Medical Monitoring:

The Impact of *Lowe v. Philip Morris*

George S. Pitcher & David C. Campbell
Williams Kastner

George Pitcher

David Campbell

For more than 200 years, the tort system has required plaintiffs to allege a present physical injury in order to state a negligence claim. However, since the early 1980s, a number of courts have abandoned this requirement and allowed plaintiffs to recover medical monitoring expenses without physical injury. Until recently, Oregon was one of only a handful of states where appellate courts had not expressly ruled on the recoverability of medical monitoring expenses. On May 1, 2008, the Oregon Supreme Court took its first step toward deciding the issue when it held that negligent conduct resulting only in an *increased risk of future injury* requiring medical monitoring *does not* give rise to a negligence claim. *See Lowe v. Philip Morris USA, Inc.,* 344 Or 403 (2008). This article examines what medical monitoring is, includes a summary of the national case law and the *Lowe* decision, and analyzes what *Lowe* means to Oregon defendants.

1. What is Medical Monitoring?

A claim for medical monitoring seeks the costs of periodic diagnostic testing to detect the onset of latent injuries and to facilitate early diagnosis and treatment. The tort was created "in an effort to accommodate a society with an increasing awareness of the danger and potential injury caused by the widespread use of toxic substances."[1] In the past 10 years, medical monitoring claims have been asserted in an increasingly wide range of cases involving pharmaceuticals, medical devices, asbestos, smoke inhalation, and real property contamination.

There presently are 15 states that have either allowed, or indicated they will allow, a medical monitoring cause of action without a present physical injury. Those states include Arizona, California, Colorado, District of Columbia, Florida, Maryland, Missouri, New Jersey, New York, Ohio, Pennsylvania, Utah, West Virginia, and Vermont.[2] On the other hand, there are 21 states that have either declined, or indicated they will decline, to recognize a medical monitoring cause of action without a present physical injury. Those states include Alabama, Connecticut, Delaware, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, South Carolina, Tennessee, Texas, Virginia, and Washington.[3] In addition, the United States Supreme Court has held that there is no claim for medical monitoring under the Federal Employers' Liability Act.[4]

2. Lowe v. Philip Morris USA, Inc.

In *Lowe*, the plaintiff sued several tobacco companies for negligently manufacturing and selling their cigarettes. She alleged that, as a result of smoking the cigarettes, she had a "significantly increased risk of developing lung cancer" and, therefore, it was reasonable and necessary for her to undergo "periodic medical screening." The defendants moved to dismiss the complaint on the

Continued on next page

MEDICAL MONITORING
continued from page 8

ground that the plaintiff did not allege a present physical injury and, therefore, had not stated a claim for negligence. The trial court granted the motion and the Court of Appeals affirmed.

On review, plaintiff argued that the increased risk of developing lung cancer was a sufficient present physical injury. The Oregon Supreme Court disagreed and said:

> Oregon law has long recognized that the fact that a defendant's negligence poses a threat of future physical harm is not sufficient, standing alone, to constitute an actionable injury. As this court has explained, 'the threat of future harm, by itself, is insufficient as an allegation of damage in the context of a negligence claim.'

Id. at 410 (*quoting Zehr v. Haugen,* 318 Or 647, 656 (1994)).

The plaintiff also argued that the economic cost of undergoing medical monitoring was a sufficient present physical injury. The court also rejected that argument and said:

> This court repeatedly has recognized that '[o]ne ordinarily is not liable for negligently causing a stranger's purely economic loss without injuring his person or property. *Oregon Steel Mills, Inc. v. Coopers & Lybrand, LLP,* 336 Or 329, 341 (2004). * * * Under *Oregon Steel Mills* and a long line of this court's cases, the present economic harm that defendants' actions allegedly have caused – the cost of medical monitoring – is not sufficient to give rise to a negligence claim.

Id. at 413.

The court concluded:

> Following our precedents, we hold that 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. The trial court correctly dismissed plaintiff's complaint for failure to state a negligence claim, and the Court of Appeals correctly affirmed the trial court's judgment.

Id. at 415.

3. What Lowe Means to Oregon Defendants

The interesting thing about *Lowe* is that we probably learn more about the future of medical monitoring claims in Oregon from Justice Walters' concurring opinion than we do from the majority. After all, as stated in the passages above, the court was simply following its existing case law. With that said, *Lowe* does confirm that a present physical injury is required for a medical monitoring plaintiff to recover in Oregon. It also makes clear that the court is unlikely to eliminate that requirement any time soon.

On the other hand, *Lowe* is not the landmark decision defense attorneys hoped it would be. First, as Justice Walters wrote, "the majority does not reject medical monitoring as a remedy in a negligence action, and Oregon law may well permit it." *Id.* at 415. She points out that, under *Zehr*, a plaintiff already may recover the cost of future diagnostic testing, so "there is no reason that such a plaintiff could not also recover medical monitoring costs." *Id.* at 416.

Second, *Lowe* does not expressly require the plaintiff to exhibit physical symptoms in order to satisfy the injury requirement. Instead, it leaves open the possibility that a physical "impact" or "effect" alone may be enough. For example, Justice Walters wrote that "if a foreign substance that creates a risk of future harm is injected into a plaintiff's body and causes detectable physical effects, that plaintiff also suffers a physical harm, even if he or she does not suffer any immediate symptoms of harm whatsoever." *Id.* at 417. Justice Walters' view may be one shared by other members of the court.[5]

Finally, unlike several recent decisions,[6] it now seems unlikely that the Oregon Supreme Court would deny a medical monitoring claim on the basis that the creation of a new cause of action is better left to the legislature. After reviewing several of the most well-known medical monitoring cases, the majority noted how "well-reasoned" the arguments were on both sides and said "[w]e need not decide which line of decisions we might find more persuasive if this were a case of first impression. Our precedents control this issue, and the differing decisions from the other jurisdictions do not provide a basis for overruling Oregon's well-established negligence requirements." *Id.* at 415. Justice Walters seems to agree: "In the absence of legislative guidance, we will undoubtedly be called upon to consider how to address claims that negligence in the use of dangerous substances has caused harm that only scientific or medical testing can disclose." *Id.* at 419. The disputes in future cases on medical monitoring in Oregon will likely focus on what constitutes a present injury, harm, or impact. ✪

Footnotes

1 *In re Paoli Railroad Yard PCB Litig.,* 916 F2d 829, 850 (3d Cir 1990).

Continued on next page

MEDICAL MONITORING
continued from page 9

2 *Burns v. Jaquays Mining Corp.*, 752 P2d 28 (Ariz Ct App 1987); *Potter v. Firestone Tire & Rubber Co.*, 863 P2d 795 (Cal 1993); *Cook v. Rockwell Int'l Corp.*, 755 F Supp 1468 (D Colo 1991) (Colorado law); *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F2d 816 (DC Cir 1984); *Petito v. A.H. Robins Co.*, 750 So2d 103 (Fla Dist Ct App 1999); *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 457 F Supp 2d 298 (SD NY 2006) (Maryland law); *Meyer v. Fluor Corp.*, 220 SW3d 712 (Mo 2007); *Ayers v. Twp. of Jackson*, 525 A2d 287 (NJ 1987); *Abbatiello v. Monsanto Co.*, 522 F Supp 2d 524 (SD NY 2007) (New York law); *Day v. NLO*, 851 F Supp 869 (SD Ohio 1994) (Ohio law); *Redland Soccer Club, Inc. v. Dept. of the Army*, 696 A2d 137 (Pa 1997); *Hansen v. Mtn. Fuel Supply*, 858 P2d 970 (Utah 1993); *Bower v. Westinghouse Electric Corp.*, 522 SE2d 424 (W Va 1999); *Stead v. F.E. Myers Co.*, 785 F Supp 56 (D Vt 1990) (Vermont law); *see also Abuan v. Gen. Elec. Co.*, 3 F3d 329 (9th Cir 1992) (Guam).

3 *Hinton v. Monsanto Co.*, 813 So2d 827 (Ala 2001); *Goodall v. United Illuminating*, 1998 WL 914274 (Conn Super Ct 1998); *Mergenthaler v. Asbestos Corp. of Am.*, 480 A2d 647 (Del 1984); *Parker v. Wellman*, 230 Fed Appx 878 (11th Cir 2007) (Georgia law); *Jensen v. Bayer AG*, 862 NE2d 1091 (Ill App 2007); *Johnson v. Abbott Labs.*, 2004 WL 3245947 (Ind. Cir Ct 2004); *Baker v. Westinghouse Elec. Corp.*, 70 F3d 951 (7th Cir 1995) (Indiana law); *Burton v. R.J. Reynolds Tobacco Co.*, 884 F Supp 1515 (D Kan 1995) (Kansas law); *Wood v. Wyeth-Ayerst Labs.*, 82 Sw3d 849 (Ky 2002); *Atkins v. Ferro Corp.*, 534 F Supp 2d 662 (MD La 2008); *La Civ Code Ann art.* 2315 (West Supp 2004); *Henry v. Dow Chem. Co.*, 701 NW2d 684 (Mich 2005); *Bryson v. Pillsbury Co.*, 573 NW2d 718 (Minn Ct App 1998); *Thomas v. FAG Bearings Corp.*, 846 F Supp 1400 (WD Mo 1994) (Missouri law); *Paz v. Brush Engineered Materials, Inc.*, 949 So2d 1 (Miss 2007); *Trimble v. Asarco, Inc.*, 232 F3d 946 (8th Cir 2000) (Nebraska law), *abrogated on procedural grounds, Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 US 546 (2005); Badillo v. American Brands, Inc., 16 P3d 435 (Nev 2001); *Curl v. American Multimedia, Inc.*, 654 SE2d 76 (NC App 2007); *Carroll v. Litton Sys. Inc.*, 1990 WL 312969 (WD NC 1990) (North Carolina law); *Mehl v. Canadian Pac. Ry.*, 227 FRD 505 (D ND 2005) (North Dakota law); *Rosmer v. Pfizer, Inc.*, 2001 WL 34010613 (D SC 2001) (South Carolina law); *Bostick v. St. Jude Med., Inc.*, 2004 WL 3313614 (WD Tenn 2004) (Tennessee law); *Jones v. Brush Wellman, Inc.*, 2000 WL 33727733 (ND Ohio 2000) (Tennessee law); *Norwood v. Raytheon Co.*, 2006 WL 267335 (WD Tex 2006); *Ball v. Joy Technologies, Inc.*, 958 F2d 36 (4th Cir 1991) (Virginia law); *Duncan v. Northwest Airlines, Inc.*, 203 FRD 601 (WD Wash 2001); *see also Purjet v. Hess Oil Virgin Islands Corp.*, 1986 WL 1200 (D Virgin Islands 1986).

4 *Metro-North Commuter Railroad Co. v. Buckley*, 521 US 424 (1997)

5 In the majority decision, the court said that, unlike the plaintiffs in *Friends for All Children v. Lockheed Aircraft*, 746 F2d 816 (DC Cir 1984) (one of the first medical monitoring cases) who suffered "explosive decompression" and "oxygen deprivation" when their plane crashed, Ms. Lowe did not allege "that she suffered any comparable present physical effects as a result of smoking defendants' products." *Id.* at 409, n. 5.

6 *See, e.g., Wood v. Wyeth-Ayerst Labs.*, 82 SW3d 849 (Ky 2002) *Duncan v. Northwest Airlines, Inc.*, 203 FRD 601 (WD Wash 2001); *Badillo v. American Brands, Inc.*, 16 P3d 435 (Nev 2001).