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THE NEXT THRESHOLD IN MEDICAL MONITORING: SUBCLINICAL INJURY AND TOBACCO LITIGATION

Professor Denis Binder*
The Next Threshold in Medical Monitoring: Subclinical Injury and Tobacco Litigation

Introduction

Tobacco litigation has been with us for 6 ½ decades.\(^1\) The related field of Toxic Torts is 3 decades old.\(^2\) Both have common issues of causation, damages, discovery, and theories of relief, but with the exception of a few cases involving asbestos and tobacco,\(^3\) they have generally existed in parallel legal universes. A recent Massachusetts opinion, *Donovan v. Philip Morris USA, Inc.*\(^4\) has finally woven them together in a novel case applying the Toxic Torts remedy of medical monitoring for sub-clinical injuries in a tobacco case.

The perils of smoking have been known for most of the 20\(^{th}\) Century.\(^5\) The Surgeon General’s Report of 1964 played a critical role in alerting the public to the risks of smoking.\(^6\) Even before the report, the medical profession was aware of the dangers.\(^7\)

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\(^*\)Professor of Law, Chapman University, Professor Binder is deeply indebted to the incisive comments of his colleagues, Professors Tom Bell and John Hall.

\(^1\) The first actual verdict for plaintiff in a tobacco case was *Cipollone v. Liggett Group Inc.*, 505 U.S. 504 (1992) ($400,000 verdict). A typical case for defendant is *Lartigue v. R. J. Reynolds Tobacco Co.*, 317 F.2d 19 (5\(^{th}\) Cir. 1963).

\(^2\) Toxic Torts has grown out of the asbestos litigation beginning three decades ago. The foundation asbestos cases are *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5\(^{th}\) Cir. 1973) (the $68,000 verdict unleashed a wave of asbestos litigation) and *Karjala v. Johns-Manville Products Corp.*, 523 F.2d 155 (8\(^{th}\) Cir. 1975).

\(^3\) Asbestos defendants often argued plaintiffs were contributorily negligent by smoking cigarettes. *See e.g. Hao v. Owens-Illinois, Inc.*, 738 P.2d 416 (Haw. 1987).

\(^4\) 914 N.E.2d 891 (Mass. 2009).

\(^5\) *Boeken v. Philip Morris, Inc.*, 11 Cal. Rptr.3d 807 (Ct. App. 2004) contains a history of the known health risks of smoking, especially those known to the industry, but not the public. Lung cancer, emphysema, and cardio-vascular risks are the main health risks of smoking with second hand smoke becoming an issue in recent years. *Brain v. Philip Morris*, 641 So.2d 888 (Fla. Ct. App. 1994), *rev. denied*, 654 So.2d 919 (Fla. 1995), a case involving second hand smoke exposure to flight attendants, was settled for $300 million to pay for research, and $50 million in attorneys fees.

Medical monitoring, also referred to as medical surveillance, is a new concept in tort law, essentially being a development of the past quarter century. Medical monitoring allows recovery of medical expenses for periodic testing after exposure to a toxin but before any clinical symptoms manifest themselves. The recognition of medical monitoring as an appropriate relief in cases led to early acceptance by courts, either as a new cause of action or as an element of damages.

Research in Europe had earlier uncovered the risks of tobacco. A 1939 German study found that only 3 of 86 male lung cancer patients were non-smokers, while 56 were heavy smokers. F. H. Mueller, Z. Krebsforsch 49, 57 (1939), as cited in R. Doll & A. Hill, Smoking and Carcinoma of the Lung, British Medical Journal 739 (Sept. 30, 1950). The British study reported results that paralleled the German study. Of the 649 male and 60 female lung cancer patients, only 0.3% of the men and 31.7% were non-smokers whereas 26% of the men and 14.6% of the females were heavy smokers (25 cigarettes a day). Id. at 747. This British research in turn led to the commencement of a 50 year study of the effects of smoking on male British physicians. See R. Doll et al, Mortality in relation to smoking: 50 years’ observations on male British doctors (PMCID: PMC437139), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC437139/ (visited on April 13, 2010).

A doctor in a 1951 worker’s compensation case testified:

“Irritation on any part of the body has a tendency to produce cancer .... We do have evidence that irritation in the lungs will produce cancer. This has been borne out in the last 16 years. Cancer in the male has been more frequent than in the female. That ratio is 10:1. In the last 10 years that ratio has decreased and the ratio in the male and female is becoming more equal. We think that has occurred because of the increase in smoking in women.” Scobey v. Southern Lumber Co., 236 S.W.2d 640, 642 (Ark. 1951). This British research in turn led to the commencement of a 50 year study of the effects of smoking on male British physicians. See R. Doll et al, Mortality in relation to smoking: 50 years’ observations on male British doctors (PMCID: PMC437139), http://www.


The greatest issue in Toxic Torts litigation over the past quarter century has consistently been causation.\textsuperscript{12} the ability or inability of plaintiff to establish that defendant's suspected toxin caused plaintiff's illness.\textsuperscript{13} As noted in Sindell v. Abbott Laboratories,\textsuperscript{14} the general rule is that the imposition of liability "depends upon a showing by the plaintiff that his or her injuries were caused by the act of defendant or by an instrumentality under the defendant's control."\textsuperscript{15}

The pathogen could be a known or suspected carcinogen, mutagen, teratogen, neurotoxin, hematoxin, endocrine disrupter, optic irritator, or cause liver, kidney, cardio-vascular, respiratory, or dermal injury.\textsuperscript{16} However, a significant time gap exists between a known exposure and the possible, but clearly uncertain, manifestation of a disease decades later, the risks of which cannot usually be calculated today.


\textsuperscript{12} For example, several lead paint cases failed because the plaintiffs could neither identify the manufacturer nor the type of paint used in a building. Spring Branch Independent School District v. NL Industries, Inc., 2004 WL 104036 (Tex. App. 2004). A causal link had to be established between the defendant and the alleged nuisance. City of St. Louis v. Benjamin Moore & Co., 226 S.W.3d 110 (Mo. 2007). Similarly, courts have denied relief to asbestos claimants who could not identify the manufacturer of the asbestos to which they were exposed. White v. Celotex, 907 F.2d 104 (9th Cir. 1990), Case v. Fibreboard Corp., 743 P.2d 1062 (Ok. 1987), Jackson v. Anchor Packing Co., 994 F.2d 1295 (8th Cir. 1993), Benshoof v. National Gypsum Co., 978 F.2d 475 (9th Cir. 1992), Zensor v. Owens Corning Fiberglas Corp., 836 F. Supp. 302 (E.D. Pa. 1993). The requirement that plaintiff shows defendant supplied the asbestos may preclude a class action suit. Fibreboard Corp. v. Accordis, Inc., 893 F.2d 706 (5th Cir. 1990).

One commentator 40 years ago postulated that in cases seeking damages for environmental harm, the causation problem will frequently be insurmountable for the plaintiff, Note, State Air Pollution Control Legislation, 9 B.C. Ind. & Comm. L. Rev. 712 (1968). See also, Chicago v. Commonwealth Edison Co., 321 N.E. 2d 412 (1974).

\textsuperscript{13} In general, see Robert L. Rabin, Environmental Liability and the Tort System, 24 Houston L. Rev. 27 (1987).

\textsuperscript{14} 163 Cal. Rptr. 132 (1980).

\textsuperscript{15} Id. at 136. For example, the plaintiff in a lead paint case was unable to link the lead paint in the housing units to a specific manufacturer even if the lead paint otherwise constituted a public nuisance. City of St. Louis v. Benjamin Moore & Co., 226 S.W.3d 110, 115 (Mo. 2007). The California Supreme Court in Brockrath v. Adrich Chemical Co., 86 Cal. Rptr. 456 (1999) held that absent market share liability, plaintiffs must allege that each toxin they absorbed was manufactured or supplied by a named defendant.

\textsuperscript{16} For purposes of this paper, we will presume the pathogen is a carcinogen and are dealing with carcinogenesis, but the analysis would be essentially the same with other diseases.
Causation is not a major problem in most personal injury litigation. For example, fault, causation, and damages are clear in most auto accidents.\(^\text{17}\) We may quibble about degrees of fault and the extent of damages, but the general parameters are known. The accident report puts many issues to rest.

Medical malpractice cases may often be more difficult, but the development of the “lost chance” theory for causation may sometimes fill in the evidentiary gap in establishing causation between the failure to diagnose early and the subsequent disease, such as cancer when early diagnosis might have made a difference.\(^\text{18}\)

Tobacco litigation is significantly different than Toxic Torts with the issue of causation. In light of the Surgeon General’s 1964 Report, and the extensive discovery since then, the general health risks of tobacco are well known. Litigation will therefore focus on the individual issues of each claimant, especially defenses, rather than trying to establish general causation.

This article analyzes the parallel tracks of tobacco and Toxic Torts litigation, focusing on causation and remedies, and show how they are finally merging.

The Underlying Causation Problem in Toxic Torts Litigation

Toxic injuries are different than traditional torts. Exposure to the toxin may be today, but an illness, such as cancer, may not manifest itself for decades, if ever, with a host of unknowns along the way. Plaintiff may be at risk through the long latency period,\(^\text{19}\) possibly for the remainder of plaintiff’s life.\(^\text{20}\)

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\(^\text{17}\) “We know what causes a broken leg or a black eye and can decide liability based on whether or not those causes were controlled by the defendant, but we do not know the mechanics of cancer and nervous disorders. We are still at the elementary stage of knowing simply that they can be caused entirely or in part by exposures to certain substances; we cannot tie the exposures more precisely to the injuries.” Note, The Applicability of Traditional Tort Analysis to Environmental Risks: The Example of Toxic Waste Pollution Victim Compensation, 35 Stan. L. Rev. 575, 582 (1983).


\(^\text{19}\) The court in Lowe v. Philip Morris USA, Inc., 183 P. 3d 181, 188 n.3 (Ore. 2008) cited a law review article and treatise to show the average latency period for cancer from toxic exposure for arsenic, 25 years, tar, 20-24 years, radiation, 20-30 years, asbestos, 18 years, and chromates, 15 years. Allan T. Siagel, Medical Surveillance Damages: A Solution to the Inadequate Compensation of Toxic Tort Victims, 63 Ind. L. J. 849, 852 n.15 (1988), citing SB Lawyers’ Medical Cyclopedia of Personal Injury and Allied Specialties §38.46b (3rd Ed. 1986).
The chemical may or may not have been scientifically linked to the disease. Dose response curves may be lacking, especially at low levels of exposure. Actual exposure levels may be unknown.\(^2^1\)

We are exposed daily to a wide array of potentially harmful chemicals.\(^2^2\) If each of these chemicals were to exert a harmful effect, our mortality rates would be much higher. Paracelsus, the 16\(^{th}\) Century Swiss physician, stated: “All poison is in everything, and nothing is without poison. The dosage makes it either a poison or remedy.”\(^2^3\)

Sometimes we are essentially able to see the full picture. Often though, we have only a few pieces of a 3,000 piece jigsaw puzzle, such that causation, both legal and medical, remains unprovable.

A major limitation exists with respect to our ability to accurately assess in any specific instance, a causal link between exposure and occurrence. The problem of the atomic veterans illustrates these phenomena.

Assume statistically that we know a given percent of the population will develop a specific type of cancer, such as leukemia. Assume further that plaintiff was exposed to radiation in the military while witnessing nuclear tests and now has leukemia. Also assume that in the 20 years between the last exposure to the nuclear testing and the manifestation, that plaintiff has had a number of medical and dental X-rays, has been exposed to natural radiation on numerous cross country flights, and has pumped thousands of gallons of gasoline containing benzene at self-service stations. To what cause, if any, can we specifically attribute plaintiff’s leukemia?

\(^2^0\) The potential risk may extend to the next generation, and perhaps future generations. See e.g. the DES litigation, Sindell v. Abbott Laboratories, 163 Cal. Rptr. 132 (1980) (clear cell adenocarcinoma in daughters), and Grover v. Eli Lilly & Co., 591 N.E.2d 696 (Ohio 1992)(deformities in DES daughter’s birth canal cause complications in delivery of grandchild).


\(^2^2\) Background levels of hazardous substances, such as arsenic, asbestos, benzene, and formaldehyde, exist normally in the ambient air. Formaldehyde occurs naturally in fruits and vegetables.

\(^2^3\) Leonard Rox Frank, Random House Webster’s, Quotionary 223 (1999). For example, benzene is linked to leukemia, aplastic anemia, non-Hodgkins lymphoma, Hodgkins lymphoma, and multiple myeloma. Yet we are continuously exposed to benzene. Everyday we pump gas at a self-service station, we are inhaling benzene in the gas vapors. Even though benzene exposure is a known cause of leukemia, not all leukemia cases can be traced to benzene exposure. How do we, for example, link a case of leukemia today to pumping gas at a self-service station two decades ago? We also do not know if a safe, threshold level of exposure to benzene exists, much less a dose response curve. Complicating the causation problem is that benzene occurs naturally in fruits and vegetables, as do many other hazardous substances, such as formaldehyde. Similarly, we are exposed daily to asbestos in the ambient air.
Now assume further that out of each 10,000 adult males, 2.3 will acquire leukemia. Amongst the 20,000 nuclear veterans studied, who like plaintiff had been exposed to the testing, 9.3 have contracted leukemia, which clearly exceeds the predicted incidence rate. Which, if any, of these leukemia victims can attribute their affliction to the weapons testing?  

A study of 3,072 atomic veterans identified 112 cases of cancer compared to the 117.5 that might be expected statistically. 64 died of cancer from 1957 through 1979, compared to the expected 64.3. Only in the case of leukemia was a statistically significant increased frequency of occurrence and mortality found. Some other forms of cancer were up somewhat, and some down, but only leukemia was statistically significant. Some of the other forms of cancer which were up, such as melanoma and brain cancer, were at odds with data from Japan, where the survivors of Hiroshima and Nagasaki have been extensively studied.

In addition, the plaintiff may have been exposed to a seemingly infinite number of other carcinogens, or suspected carcinogens, during the often long latency period between the initial exposure and manifestation of the cancer. Any of these chemicals may, or may not, singly, or in combination, have caused the illness. Little is known about synergistic interactions of chemicals in the human body.

One major causation problem is that many of the tens of thousands of human created chemicals in the environment interact differently, and unpredictably, than they react separately, which is much easier to study. For example, two substances, neither of which is toxic by itself, may become toxic, or increase the risk, when they interact in a body. Such effects may be referred to as “multiple factors,” “synergistic reactions,” or “Lifestyle cancers.”

Synergistic reactions are often little understood. One major exception is with asbestos and smoking. However, not all cigarette smokers develop the tobacco related illnesses, even if they worked with asbestos.

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26 For example, Brynn Hartman killed her husband, the comedian Phil Hartman, and then herself in a murder suicide. An autopsy revealed that Brynn, who suffered from depression, had a blood alcohol level of .12, therapeutic levels of the anti-depressant Zoloft, and that she tested positive for cocaine ingested within 5 hours of her death. The coroner stated that the three substances amplified the effects of each other. L.A. Times, June 9, 1998 at p. A12, col. 1.

27 The risk of contracting lung cancer for asbestos workers who smoke is 50 times greater than that of a nonsmoker who was not exposed to asbestos, and five times that of other smokers. Selikoff, Disability Compensation and Asbestos Associated Diseases in the United States, (Summary 6-7)(1982).
The problem of proving causation is especially great when the injury is of a kind that can be caused or aggravated by numerous factors, which may or may not be environmentally related, or where multiple sources have contributed to the pollution.

Some substances have been sufficiently linked to specific illnesses that they can serve as a “marker” for these ailments. Such markers though do not necessarily solve the causation problem. Lung cancer has been linked to cigarette smoking, asbestos, radiation, and other exposures, but science cannot be certain that any individual case of lung cancer can be linked to any one of these risks, or a combination of them, or perhaps even none of them.

In many instances, such as brain, kidney or pancreatic cancer, the cause may be idiopathic, which is a way of medical science saying it is of unknown cause, even if suspicions exist.

Relatively few pathogens, can be linked to a specific disease, such as clear cell adenocarcinoma or adenosis to DES, mesothelioma to asbestos (perhaps in combination with smoking), although some mesothelioma victims seemingly had no exposure to asbestos, lead exposure to neurological injuries in minors, or mercury to mercury poisoning and Mad Hatters. These are the relatively easy cases.

The method of exposure may also be critical in assessing liability. Inhalation, ingestion, and dermal exposure can all introduce toxins into the body, but the effect may vary. For example, asbestos is a


29 One expert in a benzene exposure case estimated that 60% of all leukemia’s are idiopathic. Sutera v. Perrier Group of America, Inc., 986 F.Supp. 655, 659 n.7 (D. Mass. 1997). The other main causes are ionizing radiation, therapies such as chemotherapy, and exposure to high level of industrial chemicals, such as benzene. Id. at 659.

30 Some evidence existed though that two types of asbestos, chrysotile and amosite, did not cause mesothelioma. Blanca v. Raymark Industries, 972 F.2d 507, 513 (3rd Cir. 1992), Rohrbaugh v. Owens-Corning Fiberglas Corp., 965 F.2d 844 (10th Cir. 1992)

Comment k to the Restatement (2d) Torts §402A provides that the duty to warn vests when the manufacturer knows, or should reasonably, know of the dangers. Thus, the link between amosite and chrysotile asbestos was not known in 1969, the date of last exposure to plaintiff. Rohrbaugh v. Owens-Corning Fiberglas Corp., 965 F.2d 844, 847 (10th Cir. 1992).

31 Lewis Carroll modeled the Mad Hatter in Alice in Wonderland after the real life hatters. They inhaled mercury fumes during the hat making process, thereby suffering from mercury poisoning and giving rise to the phrase “mad as a hatter.”
known carcinogen through inhalation, but has not shown to be hazardous through ingestion. Lead exposure though poses the same risks through inhalation, ingestion, or dermal contact regardless of the methods of exposure.

By the time the disease manifests itself, perhaps decades later, plaintiff may still have insurmountable causation problems, or defendant may have disappeared or merged out of existence with issues of successor liability and bankruptcy arising. Cases that proceed to trial after surviving motions to dismiss and summary judgment will often result in inconsistent verdicts. We also have the practical reality that the plaintiff may not always remember, or be able to discover, the various exposures earlier in life, especially when an infant and certainly not in utero.

In short, exposure is now, the risk of illness uncertain at a future date, and prospects for recovery uncertain. Proof of exposure may only be proof of exposure. We cannot jump from exposure to liability without establishing causation.

In any event, we have a defendant who acted wrongfully, perhaps negligently, or often willfully and wantonly, in exposing others to dangerous chemicals. Defendant’s actions have placed plaintiffs at risk of an injury manifesting itself sometime in the future.

Judicial Recognition of the Inadequacy of Traditional Causation Analysis in Toxic Torts Cases

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33 Once lead enters the body, it enters the bloodstream. In essence, regardless of the source, it is essentially fungible. Ethyl Corp. v. Environmental Protection Agency, 541 F.2d 1, 9 (D.C. Cir. 1976). Lead is ubiquitous in land, sea, plants, and animals.


35 For example, Merck withdrew Vioxx from the market in September 2004. The potent painkiller was shown through a clinical study to pose unacceptable increased risks of heart attacks and strokes. Tens of thousands of lawsuits were filed against Merck by Vioxx users. Prior to entering into a settlement of $4.85 billion in 2007, Merck refused to settle individual cases, taking all to trial, winning 11 of the 16 jury verdicts. Heather Won Tesoriero, Sarah Rubenstein & Jamie Heller, Merck’s Tactics Largely Vindicated As It Reaches Big Vioxx Settlement, Wall St. J., Nov. 10-11, 2007 at p. A1, col. 4, A5, col. 2.

Three major opinions have recognized the inability of traditional causation analysis to address the problems raised by modern society and technology. The first is the famous 1980 California Supreme Court decision in *Sindell v. Abbott Laboratories*. The court wrote:

"In our contemporary complex industrialized society, advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer. The response of the courts can be either to adhere rigidly to prior doctrine, denying recovery to those injured by such products, or to fashion remedies to meet these changing needs." \(^{38}\)

The New Jersey Supreme Court 7 years later in *Ayers v. Jackson Township* \(^{39}\) adopted medical monitoring as a form of relief in toxic tort cases. The Court reviewed the problems with traditional causation application in Toxic Torts cases, and then asked the prescient question:

"[A]t what stage in the evolution of a toxic injury should tort law intercede by requiring the responsible party to pay damages?" \(^{40}\)

The Supreme Judicial Court of Massachusetts echoed the earlier Sindell and Ayres cases in March 2009 in *Donovan v. Phillip Morris USA, Inc.* \(^{41}\)

"Our tort law developed in the late Nineteenth and early Twentieth Centuries, when the vast majority of tortious injuries were caused by blunt trauma and mechanical forces. 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 readily apparent." \(^{42}\)

The court further stated:

"Modern living has exposed people to a variety of toxic substances. Illness and disease from exposure to these substances are often latent, not manifesting themselves for years or even decades after the exposure. Some people so exposed may never develop an illness or disease, but some will. Subcellular or other physiological changes may occur which, in themselves, are not symptoms of any illness or disease, but are warning signs to a trained physician that the

\(^{37}\) 163 Cal. Rptr. 132 (1980).

\(^{38}\) *Id.* at 144.

\(^{39}\) 525 A.2d 287 (N.J. 1987).

\(^{40}\) *Id.* at 298.

\(^{41}\) 914 N.E.2d 891 (Mass. 2009)

\(^{42}\) *Id.* at .
The Problem of Over and Under Compensation

Courts face a major conundrum in increased risk cases in trying to balance over versus under compensation of the victims. Plaintiff presents a simple syllogism. Defendant has acted wrongfully. Defendant's wrongful conduct has imperiled plaintiff's health, and defendant should pay something. Plaintiff tries to make it a morality play based upon the alleged extreme and outrageous conduct of defendant.

On the other hand, to award generous compensation to potential victims who may never contract an injury, due to defendant's misconduct, could result in inadequate funds available later to compensate victims with manifested physical injuries caused by defendant's misconduct. The result would be overcompensation to a non-victim versus under under compensation to an actual victim.

If too many awards are made early to potential victims, who have been exposed to, but perhaps may never contract, the illness, then they have arguably been overcompensated and perhaps received a windfall. Such awards could deplete the resources available later to those who may well contract the disease, but find the pool of monies available to compensate them to be entirely or substantially depleted, resulting in under compensation. 44

The problem of over and under compensation is most apparent in class action suits. For example, the proposed class in Lowe v. Philip Morris45 involved roughly 400,000 members with the monetary value of the proposed remedies of about $74,000 per member, or $29.6 billion for the class. The class consisted of smokers who had not yet manifested any smoking related diseases. 46 If we take for example the New Jersey class of 20 million Vioxx users, 47 and assume that the cost of the requisite periodic monitoring is a

43 Id. at .

44 Ayres v. Jackson Township, 525 A.2d 287, 307-8 (1987). Bankruptcy of the tortfeasor could also limit the liability to later claimants. The specter of large punitive damages awards drove Johns-Manville into an early bankruptcy. One by on the other asbestos companies followed Johns-Manville into bankruptcy.

45 183 P.3d 181 (Ore. 2008).

46 Id. at 183, n.3 (Ore. 2008).

low $50, then suddenly we have a potential periodic payment of $500 million for millions of Vioxx users who will never contract the illness in addition to the attorney fees to the class action attorneys.\(^\text{48}\)

The Alabama Supreme Court reasoned that a “flood” of less important cases could drain the pool of resources available to compensate later victims with meritorious claims of serious, present injuries, as well as affect the allocation of scarce medical resources.\(^\text{49}\)

We are constantly exposed to hazardous conditions, both naturally and artificially. To allow medical monitoring to those not suffering a demonstrable injury could potentially exhaust the resources of the defendant, precluding or limiting recovery by those who later suffer the disease. In many situations lifetime medical surveillance would be required. Even the California Supreme Court has expressed concern about exhausting the resources of defendant to pay claims.\(^\text{50}\)

All this before many victims with physical symptoms emerge, and when the actual risk is either unquantifiable, or exceedingly low.\(^\text{51}\)

\(^{48}\) By way of comparison, the global settlement in the Vioxx litigation was $4.85 billion. *In re Vioxx Products Liability Litigation*, 650 F. Supp.2d 549 (E.D. La. 2009).

\(^{49}\) *Hinton v. Monsanto Co.*, 813 So.2d 827, 830 (Ala. 2001).

\(^{50}\) *Potter v. Firestone & Rubber Co.*, 25 Cal. Rptr.2d 550, 568 (1993). Similarly, Texas has held that mere exposure to asbestos will result in overcompensation when no disease has manifested itself and future disease is uncertain. *Temple-Inland Products Corp. v. Carter*, 993 S.W.2d 88 (Tex. 1999).

\(^{51}\) Large awards of punitive damages can also sap the resources of defendants since they are usually not covered by insurance unlike compensatory damages. With punitive damages though, the victim has been injured by egregious behavior by the defendant. Punitive damages cases usually involve individual plaintiffs rather than a class action suit. Courts have generally rejected the arguments against awarding punitive damages in mass torts cases. See *e.g.* *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394 (5th Cir. 1986), *cert denied* 478 U.S. 1022 (1986), *Fischer v. Johns-Manville Corp.*, 512 A.2d 466 (N.J. 1986).

The specter of large punitive damages awards drove Johns-Manville into an early bankruptcy. One by one the other asbestos companies followed Johns-Manville into bankruptcy. A veritable tsunami of punitive damages awards was highly foreseeable once the “Summer Simpson Papers” were discovered and admissible in trials. Summer Simpson was President of Raybestos-Manhattan from 1929 to 1948 and then served as Chairman until his death at 79 in 1953. His secretary, Marguerite Garvey, meticulously kept a copy of letters regarding worker safety in the asbestos industry. She died in 1967. The trunk was discovered during a cleaning of a vault in 1974. The documents were turned over to a plaintiff’s attorney three years later in discovery. The three critical letters are published in *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1500 n. 20 (11th Cir. 1985). The first letter, dated September 25, 1935, is from A. Rossiter, editor of Asbestos Magazine, to Summer Simpson, in which she asks: “Always you have requested that for certain obvious reasons we publish nothing (about asbestosis) .... Possibly by this time, however, the reasons for your objections to publicity on this subject have been eliminated, and if so, we would very much like to review the whole matter ....”
Tobacco litigation illustrates the over versus under compensation conundrum. Cigarette smoking is hazardous to your health. Millions will die from it. Yet not every smoker will suffer from a tobacco related illness. To compensate the potential for those who have not yet, and may never incur, a tobacco related illness, will deplete the resources available to those who do physically suffer.

The Legal Standard

A seemingly ironclad case for plaintiff would involve the showing of

1) The toxic agent;
2) Exposure of a sufficient dose to that agent;
3) Exposure of the proper nature;
4) Injury, within the definition of a disease;
5) A causal link, shown by such means as medical testimony, epidemiologic evidence, toxicological proof, or other; and
6) Elimination of alternative causes.

Trying to establish all these elements in a typical case of scientific uncertainty would be seemingly impossible. Most cases do not involve this degree of certainty. If they do, a settlement would be in order.

The legal standards are not this restrictive. The result of the uncertainties with assessing chemical exposures and risks is the development of a two-fold test of causation. Plaintiff has the burden, often

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President Simpson wrote to Vandiver Brown, General Counsel of Johns-Manville, on October 1, 1935: “As I see it personally, we would be just as well off saying nothing about it until our survey is complete. I think the less said about asbestos, the better off we are ....”

Vandiver Brown responded: “I quite agree with you that our interests are best served by having asbestosis receive the minimum of publicity.”

Asbestos companies exited bankruptcy by establishing trusts to compensate the claimants. Some of the trusts contained billions of dollars in assets. However, the trusts have been unable to fully compensate all the victims. See e.g. Nathan Koppel, New Fight Erupts Over Pursuit of Asbestos Claims: Critics Cite Lax Oversight of trusts to Compensate Victims, but Plaintiffs’ Lawyers Say System Helps Injured Workers, Lowers Costs, Wall Street J., Dec. 3, 2009, at p. A19, col. 1.
difficult burden, of establishing both general and specific causation.\textsuperscript{52} General causation requires a showing that this pathogen is capable of causing this disease. Without general causation, plaintiff's case fails.

General causation though does not prove plaintiff's case. The claimant must then show that the pathogen was, in fact, a cause of the injury. Legal battles are fought over both levels of causation.\textsuperscript{53} Exposure by itself does not prove causation.\textsuperscript{54} It simply establishes exposure, one element of

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\textsuperscript{53} See e.g. \textit{Bednar v. Bassett Furniture Mfg. Co.}, 147 F.3d 737 (8\textsuperscript{th} Cir. 1998) [formaldehyde fumes in baby dresser]. Precise levels of exposure do not necessarily have to be established for specific causation once general causation is established when sufficient evidence of excessive exposure is established. \textit{Curtis v. M&S Petroleum, Inc.}, 174 F.3d 661, 671-2 (5\textsuperscript{th} Cir. 1999).

\textsuperscript{54} \textit{Potter v. Firestone Tire & Rubber Co.}, 25 Cal. Rptr. 550, 566 (1993). See e.g. \textit{Sutera v. Perrier}, 986 F.Supp. 655, 659 n.7 (D. Mass. 1997). Plaintiff was exposed to benzene in Perrier, but that did not establish causation of plaintiff's acute promyelocytic Leukemia (APL). The 4 known causes of APL are exposure to ionizing radiation, certain therapies, such as chemotherapy, high concentrations of certain industrial chemicals, such as benzene, and idiopathic. \textit{See also, Richardson v. American Cyanamid Co.}, 757 So.2d 135, 142 (La. Ct. App. 2000).


Even if plaintiff is suffering from an asbestos related disease, exposure alone is insufficient to show defendant's asbestos was a substantial factor in plaintiff's asbestosis when plaintiff had been exposed to many different brands. \textit{Borg-Warner Corp. v. Flores}, 232 S.W.2d 765 (Tex. 2007).
causation. Plaintiff must also, especially in federal court, use expert witnesses to prove the scientific/medical evidence.

Plaintiff’s burden of proof is eased by the rule that plaintiff does not have to establish that defendant’s act was the cause of plaintiff’s injury, but that by a preponderance of the evidence it was more likely than not a cause of plaintiff’s injury.

Approaches

Courts have adopted innovative theories of relief and remedies in attempting to address the causation problems. Several approaches have been proposed to fill in the gaps in causation, such as through innovative theories of damages and remedies. For example, plaintiffs may claim a cause of action for the infliction of emotional distress, the fear of contracting an illness eventhough no symptoms have yet manifested themselves. This often breaks down into either fear of cancer or increased risk of cancer.

Most jurisdictions recognize a cause of action for increased risk, but limit it to cases where plaintiff establishes that the increased risk is more probable than not; in other words that it exceeds 50%. The

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55 For example, the Texas Supreme Court in In re Allied Chemical Corp., 227 S.W.3d 652 (Tex. 2007) held plaintiffs must show a prima facie case of causation prior to trial. The court held that “evidence that a chemical can cause a disease is no evidence that it probably caused the plaintiff’s disease.” Id. at 656 (emphasis in original). Plaintiffs must identify an expert who can explain why an epidemiologic study is reliable, the similarity of the plaintiffs to the study’s subject, and ruling out other possible causes “with reasonable certainty” id. The evidence must be based on reliable scientific methodology. See also, Lore v. Lone Pine Corp., 1986 N.J. Super. Lexis 1626 (N.J. Super. Ct. Law Div. 1986) and Cottle v. Superior Ct., 3 Cal. App.4th 1367 (1992).


57 The standard may be variously phrased as “a reasonable medical certainty,” Sterling v. Velsicol Chemical Corp., 855 F.2d 1188, 1203 (6th Cir. 1988), “reasonable medical probability, based on competent expert testimony that the defendant’s conduct contributed to plaintiff’s injury.” Rutherford v. Owens-Illinois, Inc., 67 Cal. Rptr. 2d 12, 16 (1997). It may also be phrased as “more probable than not.” Monsanto v. Goodyear Tire & Rubber Co., 650 So.2d 737, 759 (La. 1995).

plaintiff therefore must not only quantify the increased risk, but show that it exceeds 50%, both standards are often impossible to meet.

The courts do not generally recognize a cause of action for subclinical injuries. For example, even a pleural thickening of the lung tissue caused by asbestos exposure does not constitute an injury under Pennsylvania law.

If the cause of action is for negligent infliction of emotional distress, then it will fail in most jurisdictions, which require a physical injury as a prerequisite to negligent infliction of emotional distress. One exception is that if the deleterious substance is ingested by the plaintiff in food or beverages, such as in well water, then a cause of action could exist. These cases go back to the


57 Subclinical injuries entail the absence of a clinically diagnosable injury whereas subcellular means a toxic exposure may have inflicted molecular or genetic damages at the sub-microscopic level, perhaps foreshadowing future injuries.


62 Howell v. Celotex Corp., 904 F.3d 3 (3rd Cir. 1990). Even the development of discoverable changes, such as fibroids from asbestos exposure, or an abnormal immunological response to beryllium exposure, does not constitute a disease. Sheridan v. NGK Metals Corp., 614 F. Supp.2d 536, 538 (E.D. Pa. 2008).

63 Henry v. Dow Chemical Co., 701 N.W.2d 684, 692 (Mich. 2005). The requirement of a physical injury may also apply to increased risk cases. Payton v. Abbott Labs, 386 Mass. 540 (Mass. 1982), Bonnette v. Conoco, Inc., 837 So.2d 1219 [La. 2003](no compensatory damages for only slight exposure to asbestos which could lead to a slightly increased risk of developing asbestos related diseases, id. at 1231, and no emotional distress damages absent physical injury. Id. at 1233-34).

64 Laxton v. Orkin Exterminating Co., 639 S.W.2d 431 (Tenn. 1982).
contamination in food and beverage cases. Another exception to a physical injury requirement is if defendant’s conduct was intentional, or willful, wanton, or reckless.

Thus, current limitations on causation, such as when exposure is now, but an unquantifiable risk exists for disease decades later, may result in a defendant, perhaps one who has acted intentionally or willfully and wantonly, escaping liability.

Sindell v. Abbott Laboratories and Market Share Liability

Clear cell adenocarcinoma was a relatively rare cancer until 8 cases were diagnosed at Massachusetts General Hospital. Alarms were sounded in the public health community, and through medical detective work the cause was traced to pregnant women ingesting diethylstilbestrol (DES) to avoid miscarriages.

The DES daughters through no fault of their own were unable to identify the manufacturer of the DES prescribed to their mothers decades earlier. Over 200 companies manufactured the generic drug.

The Court first explored and then rejected the earlier theories of alternative liability, concert of action, and enterprise liability. Faced with either applying traditional causation analysis, which placed

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67 The mother, if still alive, might not remember which medications she received, or pharmacies she used, during the pregnancy. The pharmacy might no longer be in existence as America was converting to chain stores. Even if still in existence, the old records may no longer exist, and the pharmacy probably purchased the pharmaceuticals through wholesalers. The lack of a patent monopoly meant any company could produce the generic drug.

68 Summers v. Tice, 199 P.2d 1 (Cal. 1948). A hunter became detached from his two fellow hunters, inadvertently forming the tip of a triangle. The other two hunters thought they had a quail in sight and simultaneously fired in his direction. He was struck by two shotgun pellets in the eye and upper lip.

Both defendants were negligent, but plaintiff was unable through no fault of his own to identify whose shots actually struck him. The court held both defendants jointly and severally liable with the burden of proof shifting to defendants to absolve themselves if possible. Id. at 5.
the burden of proof on the plaintiff to establish the specific defendant who injured her, or crafting a new remedy, the Court modified the alternative liability theory of *Summers v. Tice* by transforming it into a whole new form of causation called market share. The manufacturer would be held liable in an individual case to the extent of its share of the market.\(^{71}\)

*Sindell* echoed one of the core concerns of products liability law:

"The most persuasive reason for finding plaintiff states a cause of action is that ... as between an innocent plaintiff and negligent defendant, the latter should bear the cost of injury."\(^{72}\)

*Sindell's* requirements for market share liability are that the product is fungible\(^{73}\) and that plaintiff joins in the action defendants with a substantial percentage of the market. *Sindell* received acceptance by some courts\(^{74}\) and rejection by others.\(^{75}\)

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*Sindell* technically modified the alternative liability approach by adopting a variation, market share liability.

\(^{69}\) *Agovino v. Kunze*, 5 Cal. Rptr. 534 (Cal. App. 1960). The "concert of action" theory arose out of illegal drag racing cases in which innocent bystanders were injured. In essence, liability is imposed on those "in pursuit of a common plan or design to commit a tortious act and actively participate in it or lend aid, cooperation, or encouragement to the wrongdoers." *Gauding v. Celotex Corp.*, 772 S.W.2d 66, 69 (Tex. 1989); *Biercynski v. Rogers*, 239 A.2d 218 (Del. 1968), *Hood v. Evans*, 126 S.E.2d 898 (Ga. App. 1962), Prosser & Keeton on the Law of Torts §46 (W. Keeton 5\(^{th}\) Ed. 1984).

They could be acting pursuant to a common plan or design to commit a tortuous act, a tacit agreement, or providing assistance. W. Prosser, Law of Torts 292 (4\(^{th}\) Ed. 1971), A.L.I., Restatement (2\(^{nd}\)) Torts §876.


\(^{71}\) 163 Cal. Rptr. at 145. In general, see Frank J. Giliberti, *Emerging Trends for Products Liability: Market Share Liability, Its History and Future*, 15 Touro L. Rev. 719 (1999). In theory, market share liability would provide "rough justice" in that if a company possessed 50% of the market for DES would be liable half the time for 100% of the damages. Under market share liability, it would be liable 100% of the time for 50% of the damages. 100(50) or 50(100) would roughly come out to 50% of all the damages.

\(^{72}\) *Id.* at 144.

\(^{73}\) The drug was produced from an "identical formula." *Id.* at 144.

The California Supreme Court subsequently limited its application in *Jolly v. Eli Lilly.* The court held that *Sindell* did not extend the statute of limitations or create a new cause of action. The issue in *Sindell* was one of causation, not a new cause of action. The court cautioned that “mass-tort actions for personal injury most often are not appropriate for class action certification.” It recognized that causation, often the major element in personal injury liability, can vary from claim to claim, creating factual disparities in individual cases.

The Court also held in *Brown v. Superior Court* that market share liability is not strict liability for prescription drugs, relying on Comment k to the Restatement (2d) Torts §402A. Nor is it joint and several liability. It is several liability.

Market share liability has not proven to be, at least not yet, the solution, not even a partial solution, to the causation problem in Toxic Torts. *Sindell* received tremendous commentary in the succeeding years, but in fact has generally been limited to fungible products, and in reality just DES. Not all

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77 245 Cal. Rptr. 658 (1988).

78 Id. at 665.

79 Id.

80 Id. at 670. The court’s views were different two decades later in *In Re Tobacco II Cases*, 93 Cal. Rptr. 3d 559 (2009), which revived a class action certification against the tobacco companies. Plaintiffs alleged violations of the Unfair Competition Law with decades of deceptive advertising, and misleading statements about the addictive nature of nicotine and the relationship between tobacco use and disease.

81 245 Cal. Rptr. 412 (1988).


courts have accepted medical monitoring even in DES cases. The market share theory has been rejected in asbestos and lead paint litigation.

Medical Monitoring


85 Asbestos is not a fungible product type, has been produced and distributed by hundreds of manufacturers for thousands of products with varying degrees and types of asbestos and risks. For example, the asbestos content in asbestos tapes manufactured by three companies varied from 15 to 100% by weight. Goldman v. Johns-Manville Sales Corp., 514 N.E.2d 691, 697 (Ohio 1987). Black v. Abax Corp., 603 N.W.2d 182 (N.D. 1999); Stevens v. Owens-Corning Fiberglas Corp., 57 Cal Rptr.2d 525, 540 (1996), Gaulding v. Celotex Corp., 772 S.W.2d 66 (Tex. 1989)(no market share liability for asbestos when the asbestos was purchased at a salvage yard); Goldman v. Johns-Manville Sales Corp., 514 N.E.2d 691 (1987)(asbestos is a family with the three major types differing in characteristics); Celotex Corp. v. Copeland, 471 So.2d 533, 538 (Fla. 1985); Mullen v. Armstrong World Industries, Inc., 246 Cal. Rptr. 32 (Cal. App. 1988); Blackston v. Shook & Fletcher Insulation Co., 764 F.2d 1480 (11th Cir. 1985); Thompson v. Johns-Manville Sales Corp., 714 F.2d 581 (5th Cir. 1983), cert denied 465 U.S. 1102 (1984); In re Asbestos Cases, 543 F. Supp. 1152 (N.D. Cal. 1982); contra, see Wheeler v. Raybestos Manhattan, 11 Cal. Rptr.2d 109 (Cal. App. 1992). Asbestos can be viewed as a family of related, but different minerals with different degrees of risk. The three most common types are chrysotile, crocidolite, and fibrous-cumminton-grunerite.


In addition, Ohio rejected alternative liability in lead paint cases. Jackson v. Glidden, 2007 Ohio 277 (Ohio Ct. App. 2007), rev. denied, Jackson v. Glidden, 868 N.E.2d 680 (Ohio 2007)(The inability to identify the type of paint or the manufacturer of the paint the children allegedly ingested is fatal to satisfying the first prong).

The New Jersey Supreme Court in 1987 decided *Ayers v. Jackson Township*, the germinal medical monitoring case in Toxic torts. While the litigation involved the liability of a governmental entity, the medical monitoring discussion is applicable to both public and private polluters.

The town opened a new sanitary landfill in 1972, but proceeded to ignore the environmental conditions in the permit:

1) Exclusion of liquid or soluble industrial wastes;

2) Limiting the depth of waste deposits to a specific grade above the level of the groundwater.

The result was substantial groundwater contamination reaching the municipal well water. Residents were advised six years later in 1978 of the resulting contamination and exposure to 12 chemicals, four of which were known carcinogens. Other contaminants could cause liver and kidney damage, mutations and alterations in genetic material, damage to blood and reproductive systems, neurological damages, and skin irritations. None of the residents had any currently manifested illnesses traceable to the contamination.

Expert witnesses could not quantify the actual degree of risk, but recommended a course of medical surveillance (medical monitoring), *especially in light of the medical reality that early diagnosis and treatment is effective in treating some cancers and other illnesses.*

The Court then adopted medical monitoring as a form of relief in these cases. Factors to be considered in determining the reasonableness of medical surveillance include:

1) The likelihood of disease;

2) The significance and extent of exposure to chemicals;

3) The toxicity of the chemicals;

4) The seriousness of the diseases for which they are at risk; and

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87 525 A.2d 287 (N.J. 1987).

88 *Ayers* was technically not the first case to recognize medical monitoring (*See Friends for All Children, Inc. v Lockheed Aircraft Corp.*, 746 F.2d 816 (D.C. Cir. 1984), but it was the first to apply it in Toxic Torts cases.

89 The defendant was Jackson Township, a governmental entity. Litigation therefore involved interpretation of the New Jersey Torts Claims Act, N.J.S.A. 59-1-1 to 59-12-3.

90 The chemicals were a witches’ brew of acetone, benzene, chlorobenzene, chloroform, dichlorofluoromethane, ethylbenzene, methylene chloride, methyl isobutyl ketone, 1,1,2,2-tetrachloroethane, tetrahydrofuran, 1,1,1-trichloroethane, and trichloroethylene.
5) The value of early diagnosis.\textsuperscript{91}

Two issues remained open in Ayres. The first is if the damages for medical surveillance should be paid out in a lump sum, as with traditional damages, or be placed in a fund to be drawn upon as incurred. The Court recommended the second alternative in future cases, but adopted the first in the present case.\textsuperscript{92} The second issue is if the award should include the routine expenses in a physical exam, or exclude them on the assumption that the victims should normally incur these expenses on their own.\textsuperscript{93}

California followed suit in 1993 in Potter v. Firestone Tire & Rubber Co.\textsuperscript{94} Residents near a toxic waste dump were exposed to carcinogens, but had no cancerous or precancerous conditions. Firestone’s waste shipments to the landfill were in knowing violation both of the law and of the landfill’s own restrictions. The California Supreme Court held that medical monitoring costs are recoverable as a compensable item of traditional damages “where the proofs demonstrate, through reliable medical expert testimony, that the need for future monitoring is a reasonably certain consequence of the plaintiff’s toxic exposure and that the recommended monitoring is reasonable.”\textsuperscript{95}

The court promulgated several factors similar to those of Ayres in determining the reasonableness and necessity of monitoring:

1) The significance and extent of the plaintiff’s exposure to chemicals;

2) The toxicity of the chemicals;

\textsuperscript{91} Id. at 312.

\textsuperscript{92} Id. at 314. Tort damages are normally paid out in a lump sum, one time payment. The payment of medical monitoring charges as they are accrued helps insure that the payments would be used for the intended purpose. The advantage to defendant is that not all claimants will diligently have their tests. Diagnostic tests can be expensive and intrusive, discouraging testing after years of no symptoms manifesting themselves.

\textsuperscript{93} Id. at 313, n. 13.

\textsuperscript{94} 25 Cal. Rptr.2d 550 (1993). Potter was a compelling case for liability. Firestone arranged to dispose of its industrial waste at a municipal landfill, which banned toxic substances and liquids. Firestone agreed to these conditions, but in fact sent large quantities of liquid waste to it.

Firestone’s plant engineer in May 1977 sent a memo to plant managers and department heads explaining liquid waste disposal procedures, the particular waste materials involved, and the proper method of disposal.

The plant unsuccessfully attempted to comply, but the wastes accumulated on site. A new production manager arrived with orders to turn the plant around and “make it more profitable.” He resumed the shipments to the municipal site, violating state law in the process.

\textsuperscript{95} Id. at 555-6. Medical monitoring is thus an element of damages in California and not an independent cause of action. Nor is it an increased risk cause of action.
3) The relative increase in the chance of onset of disease in the exposed plaintiff as a result of the exposure, when compared to:
   a) The plaintiff’s chance of developing the disease had he or she not been exposed; and
   b) The chances of the members of the public at large of developing the disease;
4) The seriousness of the disease for which the plaintiff is at risk; and
5) The clinical value of early detection and diagnosis.\textsuperscript{96}

These tests would be unnecessary but for defendants wrongfully exposing plaintiffs to the toxic substances. Neither the existence of a physical injury nor the probability of the cancer being reasonably certain to occur in the future is a precondition to recovery.\textsuperscript{97}

The court followed the dicta in Ayres in approving court-supervised funds to pay medical monitoring costs as they accrue.\textsuperscript{98} The court noted that medical monitoring does not usually include routine costs, such as regular physicals; only those additional tests necessitated by defendant’s acts are recoverable.\textsuperscript{99}

The gist of plaintiff’s argument for medical monitoring, as set forth in Ayres and Potter is that 1) Defendant has acted wrongfully; 2) Defendant’s wrongful act has imperiled plaintiff’s health; and 3) Defendant should have to pay something.

A major purpose of medical monitoring is to monitor the victim’s health to facilitate early diagnosis and treatment of diseases caused by exposure to the toxins.\textsuperscript{100} The Missouri Supreme Court reasoned that medical monitoring is not to compensate for a present injury, but to compensate the plaintiff for the quantifiable costs of periodic medical expenses reasonably necessary for early detection and treatment of latent injuries caused by defendant’s acts.\textsuperscript{101} The Utah Supreme Court also recognized that medical monitoring furthers the deterrent function of Torts by encouraging those who expose others to

\textsuperscript{96} Id. at 579-80.

\textsuperscript{97} Id. at 579.


\textsuperscript{99} Id. at 580.

\textsuperscript{100} 25 Cal. Rptr. 550, 579-80 (1993).

\textsuperscript{101} Meyer v. Fluor Corp., 220 S.W.3d 712 (Mo. 2007). \textit{See also, In re Paoli Railroad Yard PCB Litigation}, 916 F.2d 829, 850 (3rd Cir. 1990).
toxic substances to minimize the risks and costs of exposure.\textsuperscript{102} Medical monitoring can also over time help build the data base for assessing risks of chemical exposures.

Medical monitoring seemed the solution to provide compensation to the innocent person exposed to toxins through defendants' misconduct, but who has not yet incurred a physically diagnosable injury because of the latency period between exposure and manifestation.

The recognition of medical monitoring as an appropriate relief in cases led to early acceptance by courts,\textsuperscript{103} either as a new cause of action\textsuperscript{104} or as an element of damages.\textsuperscript{105} The distinction between a cause of action and an element of damages is critical. If it is only the latter, then medical monitoring will not arise unless plaintiff can otherwise establish an independent cause of action.

Some courts modified the Ayres factors while adopting in general the concept of medical monitoring. For example, Pennsylvania requires 1) exposure greater than normal background levels; 2) to a proven hazardous substance; 3) caused by the defendant's negligence; 4) as a proximate result of the exposure, plaintiff has a significantly increased risk of contracting a serious latent disease; 5) a monitoring procedure exists that makes the early detection of the disease possible; 6) the prescribed medical monitoring regime is different from that normally recommended in the absence of the exposure; and 7)

\textsuperscript{102} Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 976 (Utah 1993).


the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles.\footnote{Redland Soccer Club v. Department of the Army, 696 A.2d 137, 1445-46 (1997). See also Sheridan v. NGK Metals Corp., 614 F. Supp. 2d 536 (E.D. Pa. 2008).}

However, a judicial reaction emerged in recent years against the broad application of the Ayres factors, led by the United States Supreme Court in 1997.\footnote{In addition, the Louisiana Supreme Court recognized medical monitoring, Bourgeois v. A.P. Green, Indus., Inc., 716 So.2d 355 (La. 1998), but the legislature rejected it a year later. La. Stat. (Civil Code) Ann. Art 2315(B) (2009).} The Court in Metro-North R.R. Co. v. Buckley,\footnote{521 U.S. 424 (1997). Plaintiff also sought recovery for emotional distress. The Court held that mere exposure to asbestos dust does not constitute a physical impact, which is required under FELA. Id at 432, 434.} in a 7-2 opinion penned by Justice Breyer, rejected medical monitoring under the Federal Employers Liability Act.\footnote{45 U.S.C. §51 et seq.} Plaintiff was a pipefitter for Metro-North. He was exposed from 1985-1988 to asbestos, and smoked a pack a day. He received periodic medical checkups for cancer and asbestosis since 1989, with no asbestos diseases diagnosed. He continued to work and smoke. He sought $950 annually for 36 years for medical monitoring.

The case was technically a matter of statutory interpretation,\footnote{Federal appellate courts have similarly rejected medical monitoring under the Price Anderson Act, In re Hanford Nuclear Reservation Litig., 534 F.3d 986, 1009-10 (9th Cir. 2008); In Re Hanford Nuclear Reservation Litigation, 497 F.3d 1005, 1027 (9th Cir. 2007); Berg v. E.I. DuPont De Nemours & Co., 253 F.3d 1127, 1133 (9th Cir. 2002), and the Comprehensive Environmental Response, Compensation and Liability Act, Syms v. Olin Corp., 408 F.3d 95, 105 (2nd Cir. 2005); Price v. U.S. Navy, 39 F.3d 1011, 1015-17 (9th Cir. 1994); Daigle Shell Oil Co., 972 F.2d 1527, 1537 (10th Cir. 1992).} but Justice Breyer’s reasoning has been highly influential in subsequent cases. The majority was concerned with separating valid from invalid claims in a world of limited resources,”\footnote{521 U.S. at 435.} the over versus under compensation conundrum. The Justice wrote this admonition: “[T]ens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure-related medical monitoring.” The prospect of millions of potential victims coupled with the “uncertainty as to the amount of liability”
could give rise to unlimited and unpredictable liability. We are exposed daily to hazardous substances in the air we breathe, food we eat, water we drink, and products we use.

Justice Breyer’s majority opinion recognized the sympathetic case of plaintiff, but was troubled by the effect of recognizing this new cause of action on those not before the Court, who are the future victims with physical symptoms.

His opinion relied extensively on an earlier FELA case, Consolidated Rail Corp. v. Gottshall, which involved claims for emotional distress caused by exposure to asbestos in the workplace. The Supreme Court in Gottshall was concerned with the far removal in time and space from their negligent conduct of defendant, and the lack of finite limits on the number of plaintiffs who might be affected, resulting “possibly in nearly infinite and unpredictable liability for defendant.” The potential liability therefore could be infinite.

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112 Id. at 442.

113 Id. at 434, 442.

114 Id. at 443-4. Judicial concerns about trivializing awards can be shown by two nuisance/trespass cases in Oregon and Washington. The Supreme Court of Oregon in Martin v. Reynolds Metals Co., 342 P.2d 700 (Ore. 1950) recognized trespass as a cause of action for molecular invasions of fluoride gasses from an alumina reduction plant. Defendant argued a “thing,” a visible thing, was an element of trespass. The court rejected this argument, holding that a trespass is “any intrusion which invades the possessor’s protected interest in exclusive protection, whether that intrusion is by visible or invisible pieces of matter or by energy which can be measured only by the mathematical language of the physicist.” Id. at 714.

A subsequent Washington case involved the emission of arsenic and cadmium fumes from a copper smelter in Tacoma, Bradley v. American Smelting & Refining Co., 635 F. Supp. 1154 (W.D. Wash. 1986). The levels in plaintiff’s backyard exceeded normal background levels, but were within safe levels of exposure. Plaintiff argued liability should apply pursuant to the Oregon case. The federal district court certified the case to the Washington Supreme Court, which held:

“While at common law any trespass entitled a landowner to recover nominal or punitive damages for invasion of his property, such a rule is not appropriate under the circumstances before us. No useful purpose would be served by sanctioning actions in trespass by every landowner within a hundred miles of a manufacturing plant. Manufacturers would be harassed and the litigious few would cause the escalation of costs to the detriment of many .... [The plaintiff who cannot show that actual and substantial damages have been suffered should be subject to dismissal of his cause upon a motion for summary judgment.” Bradley v. American Smelting & Refining Co., 709 P.2d 782, 791 (1985).

115 Part of the concern was expressed for future plaintiffs who depend upon a tort system which can distinguish “between reliable and serious claims’ versus “unreliable and relatively trivial claims.” Id. at 444.

116 512 U.S. 532 (1994)

117 Id. at 546.
The *Metro-North* majority was also concerned that medical monitoring is not as simple as it seems. It favored a court administered fund rather than a lump sum payout, but recognized that medical professionals are not in agreement about which medical tests are appropriate, if at all, and when they should be administered. 119

Several state courts in the aftermath of *Metro-North* significantly tightened the standards, requiring for example a physical manifestation of a disease. For these courts, mere exposure to a toxic or harmful substance, absent a present physical injury, does not amount to a tort cause of action. 120 In short, these courts do not recognize medical monitoring for asymptomatic plaintiffs 121

The Michigan Supreme Court in *Henry v. Dow Chemical Co.* 122 echoed the admonitions of the United States Supreme Court in *Metro-North*: “[W]e share the concerns raised by the United States Supreme Court in *Buckley*.” 123 The court reasoned that judicial recognition of a medical monitoring cause of action could do more harm than good “not only for Michigan’s economy, but also for ‘other potential plaintiffs who are not before the court.’” 124 The court echoed Justice Breyer’s statement “it is a reality of modern society that we are all exposed to a wide range of chemicals and other environmental influences on a daily basis.” 125

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118 The Kentucky Supreme Court noted: “[G]iven that negligently distributed or discharged toxins can be perceived to lie in every corner in the modern industrialized world, and their effects on risk levels are at best speculative, the potential tort claims involved are inherently limitless and endless.” *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.2d 849, 857-8 (Ky. 2002), quoting 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, 831 (2000).

119 *Id.* at 441-2.


122 701 N.W.2d 684 (Mich. 2005). 173 plaintiffs, representing thousands of residents and workers in a proposed class action, claimed defendant had negligently discharged dioxin in the Tittabawassee floodplain. None of the claimants had a manifested disease or physical injury, but might at an indefinite time in the future.

123 *Id.* at 696.

124 *Id.*

125 *Id.* at 696, n. 15.

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The recognition of a cause of action based only on exposure could “create a potentially limitless pool of plaintiffs.”\textsuperscript{126} It could drain the resources needed to compensate plaintiffs with manifested physical injuries.\textsuperscript{127}

If we view negligence in terms of the traditional elements of duty, breach, causation, and damages, then the court held that damages require an actual injury to person or property.\textsuperscript{128} The physical injury requirement sets a clear threshold for recovery, reduces the risk of fraud, and precludes frivolous and unfounded claims.\textsuperscript{129}

The Michigan Supreme Court had some unkind words about lawyers in these cases:

To recognize a medical monitoring cause of action would essentially be to accord carte blanche to any moderately creative lawyer to identify an emission from any business enterprise anywhere, speculate about the adverse health consequences of such an emission, and thereby seek to impose on such business the obligation to pay the medical costs of a segment of the population that has suffered no actual medical harm.\textsuperscript{130}

The practical reality of adopting medical monitoring in cases not involving a present physical injury would be to allocate the polluter’s resources on a first come, first served basis.\textsuperscript{131} We should not therefore be surprised that many federal and state courts balk at class action medical monitoring suits.\textsuperscript{132}

\textsuperscript{126} Id. at 692.

\textsuperscript{127} Id. at 694-5.

\textsuperscript{128} Id. at 689-690.

\textsuperscript{129} Id. at 690-91.

\textsuperscript{130} Id. at 703.

\textsuperscript{131} Id.

Each potential victim is sui generis in terms of susceptibility to the potential illness, the dosage and exposure levels, the means of exposure, as well as individual defenses, such as assumption of the risk, contributory/comparative negligence,\textsuperscript{133} misuse, preexisting ailments,\textsuperscript{134} adequacy of any warnings, and statutes of limitations.

Many courts reasoned after Metro North that medical monitoring should be initiated by the legislature.\textsuperscript{135} Many commentators have questioned the efficacy of medical monitoring.\textsuperscript{136} In addition, questions have arisen about the viability of judicially administered medical monitoring plans.

Conversely, West Virginia has held an independent cause of action exists for medical monitoring absent a physical injury. The test is whether medical monitoring is, to a reasonable degree of medical exigency, necessary to properly diagnose a disease’s warning signs.\textsuperscript{137}

\textit{Corp.}, 383 F. 3d 495 (6\textsuperscript{th} Cir. 2004)(injunctive relief is to monitor ongoing health issues rather than to redress past injuries).


\textsuperscript{134} A fundamental principle of tort law is that you take your victims as you find them. What we are talking about here is that if, for example, the patient has a history of heart attacks, it is not as easy to convince a jury that this medication caused the heart condition. Defendants undertake extensive discovery of claimants’ medical history, as well as of their family members, hoping to find evidence that the claimants suffered from these conditions prior to exposure.


For a look at medical monitoring from both the legal and medical perspectives, see Guzelian, Hillman & Guzelian, A Quantitative Methodology for Determining the Need for Exposure-Prompted Medical Monitoring, 79 Ind. L. J. 57 (2004).

New Jersey, which led the way in adopting medical monitoring, subsequently limited its application. First, it restricted the Ayers holding to cases where plaintiff 1) can show exposure caused “a distinctive increased risk of future injury,” requires “a course of medical monitoring, independent of any other that the plaintiff would otherwise have to undergo,” and 3) direct, rather than indirect, exposure.138

More recently the New Jersey Supreme Court rejected medical monitoring in a pharmaceutical class action suit,139 following the recent trend of many courts.140 The Court held recovery was unavailable without a physical injury.141 The case was technically one of statutory interpretation of the word “harm” in the New Jersey Products Liability Act.142 “Harm” was defined as “(b) personal physical illness, injury, or death.”143 The court construed harm to require a physical injury.144

Similarly the California Supreme Court in Lockheed Martin Corp. v. Superior Court145 failed to demonstrate the common issues with respect to causation and damages predominated over individualize issues, and thereby affirmed the denial of class action certification. The Court thereby

138 Theer v. Philip Carey Co., 628 A.2d 724 (N.J. 1993). Plaintiff alleged an increased risk of cancer from exposure to asbestos through laundering her husband’s clothes. Her husband had died of lung cancer after working with asbestos for 29 years.


The problem the federal courts have with medical monitoring class action suits is that because of the nature of prescription drugs, the individual issues of each plaintiff preclude broad class action suits. Questions arise over the extent of the warnings each user received as well as individual health issues.

141 948 A.2d at 589.

142 N.J.S.A. 2A:58C-1 to 11.

143 N.J.S.A. 2A:58c-1b(2).

144 948 A.2d at 595. The Court quoted dicta in an earlier appellate opinion that Ayres should only be applied in rare circumstances.

145 63 P.2d 913 (Cal. 2003).
retreated from its earlier broad acceptance of medical monitoring in *Potter v. Firestone Tire & Rubber Co.* Others have rejected it in class action suits because of the need to establish individual fault.\footnote{25 Cal. Rptr. 550 (1993).}

\footnote{See n. 129, supra.}

**A History of Tobacco Litigation**\footnote{The purpose of this section is not to undertake a detailed analysis of tobacco litigation, but to present the class action and medical monitoring issues applicable to this article. In general, see D. Douglas Blanke, Towards Health With Justice: Litigation and Public Inquiries as Tools for Tobacco Control [World Health Organization 2002], Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 Stan. L. Rev. 853 (1992). For a compilation of tobacco cases, see The Tobacco Products Liability Project TPLP, http://www.tobacco.neu.edu.}

Thousands of cases, scores of class action suits, billions in judgments and settlements,\footnote{Of course, judgments and verdicts were often reduced or reversed on appeal.} and novel legal theories characterize tobacco litigation in the United States. Yet, analyzing tobacco litigation is fairly easy for our purposes since commentators have identified three waves of tobacco litigation.\footnote{Stephen D. Sugarman, *Mixed Results From Recent United States Tobacco Litigation*, Tort L. Rev. 1 (July 2002)(hereinafter referred to as “Sugarman”), Christine Hatfield, *The Privilege Doctrines – Are They Just Another Discovery Tool Utilized By the Tobacco Industry to Conceal Damaging Information*, 16 Pace L. Rev. 525 (1996).}

The first began in 1954 and lasted about a quarter century. Altria, the parent company of Philip Morris, reported 125 lawsuits were filed between 1954 and 1978. Only nine of these went to trial, and every one of the 125 failed.\footnote{Altria, History of Tobacco Litigation: 1954-1978, http://altria.com/media/03_06_01_02_011954-1978.asp (visited on Feb. 11, 2010).}

The usual reason was a failure to establish causation. The tobacco industry successfully argued that the plaintiffs were unsuccessful in linking their illnesses to smoking. Another obstacle for plaintiffs is that the law of product liability was still developing. The critical provision, Section 402A of the Restatement 2d of Torts, was not promulgated until 1964. Plaintiffs therefore relied upon traditional theories of negligence in these early suits.

Another factor might be that since roughly half of the adult population smoked, they saw nothing wrong with smoking. In addition, the plaintiffs did not engage in extensive discovery, thereby depriving them of critical evidence in their lawsuits.
The second wave was between 1978 and 1993. Once again, every suit was ultimately unsuccessful for plaintiff. Of the 18 cases which went to trial, only one, *Cipollone v. Liggett Group Inc.*, received a judgment for plaintiff, $400,000. *Cipollone* is most famous for the Supreme Court opinion which substantially limited the causes of action for smoking after 1969, when Congress mandated the following warning on tobacco packages: “Caution: Cigarette Smoking is Dangerous to Your Health.”

The divided Court held that causes of actions based on post 1969 failures to warn based on post 1969 advertising or promotion and negligence were preempted, but express warranty, intentional fraud and fraudulent misrepresentation, and conspiracy were not. The effect of *Cipollone* was not, as many predicted, to still tobacco litigation, but to shift the focus often away from traditional products liabilities to theories of fraud, misrepresentation, and consumer fraud.

The case of *Castano v. American Tobacco Co.* involved a proposed nationwide class of nicotine-dependent persons. The relief sought included medical monitoring. The District Court granted class certification, but not on the medical monitoring claim.

The Court of Appeals reversed, holding that the district court “failed to consider how variations in state law affect predominance and superiority” and that the predominance inquiry did not include a consideration of how the trial on the merits would proceed. Variations in state law may “swamp” common issues.

The *Castano* class members were exposed to nicotine through different products, for different amounts of time, and over different time periods, started smoking for different reasons, and had different knowledge of the risks of smoking. Other individual issues include when plaintiff became

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153 505 U.S. 504 (1992). Rose Cipollone began smoking in 1942 and died in 1984. Her causes of action, as pursued by her son, included express warnings based on advertisements, failure to warn of the hazards of smoking, fraudulently misrepresented those hazards, conspiracy to deprive the public of medical and scientific information about smoking.

154 *Cipollone* dropped the case on remand.

155 Section 5 of the statute provided: “No requirement or prohibition based on smoking and health shall be imposed under state law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.” 15 U.S.C. §133. In general, see Alan M. Darnell & Meryl G. Nadler, *Important Rulings Emanating From the Cipollone Tobacco Trial*, 25 Cal. West. L. Rev. 323 (1989).

156 Id. at 524-25.

157 84 F.3d 734 (5th Cir. 1996)

addicted, and if plaintiff tried to stop smoking. These individualities affect causation, reliance and fraud, comparative fault, and other affirmative defenses. In turn, the legal results will differ depending upon the application of the laws of each individual state.

The court recognized that because of all these issues, class action certification has historically been disdained in mass tort cases. Federal Rule of Civil Procedure §23(b)(3) provides that in class action suits "questions of law or fact common to class members predominate over any questions affecting only individual members." Thus, individual questions, such as causation, may preclude class action certification.

_Castano_ was significant in another respect. It was the first case in which plaintiffs were able to discover critical tobacco industry documents.

One result of _Castano_ is that class action suits were pursued at the state level. One of the most famous was _R.I. Reynolds Co. v. Engle_. The Florida Court of Appeals held common issues predominated over individual issues, but limited the class to Florida residents. The trial on remand

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159 See Sugarman, supra n. 148 at 13.

160 84 F.3d at 746.

161 For example, reliance is an element that must be individually shown in a RICO case, thereby precluding class action certification. _McLaughlin v. American Tobacco Co._, 522 F.3d 215 (2nd Cir. 2008).


163 Class action suits were usually unsuccessful in federal courts, which held individual issues outweighed common issues. One study found that all federal class action and most state class action suits were unresponsive to certifying class action suits. Susan E. Kearns, _Decertification of Statewide Tobacco Class Actions_, 74 N.Y.U. L. Rev. 1336, 1354-55 (1999). See _e.g._, _McLaughlin v. American Tobacco Co._, 522 F.3d 215 (2nd Cir. 2008)(class action certification in $800 billion RICO suit reversed). The court recognized that "not every wrong can have a legal remedy." Id. at 219. It also ruled that reliance cannot be the subject of general proof. _Id._ at 222, _Benedict v. Altria Group_, 241 F.R.D. 668 (D. Kan. 2007)(class certification rejected for "light brands" under Kansas Consumer Protection Act).

Class action suits were often unsuccessful even at the state level. See _e.g._, _Price v. Philip Morris, Inc._, 848 N.E.2d 1 (Ill. 2006)(class action suit under Illinois Consumer Protection Act); Contra, _see Aspinall v. Philip Morris, Inc._, 902 N.E.2d 421 (Mass. 2009), _In re Tobacco II Cases_, 93 Cal. Rptr. 559 (2009).

164 945 So.2d 1246 (Fla. 2006)

was split into four phases. The jury on remand awarded $145 billion in punitive damages. The jury’s findings of fact included several causes of action and other legal issues and the linkage of 20 diseases to cigarette smoking.

The Florida Supreme Court subsequently reversed the class action certification, but affirmed the findings of fact. It reasoned smokers’ cases “are highly individualized” and do not “lend themselves to class-action treatment.”

Engle was a mixed, if not a Pyrrhic victory, for the tobacco industry. While the court reversed the class action and punitive damages awards, and held that cases would have to be brought on an individual basis, it upheld many of the factual findings of the jury. Individual members of the class would not therefore have to relitigate general causation for the 20 illnesses the jury linked to cigarette smoking. In addition, plaintiffs are spared having to prove negligence, defective and unreasonably dangerous products, addictive products, strict liability, fraud by concealment, civil conspiracy – misrepresentation, conspiracy – concealment, breach of implied warranty, and general causation.

Plaintiffs would have to show at trial that they smoked defendant’s product, the smoking caused their specific disease, and reliance with fraud is alleged. Thus, these cases will often be a matter simply of establishing damages, including punitive damages.

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166 Bifurcation is common in Toxic Torts; the Woburn, Massachusetts case made famous in Jonathan Harr, A Civil Action (Random House 1996) involved a trifurcation. Sterling v. Vesicol Chemical Corp., 855 F.2d 1188 (6th Cir. 1988) bifurcated on general causation for the class and then shifted to specific causation on an individual plaintiff basis.

167 Negligence, defective and unreasonably dangerous products, addictive products, strict liability, fraud by concealment, civil conspiracy – misrepresentation, conspiracy – concealment, breach of implied warranty, and general causation.


169 Id. at 1269.

170 For a look at the outcome of state class action suits, see Susan E. Kearns, Decertification of Statewide Class Actions, 74 N.Y.U. L. Rev. 1336 (1999).

171 Id. at 1277. The Florida Supreme Court thus adopted offensive collateral estoppel from the first jury determination. In general, see Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322 (1979).
The third wave of cases involved class action suits, state claims seeking reimbursement for Medicare expenditures, and individual cases, including addiction cases. A fourth wave is proceeding now. It consists of some class action suits, but mostly individual suits, that rely upon the industry documents as an outgrowth of the discovery of tobacco industry documents during the public law suits of the 1980's and 1980's. Unlike the third wave, some courts are more willing to certify class actions in these cases.

Many state class action lawsuits are proceeding on consumer fraud claims, often using state unfair consumer practice statutes. These cases usually involve "light" cigarettes, nicotine addiction, and false statements by the companies. Punitive damages are often sought for the extreme and outrageous conduct of the companies. The result is that plaintiffs win some and lose some, but when they win, the verdicts are often astronomical.

The Supreme Court facilitated these suits by its 2008 decision in Altria Group, Inc. v. Good. The Court's 5:4 decision held that neither the Federal Labeling Act nor FTC decisions preempt state claims on low tar or light cigarettes, predicated on a duty not to deceive. Plaintiff's suit was brought under Maine's Unfair Trade Practices Act.

Donovan v. Phillip Morris USA, Inc.: Medical Monitoring in Tobacco Litigation

Jurries have awarded large judgments against tobacco companies in recent years, but lawsuits seeking medical monitoring have been unsuccessful in tobacco litigation. For example, the Oregon Supreme Court in 2008 held the remedy was unavailable because the claimant had not yet incurred a physical

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173 For example, a jury in Bullock v. Philip Morris USA, Inc. 42 Cal. Rptr. 3d 140 (Ct. App. 2006) awarded $850,000 in compensatory damages and $28 billion in punitives. Plaintiffs agreed to a remittitur to $25 million in punitives. Similarly, a jury in Boeken v. Philip Morris, Inc., 26 Cal. Rptr.3d 638 (Ct. App. 2005), cert. denied, 547 U.S. 1018 (2005), awarded $5.54 million in compensatory and $3 billion in punitive damages. The trial court reduced the punitives to $100 million, which was then cut in half to $50 million by the appellate court. Henley v. Philip Morris, Inc., 9 Cal. Rptr.3d 29 (Ct. App. 2004) involved a jury award of $1.5 million compensatory and $50 million punitive, reduced to $25 million.

A more typical case is Whiteley v. Philip Morris, Inc., 11 Cal. Rptr. 3d 807 (Cal. App. 2004), which involved an award of $1,689,117 compensatory and $20 million punitive.


175 The opinion recounted the FTC history of tobacco labeling requirements.


177 914 N.E.2d 891 (Mass. 2009).
injury.\textsuperscript{178} The Oregon Supreme Court earlier upheld a large judgment against Philip Morris,\textsuperscript{179} but that involved a plaintiff with a physical injury. Oregon is thereby willing to award damages for existing injuries, but not for prospective, uncertain future injuries.

\textit{Donovan v. Philip Morris USA, Inc.} involved a class action suit brought by long term tobacco smokers in Massachusetts. One plaintiff claimed 20 pack years of smoking.\textsuperscript{180} The class was limited to Massachusetts residents 50 years or older, who smoked Marlboros 20 pack years or more, currently smoke or quit smoking within the preceding year, were not diagnosed with lung cancer or under investigation by a physician for suspected lung cancer, and smoked Marlboros within Massachusetts.

Plaintiffs’ claims, as summarized by the court, were that the plaintiffs “have sustained a present injury in the form of objectively observable and identifiable damage to the tissues and structures of their lungs resulting in a substantially increased risk of cancer” caused by defendant’s negligence in designing and manufacturing cigarettes.” They have continued to smoke Marlboros.\textsuperscript{181}

The only relief sought was a medical monitoring program that utilized LDCT (low-dose computed tomography) screening, a newly developed technology, which effectively screens for lung cancer. Plaintiffs claimed LDCT had become accepted and available in the medical community within the preceding three years. Plaintiffs claimed no accepted or efficacious method of lung cancer screening or surveillance method existed prior to LDCT.\textsuperscript{182}

\textsuperscript{178} \textit{Lowe v. Philip Morris, Inc.}, 183 P.3d 181 (Ore. 2008). See also, \textit{Barnes v. American Tobacco Co.}, 161 F.2d 127 (3d Cir. 1998). The Court of Appeals affirmed the district court’s denial of class action certification because of too many individual issues involving addiction, causation, and affirmative defenses. These claims should be determined on an individual basis. See also, \textit{Scott v. The American Tobacco Co.}, 949 So.2d 1266 (La. Ct. App. 2007).

\textsuperscript{179} \textit{Williams v. Philip Morris, Inc.}, 176 P.3d 1258 (Ore. 2008). The verdict was $800,000 compensatory and $79.5 million compensatory. The United States Supreme Court had earlier overturned the award. \textit{Philip Morris USA v. Williams}, 549 U.S. 346 (2007). The Court held that a jury was not to consider harm directed against those who were not before the court, but only harm directed at the plaintiffs.

\textsuperscript{180} A pack year is the equivalent of smoking one pack of cigarettes daily for a year. Thus, two packs a day for 5 years would be ten pack years.

\textsuperscript{181} The phenomenon of plaintiffs continuing to smoke after contracting tobacco illnesses should not be surprising because of the addictive effects of nicotine.

\textsuperscript{182} Defendant’s brief argued LDCT has been around for over a decade and that no major medical scientific or public health organization has recommended routine CT screening for lung cancer for smokers. To the contrary, several have “expressly declined to recommend LDCT scans as an effective screening tool for lung cancer.” \textit{Donovan v. Philip Morris USA Inc}, Brief of Defendant-Appellee Philip Morris USA Inc. at 8 (May 14, 2009). These organizations include the American cancer Society, the American College of Chest Physicians, the American Lung Association, the National Comprehensive Cancer Network, the National Cancer Institute, and the United States Preventative Services task Force. \textit{id.}
They claimed LDCT technology could detect the onset of cancer at the earliest practicable time for maximizing the effective treatment of the disease. Subcellular changes may not be symptoms of a disease or illness, but could provide warning signs to a physician that the patient has a condition which indicates a substantial increase in risk of contracting a serious disease or illness.

Plaintiffs did not seek damages for pain and suffering, diminution of earning capacity, cancer, or increased risk of cancer. They sought only future medical expenses “reasonably to be incurred as a result” of the alleged negligence of defendant. That would include medical monitoring.  

Plaintiff filed suit in federal district court under diversity of jurisdiction. Defendants moved for dismissal and summary judgment. The district court certified the following question to the Supreme Judicial Court of Massachusetts:

“1. Does the plaintiff’s suit for medical monitoring, based on subclinical effects of exposure to cigarette smoke and increased risk of cancer, state a cognizable claim and/or permit a remedy under Massachusetts state law?”

Phillip Morris sought dismissal of the claims and filed a motion for summary judgment. It argued plaintiffs had the burden of proof to show “proof of physical harm manifested by objective symptomology as a necessary part of damages.”

The Supreme Judicial Court of Massachusetts disagreed, holding for plaintiff on October 19, 2009, with the result that cigarette companies may face a wave of medical monitoring suits in the future. The Court initially dodged some of the troublesome issues in earlier medical monitoring cases by limiting the decision to the named plaintiffs and their individual claims.

The Court held that

“When competent medical testimony establishes that medical monitoring is necessary to detect the onset of a serious illness or disease due to physiological changes indicating a substantial increase in


Of course, this debate may simply raise a disputed question of fact for the trial.

914 N.E. 2nd at . To some extent therefore, Donovan is a test case seeking to expand traditional remedies in tobacco cases.

An additional certified question involved the running of the statute of limitations. The court held the statute “begins to run when 1) there is a physiological change resulting in a substantial increase in the risk of cancer, and 2) that increase, under the standard for care, triggers the need for available diagnostic testing that has been accepted in the medical community as an efficacious method of lung cancer screening or surveillance.” Id. at .
risk of harm from exposure to a known hazardous substance, the element of injury and damage will have been satisfied and that the cost of monitoring is recoverable in tort.”

A particular level or quantification in the increase of risk is unnecessary. The test is if the increase is substantial and there has been a corresponding subcellular change. One critical holding of Donovan, that separates it from earlier Toxic Tort cases, is that it recognizes a subclinical injury as a compensable injury, at least for purposes of medical monitoring.

The Court did not, at least to this point, broadly extend the holding to chemical exposures or radiation. Thus, in theory, just as the New Jersey Supreme Court decision denying the state of the art defense to asbestos companies in Beshada v. Johns-Manville Products Corp.\(^{185}\) was subsequently limited to the special facts of asbestos cases,\(^{186}\) Massachusetts might not extent Donovan to Toxic Torts cases.

Theoretically, Donovan was simply a denial of a motion by defendant for summary judgment. The case is still to go to trial. The Court recognized that plaintiffs have the burden of proof at trial of proving by a preponderance of the evidence each element of the claim. Competent expert testimony will usually be required to prove the elements of plaintiff’s case.

In reality, the opinion opens up an entirely new line of litigation against the tobacco industry, as well as generators, users, disposers, transporter, and landfills with chemicals and toxins.

Conclusion

The advent of both the toxic tort and the mass toxic tort, often with long latency periods between exposure and manifestation, has tested the preexisting norm of traditional causation exemplified by a normal auto accident. Courts are adopting innovative approaches to assess liability when the traditional standard of linking damages to specific tortious acts by specific defendants does not work.

The market share approach of Sindell v. Abbott Labs initially received an enthusiastic response, but then was limited in its application. Ayres v. Jackson Township and medical monitoring did not receive as much attention initially as Sindell, but quickly received judicial acceptance, but then stalled in recent years.

Ayers v. Jackson Township introduced medical monitoring into the toxic torts arena. Whether courts apply it as an independent cause of action or as a new remedy, it is a non-traditional approach by the courts to address emerging causation issues. It advanced damages to those who have been exposed, but do not yet manifest recoverable physical or psychological injuries.

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\(^{185}\) 447 A. 2d 539 (N.J. 1982).

\(^{186}\) In re Asbestos Litigation, 829 F.2d 1299 (3rd Cir. 1987), Feldman v. Lederle Laboratories, 479 A.2d 374, 388 (N.J. 1984).
However, after an initial surge of support, medical monitoring hit judicial roadblocks. It fell astride of the problem of over compensating early claimants who have not incurred any manifestations of a disease, and may not do so in the future, at the risk of under compensating victims years later with actual physical injuries.

Tort law in recent decades has tended to be a law of victim compensation. Courts want to compensate the legitimately injured. However, courts in recent years have become cognizant of the resources issues. They are now more hesitant to award damages to those who may never suffer a physical injury at the expense of later claimants who do incur physical injuries.

Courts and juries have awarded substantial judgments to cigarette smokers in recent years, but only when physical injuries existed. That may now change.

*Donovan v. Philip Morris USA, Inc.* will either be an anomaly, essentially limited to Massachusetts, or it will breathe new life into medical monitoring and extend it to subclinical injuries. The Supreme Judicial Court of Massachusetts narrowly limited its application by excluding class action suits as well as chemical and radiation exposure cases from its ruling, at least for now. Even with these constraints, Donovan still represents a significant advance in medical monitoring.