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Donovan v. Philip Morris USA, Inc.: The Best Approach to Satisfying the Injury Requirement in Medical Monitoring Claims

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Abstract: Medical monitoring claims seek money damages for the costs of medical testing required after toxic exposure. However, victims of toxic exposure often face challenges proving medical monitoring claims. Many courts require plaintiffs prove they have a present physical injury, and victims usually do not have any disease or illness attributable to the toxic exposure when they bring medical monitoring claims. This Note argues that while a present physical injury should be required, a plaintiff that demonstrates subcellular changes indicating toxic exposure and an increased risk of developing a disease sufficiently satisfies the present physical injury requirement. The best standard for addressing a medical monitoring claim was outlined in Donovan v. Philip Morris USA, Inc., a recent decision by the Supreme Judicial Court of Massachusetts.

Introduction

Toxic torts involve harm from exposure to a hazardous substance. victims have brought toxic tort claims as a result of exposure to tobacco products, asbestos, Agent Orange, and other hazardous substances. Toxic tort victims have difficulty proving causation and injury in tort claims because injuries in toxic torts frequently do not manifest until years after exposure. In the interim, a victim of toxic exposure may be advised by a physician to undergo medical monitoring. Toxic tort victims have attempted to recover the cost of medical monitoring from the party responsible for the exposure. However, some courts

2 Id.
4 See id. at 35 (introducing a hypothetical factual scenario in which a claim for medical monitoring may arise).
5 See id. at 38–39; Pizzirusso, supra note 1, at 203.
have declined to award damages for medical monitoring when plaintiffs are unable to show a present physical injury, forcing innocent victims of toxic exposure to pay for their own medical costs while waiting for symptoms of a disease to develop.\(^6\)

Courts have split on the issue of whether medical monitoring claims are valid in the absence of a present physical injury.\(^7\) Opponents argue that a present physical injury is necessary to distinguish between legitimate and frivolous claims, and that allowing claims without such injury is an unnecessary departure from traditional notions of injury.\(^8\) Supporters of medical monitoring claims in the absence of a present physical injury argue that it is consistent with tort principles to allow an innocent plaintiff to recover for the costs of medical monitoring from a negligent defendant.\(^9\) Courts allowing such claims cite the public health interest in diagnosing diseases early, the deterrent effect of awarding medical monitoring costs, the mitigation of the cost and severity of future illnesses, and the inherent fairness of requiring the negligent party to pay for the medical monitoring costs of its victims.\(^10\)

Recently, in \textit{Donovan v. Philip Morris USA, Inc.}, the Supreme Judicial Court of Massachusetts held that plaintiffs could proceed on a claim for medical monitoring in the absence of symptoms of any illness.\(^11\) However, the court formulated a test which required—among other elements—that plaintiffs show that the exposure caused, at a minimum, subcellular changes that increased the risk of disease.\(^12\) The court explained that this test addresses concerns of false claims.\(^13\)

The Massachusetts approach presents the best standard for adjudicating medical monitoring claims.\(^14\) The plaintiff should be required to

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\(^6\) See, e.g., \textit{Metro-N. Commuter R.R. v. Buckley}, 521 U.S. 424, 438–44 (1997) (declining to award medical monitoring damages under the Federal Employers’ Liability Act to a plaintiff who did not have symptoms of any disease); \textit{Henry v. Dow Chem. Co.}, 701 N.W.2d 684, 688 (Mich. 2005) (holding that a plaintiff bringing a claim for medical monitoring without establishing any present physical injury has failed to state a valid negligence claim); \textit{Lowe v. Philip Morris USA, Inc.}, 183 P.3d 181, 186 (Or. 2008) (holding that “the cost of medical monitoring . . . is not sufficient to give rise to a negligence claim” where the plaintiff has not alleged any physical harm).


\(^8\) See \textit{infra} Part II.A.

\(^9\) See \textit{infra} Part II.B.


\(^11\) 914 N.E.2d 891, 901–02 (Mass. 2009).

\(^12\) \textit{Id.} at 902.

\(^13\) \textit{Id.} at 901.

\(^14\) See \textit{infra} Part III.B.
prove a present physical injury. However, subcellular changes that establish exposure and an increased risk of disease necessitating medical monitoring should satisfy the physical injury requirement, even if such changes are not symptoms of any disease. The Donovan standard also requires a plaintiff to show that defendant’s negligence caused her exposure, effective medical tests exist for the relevant disease, such tests followed by early diagnosis and treatment would significantly decrease the potential severity of disease, and such tests are reasonably necessary. This standard is fair to both plaintiffs and defendants. Furthermore, the standard is flexible enough to account for any future medical developments that provide more efficient methods for establishing exposure and causation.

This Note argues that other courts should follow the Massachusetts approach by holding that plaintiffs who can establish subcellular changes satisfy the injury requirement for medical monitoring claims. Part I introduces the difficulties inherent in toxic tort claims and outlines some novel claims brought by plaintiffs. Part II examines the legal and policy arguments for and against medical monitoring claims absent physical injury, as explained by courts and commentators. Part III argues that plaintiffs who can show at least subcellular changes as a result of toxic exposure have satisfied the injury requirement, and concludes that the Donovan test is the best model for adjudicating medical monitoring claims.

I. TOXIC TORTS

Tort law seeks to compensate people who are injured by the conduct of another. In order to bring a successful tort claim for negligence, the plaintiff must prove that the defendant owed a duty to the victim, that the defendant’s conduct breached that duty, and that the

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15 See infra Part III.A.
16 See id.
17 See Donovan, 914 N.E.2d at 902.
18 See infra Part III.B.2–3.
19 See infra Part III.B.2.
20 See infra Part III.
21 See infra Part I.
22 See infra Part II.
23 See infra Part III.
defendant’s conduct caused an actual injury to the plaintiff. The four elements for a successful tort claim are known as duty, breach, causation, and actual loss or damage. Causation and actual loss—i.e., injury—are two elements that create obstacles for toxic tort victims. Tort law is not concerned with negligent acts “where no actual loss has occurred.” In other words, not all injuries meet the requisite level of harm to be actionable under tort law. Toxic torts are a specific type of tort, involving harm from exposure to a hazardous substance. Examples of toxic tort cases include claims against tobacco companies for causing lung cancer and claims brought by individuals exposed to asbestos.

A. Difficulties in Toxic Torts: Establishing Causation and Injury

Toxic tort victims often face obstacles in proving injury because victims of exposure frequently do not manifest any symptoms of physical injury until months or years after the exposure. Even if a victim of a toxic exposure experiences physical symptoms such as general malaise shortly after exposure, the victim may have an increased risk of cancer or other medical conditions and those symptoms will not manifest until months or years later. Furthermore, the possible effects of exposure to some hazardous substances are often unknown. Thus, establishing injury after exposure becomes problematic for toxic tort victims.

Victims also encounter problems with causation when attempting to prove that the disease is attributable to exposure that occurred years ago and not to some intervening cause. The loss of evidence during the years between exposure and illness adds to the difficulty of proving

25 Id. § 30, at 164–65. In addition to these requirements, plaintiffs may have to meet certain standing requirements. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). For purposes of this Note, it is sufficient to identify that courts may not allow plaintiffs to proceed with a claim if the relief sought would not redress their injury. See id.

26 Keeton et al., supra note 24, § 30, at 164–65.

27 Czmus, supra note 3, at 35.

28 Keeton et al., supra note 24, § 30, at 165.


30 Pizzirusso, supra note 1, at 185.

31 Id.

32 See Czmus, supra note 3, at 35–36.

33 Id.

34 Id. at 37.

35 Id. at 35.

causation. These problems arise in part because the nature of toxic exposure makes it difficult for the victim to determine the exact number and concentration of the toxins as well as the duration of exposure.

Causation in the toxic tort setting has two elements. First, a plaintiff must establish general causation by proving that the toxic substance is capable of producing the harm that plaintiff has suffered. Second, a plaintiff needs to establish specific causation by proving that toxic exposure did in fact cause the plaintiff’s harm. General causation can be established by epidemiological studies that examine the association between exposure to a toxic substance and disease among a sample population. However, most toxic substances have not been thoroughly tested. Adding to the difficulty in proving general causation, many courts do not allow plaintiffs to use studies that relate a toxin to a specific disease to prove that the toxin can cause a related disease. Similarly, courts have often precluded plaintiffs from using evidence that relates a specific toxin to a disease to prove that a chemically related toxin can cause the same disease. Since general causation is usually a prerequisite to establishing individual causation, proving that a particular toxic substance is capable of causing the plaintiff’s harm is critical.

After establishing general causation, a plaintiff must establish specific causation—usually through expert testimony of a physician—by proving that the exposure did in fact cause the plaintiff’s injury. However, proving specific causation is still very difficult, and the admissibility of such expert testimony is not universally accepted. Even after establishing general causation, a plaintiff will run into difficulties establishing specific causation because “the complex etiology of many diseases creates the possibility that any of a variety of factors could have caused the

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37 Id. at 548.
38 Czmus, supra note 3, at 37.
41 Marchant, supra note 39, at 330; Pierce & Sexton, supra note 40, at 34.
42 Pierce & Sexton, supra note 40, at 35.
43 See Marchant, supra note 39, at 331.
44 Id.
45 Id.
46 Id.
47 See Pierce & Sexton, supra note 40, at 35.
48 See id. at 35–36.
49 See id. at 36 n.19.
plaintiff’s injury” and that the disease was not necessarily caused by the exposure.\textsuperscript{49}

There is a potential alternative method to prove general and specific causation in toxic torts.\textsuperscript{50} A field of science called toxicogenomics seeks to study “the cell-wide changes in gene expression following exposure to toxins.”\textsuperscript{51} The techniques used in toxicogenomics aim to provide information about molecular changes that result from toxic exposure.\textsuperscript{52} Since altered gene expression can occur instantaneously upon exposure, toxicogenomic data has the potential to provide much more useful evidence of exposure than the traditionally relied-upon evidence of clinical symptoms.\textsuperscript{53} Toxic substances can be categorized according to the physiological response—gene expression changes—that they produce.\textsuperscript{54} Doctors and lawyers could then simply look at an individual’s gene expression to confirm whether the individual was exposed to a certain toxic substance.\textsuperscript{55} However, “toxicogenomics is a relatively new [field of] science,”\textsuperscript{56} and there are still some uncertainties in toxicogenomic data.\textsuperscript{57} One commentator has noted that while “[toxicogenomic data] could eventually serve as evidence to either establish or rebut the claim that exposure to a particular toxin caused the specific injury . . . the admissibility of toxicogenomic data in toxic tort litigation still is an open question.”\textsuperscript{58}

The difficulties inherent in toxic tort litigation for victims of exposure have caused some to argue that “traditional tort principles inade-

\textsuperscript{49} See id. at 36.

\textsuperscript{50} See generally Marchant, supra note 39, at 331 (describing the use of toxicogenomic data to prove general and specific causation).

\textsuperscript{51} See id. at 329.

\textsuperscript{52} See id.

\textsuperscript{53} Id.

\textsuperscript{54} Id.

\textsuperscript{55} Id.

\textsuperscript{56} See Pierce & Sexton, supra note 40, at 37 n.20.

\textsuperscript{57} See Marchant, supra note 39, at 330 (describing difficulties in toxicogenomics, including: quality control issues, false positives, and differentiating between adaptive responses in cells that have no toxicological significance and responses that actually represent disease progression).

\textsuperscript{58} See Pierce & Sexton, supra note 40, at 56. This Note introduces the concept of toxicogenomic data only to support the claim that defining injury to include subcellular changes that indicate an increased risk of disease is an acceptable element of a standard for medical monitoring claims. Indeed, one commentator has noted that toxicogenomic data “could help many plaintiffs trigger recovery, by demonstrating both an existing ‘injury’ and a sufficient increase in risk” and that the field “has the potential to greatly expand the number of potential medical monitoring claims.” Marchant, supra note 39, at 332.
quately address the issues in toxic tort litigation.” Consequently, courts have recognized novel claims in the toxic tort setting to address problems encountered by victims of toxic exposure.

B. Novel Theories in Toxic Torts to Address Shortcomings

Three distinct theories of tort recovery have emerged as a solution to some of the difficulties faced by victims of toxic torts. In the 1980s, courts began to accept claims for increased risk of illness, fear of disease or emotional distress, and medical monitoring resulting from toxic torts. All three of these claims depart from traditional notions of actionable harms and what the common law of tort has required to show injury.

1. Enhanced Risk of Illness

Claims for enhanced risk do not involve any type of present physical injury, and plaintiffs seek damages based on the fact that exposure has significantly increased their risk of developing a serious disease. While some courts may accept that enhanced risk of illness is an injury, the enhanced risk theory is the least accepted of the three novel theories advanced by toxic tort victims because there is no common law basis for such a recovery. One explanation for why the common law does not treat enhanced risk as a physical harm is that the duty of care is generally to avoid causing the ultimate harm, and not a duty to avoid engaging in conduct that will increase risk of causing the ultimate harm. For courts that permit such claims, plaintiffs have had difficulty

59 Czmus, supra note 3, at 35.
60 Ann Taylor, Comment, Public Health Funds: The Next Step in the Evolution of Tort Law, 21 B.C. Envtl. Aff. L. Rev. 753, 754 (1994). However, some have argued that even these novel claims are inadequate to compensate victims of toxic torts. See Pizzirusso, supra note 1, at 206.
61 Pizzirusso, supra note 1, at 197.
62 Id.
63 See Keeton et al., supra note 24, § 30, at 165 (stating that “[t]he threat of future harm, not yet realized, is not enough” in a negligence action); Taylor, supra note 60, at 754.
66 See Pizzirusso, supra note 1, at 200, 202 (stating that increased risk claims are less accepted than claims for emotional distress and that medical monitoring claims are the most accepted by the courts).
67 Goldberg & Zipursky, supra note 29, at 1652.
succeeding because courts will often require plaintiffs to prove, using expert testimony, that they are more likely than not to develop the illness—a standard that is very difficult to meet.68

2. Emotional Distress

Emotional distress, or “fear of,” claims in the toxic tort context allege a present injury in the form of mental anguish from the fear of developing a disease as a consequence of exposure to a toxic substance.69 Claims for fear of developing a disease have been more accepted by courts than enhanced risk claims because emotional distress claims are based upon traditional common law doctrines.70 Many courts require plaintiffs bringing emotional distress claims to show an accompanying physical injury or prove an actual increase in the risk of developing a disease.71 This helps courts to distinguish between legitimate and false claims.72 Some courts have ruled that some sort of physical or subcellular changes, which are not traditional physical injuries themselves, may be sufficient to support a claim for emotional distress.73

3. Medical Monitoring

While medical monitoring claims involve enhanced risk, the claim itself does not seek damages to remedy that risk.74 The claim is that the present injury is the need to undergo costly medical diagnostic tests that a medical doctor has deemed to be advisable or necessary as a result of wrongful exposure to some toxic substance caused by the defendant.75 The remedy for such a claim is money damages equivalent to

68 Pizzirusso, supra note 1, at 201.
69 Bourne, supra note 64, at 254; Pizzirusso, supra note 1, at 198.
70 Pizzirusso, supra note 1, at 198-200.
71 Id. at 199.
72 Id.
73 E.g., Anderson v. W.R. Grace & Co., 628 F. Supp. 1219, 1226-27 (D. Mass. 1986) (declining to grant summary judgment on the basis that plaintiffs’ harm is subcellular and therefore does not meet the injury requirement for emotional distress claims); see, e.g., In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., 528 F. Supp. 2d 303, 314-15 (S.D.N.Y. 2007) (finding that testimony regarding subcellular changes to plaintiffs’ DNA raises a genuine issue of material fact as to whether there is sufficient injury for a claim of emotional distress); Bryson v. Pillsbury Co., 573 N.W.2d 718, 720-21 (Minn. Ct. App. 1998) (finding that the question of whether subcellular changes in the form of chromosome damage constitutes a present injury is an issue for the trier of fact).
74 Bourne, supra note 64, at 254.
75 Id.; Pizzirusso, supra note 1, at 203.
the cost of medical monitoring.\textsuperscript{76} Medical monitoring is generally defined by medical professionals as “a form of surveillance based on repetitive use of the same test . . . to detect a specified change in the patient indicating a . . . need for treatment or a change in his treatment.”\textsuperscript{77} The plaintiff usually does not have to quantify any specific level of enhanced risk or even show that a future illness is likely to occur.\textsuperscript{78} The exact elements of a medical monitoring claim vary by jurisdiction.\textsuperscript{79} Claims for medical monitoring are often brought as class actions following a mass exposure.\textsuperscript{80}

II. Medical Monitoring

Courts in different jurisdictions have reached opposite conclusions in cases involving medical monitoring claims without a present physical injury.\textsuperscript{81} In 1984, the D.C. Circuit was the first court to allow a claim for medical monitoring absent physical injury in \textit{Friends for All Children, Inc. v. Lockheed Aircraft Corp.}\textsuperscript{82} The New Jersey Supreme Court soon followed suit and allowed plaintiffs to recover medical monitoring costs in \textit{Ayers v. Township of Jackson}.\textsuperscript{83} As more jurisdictions addressed the validity of medical monitoring claims absent a showing of a present physical injury, there was a general trend to follow the \textit{Ayers} court.\textsuperscript{84} California, Pennsylvania, and Utah were among the states to recognize medical monitoring claims absent proof of physical injury.\textsuperscript{85} Then, in 1997, the United States Supreme Court addressed the issue for the first time in \textit{Metro-North Commuter Railroad Co. v. Buckley}, and rejected a claim for medical monitoring without physical injury under the Federal Employ-

\textsuperscript{76} Pizzirusso, supra note 1, at 203.

\textsuperscript{77} Victor E. Schwartz et al., \textit{Medical Monitoring: The Right Way and the Wrong Way}, 70 Mo. L. Rev. 349, 351 (2005). Note that some commentators have argued that courts and medical professionals have differing views on medical monitoring programs. See infra Part II.A.

\textsuperscript{78} \textit{Ayers v. Twp. of Jackson}, 525 A.2d 287, 309 (N.J. 1987) (rejecting Appellate Division’s conclusion that a claim for medical monitoring is dependent on the risk of injury being quantified and probable); Czmus, supra note 3, at 36.


\textsuperscript{80} Goldberg & Zipursky, supra note 29, at 1703.

\textsuperscript{81} Herbert L. Zarov et al., \textit{A Medical Monitoring Claim for Asymptomatic Plaintiffs: Should Illinois Take the Plunge?}, 12 DePaul J. Health Care L. 1, 1–2 (2009).

\textsuperscript{82} See 746 F.2d 816, 826 (D.C. Cir. 1984); Zarov et al., supra note 81, at 3.

\textsuperscript{83} See 525 A.2d 287, 312 (N.J. 1987); see also infra notes 144–148 and accompanying text.

\textsuperscript{84} See Zarov et al., supra note 81, at 7 (noting that the trend of allowing medical monitoring claims in the absence of a present physical injury shifted in 1997).

\textsuperscript{85} Id. at 5–7.
ers’ Liability Act. Thereafter, a number of states, including Michigan, Oregon, and Nevada, rejected medical monitoring claims absent proof of physical injury. However, there has not been a completely uniform trend in one direction, as various jurisdictions have reached opposite conclusions pre- and post-\textit{Buckley}, and some jurisdictions have yet to consider the issue. Thus, the law surrounding such claims is currently unsettled.

A. Legal Arguments Against Medical Monitoring Claims

Opponents of using medical monitoring as a cause of action argue that tort law appropriately requires a present physical injury, and allowing such claims would unfairly expand tort liability. Traditional common law does not allow for recovery for future harms or purely eco-
nomic harms absent a present physical injury, and there are important legal and policy justifications for this requirement.\(^92\) Allowing medical monitoring claims without a showing of physical harm causes courts to speculate about the extent to which a plaintiff has a cognizable legal claim and makes it difficult for courts to exclude frivolous suits.\(^93\) Requiring a present physical injury also sets a clear standard for courts to follow when deciding which plaintiffs have a valid claim.\(^94\) Further, such a requirement restrains courts from deciding questions more appropriate for a legislative body, such as the amount of exposure required to state a claim, the type of medical evidence needed to support such a claim, and whether exposure to one chemical is more deserving of medical monitoring than another.\(^95\) Indeed, the common law in many states refuses to recognize stand-alone emotional harms and purely economic damages for these same reasons.\(^96\) Medical monitoring costs can quickly rise into the million dollar range,\(^97\) and since plaintiffs do not have to show that a future illness is likely, it is possible that many may never develop a disease.\(^98\) Critics argue that while deterrence and ensuring public health are important considerations, medical monitoring claims brought in courts are not the appropriate way to deal with the issue, which should instead be left to legislatures to resolve.\(^99\)

1. The Supreme Court Denies Medical Monitoring Claims Absent Physical Injury: *Metro-North Commuter Railroad Co. v. Buckley*

In *Buckley*, the United States Supreme Court ruled that a plaintiff could not bring a claim for medical monitoring without a physical injury.

\(^92\) See Henry, 701 N.W.2d at 689–92 (stating that Michigan common law does not recognize claims for future injury or purely economic loss and enumerating purposes of a present physical injury requirement).

\(^93\) Id. at 690–91.

\(^94\) Id.

\(^95\) Schwartz et al., supra note 77, at 377–78 (arguing that “courts are not fit to answer all the questions arising with the implementation of a medical monitoring system” and that “[s]tate legislatures are better-suited to undertake this analysis than the courts”).

\(^96\) See Henry, 701 N.W.2d at 690–91; Pizzirusso, supra note 1, at 199 (stating that many courts recognizing fear of cancer or emotional distress claims require an actual present injury).

\(^97\) See Ayers v. Twp. of Jackson, 525 A.2d 287, 297–98 (N.J. 1987) (disagreeing with Appellate Division’s decision to set aside jury verdict of $8,294,500 for medical monitoring costs).

\(^98\) See Czms, supra note 3, at 36 (stating that many courts that allow medical monitoring claims do not force plaintiffs to show that a future illness is likely to occur).

\(^99\) See Martin & Martin, supra note 79, at 121; Schwartz et al., supra note 77, at 374 (“Medical monitoring, if instituted as a cause of action at all, should be instituted by state legislatures, not the courts.”).
under the Federal Employers’ Liability Act.\textsuperscript{100} The plaintiff in \textit{Buckley} alleged that he was negligently exposed to asbestos, and sued to recover the cost of future medical checkups.\textsuperscript{101} In denying the plaintiff’s claim because he could not show physical harm or symptoms of any disease, the Court reasoned that it is difficult to determine which medical monitoring costs are the result of toxic exposure, as opposed to routine medical monitoring.\textsuperscript{102} The Court added that there is usually uncertainty among medical professionals as to which tests are truly necessary and when they should be administered.\textsuperscript{103} Furthermore, the Court recognized that modern-day living results in chemical exposure in varying degrees for millions of individuals.\textsuperscript{104} Allowing medical monitoring claims absent physical harm, the Court predicted, could cause a “flood” of less important cases” that would detract judicial and medical resources from more deserving plaintiffs with present injuries.\textsuperscript{105} The Court also noted that large recoveries in some cases would unnecessarily award plaintiffs who have alternative forms of payment, such as insurance, available to them.\textsuperscript{106}


In 2005, the Supreme Court of Michigan held that plaintiffs could not state a claim for medical monitoring absent physical harm in \textit{Henry v. Dow Chemical Co.}\textsuperscript{107} Plaintiffs claimed that defendant had negligently exposed them to high levels of a known carcinogen and should pay for plaintiffs’ medical monitoring costs.\textsuperscript{108} The court began its analysis by determining the exact nature of the plaintiffs’ medical monitoring claim, and then deciding whether it was cognizable under Michigan law.\textsuperscript{109} First, the court considered that plaintiffs were alleging damages in anticipation of future injury and decided that Michigan law does not recognize claims for future injury.\textsuperscript{110} Alternatively, the court considered that plaintiffs’ claim was that their present injury is the additional expense of medical monitoring and concluded that this claim also fails

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\textsuperscript{101} \textit{Id.} at 427.
\textsuperscript{102} \textit{Id.} at 441–42.
\textsuperscript{103} \textit{Id.} at 441.
\textsuperscript{104} Zarov \textit{et al.}, \textit{supra} note 81, at 1; \textit{see Buckley}, 521 U.S. at 442.
\textsuperscript{105} \textit{Buckley}, 521 U.S. at 442.
\textsuperscript{106} \textit{Id.} at 442–43.
\textsuperscript{107} 701 N.W.2d 684, 688 (Mich. 2005).
\textsuperscript{108} \textit{Id.}
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} \textit{Id.} at 688–89.
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because Michigan tort law does not recognize financial losses as “injuries.”

In rejecting this view of plaintiffs’ claims, the court made an important distinction between damages and injury. The court noted that plaintiffs demonstrated economic losses that would be considered damages, but that these losses are not themselves considered an injury. The court reasoned that while financial damages in the form of medical monitoring costs may be awarded to plaintiffs who had established a present physical injury, these expenses are not compensable in the absence of a present physical injury and do not substitute for an actual, present injury. Finally, the court reasoned that the only other way to characterize plaintiffs’ claim is that they have alleged a fear of future physical injury, and concluded that a claim characterized in this manner would also fail because Michigan common law only recognizes claims for emotional distress when accompanied with “physical manifestations of that distress.”

3. Oregon Also Holds No Medical Monitoring Without Physical Harm:

*Low v. Philip Morris USA, Inc.*

In 2008, the Supreme Court of Oregon followed Michigan by ruling that a claim for medical monitoring absent physical harm does not state a claim for negligence in *Low v. Philip Morris USA, Inc.* Plaintiffs alleged that defendants’ negligent manufacture and sale of cigarettes caused plaintiffs to be at a significantly increased risk of developing lung cancer and that, because of defendants’ negligence, it was reasonable and necessary for plaintiffs to undergo medical monitoring tests. The court observed that Oregon has repeatedly declined to impose liability for negligence when a plaintiff has suffered purely economic loss and no accompanying injury to person or property. The court concluded by noting that although other jurisdictions have allowed medical monitoring, Oregon precedent controls the issue and declined to modify the state’s common law.

111 Id. at 691.
112 Id.
113 Henry, 701 N.W.2d at 691.
114 Id.
115 Id. at 692.
116 See 183 P.3d 181, 186 (Or. 2008).
117 Id. at 183–84.
118 Id. at 186.
119 Id. at 187.
4. Questioning the Benefits of Medical Monitoring

Some commentators have argued that the scientific community’s approach to medical monitoring is inconsistent with the views of courts that allow medical monitoring without requiring evidence of present physical injury.\(^{120}\) According to the medical community, medical monitoring programs are only appropriate when they have the potential to prevent or cure a disease.\(^{121}\) Therefore, a comprehensive cost-benefit analysis should precede every medical monitoring program.\(^{122}\)

Other critics assert that many courts that allow medical monitoring claims overstate the beneficial effects of diagnostic testing.\(^{123}\) These critics argue that many medical monitoring programs are ineffective and fail to detect diseases early in asymptomatic patients.\(^{124}\) Additionally, they argue that some medical monitoring programs frequently result in false positives\(^{125}\) or false negatives,\(^{126}\) and the consequences of each should be accounted for as risks of undergoing medical monitoring.\(^{127}\)

Finally, critics note that early detection of some diseases may fail to improve a patient’s health, and in such cases, the risks of medical monitoring outweigh any potential benefits.\(^{128}\) These critics argue that courts are not in a position to decide which diseases need medical monitoring, nor are they in a position to decide what criteria should be used to determine whether medical monitoring is appropriate in a specific case.\(^{129}\) Critics argue that because courts lack the expertise to address the issues involved in medical monitoring, and because allowing such

\(^{120}\) Schwartz et al., supra note 77, at 362 (“[M]edical monitoring is only appropriate where it can be expected to be effective and where its benefits outweigh its costs. A basic objective ‘predictor’ for this result is some contemporary injury or harm. In contrast, [some] courts have ignored this medical and scientific guidance and have instead implemented full-scale medical monitoring awards where the plaintiffs have no present physical injury.”); Zarov et al., supra note 81, at 29 (stating that the medical community has reached a different conclusion than courts with respect to the benefits of medical monitoring).

\(^{121}\) Schwartz et al., supra note 77, at 350–51.

\(^{122}\) Id. at 349.

\(^{123}\) Zarov et al., supra note 81, at 29–34.

\(^{124}\) Id. at 30–31 (citing the failure of medical monitoring to detect nephrotoxicity resulting from lead exposure before observable symptoms).

\(^{125}\) A test result indicating disease when the patient has none. Id. at 31.

\(^{126}\) A test result indicating that the patient is healthy when the patient has a disease. Id. at 32.

\(^{127}\) See id. at 31–32.

\(^{128}\) Id. at 33–34.

\(^{129}\) Schwartz et al., supra note 77, at 377–78.
claims departs significantly from traditional tort law, if such claims are to be permitted, a legislature should be the responsible body.\textsuperscript{130}

B. Legal Arguments Supporting Medical Monitoring Claims

Supporters of medical monitoring claims absent physical injury argue that these claims are consistent with tort principles because they only require the defendant to pay for medical costs that would otherwise have been unnecessary but for the defendant’s culpable conduct.\textsuperscript{131} These supporters believe that it is consistent with tort principles to shift the burden of medical monitoring costs from the party that has been wrongfully exposed to toxic chemicals to the party that was responsible for that wrongful exposure.\textsuperscript{132}

Courts that support medical monitoring claims have cited four policy considerations.\textsuperscript{133} First, courts have recognized the public health interest in facilitating access to medical testing when it enables early diagnosis and treatment.\textsuperscript{134} Second, awarding medical monitoring costs deters the irresponsible behavior of discharging toxins.\textsuperscript{135} Third, awarding medical monitoring costs has the effect of reducing overall costs by preventing or mitigating future illnesses.\textsuperscript{136} Finally, there is an inherent unfairness in forcing innocent victims of wrongful exposure to pay for medical monitoring expenses when it would be reasonable to shift that burden to the party responsible for the wrongful exposure.\textsuperscript{137}

The first court to allow a medical monitoring claim absent physical harm was the D.C. Circuit Court in \textit{Friends for All Children, Inc., v. Lockheed Aircraft Corp.}\textsuperscript{138} The case involved an action brought by survivors of a plane crash who had to undergo medical testing for a possible neurological disorder.\textsuperscript{139} In affirming the district court’s order that the defendant fund the diagnostic tests, the D.C. Circuit reasoned that the ruling would serve the purposes of tort law by deterring wrongful con-

\textsuperscript{130} Id. at 382–83.
\textsuperscript{131} See \textit{Friends for All Children, Inc., v. Lockheed Aircraft Corp.}, 746 F.2d 816, 825 (D.C. Cir. 1984) (stating that allowing medical monitoring damages “accords with commonly shared intuitions of normative justice which underlie the common law of tort”).
\textsuperscript{132} See \textit{id}.
\textsuperscript{133} See \textit{Potter v. Firestone Tire & Rubber Co.}, 863 P.2d 795, 824 (Cal. 1993).
\textsuperscript{134} Id.
\textsuperscript{135} Id.
\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{138} 746 F.2d 816 (D.C. Cir. 1984); Schwartz et al., \textit{supra} note 77, at 359.
\textsuperscript{139} \textit{Friends for All Children, Inc.}, 746 F.2d at 818–19.
duct and compensating victims of wrongdoing. The court considered the Restatement (Second) of Torts’ definition of injury, which defines it as “the invasion of any legally protected interest of another.” The court reasoned that an interest in avoiding expensive medical tests is similar to the interest in avoiding a physical injury, and that the defendant clearly invaded this interest with its negligent conduct. Since the defendant’s actions proximately caused the need for diagnostic testing, the court was satisfied with imposing liability on the defendant for the cost of the diagnostic examinations.

In Ayers v. Township of Jackson, the New Jersey Supreme Court also allowed a claim for medical monitoring absent physical harm in a case involving plaintiffs who were exposed to toxic pollutants as a result of defendant’s negligent operation of a landfill. The court was persuaded by both policy and legal considerations. The court noted that recognizing pre-symptom claims for medical monitoring allows tort law to operate in a way so as to deter polluters, while mitigating serious future illnesses and thereby reducing overall costs to both parties. Moreover, the court reasoned, it is inequitable to force a wrongfully exposed individual to pay for his own medical costs when medical monitoring is necessary. The court concluded by holding that medical monitoring claims can be supported without physical harm where the plaintiff proves

through reliable expert testimony predicated upon the significance and extent of exposure to chemicals, the toxicity of the chemicals, the seriousness of the diseases for which individuals are at risk, the relative increase in the chance of onset of disease in those exposed, and the value of early diagnosis, that such surveillance to monitor the effect of exposure to toxic chemicals is reasonable and necessary.

The court in In re Paoli Railroad Yard PCB Litigation followed Ayers, and held that Pennsylvania law recognizes a claim for medical monitor-

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140 Id. at 825.
141 Id. at 826 (quoting Restatement (Second) of Torts § 7 (1977)).
142 Id.
143 Id. at 825–26.
145 Id. at 311–12.
146 Id. at 312.
147 Id.
148 Id.
The court defined a claim for medical monitoring as seeking “to recover only the quantifiable costs of periodic medical examinations necessary to detect the onset of physical harm,” and defined the injury in these claims as “the cost of the medical care that will, one hopes, detect that injury.” The court then outlined four factors to prove a claim for medical monitoring: (1) significant exposure to a proven hazardous substance because of defendant’s negligence; (2) increased risk of developing disease as a proximate result of exposure; (3) increased risk, which makes medical monitoring necessary; and (4) procedures exist to make early detection and treatment beneficial.

In a more recent case, Bower v. Westinghouse Electric Corp., the Supreme Court of Appeals of West Virginia applied a similar test in finding medical monitoring claims absent physical harm cognizable. The court stated that a plaintiff must prove that:

1. he or she has . . . been significantly exposed; 2. to a proven hazardous substance; 3. through the tortious conduct of the defendant; 4. as a proximate result of the exposure, plaintiff has suffered an increased risk of contracting a serious latent disease; 5. the increased risk of disease makes it reasonably necessary for the plaintiff to undergo periodic diagnostic medical examinations different from what would be prescribed in the absence of the exposure; and 6. monitoring procedures exist that make the early detection of a disease possible.

C. The Massachusetts Approach: the Donovan v. Philip Morris USA, Inc. Test

In October 2009, Massachusetts considered the issue and allowed medical monitoring, but formulated a standard that deviated from other states that have allowed the claim in the absence of present physical injury. In Donovan v. Philip Morris USA, Inc., the Supreme Judicial
Court of Massachusetts (SJC) held that a cigarette manufacturer may have to pay for the medical monitoring costs of smokers who have not yet developed lung cancer.\textsuperscript{155} The United States District Court for the District of Massachusetts had certified the questions regarding state law to the SJC.\textsuperscript{156} The plaintiffs were a class of Marlboro cigarette smokers who were at least fifty years old and had smoked the equivalent of twenty pack-years\textsuperscript{157} of cigarettes.\textsuperscript{158} Among other claims, plaintiffs alleged that Philip Morris negligently designed their cigarettes, and therefore Philip Morris should pay for medical tests for early detection of lung cancer.\textsuperscript{159} The tests cost approximately $400 to $500 per year.\textsuperscript{160} Plaintiffs contended that Marlboro cigarettes contain “an excessive and unreasonably dangerous quantity of carcinogens,” and that Philip Morris had feasible alternative designs for cigarettes containing a lower amount of carcinogens.\textsuperscript{161}

Over the objections of the defendant, the court reasoned that subcellular or physiological changes that are not, in themselves, symptoms of any illness or disease, but are warning signs of a substantial increase in risk of contracting a disease, satisfy the element of injury in a tort action.\textsuperscript{162} Recognizing that the plaintiffs’ harm would arguably not have satisfied the injury requirement in traditional tort actions, Justice Spina wrote, “[w]e must adapt to the growing recognition that exposure to toxic substances and radiation may cause substantial injury which should be compensable even if the full effects are not immediately apparent.”\textsuperscript{163} The court clarified that as long as there is a subcellular or physiological change, and a substantial increase in risk of harm, plaintiffs do not need to allege any specific level of increased risk to state a resulting increased risk of acquiring a disease without showing any physiological changes).

\textsuperscript{155} See 914 N.E.2d at 894–95.

\textsuperscript{156} Id.

\textsuperscript{157} A “pack-year” is the average number of packs of cigarettes smoked each day multiplied by the number of years smoked. Id. at 895 n.6 (defining “pack-year”). Therefore, twenty pack-years could mean smoking a pack a day for twenty years or smoking two packs a day for ten years. See id.

\textsuperscript{158} Id.

\textsuperscript{159} Id.

\textsuperscript{160} Id.


\textsuperscript{162} Donovan, 914 N.E.2d at 896.

\textsuperscript{163} Id. at 901. The terms “subcellular change” and “physiological change” are used interchangeably throughout this Note to refer to a condition that indicates an increased risk of disease as a result of exposure to a toxic substance, but is not, by itself, a symptom of any disease.
claim for medical monitoring. Finally, the court explicitly outlined the elements that a plaintiff must prove in order to state a claim for medical monitoring:

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

The court implied that this test strikes an appropriate balance by addressing concerns over false claims and permitting legitimately injured parties to recover costs of medical monitoring “without having to overcome insurmountable problems of proof.”

The court in Donovan recognized that not all claims for medical monitoring in toxic tort cases will involve physiological or subcellular changes. Therefore, Justice Spina wrote, “[w]e leave for another day consideration of cases that involve exposure to levels of chemicals or radiation known to cause cancer, for which immediate medical monitoring may be medically necessary although no symptoms or subclinical changes have occurred.” In one of the only cases that has discussed Donovan at any length, the Superior Court of Rhode Island granted the defendant’s motion to prohibit testimony regarding medical monitoring because the plaintiff had failed to present any physiological changes and, therefore, medical monitoring damages would be inappropriate. The court emphasized that Donovan was limited to cases involving physiological changes.

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164 Id.
165 Id. at 901–02.
166 See id. at 901.
167 Donovan, 914 N.E.2d at 901.
168 Id.
170 Id.
While the SJC is the latest court to recognize a claim for medical monitoring absent physical harm, it is not the first to explicitly define what type of evidence is necessary to establish exposure.\(^{171}\) The SJC is also not the first to recognize the value of cellular changes as beneficial scientific evidence.\(^{172}\) In 1994, a commentator argued that while “courts would prefer to have easily documentable scientific evidence regarding plaintiffs’ cellular changes, the availability of such scientific evidence is unlikely.”\(^{173}\)

Reactions to the Donovan case have been varied, with some claiming that the decision increases potential liability of tobacco companies greatly, and others saying that toxic tort law in Massachusetts has not changed much.\(^{174}\) While tens of thousands of people could qualify as plaintiffs and be awarded medical monitoring if the class action against Philip Morris is successful, many of those may have health plans that pay for the diagnostic tests.\(^{175}\)

### III. Donovan as a Model for Medical Monitoring Claims

The case law and the arguments outlined above exemplify the legal debate over whether claims for medical monitoring absent physical injury—as traditionally defined—should be allowed. On the one hand, the traditional requirement that plaintiffs establish some present physical harm is justifiable because, in the absence of such a requirement, courts would be forced to speculate about the extent of injury and to engage in arbitrary line-drawing.\(^{176}\) Allowing such claims would greatly expand tort liability and unnecessarily burden the courts by assigning them the precarious responsibility of deciding which instances of exposure are worthy of medical monitoring claims—a responsibility better left to legislatures.\(^{177}\) On the other hand, plaintiffs should be allowed to

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\(^{171}\) See Sorrentino v. ASN Roosevelt Ctr., LLC, 579 F. Supp. 2d 387, 390 (E.D.N.Y. 2008) (finding that a plaintiff who can show presence of the toxic substance in his or her body or can establish some physical manifestation of toxic contamination can recover medical monitoring costs).

\(^{172}\) See id.; Bryson v. Pillsbury Co., 573 N.W. 2d 718, 720–21 (Minn. Ct. App. 1998) (finding that the question of whether subcellular changes constitutes a present injury is an issue for the trier of fact).

\(^{173}\) Czmus, supra note 3, at 54.

\(^{174}\) See Ellement, supra note 160, at A11 (quoting one lawyer as stating that the ruling created “a new track of litigation that [tobacco companies] haven’t had to deal with” and another lawyer as stating that the ruling does not “move[] the needle in Massachusetts in . . . favor of consumers . . . very much”).

\(^{175}\) Id.


\(^{177}\) See id. at 695–96; Schwartz et al., supra note 77, at 377–78.
recovery of medical costs incurred solely as a result of defendants’ negligence, because it is unfair to force innocent victims to pay for their own medical tests.\footnote{178}{See Ayers v. Twp. of Jackson, 525 A.2d 287, 312 (N.J. 1987).}

The Donovan court set an appropriate standard for courts to apply in assessing claims for medical monitoring, by requiring a plaintiff bringing a medical monitoring claim to show at least subcellular or physiological changes.\footnote{179}{See Donovan v. Philip Morris USA, Inc., 914 N.E.2d 891, 902 (Mass. 2009).} The court recognized that the injury requirement in tort law is satisfied by showing medically observable changes that, while not symptoms of disease, establish exposure and a corresponding increased risk of disease.\footnote{180}{Legal and policy justifications defend this standard.\footnote{181}{The Present Physical Injury in Medical Monitoring Claims: Exposure to a Toxic Substance that Has Caused at Least Subcellular Changes}}

A. The Present Physical Injury in Medical Monitoring Claims: Exposure to a Toxic Substance that Has Caused at Least Subcellular Changes

Courts that have rejected medical monitoring claims have framed them as either claims for stand-alone emotional distress, stand-alone economic harm, or as alleging damages in anticipation of future injury.\footnote{182}{See Henry, 701 N.W.2d at 892; Lowe v. Philip Morris USA, Inc., 183 P.3d 181, 184, 186 (Or. 2008).} These courts have then rejected the claims on the basis that state common law does not recognize these novel theories in the absence of some traditionally defined physical injury.\footnote{183}{See Henry, 701 N.W.2d at 688–92; Lowe v. Philip Morris USA, Inc., 183 P.3d 181, 184, 186 (Or. 2008).} The courts can justify following their states’ traditional common law doctrines by arguing that there is generally no duty to avoid causing an increased risk of harm.\footnote{184}{See Goldberg & Zipursky, supra note 29, at 1692.} Furthermore, the physical injury requirement is necessary to help distinguish between legitimate and false claims.\footnote{185}{See id.}

Medical monitoring claims are best framed as requesting relief for the present injury of medical testing as a result of subcellular changes that necessitate medical monitoring.\footnote{186}{See Donavan v. Philip Morris USA, Inc., 914 N.E.2d 891, 901 (Mass. 2009).} The subcellular component of the injury should be viewed as the “physical” harm.\footnote{187}{See id.} Such a construction of injury is not a radical departure from tort law; some courts have already stated that the injury requirement is satisfied by showing subcel-
lular changes in claims for emotional distress.\textsuperscript{188} Claims for medical monitoring only seek reimbursement for medical expenses incurred as a result of the defendant’s negligence.\textsuperscript{189} These medical expenses are required because of toxic exposure.\textsuperscript{190} Subcellular or physiological changes indicating an increased risk of harm can establish toxic exposure.\textsuperscript{191} Therefore, subcellular physiological changes are sufficient to satisfy the present physical injury requirement in a claim for medical monitoring.\textsuperscript{192} Indeed, by their very nature, claims for medical monitoring will not involve present physical harm as traditionally conceptualized because the whole aim of medical monitoring is to detect the onset of physical harm.\textsuperscript{193} Hence, the “physical injury” in medical monitoring claims is appropriately viewed as subcellular changes requiring medical monitoring.\textsuperscript{194} However, recognizing that subcellular changes satisfy the present physical injury requirement and framing the claim in this manner is only the first step in analyzing medical monitoring claims.\textsuperscript{195} After addressing the injury requirement, the Donovan court articulated a fair standard to apply to medical monitoring claims.\textsuperscript{196}

\textbf{B. The Donovan Court Articulated the Best Standard for Medical Monitoring Claims}

The court in Donovan framed the medical monitoring claim as damages for medical expenses that were incurred as a result of the defendant’s negligence.\textsuperscript{197} This construction of medical monitoring claims incorporates an understanding of “injury” that recognizes a present

\textsuperscript{188} See, e.g., \textit{In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.}, 528 F. Supp. 2d 303, 314–15 (S.D.N.Y. 2007) (finding that testimony regarding subcellular changes to plaintiffs’ DNA raises a genuine issue of material fact as to whether it is a sufficient injury for an emotional distress claim); Anderson v. W.R. Grace & Co., 628 F. Supp. 1219, 1226–27 (D. Mass. 1986) (declining to grant summary judgment on the basis that plaintiffs’ harm is subcellular and therefore not meeting the injury requirement for emotional distress claims); Bryson v. Pillsbury Co., 573 N.W.2d 718, 720–21 (Minn. Ct. App. 1998) (finding that the question of whether subcellular changes in the form of chromosome damage constitutes a present injury is an issue for the trier of fact).

\textsuperscript{189} Bourne, \textit{supra} note 64, at 254; Pizzirusso, \textit{supra} note 1, at 203.

\textsuperscript{190} Bourne, \textit{supra} note 64, at 254; Pizzirusso, \textit{supra} note 1, at 203.

\textsuperscript{191} See Donovan, 914 N.E.2d at 901; \textit{supra} notes 51–55 and accompanying text.

\textsuperscript{192} See Donovan, 914 N.E.2d at 901.

\textsuperscript{193} See Schwartz et al., \textit{supra} note 77, at 351.

\textsuperscript{194} See Donovan, 914 N.E.2d at 901; Schwartz et al., \textit{supra} note 77, at 351.

\textsuperscript{195} See Donovan, 914 N.E.2d at 901–02; discussion \textit{infra} Part III.B.

\textsuperscript{196} See Donovan, 914 N.E.2d at 902.

\textsuperscript{197} Id. at 900.
physical injury in the absence of symptoms of a known disease.\textsuperscript{198} Thus, the \textit{Donovan} Court did not follow other courts that set forth a similar standard for medical monitoring in concluding that no present physical injury was required.\textsuperscript{199} After preliminarily recognizing that the injury requirement is satisfied if a medical monitoring claim demonstrates subcellular or physiological changes that indicate a need for medical testing, the court set forth a fair standard that plaintiffs must meet in order to recover damages.\textsuperscript{200} The first part of the test requires that the defendant’s negligence caused the plaintiff’s exposure.\textsuperscript{201} This aspect of the test satisfies the basic requirement of tort law that the plaintiff must prove the defendant breached a duty to the plaintiff and caused the plaintiff harm.\textsuperscript{202}

The second part of the test addresses the injury requirement and requires that the exposure “produced, at least, subcellular changes that substantially increased the risk of serious disease, illness, or injury.”\textsuperscript{203} The test further requires that an effective medical test for early detection exists, and that early detection and treatment will significantly decrease the risk of death or severity of disease.\textsuperscript{204} Like other courts that have allowed medical monitoring, \textit{Donovan} also requires that the diagnostic exams be reasonably necessary.\textsuperscript{205} According to this standard, “increased risk of future disease” is a necessary component of the reasonably necessary standard, because if the subcellular changes did not result in an increased risk of future disease, medical monitoring would not be reasonably necessary.\textsuperscript{206} Therefore, the \textit{Donovan} court appropriately reasoned that no particular quantification of the increase in risk is required—only that the increased risk be significant.\textsuperscript{207}

\textsuperscript{198} Id. at 901.
\textsuperscript{199} Compare \textit{id.} at 901–02, with \textit{Ayers v. Twp. of Jackson}, 525 A.2d 287, 312–13 (N.J. 1987) (setting forth a standard that does not require proof of physical injury), and \textit{Bower v. Westinghouse Elec. Corp.}, 522 S.E.2d 424, 432 (W. Va. 1999) (allowing a medical monitoring claim where plaintiff does not have to prove any physiological changes or physical injury).
\textsuperscript{200} See \textit{Donovan}, 914 N.E.2d at 901–02.
\textsuperscript{201} \textit{Id.}
\textsuperscript{202} See \textit{id.; Keeton et al.}, supra note 24, \textsection 30, at 164–65.
\textsuperscript{203} See \textit{Donovan}, 914 N.E.2d at 902.
\textsuperscript{204} \textit{Id.}
\textsuperscript{206} See \textit{id.; supra} notes 74–78 and accompanying text.
\textsuperscript{207} See \textit{Donovan}, 914 N.E.2d at 901.
1. Establishing at Least Subcellular Change is a Necessary Component of Medical Monitoring Claims

A significant difference between other courts that allowed medical monitoring claims and Donovan is the Donovan Court required the plaintiffs show that the exposure produced at least subcellular changes. 208 This assertion recognizes that showing a present physical harm should be necessary in medical monitoring claims. 209 Requiring at least subcellular changes addresses a central and practical concern of those courts that do not allow medical monitoring claims; it provides a basis for holding that the present physical injury requirement has been satisfied. 210 For example, the Oregon Supreme Court in Lowe faced a complaint almost identical to the one presented before the Massachusetts SJC. 211 In Lowe, if smokers had alleged at least subcellular changes—along with establishing the other elements of the Donovan test—they would have stated a valid claim for medical monitoring under the Massachusetts approach. 212

The usefulness of subcellular or physiological changes in determining toxic exposure has also been discussed by legal commentators who note the implications of increasingly sophisticated scientific methodology. 213 An example of the usefulness of examining subcellular changes is found in the field of toxicogenomics. 214 While toxicogenomic data may one day be used in toxic tort cases to prove that physiological changes indicate exposure to specific toxic substances, today competent medical testimony can be used to at least establish measurable subcellular changes, which indicate an increase in risk of disease that necessitates medical monitoring. 215

2. The Donovan Standard for Medical Monitoring Claims Does Not Unfairly Exclude Deserving Plaintiffs

The Donovan standard is carefully balanced: it is sufficiently broad so that it does not unfairly exclude potential deserving plaintiffs, but

208 Compare id. at 902, with Bower, 522 S.E.2d at 432–33 (outlining a standard that focused on the increased risk of contracting a disease and not requiring plaintiffs to show any type of present physiological change).
209 See discussion supra notes 91–96 and accompanying text.
210 See id.; supra notes 186–194 and accompanying text.
211 See Donovan, 914 N.E.2d at 895; Lowe v. Philip Morris USA, Inc., 183 P.3d 181, 183–84 (Or. 2008).
212 See Donovan, 914 N.E.2d at 895, 901–02; Lowe, 183 P.3d at 183–84.
213 See Marchant, supra note 39, at 329; Pierce & Sexton, supra note 40, at 56.
214 See Marchant, supra note 39, at 329; Pierce & Sexton, supra note 40, at 56.
215 See Donovan, 914 N.E.2d at 901; Pierce & Sexton, supra note 40 at 56.
rejects potentially frivolous claims. Notably, this standard leaves out those plaintiffs who claim to have been exposed to a toxic substance but cannot show a corresponding subcellular or physiological change. The \textit{Donovan} standard requires subcellular or physiological changes because, in the context of medical monitoring claims, this requirement appropriately replaces the role of the traditional physical harm requirement. The present physical harm requirement is critical because it allows courts to distinguish between legitimate and frivolous claims. Furthermore, the requirement sets a clear standard for courts to follow and restrains courts from having to speculate about the extent of the injury. As the United States Supreme Court noted in \textit{Buckley}, the realities of modern day living necessarily expose millions of people to various chemicals in varying degrees. Without some showing of present physical harm, millions of people could bring claims merely alleging exposure and increased risk, leaving courts without any justifiable standard to distinguish between deserving and non-deserving plaintiffs. Thus, it is not unfair to exclude plaintiffs who are unable to establish subcellular changes because, in the context of medical monitoring claims, the requirement is analogous to the traditional injury requirement required in all tort actions.

The standard also leaves out plaintiffs who cannot prove that medical testing would be effective in their case. Therefore, if a plaintiff alleges that toxic exposure caused subcellular changes that resulted in an increased risk of disease \(X\), and medical monitoring for disease \(X\) either does not exist or would not be effective, then the plaintiff cannot proceed with a claim for medical monitoring. This is a fair result because, in the absence of an effective remedy, the current injury is one
that would not be redressable. Indeed, other courts that have allowed medical monitoring claims have imposed similar restrictions. Subcellular changes indicating an increased risk of disease do not state a valid claim for medical monitoring if the plaintiff cannot establish that medical testing is necessary and would be effective. Likewise, mere exposure and increased risk of harm without any accompanying physiological indicators should not be considered a legally cognizable harm. Perhaps one day, toxicogenomic studies will have progressed enough to be used to definitively establish causation in toxic exposure cases. The Donovan test is flexible and fully consistent with any medical advances that could potentially detect subcellular or physiological changes upon exposure to toxic substances. Indeed, medical advances that improve the detection of subcellular or physiological changes that occur as a result of exposure would fairly increase the applicability of the Donovan test to plaintiffs with medical monitoring claims.

3. The Donovan Standard for Medical Monitoring Claims Is Not Unfair to Defendants

The Donovan standard is sufficiently narrow so that it is not unfair to potential defendants. The Donovan standard severely limits the number of plaintiffs who can state a valid claim for medical monitoring damages. With this standard, plaintiffs who merely allege exposure without being able to show the presence of any toxin or physical change in their bodies will not be able to pursue a claim for medical monitoring. In requiring that plaintiffs establish some sort of physiological or subcellular change, the Donovan standard addresses concerns

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226 See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (stating that plaintiffs may not be allowed to proceed with a claim if the relief sought would not redress their injury).
228 See Donovan, 914 N.E.2d at 902.
229 See id.; Goldberg & Zipursky, supra note 29, at 1651.
230 See Pierce & Sexton, supra note 40, at 56.
231 See Donovan, 914 N.E.2d at 902.
232 See id. at 901–02.
233 See id. at 902 (describing the elements that a plaintiff must meet before stating a valid claim for medical monitoring).
234 See id.
of false claims cited by courts that reject medical monitoring claims.\textsuperscript{236} The standard allows a court to view subcellular changes as a threshold that solves the line-drawing problems that some courts identify when rejecting medical monitoring claims.\textsuperscript{237} One critique of medical monitoring claims absent physical harm, cited by the \textit{Buckley} Court, was the prediction of a flood of litigation from plaintiffs who have been exposed to varying degrees of chemicals.\textsuperscript{238} It is unclear whether the \textit{Buckley} Court would accept subcellular changes as meeting the criteria of physical injury; nevertheless, the requirement limits the “flood” of . . . cases” to plaintiffs who can demonstrate physiological change.\textsuperscript{239}

The standard further limits the potential pool of plaintiffs by requiring that effective medical tests for the relevant disease exist, that early detection would be useful and effective, and that such tests are reasonably necessary.\textsuperscript{240} Therefore, courts would disallow a medical monitoring claim if plaintiffs cannot show that medical monitoring would be effective or if doctors conclude that the risks of medical monitoring outweigh the benefits.\textsuperscript{241} This standard addresses critics’ concerns about the differing viewpoints of the courts and the scientific community regarding medical monitoring because it requires plaintiffs to show that medical monitoring is acceptable—and reasonably necessary—as determined by the medical community.\textsuperscript{242}

The courts that have not allowed medical monitoring claims have also cited the potentially enormous costs of medical monitoring claims that would be imposed on defendants.\textsuperscript{243} A standard that limits the potential pool of plaintiffs would also limit the potential cost to the defendant.\textsuperscript{244} Furthermore, the potential cost to defendants could be mitigated if plaintiffs’ health insurance covers the cost of the medical tests.\textsuperscript{245}

Finally, it is important to emphasize that in order to recover medical monitoring costs, plaintiffs have to prove that they were exposed as

\begin{itemize}
  \item \textsuperscript{237} See \textit{Henry}, 701 N.W.2d at 690–91.
  \item \textsuperscript{238} \textit{Metro-N. Commuter R.R. Co. v. Buckley}, 521 U.S. 424, 442 (1997).
  \item \textsuperscript{239} See id.; \textit{Donovan}, 914 N.E.2d at 902.
  \item \textsuperscript{240} See Donovan, 914 N.E.2d at 902.
  \item \textsuperscript{241} See id.
  \item \textsuperscript{242} See id.; \textit{Donovan}, 914 N.E.2d at 902 and accompanying text.
  \item \textsuperscript{243} \textit{Buckley}, 521 U.S. at 442.
  \item \textsuperscript{244} See id.
  \item \textsuperscript{245} See \textit{Ellement}, \textit{supra} note 160, at A11.
\end{itemize}
a result of defendants’ negligence.\textsuperscript{246} It is fair to require negligent defendants to pay for medical costs incurred as a result of their negligence.\textsuperscript{247} Indeed, courts have cited the inherent unfairness in forcing innocent victims of wrongful exposure to pay for their medical expenses as a policy reason for allowing medical monitoring claims.\textsuperscript{248}

**Conclusion**

Victims of toxic exposure often have difficulty in establishing causation and injury in tort claims.\textsuperscript{249} Medical monitoring is a novel claim for recovery in the toxic tort setting.\textsuperscript{250} A medical monitoring claim is for reimbursement of medical diagnostic testing that plaintiffs needed as a result of wrongful exposure to a toxic substance.\textsuperscript{251} Courts have been split on whether medical monitoring claims are cognizable in the absence of present physical harm.\textsuperscript{252} In 2009, the Supreme Judicial Court of Massachusetts set forth the best standard for addressing medical monitoring claims.\textsuperscript{253}

The court allowed plaintiffs that could prove at least subcellular changes to proceed with a claim for medical monitoring, even if no symptoms of any disease were present.\textsuperscript{254} In doing so, the court held that the injury requirement is met in a medical monitoring claim when medically observable changes establish exposure and a corresponding increase in risk of disease.\textsuperscript{255} Although not within the field of traditionally recognized injuries, subcellular or physiological changes as a result of toxic exposure that necessitate medical monitoring are appropriately viewed as an injury.\textsuperscript{256}

This standard is better for plaintiffs who cannot show objective symptoms of any disease because it modifies the traditional physical harm requirement in the context of medical monitoring claims.\textsuperscript{257} While it leaves out plaintiffs who cannot show at least some physiologi-

\textsuperscript{246} See Donovan, 914 N.E.2d at 902.
\textsuperscript{247} See id. at 900-01 (concluding that medical monitoring damages are appropriate if suffered as a result of defendant’s negligence); Keeton et al., supra note 24, § 1, at 6.
\textsuperscript{249} Czmus, supra note 3, at 35–36.
\textsuperscript{250} Pizzirusso, supra note 1, at 197.
\textsuperscript{251} Bourne, supra note 64, at 254; Pizzirusso, supra note 1, at 203.
\textsuperscript{252} Aberson, supra note 7, at 1114–17.
\textsuperscript{253} See discussion supra Part III.B.
\textsuperscript{254} Donovan v. Philip Morris USA, Inc., 914 N.E.2d 891, 901–02 (Mass. 2009).
\textsuperscript{255} Id.
\textsuperscript{256} See discussion supra Part III.A.
\textsuperscript{257} See Donovan, 914 N.E.2d at 901–02.
cal change, this is a fair result because it sets a clear standard for courts to follow and fulfills the functions of the traditional injury requirement in torts.\textsuperscript{258} The \textit{Donovan} test is fair to defendants because it greatly limits the pool of potential plaintiffs that can bring medical monitoring claims.\textsuperscript{259} Furthermore, the standard requires that plaintiffs prove that defendants were negligent.\textsuperscript{260} The subcellular change requirement addresses concerns of false claims and further limits the pool of plaintiffs by requiring that early detection be useful for the particular disease which the plaintiffs are at an increased risk of developing.\textsuperscript{261}

Therefore, in the absence of legislative action, courts should adjudicate medical monitoring claims according to the \textit{Donovan} standard.\textsuperscript{262} Perhaps medical advances in the near future will solve some of the causation difficulties inherent in toxic torts; but for now, the \textit{Donovan} standard best balances the rights of plaintiffs and defendants, and grants at least the costs of medical monitoring to plaintiffs with subcellular changes.\textsuperscript{263}

\begin{footnotesize}
\begin{enumerate}
\item[259] See Donovan, 914 N.E.2d at 902.
\item[260] See id.
\item[261] See id. at 901–02.
\item[262] See discussion \textit{supra} Part III.B.
\item[263] See discussion \textit{supra} Part III.B.
\end{enumerate}
\end{footnotesize}