–9. Plaintiffs also sought class certification on behalf of Massachusetts residents aged fifty or older who smoke or smoked Marlboro cigarettes up until one year before filing and had not been diagnosed with lung cancer or precursors thereto. *See id.* at 1–2.

<sup>7</sup> *Donovan v. Philip Morris USA, Inc.*, No. 06-12234 (D. Mass. filed Dec. 14, 2006).

<sup>8</sup> *Donovan v. Philip Morris USA, Inc.*, No. 06-12234, at 2 (D. Mass. Feb. 23, 2009) (statement of facts).

<sup>9</sup> *Id.* at 2, 5–8. LDCT screening utilizes a new technology to provide an early screening method for lung cancer. *Id.* at 5–6. Plaintiffs claimed that early-stage lung cancer is "usually curable," but as the cancer progresses, "the prospect for successful treatment and cure are reduced," *id.* at 6–7, and that LDCT is widely accepted in the medical community as the first effective early screening test for lung cancer. Brief of Plaintiffs-Appellants at 8–9, *Donovan*, 914 N.E.2d 891 (Mass. 2009) (No. SJC-10409). Plaintiffs presumably sought this equitable remedy rather than monetary damages to fund monitoring in order to avoid *Metro-North Commuter Railroad Co. v. Buckley*, 521 U.S. 424 (1997), which prohibited lump sum awards for asymptomatic asbestos plaintiffs. Further, it is well documented that many successful plaintiffs fail to use their damage awards to pursue the medical monitoring they sought. *See, e.g.*, Arvin Maskin et al., *Medical Monitoring: A Viable Remedy for Deserving Plaintiffs or Tort Law's Most Expensive Consolation Prize?*, 27 WM. MITCHELL L. REV. 521, 540–42 (2000).

<sup>10</sup> Brief of Plaintiffs-Appellants, *supra* note 9, at 5.

law to the SJC.<sup>11</sup> Of interest to the district court was whether the plaintiffs — both of whom alleged subclinical physiological harm from smoking, though neither had developed lung cancer, were under suspicion of developing cancer, or had exhibited any outward symptoms of negative effects from smoking — could state a cognizable claim permitting a remedy under Massachusetts tort law.<sup>12</sup> The district court also inquired how to apply the statute of limitations to the claim.<sup>13</sup>

Justice Spina, writing for a unanimous SJC, held that the plaintiffs' allegations of subclinical effects on lung tissue constituted a legally cognizable injury on which their medical monitoring claim could be based and that the statute of limitations had not expired for their claim.<sup>14</sup> For the negligence analysis, the court first distinguished this case from one attempting to bring a claim for "the full range of tort damages" on the basis of "increased risk of cancer."<sup>15</sup> Instead, in the court's view, "plaintiffs [sued] only for medical expenses reasonably to be incurred because of the alleged negligence . . . . [P]laintiffs' complaint seeks only present and future medical expenses . . . to determine the onset of cancer at the earliest practicable time for the purpose of maximizing the effective treatment of the disease."<sup>16</sup> The court declined to require outward manifestation of symptoms, exhibition of warning signs, or contraction of a recognizable illness in order to meet

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<sup>11</sup> *Donovan v. Philip Morris USA, Inc.*, No. 06-12234 (D. Mass. Dec. 31, 2008) (order notifying parties of intent to certify questions to the SJC). The two questions were:

1. Does the plaintiffs' suit for medical monitoring, based on the subclinical effects of exposure to cigarette smoke and increased risk of lung cancer, state a cognizable claim and/or permit a remedy under Massachusetts state law?
2. If the plaintiffs have successfully stated a claim or claims, has the statute of limitations governing those claims expired?

*Donovan v. Philip Morris USA, Inc.*, No. 06-12234 (D. Mass. Feb. 23, 2009) [hereinafter *Certification Order*] (certification order to the SJC).

<sup>12</sup> *Certification Order*, *supra* note 11. The answer to this question would affect the district court's consideration of defendant's FRCP 12(c) motion.

<sup>13</sup> *Id.* This legal inquiry would inform the district court's decision about the defendant's summary judgment motion. While the SJC's opinion on either question was not procedurally dispositive of the outcome of the two motions, the SJC's answer would likely dictate the district court's decision on the first question. The statute of limitations question would require further inquiry by the district court before it could decide the summary judgment motion.

<sup>14</sup> *Donovan*, 914 N.E.2d at 894–95. In considering these questions, the SJC left aside consideration of the potential remedy of a program of medical monitoring, leaving the district court to consider any resulting implications of such a remedy at class certification. Instead, the SJC considered the question of the available remedy as if the case was a simple dispute between the named plaintiffs and the defendant. *Id.* at 898.

<sup>15</sup> *Id.* at 900. While the SJC took pains to distinguish the newly recognized medical monitoring claim from a tort claim for increased risk, the increased risk plaintiffs face as a result of smoking was important to the medical monitoring claim: "[Plaintiffs] have proffered evidence of physiological changes caused by smoking, and they have proffered expert medical testimony that, because of these physiological changes, they are at a substantially greater risk of cancer due to the negligence of Philip Morris." *Id.* at 901.

<sup>16</sup> *Id.* at 900.

the standard, concluding that

“[s]ubcellular or other physiological changes may occur which, in themselves, are not symptoms of any illness or disease, but are warning signs . . . that the patient has developed a condition that indicates a substantial increase in risk of contracting a serious illness . . . and thus the patient will require periodic monitoring.”<sup>17</sup>

Since the plaintiffs alleged that such changes resulted from defendant’s negligence, the SJC determined that they could proceed past the threshold stages of litigation and proffer proof of their claims through expert testimony and factual evidence.<sup>18</sup>

The remainder of the SJC’s opinion addressed procedural issues. The court held that, in contrast to the “single controversy rule,” litigation of the plaintiffs’ medical monitoring claim would not preclude a future action for damages if plaintiffs were eventually to contract lung cancer,<sup>19</sup> concluding that the single controversy rule “was never intended to address the problem of toxic torts, where a disease may be manifested years after the exposure.”<sup>20</sup> Finally, the court turned to the statute of limitations claim, determining that the statute of limitations in this case began to run only after the plaintiffs received *both* notice of a “substantial increase in the risk of cancer”<sup>21</sup> due to their smoking *and* a “recommendation for diagnostic testing conformably with[in] the medical standard of care.”<sup>22</sup> *Donovan*, then, established a new statute of limitations inquiry: courts must look not only to when “physiological change resulting in a substantial increase of risk of cancer” occurred, but more importantly, when “the need for available[, efficacious, and accepted] diagnostic testing” was identified.<sup>23</sup> The court concluded that the suit could proceed to the discovery and fact-finding stages of litigation based on the complaint since the plaintiffs’ claim would satisfy the statute of limitations inquiry if they were able to prove what they alleged.<sup>24</sup>

Prior to *Donovan*, courts applying Massachusetts tort law had interpreted the SJC’s decision in *Payton v. Abbott Labs*<sup>25</sup> to mean that mere exposure or subcellular damage resulting in increased risk of harm did not constitute a cause of action if there was no present, iden-

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<sup>17</sup> *Id.* at 901.

<sup>18</sup> *Id.* at 901–02.

<sup>19</sup> *Id.* at 902.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 903.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 903–04.

<sup>25</sup> 437 N.E.2d 171 (Mass. 1982).

tifiable disease or symptomatology.<sup>26</sup> In *Payton*, the SJC declined to relax the injury requirement for an intentional infliction of emotional distress claim, holding that manifest physical injury was key and that the alleged injury “must be manifested by objective symptomatology and substantiated by expert medical testimony.”<sup>27</sup> Though the SJC couched its decision in *Donovan* as consistent with *Payton*<sup>28</sup> and merely the next logical step in the modern evolution of tort law, it failed to acknowledge the potential ramifications of this development.

In fact, the SJC significantly expanded important aspects of tort doctrine in *Donovan*, combining features that were previously exceptions to the rule: First, Massachusetts will now allow medical monitoring claims to proceed past threshold stages of litigation to fact-finding when increased risk of disease is demonstrated through the presence of subcellular changes and medical monitoring is available for the risk. Second, *Donovan* directs Massachusetts courts to ignore the usual claim preclusion rules and allow multiple suits to arise from the same exposure transaction — one for medical monitoring and another if a traditional symptomatic condition develops.<sup>29</sup> Third, *Donovan*’s statute of limitations analysis allows exposure to and discovery of increased risk to become actionable as a medical monitoring suit if and when technological advancements create new diagnostic procedures able to detect an illness or disorder that the exposed litigant is at risk of developing.<sup>30</sup>

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<sup>26</sup> For toxic tort cases, the U.S. District Court for the District of Massachusetts repeatedly read *Payton* to require “loss, pain, distress, or impairment” that is “clinically evident or manifest,” *In re Mass. Asbestos Cases*, 639 F. Supp. 1, 2–3 (D. Mass. 1985) (quoting *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins., Inc.*, 682 F.2d 12, 19 (1st Cir. 1982)) (internal quotation marks omitted), and applied state law to hold that “the first appearance of *symptoms* attributable to [asbestos] constitutes the injury.” *Id.* at 3 (alteration in original) (emphasis added) (quoting *Payton v. Abbott Labs*, 551 F. Supp. 245, 245 (D. Mass. 1982)) (internal quotation marks omitted). The same court interpreted Massachusetts law to determine that “cellular damage does not rise to the level of physical injury” necessary to sustain a tort claim. *Caputo v. Boston Edison Co.*, 1990 WL 98694, at \*4 (D. Mass. July 9, 1990) (“Because plaintiff . . . failed to ‘establish the existence of an element essential’ to his claims, namely, injury caused by defendant, summary judgment is mandated.” (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1985))).

<sup>27</sup> *Payton*, 437 N.E.2d at 181.

<sup>28</sup> *Donovan*, 914 N.E.2d at 900–01 (suggesting *Payton*’s injury requirement was only a safeguard against false claims).

<sup>29</sup> It is unclear how issue preclusion will interact with these cases as they arise. For example, should *Donovan* win on the merits in district court for medical monitoring and later develop lung cancer, would the defendant have the opportunity to defend against the same claims at a second trial or only an opportunity to contest the new damages claims? Would a victory for the defendants in a medical monitoring action preclude plaintiffs from litigating a negligence claim if cancer develops?

<sup>30</sup> In *Donovan*, for example, both plaintiffs admitted that they were made aware of their increased risk by doctors more than five years before they filed suit, but since plaintiffs alleged that a medically accepted monitoring procedure was not available until immediately before the filing

The merits of this change in tort law — expanding the longstanding tort-law injury standard to include asymptomatic, nonmalignant changes in subcellular health in medical monitoring claims — are highly debatable from a policy perspective, but outside the scope of this piece. Yet regardless of the merits, the policy fashioned by *Donovan* unquestionably creates favorable conditions for plaintiffs in Massachusetts tort cases.<sup>31</sup> Though plaintiffs must still eventually prove each element of their case to win at trial<sup>32</sup> — a high hurdle — allowing these cases to proceed past the threshold stages of litigation gives plaintiffs tremendous hold-up power against defendants. *Donovan* had been in litigation for three years before the district court certified the questions to the SJC. Significant discovery costs incurred before rulings on summary judgment are sure to follow from the SJC's ruling,<sup>33</sup> increasing pressure on defendants to settle claims.<sup>34</sup> In addition to effects on entities operating in Massachusetts, the number and complexity<sup>35</sup> of these cases could clog courts in Massachusetts for years.<sup>36</sup>

The favorable conditions for plaintiffs stemming from the decision to recognize medical monitoring claims are usually balanced by procedural limitations on plaintiffs' recovery by claim preclusion and the statute of limitations.<sup>37</sup> But by allowing exceptions to these rules for

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of the complaint, the SJC allowed the case to proceed under the statute of limitations. *Donovan*, 914 N.E.2d at 903–04.

<sup>31</sup> For the potential problems associated with this balance, see the West Virginia case study and the discussion of the Louisiana legislature's swift action to supersede a court ruling that temporarily allowed medical monitoring suits in that state in Brief of Amici Curiae Coalition for Litigation Justice, Inc., et al. in Support of Defendant-Appellee at 31–34, *Donovan*, 914 N.E.2d 891 (Mass. 2009) (No. SJC-10409). See also Henderson & Twerski, *supra* note 4, at 817–18 (explaining the catastrophic effects of “[d]eparting from long-standing tradition in tort law [and seeking] to provide immediate compensation for plaintiffs who are asymptomatic,” *id.* at 817, among other deviations from legal norms in asbestos litigation).

<sup>32</sup> See *Donovan*, 914 N.E.2d at 898–99.

<sup>33</sup> Specifically how these claims will proceed is somewhat unclear. Utah, for example, uses an eight-pronged test for medical monitoring recovery. Patricia E. Lin, *Opening the Gates to Scientific Evidence in Toxic Exposure Cases: Medical Monitoring and Daubert*, 17 REV. LITIG. 551, 564 (1998). Recall the SJC's fact-intensive, two-pronged test — which may itself require a battle of the experts — for statute of limitations analysis. See *Donovan*, 914 N.E.2d at 903.

<sup>34</sup> SAMUEL ISSACHAROFF, CIVIL PROCEDURE 186 (2005).

<sup>35</sup> To reach the merits, *Donovan* will require expert testimony on a number of issues including existence of subclinical, physiological change in the plaintiffs; health risk assessments and epidemiological studies to establish increased risk of disease; availability of medical monitoring procedures and necessity of those procedures in medically accepted standards of care; and whether early detection aids in successful treatment of disease. See Lin, *supra* note 33. In conjunction with the fact-intensive statute of limitations evaluation required, seeking to adjudicate the simpler elements of a negligence claim (injury and availability of a remedy) could involve complicated expert testimony before even engaging traditional causation issues.

<sup>36</sup> See sources cited *supra* note 3.

<sup>37</sup> See Philip Zimmerly, Note, *The Answer Is Blowing in Procedure: States Turn to Medical Criteria and Inactive Dockets To Better Facilitate Asbestos Litigation*, 59 ALA. L. REV. 771, 784–85 & n.111 (2008) (discussing the pro-plaintiff nature of permissive expansions of statute of limita-

medical monitoring claims, *Donovan* may exacerbate the imbalance.<sup>38</sup> *Donovan*'s relaxation of claim preclusion requirements creates incentives for all potential plaintiffs to join medical monitoring suits immediately upon the availability of a monitoring procedure.<sup>39</sup> After all, there is no downside for the plaintiff, who no longer must decide which claims stemming from his use of cigarettes to litigate in the first suit since he will get another chance to litigate should an illness or condition later develop. If the claims in *Donovan* are successful, all smokers who surpass a threshold number of pack-years (and therefore have the subclinical changes recognized by Massachusetts) could be potential class members able to collect for medical monitoring regardless of their actual individual risk of ever developing a condition.

*Donovan*'s statute of limitations standard poses similar concerns. Under the traditional discovery rule, the statute of limitations begins to run on exposure claims upon discovery of subclinical changes constituting the injury or upon discovery of the substantially increased risk of disease.<sup>40</sup> But *Donovan* expands the limitations period to begin upon acceptance of a medical advance,<sup>41</sup> meaning that when a diagnostic tool first becomes available for a condition,<sup>42</sup> defendants again

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tions and claim preclusion rules at the expense of the defendant's interest in repose, and the effects on case load in asbestos litigation).

<sup>38</sup> Professor S. Todd Brown has expounded upon this phenomenon as it relates to still-ongoing asbestos litigation: "[C]ritical developments in asbestos mass tort litigation and settlement . . . demonstrate how seemingly innocuous, isolated activities and adjustments to parties' expectations may shift investment incentives in socially undesirable ways when viewed collectively." S. Todd Brown, *The Private Market for Specious Claims* 9 (Feb. 10, 2010) (unpublished manuscript, on file with the Harvard Law School Library). One of these "critical developments" was "modifying the concept of 'injury' to include physiological changes even where the plaintiff has no discernible impairment." *Id.* at 10–11. Another was changing the statute of limitations regime from that of an exposure rule to the discovery rule. *Id.* at 10 n.22.

<sup>39</sup> Compare this incentive to that of the asbestos industry, where asymptomatic and unimpaired plaintiffs flooded the system, exacerbating the financial woes of asbestos manufacturing companies that led them to bankruptcy. Brown, *supra* note 38, at 11. Commentators contend that these asymptomatic plaintiffs draw compensation away from those who are impaired. *See, e.g.,* Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 BAYLOR L. REV. 331, 338–39, 341 (2002) (arguing that because of increasing numbers of judgments for unimpaired plaintiffs, "sick claimants may face a depleted pool of assets in the future," *id.* at 339); Henderson & Twerski, *supra* note 4, at 817–18 (arguing that developments of the law favoring unimpaired plaintiffs "strike[] mercilessly at another group of plaintiffs who, when the funds for damages run dry, will be denied recovery for real, rather than anticipated, ills," *id.* at 818).

<sup>40</sup> *Donovan*, 914 N.E.2d at 903.

<sup>41</sup> "The plaintiffs . . . must show that the standard of care of the reasonable physician did not call for the monitoring of any precancerous condition prior to the statute of limitations period . . ." *Id.* at 904.

<sup>42</sup> Under the SJC's formulation of the statute of limitations requirement concerning the diagnostic tool, a medical monitoring program must be available, medically necessary, and accepted within the reasonable standard of care for the exposed patient. *Id.* at 903. But again, these ca-

become vulnerable to suits for long-ago exposures, this time for the costs of medical monitoring.<sup>43</sup>

The most troubling problem with this new scheme is the change in incentives for potential plaintiffs. Before *Donovan*, Massachusetts plaintiffs were forced to weigh their options for recovery after an exposure or incident — should they sue before injury accrues for the cost of medical monitoring, or should they utilize medical insurance to pay for normal testing based on their risk assessment and sue if disease manifests? The statute of limitations further limited their options since they were forced to act within the statutory period. Now, no such calculation is required. The most likely manifestation of the problems with *Donovan* will be a shift in bargaining power to the plaintiffs in medical monitoring suits.<sup>44</sup> Defendant companies will likely settle to avoid the costs of litigating these claims since defendants can no longer rely on the threshold stages of litigation to block nonmeritorious suits<sup>45</sup> and because of the expense of the fact-intensive inquiries required to determine whether a legally cognizable injury has in fact occurred. Because of the abolition of the single controversy rule, defendants will further be encouraged to settle and thereby avoid a court determination of liability in the medical monitoring suit — liability that could multiply exponentially if issue preclusion were to apply to a follow-up suit by the same plaintiff if disease were to manifest. Regardless of one's opinion of the substance of these policies, it is clear that the SJC has fundamentally changed the legal landscape of torts in the commonwealth. By expanding access to remedies to plaintiffs who have yet to, and may never, suffer any manifest adverse health effects and by adapting procedural rules to encourage such cases, the SJC may have ventured into a quagmire.

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veats are of little use to defendants in threshold stages of litigation because of their fact-intensive nature; in litigation, these are facts to be proven at summary judgment or trial.

<sup>43</sup> In fact, this is precisely how the *Donovan* suit arose. *See id.*

<sup>44</sup> *See* ISSACHAROFF, *supra* note 34, at 153 (recognizing that the evolution of preclusion rules “chang[es] the risks faced by the parties” and “introduce[s] a new dimension of strategic use of preclusion”). Moreover, these suits will not necessarily be limited to cigarette smokers. Consider applying the doctrine to other industries: Could fast food companies be held liable for medical monitoring under this rubric? Professional sports clubs for the possibility of latent damage to their athletes? At-fault drivers for the monitoring of a presumably uninjured accident victim for possible latent injuries?

<sup>45</sup> *See* Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 94–95 (2009); *id.* at 133 (“When cost disparity significantly favors the plaintiff . . . the economic model predicts that a plaintiff may file suit — and the defendant may settle the claim — even when the plaintiff’s claim is wholly frivolous.”).