

OPINION

# Torts 101—Damages for Those Who Might Get Sick Are Nonsensical

New York court's decision on medical monitoring follows a basic tenet of law.



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Suppose you have been exposed to a product that may increase your risk of a disease. You presently have no injury, but you are concerned that you could develop a disease in the future. Should the person who created the situation or made the product associated with the risk pay for you to obtain periodic medical testing?

Courts have come to different conclusions. Most courts over

the past 20 years have said no to medical monitoring claims. Since 2000, these include the Supreme Courts of Alabama, Kentucky, Michigan, Mississippi, Nevada and Oregon. A few courts, however, recently have allowed medical monitoring claims in some situations, including the highest courts of Missouri in 2007, Massachusetts in 2009 and Maryland last year.

To the surprise of many in the plaintiffs bar, a majority of New York's highest court recently

joined the list of courts that have said no to medical monitoring for asymptomatic claimants. The New York Court of Appeals said that awarding medical monitoring to those individuals can threaten recoveries for the truly sick and lead to administrative nightmares and public policy judgments that are better left to the legislature.

The New York Court of Appeals reached the right conclusion. For over 200 years, one of the fundamental principles of tort law has been that a plaintiff cannot

recover without proof of a physical injury. This bright-line rule may seem harsh in some cases, but it is the best filter courts have developed to prevent a flood of claims, provide faster access to courts for those with reliable and serious claims, and ensure that the sick will not have to compete with the nonsick for compensation.

The New York case, *Caronia v. Philip Morris USA*, involved longtime heavy smokers over the age of 50 who had not been diagnosed with lung cancer. The plaintiffs sought the creation of a court-supervised program, at the defendant's expense, that would provide them with a low-dose CT scan of the chest, which the plaintiffs claimed would enable early detection of lung cancer.

The New York court held that the presence of a physical injury is a "fundamental" requirement for a party to obtain a recovery under New York law.

The court was guided by a 1997 U.S. Supreme Court decision that rejected medical monitoring under a federal law that governs injuries to railroad workers. In that case, *Metro-North Commuter R.R. Co. v. Buckley*, the court said that "the potential systemic effects of creating a new, full-blown tort law cause of action cannot be ignored."

The New York court said that if the physical injury requirement for a tort claim were cast aside, "tens of millions" of potential plaintiffs could bring claims, "effectively flooding the courts" and depleting resources for legitimate claimants with real injuries. A sharp dissent

argued that the number and size of claims could be contained.

#### DAILY CONTACT WITH SUBSTANCES

The majority's concerns are neither academic nor exaggerated. On a daily basis, almost everyone comes into contact with a potentially limitless number of substances that, arguably, may warrant medical monitoring relief.

Furthermore, the history of the asbestos litigation proves that payments to the nonsick can jeopardize timely and adequate recoveries for the sick. A decade ago, before state legislatures and courts in some asbestos-litigation hotbeds established reforms, hundreds of thousands of claimants with little or no physical impairment swamped the judiciary.

These claims were generated by mass screenings conducted by plaintiffs law firms and their agents. Abuses occurred, including bogus diagnoses of disease. Legal costs and settlements associated with the elephantine mass of claims were a significant factor in pressuring more than 100 companies to file bankruptcy.

The majority of New York's high court also recognized the incredible burden of designing and overseeing a medical monitoring program. The court candidly admitted that it lacked the technical expertise to effectively implement and administer a program that would be heavily dependent on a variety of scientific disciplines.

Other courts have explained that virtually any monitoring program would need to be tailored to

specific diseases and individuals. Additionally, as medical monitoring programs mature, they will inevitably require adjustments.

There are also practical considerations that go against the adoption of medical monitoring. First, other established sources of payment exist to cover monitoring costs, such as employer-provided health insurance plans. Second, unless the award itself is monitored, there is no guarantee that any payment will actually be used for checkups.

In fact, it seems doubtful that healthy plaintiffs will hoard their awards and spend the money only on periodic medical tests, especially if the testing relates to a disease the plaintiffs will likely never contract.

In following a fundamental principle that tort claims should be reserved for those who have a present physical injury, New York's high court reached a sound decision that should guide courts in other states where the viability of medical monitoring actions remains to be decided.

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