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publication in the New York Reports.

No. 227
Marcia L. Caronia, Linda McAuley
and Arlene Feldman,
Appellants,
v.
Philip Morris USA, Inc.,
Respondent.

Victoria E. Phillips, for appellants.
Kenneth J. Parsigian, for respondent.
Product Liability Advisory Council, Inc.; American
Chemistry Council et al.; Business Council of New York State,
Inc. et al.; and American Legacy Foundation et al., amici curiae.

PIGOTT, J.:

The United States Court of Appeals for the Second
Circuit has asked us to determine whether this State recognizes
an independent equitable cause of action for medical monitoring
and, if so, what the elements, appropriate statute of limitations
and accrual date are for that particular cause of action.

I.

Plaintiffs, who are all over the age of fifty, are current and/or former smokers of Marlboro cigarettes with histories of 20 pack-years¹ or more. None of the plaintiffs has been diagnosed with lung cancer, nor are they currently "under investigation by a physician for suspected lung cancer." Plaintiffs commenced this putative class action against Philip Morris USA, Inc. in federal court asserting claims sounding in negligence, strict liability and breach of the implied warranty of merchantability. Plaintiffs requested equitable relief, namely, the creation of a court-supervised program, at Philip Morris's expense, that would provide them with Low Dose CT Scanning of the chest (LDCT), which plaintiffs claim is a type of medical monitoring that assists in the early detection of lung cancer. At the completion of discovery, the District Court granted Philip Morris summary judgment with regard to plaintiffs' negligence and strict liability claims, but ordered further briefing concerning the breach of implied warranty claim and on the issue whether our Court would recognize an independent cause of action for medical monitoring (see Caronia v Philip Morris USA, Inc., 2010 WL 520558, *1, 2010 US Dist LEXIS 12168, *2-3 [ED NY, Feb. 11, 2010]).

In the interim, plaintiffs served a fourth amended

¹ A "pack-year" is the equivalent of smoking one pack of Marlboro cigarettes a day for a year.

complaint asserting, in addition to their prior causes of action, a separate, equitable cause of action for medical monitoring, seeking the establishment of the medical monitoring program. The District Court dismissed the breach of implied warranty and medical monitoring claims, holding that although this Court would likely recognize the latter claim, plaintiffs "failed to plead that Philip Morris's allegedly tortious conduct is the reason that they must now secure a monitoring program that includes LDCT scans" (Caronia v Philip Morris USA, Inc., 2011 WL 338425, *3, 2011 US Dist LEXIS 12610, *8-9 [ED NY, Jan. 13, 2011]). The United States Court of Appeals for the Second Circuit affirmed the dismissal of plaintiffs' negligence, strict liability and breach of implied warranty claims, but, acknowledging that this Court has not considered whether an independent cause of action for medical monitoring exists in New York, certified the following questions of law:

(1) Under New York Law, may a current or former longtime heavy smoker who has not been diagnosed with a smoking-related disease, and who is not under investigation by a physician for such a suspected disease, pursue an independent equitable cause of action for medical monitoring for such a disease?

(2) If New York recognizes such an independent cause of action for medical monitoring,

A. What are the elements of that cause of action?

B. What is the applicable statute of limitations, and when does that cause of action accrue?

We answer the first certified question in the negative, and decline to answer the second certified question as academic.

II.

Plaintiffs do not claim to have suffered physical injury or damage to property. They assert, rather, that they are at an "increased risk" for developing lung cancer and would benefit from LDCT monitoring, which they claim would allow them to discover the existence of cancers at an earlier stage, leading to earlier treatment.

A threat of future harm is insufficient to impose liability against a defendant in a tort context (see Prosser & Keeton, Torts § 30 at 165 [5th ed 1984]). The requirement that a plaintiff sustain physical harm before being able to recover in tort is a fundamental principle of our state's tort system (see Kimbar v Estis, 1 NY2d 399, 403 [1956] [no action will lie in negligence absent a "resultant injury to plaintiff"]; see also Voss v Black & Decker Mfg. Co., 59 NY2d 102, 106-107 [1983] [plaintiff must sustain injury or damage before being able to recover under a strict products liability theory]). The physical harm requirement serves a number of important purposes: it defines the class of persons who actually possess a cause of action, provides a basis for the fact-finder to determine whether a litigant actually possesses a claim, and protects court dockets from being clogged with frivolous and unfounded claims.

Having alleged no physical injury or damage to property

in their complaint, plaintiffs' only potential pathway to relief is for this Court to recognize a new tort, namely, an equitable medical monitoring cause of action. Plaintiffs claim that such a cause of action is "consistent with existing New York law," pointing to Askey v Occidental Chemical Corp. (102 AD2d 130 [4th Dept 1984]), a case involving a motion by plaintiffs seeking class certification to bring toxic exposure claims against a landfill owner, and, in particular, seeking recovery of future medical monitoring costs (id. at 131). Certain of the Askey plaintiffs alleged actual injury from the exposure, while others, like plaintiffs here, claimed only an increased risk of developing cancer or other diseases. The latter plaintiffs sought the imposition of a constructive trust on the owner's property to cover medical monitoring costs (id. at 132-133). Addressing the plaintiffs who had alleged no injury, the Appellate Division stated that "damages resulting from the enhanced risk of cancer and the threat of future harm not yet realized are not compensable in a tort claim . . . , [but that] there is a basis in law to sustain a claim for medical monitoring as an element of consequential damage" (id. at 135 [emphasis supplied]). The Askey court derived its rationale from our holding in Schmidt v Merchants Desp. Trans. Co. (270 NY 287 [1936], rearg denied 271 NY 531 [1936]), which involved a worker who sued his employer for exposure to a toxic dust that resulted in his contracting an incurable lung disease (id. at 297).

The issue in Schmidt, however, involved when the cause of action from the toxic exposure accrued. This Court concluded that the injury to the plaintiff occurred "when the alleged negligence of the defendant caused the plaintiff to inhale the deleterious dust," making the defendant responsible for any damages that flowed from that injury (id. at 301). Even in Schmidt, however, this Court required some injury or damage to the plaintiff before he could recover. Having concluded that the injury or damage occurred at the time of "invasion" of the plaintiff's "personal or property rights," we addressed the issue of damages, holding that:

"[c]onsequential damages may flow later from an injury too slight to be noticed at the time it is inflicted. No new cause of action accrues when such consequential damages arise. So far as consequential damages may be reasonably anticipated, they may be included in a recovery for the original injury, though even at the time of trial they may not yet exist" (id. at 300-301 [emphasis supplied]).

The Askey court, relying on Schmidt, concluded that the plaintiffs exposed to the landfill toxins had "an increased risk of invisible genetic damage and a present cause of action for their injury," and could recover "'reasonably anticipated' consequential damage," including medical monitoring, so long as the plaintiffs could "establish with a reasonable degree of medical certainty that such expenditures [were] 'reasonably anticipated' to be incurred by reason of their exposure" (Askey, 102 AD2d at 137). The accrual rule set forth in Schmidt, and

referenced in Askey, was replaced by CPLR 214-c, which requires a plaintiff to initiate a cause of action for personal injury damages caused by the latent effects of exposure to harmful substances within three years from the date the injury was discovered or could have been discovered "through the exercise of reasonable diligence."

Neither Schmidt nor Askey questioned this State's long-held physical harm requirement; rather, they merely accepted, for accrual purposes, that the injury accrued at the time of exposure. In light of section 214-c's enactment in 1986 (well after Askey and Schmidt), the Askey court's holding that persons who are exposed to toxins may recover all "'reasonably anticipated' consequential damages," including the cost of future medical monitoring to "permit the early detection and treatment of maladies" (Askey, 102 AD2d 137), must be viewed in its proper context. Given that the injuries in Askey and Schmidt were deemed (for accrual purposes) to have been sustained at the time of exposure, it is understandable why the courts in those cases would have concluded that any and all damages flowing from those "injuries," including damages for medical monitoring, would be potentially recoverable as consequential damages.

The Appellate Divisions have consistently found that medical monitoring is an element of damages that may be recovered only after a physical injury has been proven, i.e., that it is a form of remedy for an existing tort. For instance, in Abusio v

Consolidated Edison Co. of New York, Inc. (238 AD2d 454 [2d Dept 1997], lv denied 90 NY2d 806 [1997]), where the plaintiffs brought a negligence cause of action arising out of exposure to toxins, the court concluded that the trial court properly set aside the damage awards for emotional distress and medical monitoring, holding that although plaintiffs established that they were exposed to toxins, they failed to establish that they had a "rational basis" for their fear of contracting the disease, i.e., they failed to establish a "clinically demonstrable presence of [toxins] in the plaintiff's body, or some indication of [toxin]-induced disease i.e., some physical manifestation of [toxin] contamination" (id. at 454-455).

Courts have followed the test enunciated in Abusio in a number of cases where medical monitoring was sought as an element of damages (see Osarczuk v Associated Universities, Inc., 36 AD3d 872, 878 [2d Dept 2007] [remitting case to trial court for consideration of the plaintiffs' motion as it related to causes of action seeking damages and equitable relief for personal injuries and property damage]; Allen v General Elec. Co., 32 AD3d 1163, 1165-1166 [4th Dept 2006] [in order to obtain medical monitoring damages, plaintiff must establish "clinically demonstrable presence" of toxins in the body or evidence of toxin-induced disease]; Dangler v Town of Whitestown, 241 AD2d 290 [4th Dept 1998] [medical monitoring considered as damages]). In each of these cases, the plaintiffs alleged either personal

injury or property damage or both.²

Federal courts sitting in New York have surmised, in reliance on Askey and Abusio, that this Court would recognize an independent equitable medical monitoring cause of action where a plaintiff's only "injury" is the "financial burden associated with periodic medical monitoring" (Abbatiello v Monsanto Co., 522 F Supp 2d 524, 538-539 [SD NY 2007]), or where the plaintiff alleges absolutely no injury at all (see Gibbs v E.I. DuPont De Nemours & Co., 876 F Supp 475, 478-479 [SD NY 1995]; Beckley v United States, 1995 WL 590658, *4, 1995 US Dist LEXIS 14599, *9 [WD NY 1995], but see In re World Trade Center Disaster Site Litig., 2006 WL 3627760, *3 [SD NY 2006] [holding that medical monitoring damages may be recovered "if causes of action are otherwise proved and if the remedies are held to be appropriate and in accordance with law" but that medical monitoring does not constitute an independent cause of action]). Askey and Abusio, however, necessitate that the plaintiff sustain a physical injury before he or she may recover consequential damages for medical monitoring.

The highest courts in our sister states are divided on whether an independent cause of action for medical monitoring should lie absent any allegation of present physical injury or

² To the extent that any of these, or other, cases can be read as recognizing an independent cause of action for medical monitoring absent allegation of any physical injury or property damage, they should not be followed.

damage to property. Some have refused to recognize such equitable claims for the imposition of court-supervised medical monitoring program absent such injury or harm (see Henry v The Dow Chem. Co., 473 Mich 63, 75, 701 NW2d 684, 690 [2005] [reaffirming "the principle that a plaintiff must demonstrate a present physical injury to person or property in addition to economic losses that result from that injury in order to recover under a negligence theory"]; see also Lowe v Philip Morris USA, Inc., 344 Or 403, 414-415, 183 P3d 181, 187 [2008] ["negligent conduct that results only in a significantly increased risk of future injury that requires medical monitoring does not give rise to a claim for negligence"]). Others, however, have dispensed with the physical injury requirement and have recognized an independent medical monitoring cause of action (see Donovan Philip Morris USA, Inc., 455 Mass 215, 225-227, 914 NE2d 891, 901-903 [2009] [concluding that the cause of action is in tort, not equity]; Bower v Westinghouse Elec. Corp., 206 W Va 133, 140-142, 522 SE 2d 424, 431-433 [1999] [holding that a plaintiff who does not allege a present physical injury may recover future medical monitoring costs]; Redland Soccer Club, Inc. v Department of the Army and Dept. of Defense of the U.S., 548 Pa 178, 195-196, 696 A2d 137, 145-146 [1997] [stating that the injury in a medical monitoring claim is an economic one]; Burns v Jaquays Mining Corp., 156 Ariz 375, 380, 752 P2d 28, 33 [Ariz Ct App 1988])).

Plaintiffs ask us to follow the second line of cases - Donovan in particular - and recognize a cause of action for medical monitoring because Philip Morris's "wrong," i.e., its alleged failure to design a safer cigarette that delivers lower amounts of tar, should not be without a remedy. Although "the desire to provide an avenue to redress wrongs is . . . an important consideration underlying our tort jurisprudence, the recognition that there has been an interest worthy of protection has been the beginning, not the end, of our analysis" (Ortega v City of New York, 9 NY3d 69, 78 [2007]). This Court undoubtedly has the authority to recognize a new tort cause of action, but that authority must be exercised responsibly, keeping in mind that a new cause of action will have both "foreseeable and unforeseeable consequences, most especially the potential for vast, uncircumscribed liability" (Madden v Creative Servs., 84 NY2d 738, 746 [1995] [citations omitted]). "Tort liability . . . depends on balancing competing interests: the question remains who is legally bound to protect plaintiffs' right at the risk of liability. . . . To identify an interest deserving protection does not suffice to collect damages from anyone who causes injury to that interest . . . Not every deplorable act . . . is redressable in damages" (id. at 746 [citation, internal quotation marks and brackets omitted]).

We do not deny that there are significant policy reasons that favor recognizing an independent medical monitoring

cause of action. There is certainly "an important health interest in fostering access to medical testing" for those whose exposure has resulted in an increased risk of disease, and such testing could lead to early detection and treatment, not only mitigating future illness but also reducing the cost to the tortfeasor (Bower, 206 W Va at 140, 522 SE2d at 431, quoting Potter v Firestone Tire & Rubber Co., 6 Cal4th 965, 1008, 863 P2d 795, 824 [1993]). However, "the potential systemic effects of creating a new, full-blown tort law cause of action cannot be ignored" (Metro-North Commuter R.R. Co. v Buckley, 521 US 424, 443-444 [1997] [refusing to recognize a tort claim for medical monitoring costs where the plaintiff was exposed to asbestos but had not manifested symptoms of a disease]). For instance, dispensing with the physical injury requirement could permit "tens of millions" of potential plaintiffs to recover monitoring costs, effectively flooding the courts while concomitantly depleting the purported tortfeasor's resources for those who have actually sustained damage (id. at 442-444).³ Moreover, it is

³ Contrary to the dissent's contention (dissenting op at 6), the concern that a medical monitoring cause of action would promote frivolous claims is not "unfounded." For instance, in West Virginia, shortly after the state's highest court decided Bower, a class action lawsuit was filed against cigarette manufacturers on behalf of 250,000 West Virginia smokers seeking damage for medical monitoring notwithstanding the fact that they had not been diagnosed with any smoking-related disease (see Victor E. Schwartz, *Medical Monitoring: The Right Way and the Wrong Way*, 70 Mo L Rev 349, n 190 [2005]; see also In re West Virginia Rezulin Litig., 214 W Va 52, 73, 585 SE2d 52, 73 [2003] [relying on Bower in holding that the lower court erred in

speculative, at best, whether asymptomatic plaintiffs will ever contract a disease; allowing them to recover medical monitoring costs without first establishing physical injury would lead to the inequitable diversion of money away from those who have actually sustained an injury as a result of the exposure.

From a practical standpoint, it cannot be overlooked that there is no framework concerning how such a medical monitoring program would be implemented and administered. Courts generally lack "the technical expertise necessary to effectively administer a program heavily dependent on scientific disciplines such as medicine, chemistry, and environmental science" (Henry, 473 Mich at 91-92, 701 NW2d at 698-699). The Legislature is plainly in the better position to study the impact and consequences of creating such a cause of action, including the costs of implementation and the burden on the courts in adjudicating such claims (see Schwartz, *Medical Monitoring: The Right Way and the Wrong Way*, 70 Mo L Rev at 382-385).⁴

denying class certification of 5,000 plaintiffs seeking medical monitoring damages]).

⁴ The state legislature in Louisiana, one year after its highest court recognized an independent cause of action for medical monitoring in Bourgeois v A.P. Green Industries, Inc. (716 So2d 355 [1998]) which did not require the plaintiff to establish any physical harm, amended its civil code to eliminate medical monitoring as a compensable item of damage absent manifest physical injury or damage (see La Civ Code Ann art 2315).

III.

We conclude that the policy reasons set forth above militate against a judicially-created independent cause of action for medical monitoring. Allowance of such a claim, absent any evidence of present physical injury or damage to property, would constitute a significant deviation from our tort jurisprudence. That does not prevent plaintiffs who have in fact sustained physical injury from obtaining the remedy of medical monitoring. Such a remedy has been permitted in this State's courts as consequential damages, so long as the remedy is premised on the plaintiff establishing entitlement to damages on an already existing tort cause of action. Accordingly, we answer the first certified question in the negative, and we decline to answer the second certified question as academic.

Caronia v Philip Morris USA

No. 227

LIPPMAN, Chief Judge (dissenting):

Rarely are we presented with a case more worthy of the age-old maxim that equity will not suffer a wrong without a remedy. Where, as here, it is within the Court's power to provide a vehicle for plaintiffs to seek equitable relief capable of forestalling profound suffering and death, judicial hesitance and legislative deference only serve to thwart the ends of justice. Because I believe that overall fairness demands that New York recognize an independent equitable medical monitoring cause of action for smokers who can prove that their enhanced risk of cancer was caused by the wrongful conduct of tobacco companies, I dissent and would answer the first certified question in the affirmative.¹

Relief in the form of medical monitoring has developed in response to "a world in which people regularly encounter environmental toxins, the effects of which are largely unknown"

¹ In light of the Court's disposition, it is unnecessary for me to formally reach the second certified question. However, in the course of responding to the majority opinion, I will of necessity discuss particular features of the proposed cause of action that would make it both administratively manageable and effective in achieving its equitable purpose.

(*Recent Cases, Supreme Judicial Court of Massachusetts Recognizes Cause of Action for Medical Monitoring of Tobacco Users*, 123 Harv L Rev 1771, 1771 [2010]), and the "growing recognition that exposure to toxic substances . . . may cause substantial injury which should be compensable even if the full effects are not immediately apparent" (Donovan v Philip Morris USA, Inc., 455 Mass 215, 225, 914 NE3d 891, 901 [2009] [citing Hansen v Mountain Fuel Supply Co., 858 P2d 970, 977 [Utah 1996]]). It is undisputed in the scientific community and conceded by defendant Philip Morris -- albeit only since 1999 -- that cigarettes are a lethal and addictive product which contain cancer-causing carcinogens. Lung cancer is the leading cause of cancer death in the United States, and smoking is responsible for between 80 and 90 percent of lung cancer deaths. Moreover, the high mortality rate in lung cancer patients is largely due to the latent nature of the disease, whose symptoms typically manifest only after the cancer has metastasized, at which point survival rates are in the single digits. However, advances in imaging technology have resulted in the development of Low-Dose Computerized Tomography scanning of the chest (LDCT), a monitoring method widely acknowledged in the medical community as allowing for the detection of lung cancer tumors at a much earlier stage than previously possible. LDCT can detect cancer when it is still localized, at a point when surgery and/or chemotherapy have vastly higher success rates. The significance of this

technological advancement cannot be overstated. It is a critical development in our society's medical knowledge that has the potential of transforming lung cancer into a survivable disease.

Furthermore, plaintiffs have submitted expert evidence attesting that Marlboro cigarettes expose smokers to excessive and unreasonably dangerous levels of carcinogens. These experts also contend that, since the time Marlboro cigarettes were first sold, it was technologically feasible for Philip Morris to design a cigarette which delivered a dramatically lower amount of tar but were equally "pleasurable," reducing exposure to carcinogenic agents by 100 fold without reducing the product's "utility."²

We are thus presented with a defendant who has allegedly engaged in long-term and continuing misconduct and plaintiffs who, as a proximate result of that wrongdoing, have allegedly reached a risk level threshold for lung cancer at which medical experts believe LDCT screening is "reasonable and necessary" to facilitate early detection so as to avert terrible suffering and near-certain death. Legal recovery eludes these plaintiffs, however, because they do not manifest the kind of physical, symptomatic injury traditionally required for a valid

²Specifically, plaintiffs' experts contend that it was feasible for Philip Morris to make design improvements that would have reduced Marlboros' excessive carcinogenicity by increasing a smoker's "resistance to draw," utilizing a less carcinogenic "filler" tobacco, reducing the protein content of tobacco, avoiding its over-fertilization, reducing or eliminating the use of flue curing, and reducing the use of sugars in Marlboros.

tort claim. Furthermore, plaintiffs are unlikely to manifest symptoms of lung cancer unless and until the disease is at an advanced stage, at which point mortality rates are high and the only treatments available would be aimed at extending their lives, not saving them.

It is difficult to envision a scenario more worthy of the exercise of this Court's equitable powers. Indeed, it is contrary to the spirit of New York law to deny these plaintiffs an opportunity to seek relief in equity where the policy justifications for the proposed medical monitoring cause of action are so compelling. First, monitoring claims promote the "important public health interest in fostering access to medical testing for individuals whose exposure to toxic chemicals creates an enhanced risk of disease, particularly in light of the value of an early diagnosis and treatment for many cancer patients" (Potter v Firestone Tire & Rubber Co., 6 Cal 4th 965, 1008, 863 P2d 795, 824 [1993]; accord Meyer ex rel Coplin v Fluor Corp., 220 SW3d 712, 718 [Mo 2007]; Bower v Westinghouse Elec. Corp., 206 WVa 133, 140, 522 SE2d 424, 431 [1999]; Redland Soccer Club, Inc. v Dept. of the Army, 548 Pa 178, 194, 696 A2d 137, 145 [1997]; Ayers v Twp. of Jackson, 106 NJ 557, 603, 525 A2d 287, 311 [1987]). Second, implementing a medical monitoring program has economic benefits not only for plaintiffs,³ but also for

³ Though not addressed by the majority, Philip Morris is unpersuasive in arguing that, due to promised coverage of preventive procedures under the Affordable Care Act, it is a

tobacco companies, since the cost of monitoring and treatment upon early detection pales in comparison to the expenses of treatment post-diagnosis, not to mention those incurred by defendants in wrongful death suits (see Ayers, 106 NJ at 604 ["The availability of a substantial remedy before the consequences of the plaintiffs' exposure manifest may also have the beneficial effect of preventing or mitigating serious future illnesses and thus reduce the overall costs to the responsible parties."]; accord Burns v Jaquays Min. Corp., 156 Ariz. 375, 380, 752 P2d 28, 33 [1987]). Third, requiring defendant to cover the costs of reasonably necessary medical monitoring would serve an important deterrence function. As evidenced by the District Court's dismissal of plaintiffs' negligence, strict liability and breach of warranty claims, the burdens of proof for injury, causation and timeliness in tort make the threat of legal action ineffective at deterring the kind of misconduct alleged here. This is especially true since, by the time lung cancer symptoms manifest, the long period of latency erects obstacles to establishing the causal connection between the tortious conduct and the onset of plaintiffs' disease (see Ayers, 106 NJ at 604; Arvin Maskin, *Medical Monitoring: A Viable Remedy for Deserving*

foregone conclusion that plaintiffs and the class they seek to represent will soon obtain free access to LDTC monitoring. To the extent that this not-yet-effective legislation may provide widespread coverage for LDTC monitoring, the potential for an offset against plaintiffs' recovery under the collateral source rule should not preclude liability.

Plaintiffs or Tort Law's Most Expensive Consolation Prize?, 27 Wm Mitchell L Rev 521, 526-527 [2000] ["the longer the latency period, the more likely that plaintiffs will have exercised other lifestyle or occupational choices that arguably could have contributed to their illness, rendering a verdict against the defendants less likely"]. Finally, it is just to shift the cost of medical monitoring onto the tortfeasor because "it would be inequitable for an individual wrongfully exposed to dangerous toxins, but unable to prove that cancer or disease is likely, to have to pay the expense of medical monitoring when such intervention is clearly reasonable and necessary" (Potter, 6 Cal at 1008 [citations omitted]).

In sum, where a defendant's alleged misconduct causes severe harm, and the opportunity exists to save lives and alleviate suffering, countervailing public policy considerations must be extraordinarily compelling to justify such an "absolute failure of justice" (Strusburgh v New York, 87 NY 452, 456 [1882]). The majority's justifications fall short of the mark.

In refusing to recognize an independent equitable action for medical monitoring, the majority raises the specter of a flood of frivolous claims brought by asymptomatic plaintiffs, leading to the "inequitable diversion of money away from those who have actually sustained an injury as a result of the

exposure" (majority op at 13). This fear is unfounded.⁴ As an initial matter, the surest way to safeguard against frivolous claims and limitless liability is to carefully tailor the elements of a cause of action, which is by no means an insurmountable challenge here. The first step is to prescribe an alternatively defined injury requiring definite and identifiable proof. Plaintiffs urge us to define the injury as the enhanced risk of cancer recognized by medical experts according to specifically defined thresholds of age (at least 50 years old) and exposure to carcinogens (at least 20 pack-years). Such an approach neither opens the litigation floodgates nor unduly burdens the courts. Indeed, linking the injury element to standards recognized in the scientific community is a familiar judicial exercise in the context of claims related to latent

⁴ The majority's reliance on problems related to medical monitoring litigation in West Virginia after Bower v Westinghouse Elec. Corp., 206 WVa 133, 522 SE2d 424 [1999] is misplaced. Bower failed to adequately delineate the elements of the recognized cause of action (see Maskin, supra at 538 [discussing weaknesses of the Bower approach]). Unlike the limitations proposed here, Bower did not require plaintiffs to prove that their enhanced risk of disease correlated to a threshold risk level recognized by the medical community as rendering monitoring reasonable and necessary. Nor did Bower require plaintiffs to demonstrate the existence of an effective treatment in order to justify medical monitoring. Finally, the remedy in Bower is not limited to a court-administered fund for a monitoring program, but rather allows for lump-sum awards. That West Virginia does not represent an ideal model for an independent equitable action for medical monitoring does not militate against recognition of such a claim that is subject to appropriate limitations (see Victor E. Schwartz, *Medical Monitoring: The Right Way and the Wrong Way*, 70 Mo L Rev 349, 366-368 [2005]).

injury due to exposure to toxic substances. For example, in Giordano v Market America, Inc. (15 NY3d 590, 601 [2010]), this Court was called upon to interpret CPLR 214-c's requirement that a plaintiff "'allege and prove that technical, scientific or medical knowledge and information sufficient to ascertain the cause of his injury has not been discovered, identified or determined' before the otherwise-applicable limitation period" (id. at 600). This Court determined that "the test is one of a general acceptance of that [causal] relationship in the relevant technical, scientific or medical community" (id. at 601) We rejected the argument that courts are ill-equipped to determine whether the element of causation had been proven based on such expert testimony since "[the] test is familiar to New York lawyers and judges. Our courts follow Frye v United States, 293 F 1013 [DC Cir 1923]) in making 'general acceptance' the test for admitting expert testimony about scientific principles or discoveries" (id., citing People v LeGrand, 8 NY3d 449, 457 [2007] and People v Wesley, 83 NY2d 417, 422 [1994]). Just as courts are capable of applying the "general acceptance" standard to discern whether a plaintiff has satisfied the causality requirement under CPLR 214-c, so too are we equipped to apply analogous standards based on contemporary scientific principles to "determine whether a litigant actually possesses a claim" (majority op at 4) in equity for medical monitoring (see Donovan, 455 Mass. at 226-227 [enumerating elements of a cause of action

for medical monitoring and noting that "[p]roof of these elements usually will require competent expert testimony"; In re Paoli R.R. Yard PCB Litig., 916 F 2d 829, 852 [3d Cir 1990], cert denied 499 US 961 [1991]; Ayers, 106 NJ at 606; Hansen, 858 P2d at 979-980).

Beyond circumscribing the alternative injury requirement, the claim's scope would be further curtailed by the other enumerated elements. For instance, plaintiffs would still have the burden of proving defendant's tortious conduct, however defined (see Donovan, 455 Mass. at 226 [negligence]; Hansen, 858 P2d at 979 [same]; Potter, 6 Cal 4th at 974 [same]; Redland, 548 Pa at 195-196 [same]; Bower, 206 WVa at 139, 140 ["tortious conduct"]; Abbatiello v Monsanto Co., 522 F Supp 2d 524, 539 [SD NY 2007] [predicting that this Court would recognize an independent action for medical monitoring and would allow plaintiffs to prove wrongdoing sounding in negligence, strict liability, abnormally dangerous activities, nuisance, or trespass]). Furthermore, despite the uncontroverted medical evidence that nicotine's addictive qualities, combined with the additives in cigarettes which enhance those propensities, put the addictive nature of cigarettes on par with cocaine and heroin (see e.g. Evans v Lorillard Tobacco Co., 465 Mass. 411, 420, 990 NE2d 997, 1009 [2013]), smoking cigarettes undeniably involves a conscious (not to mention legal) act of exposure to carcinogens. Heavy smokers are thus different from individuals whose exposure

to toxic substances is wholly inadvertent. In this sense, smokers' claims for medical monitoring could be further restricted by the availability of tort defenses such as contributory negligence (see Donovan, 455 Mass. at 226 n 11; Potter, 6 Cal 4th at 974 [comparative fault principles may apply in smoking context]; Dangler v Town of Whitestown, 241 AD2d 290, 294 [4th Dept 1998] [a jury may be entitled to consider plaintiffs' "voluntary exposure to carcinogens, for example, by smoking"]).

The majority's position that the proposed cause of action threatens a deluge of frivolous claims is also undermined by the fact that plaintiffs would need to prove: (1) the existence of an efficacious method of screening for early detection which not only (2) conforms with the medical standard of care but (3) is also reasonably necessary given the enhanced risk of cancer (see e.g. Hansen, 858 P2d at 979-980). In this case, these requirements would, among other things, necessitate proof that, had Philip Morris marketed and sold "safer" cigarettes, plaintiffs would have smoked them. A recent case of this Court evidences the difficulty of supplying such proof (Adamo v Brown & Williamson Tobacco Corp., 11 NY3d 545 [2008] [plaintiffs failed to establish tobacco manufacturer's liability in a product liability action where there was no proof that the proposed alternative design (a "safer" cigarette) was equivalent in "function" or "utility" in terms of providing smokers with

equivalent satisfaction])). When properly tailored, the cause of action would set a high bar for plaintiffs to meet, dispelling concerns of any onslaught of meritless litigation.

Nor is the majority warranted in its fear that recognizing an appropriately tailored cause of action for medical monitoring for plaintiff-smokers would expose defendants to boundless liability. Notably, this concern has been voiced in the toxic tort context primarily regarding the availability of lump-sum money damages, rather than injunctive relief (see e.g. Ayers, 106 NJ at 609-610 [upholding the jury's lump-sum award but noting the court's preference for relief in the form of a court-administered fund for medical monitoring]; Victor E. Schwartz, *Medical Monitoring: The Right Way and the Wrong Way*, 70 Mo L Rev 349, 369-373 [2005] [arguing that "[l]ump-sum awards are starkly at odds with the traditional scientific goal of medical monitoring and surveillance: detecting the onset of disease," and noting that the lack of assurance that such damages will be spent on surveillance presents the danger of a windfall recovery])).

In particular, the majority relies on Metro-North Commuter R. Co. v Buckley (521 US 424 [1997]), where asymptomatic plaintiffs who had been exposed to asbestos sued their employer under the Federal Employers' Liability Act (45 USC § 51 et seq.) for negligent infliction of emotional distress, seeking, inter alia, compensatory damages for future medical monitoring. In denying plaintiffs money damages, the Supreme Court pointed out

that cases permitting recovery of a monitoring remedy without proof of manifest injury were based on equitable or injunctive decrees (*id.* at 440-441 [citing *Ayers*, 106 NJ at 608; *Hansen*, 858 P2d at 982; *Potter*, 6 Cal 4th at 1010; *Burns*, 156 Ariz. at 381]). The Supreme Court's cautions as to runaway liability thus have little bearing on the certified question before this Court, which concerns the availability of an *equitable* remedy in an independent *equitable* cause of action. Indeed, Justice Ginsburg's dissent observed that "non-injured" claimants were at liberty to seek an equitable remedy (*Metro-North*, 521 US at 455-456 [Ginsburg, J., dissenting] ["[Plaintiff] may replead a claim for relief and recover medical monitoring, but he must receive that relief in a form other than a lump sum"]).⁵

Finally, establishing a court-administered fund to finance a medical surveillance program is a "highly appropriate exercise of the Court's equitable powers" (*Ayers*, 106 NJ at 608). In reaching a contrary conclusion, the majority claims that courts lack the requisite expertise to administer a program

⁵ *Askey v Occidental Chem. Corp.* (102 AD2d 130 [4th Dept 1984]), *Abusio v Consolidated Edison Co. of New York, Inc.* (238 AD2d 454 [2d Dept 1997]) and their progeny similarly addressed medical monitoring as an aspect of consequential damages in an action at law. As such, those cases are inapposite to the questions certified to the Court, and the majority's analysis of them is misdirected. The relevance of *Askey* here is that New York courts have recognized the desirability of providing equitable relief in the form of monitoring, while acknowledging the difficulties inherent in pursuing it as a remedy in a traditional tort action. An independent equitable cause of action for medical monitoring would resolve this dilemma.

"dependent on scientific disciplines" and that "there is no framework concerning how such a medical monitoring program would be implemented and administered" (majority op at 13). In fact, valuable guidance on the administration of medical monitoring programs has been provided by the courts that have granted such relief. For example, almost fifteen years ago a Florida appellate court outlined specific guidelines to follow in running a medical monitoring fund (see Petito v H.H. Robins Co., Inc., 750 So2d 103, 107 [Fla Dist Ct App 1999]). In adopting the Petito framework, the Court of Appeals of Maryland recently summarized the following steps that may be appropriate for courts to follow if plaintiffs can demonstrate an entitlement to medical monitoring relief:

"(1) appoint a plan administrator; (2) with the administrator's advice, approve an advisory panel of persons qualified and knowledgeable in the relevant medical field or fields to supervise, among other things, the persons who consume or undergo medication and treatment, and select a list of skilled and neutral examining physicians to perform the medical tests; (3) establish a time frame for those eligible to obtain the monitoring; and (4) authorize the plan administrator to pay the reasonable amounts of claims based on submitted reports and findings by the monitoring physicians"

(Exxon Mobil Corp. v Albright, 433 Md 303, 388, 71 A3d 30 [2013], citing Petito, 750 So2d at 106). These and similar guidelines provide useful roadmaps for administering a medical monitoring program.

The common law must evolve with advances in scientific understanding to fashion relief and provide redress for wrongs newly understood, particularly when such relief can prevent devastating disease and death. In equity, "there is often an element of discretion, but never a discretion that is absolute as not to bend before the blast of extraordinary circumstances" (Evangelical Lutheran Church v Sahlem, 254 NY 161, 167 [1930] [Cardozo, Ch. J.]). In the face of such circumstances, the majority resolutely stands frozen in time as it denies plaintiffs the opportunity to take advantage of life-saving technology. This result is indefensible when equitable relief is well within the province of this Court.

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Following certification of questions by the United States Court of Appeals for the Second Circuit and acceptance of the questions by this Court pursuant to section 500.27 of this Court's Rules of Practice, and after hearing argument by counsel for the parties and consideration of the briefs and the record submitted, first certified question answered in the negative and second certified question not answered as academic. Opinion by Judge Pigott. Judges Graffeo, Read and Abdus-Salaam concur. Chief Judge Lippman dissents in an opinion in which Judge Rivera concurs. Judge Smith took no part.

Decided December 17, 2013