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PRODUCTS LIABILITY

A Missed Opportunity

Possible criteria for a more stable medical monitoring rule

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On June 4, 2008, the New Jersey Supreme Court decided *Sinclair v. Merck & Co., Inc.*, 195 N.J. 51, interpreting New Jersey's medical monitoring principles in a products liability setting. *Sinclair* is the fourth Supreme Court case since 1987 considering the broader issue, and the first case in the last 15 years. This article will discuss the first three, *Ayers v. Township of Jackson*, 106 N.J. 557 (1987), *Mauro v. Raymark Indus., Inc.*, 116 N.J. 126 (1989), *Theer v. Philip Carey Co.*, 133 N.J. 610 (1993), and, after a brief review of *Sinclair*, will consider possible criteria for a more stable medical monitoring rule.

The *Sinclair* plaintiffs filed a class action alleging six different causes of actions: negligence, violation of the Product Liability Act, vi-

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olation of the Consumer Fraud Act, breach of express and implied warranties and unjust enrichment. They alleged that Merck, the manufacturer of Vioxx, was responsible for the cost of medical testing of its customers who ingested Vioxx between May 1999 and September 2004 as they might suffer from serious silent or latent injuries warranting such medical monitoring. They sought reimbursement for their economic losses to pay for medical monitoring and to have a court-administered screening program established to provide medical diagnostic tests for members of the class, as well as follow-up visits with an epidemiologist. The plaintiffs did not assert, however, any current, known adverse effects resulting from ingesting the medicine. The court, over a vigorous dissent by Justice Long, determined that the Product Liability Act precludes medical monitoring in product liability cases where there is no present injury.

The thesis of this article is that because other causes of action were alleged, the majority in *Sinclair* might have more fully addressed the medical monitoring problem as an additional basis for its decision. It could have analyzed that claim on its merits, namely whether medical monitoring as a matter of policy should have been

applied to these Vioxx claims, and then have reached the same result as an additional aspect of its holding. Direction was and is needed, as a manifestation of a current injury or greater reliance on a nonsubsumed cause of action might leave the same issue for a future court.

The salutary purposes of medical monitoring were recognized in *Ayers*, *Mauro*, and even *Theer* (which rejected medical monitoring's application to a remote victim), and the doctrine is now entrenched in New Jersey law. The theory can best be explained by the realization that not all tortious acts cause immediate severe personal injuries which can be addressed within the two-year statute of limitations in N.J.S.A. 2A:14-2.

Even the discovery rule might not be sufficiently helpful because once a potential plaintiff understands that he or she may have been exposed to the cause of the potential injury, suit must be commenced within two years of such discovery. The full extent of the injury may not manifest itself within the applicable period, but rather many years thereafter, if at all. For example, if 10 people are negligently exposed to harmful radiation with a 10 percent chance of developing cancer, it is probable that one of them will develop the cancer and nine of them will not. One remedy might be to require all 10 to bring actions and allow each a recovery for 10 percent, which is the risk they currently bear and could prove within the period of limitations.

This, however, makes little sense, since based on probabilities, nine of the 10 would receive a windfall and one would recover only 10 percent of the value of the eventual harm. Such enhanced risk claims for unlikely injuries have been rejected since *Mauro*. The expenses of the 10 actions with their consequent discovery, experts, legal fees and other costs would fall heavily on the defendant. Furthermore, as noted earlier, perhaps none would suffer the harm or more would be affected. The medical monitoring remedy, coupled with the tolling of the statute of limitations, permits all of the exposed potential claimants to be examined to see whether the cancer develops, and those, if any, eventually affected could then bring their claim for actual damages. This procedure was recognized in *Mauro* and makes eminent sense. The cases with real harm can be tolled, evaluated, and most probably settled with far less cost than the many speculative pre-injury claims.

The application of medical monitoring, however, becomes progressively unclear when one examines its fringes. For example, assume a company releases a potential carcinogen into the atmosphere in the New York metropolitan area. Epidemiologists may be able to state that of the 20 million people potentially affected, one or two could be expected to contract cancer. Many thousands would develop similar cancers from other sources. Possibly, the synergistic effects of the chemical when combined with other carcinogens might even be a factor in another few cases. Would it make sense to have monthly or even annual cancer examinations for every person in the metropolitan area paid for by the negligent factory owner? Or are the risks, while finite, so remote and the causative connections so tenuous, that medical monitoring should not be applied? Somewhere between the group of 10 with a 10 percent risk in the first example and the 20 million with minute risks in the second, the law should be able to divine a general rule, based on logic, or at least assert criteria for the proper

application of medical monitoring. The toxic tort/asbestos historical limitation of the existing Supreme Court cases is definitively unappealing, as the problem obviously extends beyond this narrow classification of cases, witness the negligent radiation exposure case posited above.

There are two distinct issues: first, causation in fact and second, whether the cause in question can be quantified after the fact as a proximate cause of the effect. For example, if a child receives a blow to the head that causes a concussion, there are recognized risks of a later seizure disorder in the teenage years. A general cause and effect is well established. But as seizures have multiple causes, can the earlier accident later be isolated as a proximate cause? As difficult as this question may be, it becomes even more so when one attempts to define actual causes many years after the event, especially when the result may have multiple possible causes.

The principles expressed in the medical surveillance cases generally lead back to *Ayers*, a mass exposure toxic tort case where it was unlikely that the injuries resulting from the toxic chemical exposure would be confused with other exposures for which the defendant would not be liable. In *Mauro*, an asbestos exposure case, the source of the eventual disease was also apparent, as asbestos-related cancers were likewise readily discernable. *Mauro* also distinguished four discernable claims that could be made as a result of the exposure, two of which were readily addressed. First, there was the medical surveillance, a current need. Second, there was the plaintiffs' current fear of cancer, a compensable claim that was neither time-dependent nor speculative, and supported by adequate expert testimony.

Third, there could be a claim for an enhanced risk of cancer. This category was rejected, unless proof could demonstrate that the eventual disease was more likely than not. Furthermore, although not expressed by

the court, if there were such current recovery, eventual recovery for the disease itself if it developed would be precluded. The fairest system was that adopted in *Mauro*, namely that plaintiffs could obtain recovery for their existing losses, namely their need for medical surveillance and their current cancer-phobia condition. Their cause of action for contracting the disease itself was tolled until time had passed and it could be demonstrated that the disease actually developed.

The fourth and last claim under *Mauro* was the claim for the cancer injury itself, a claim tolled from the date of the initial harm to the eventual development of the disease. This tolling procedure was first noted in *Ayers* and confirmed in *Mauro*. But the process also takes into account the rights of the alleged tortfeasor. Since the initial suit for the surveillance and cancer-phobia had to be filed within the usual statute of limitations, discovery by the defendant could be commenced at that time and the claimant monitored for the interim period so that there would be fewer, if any, causation surprises at the time of any second suit. New Jersey's procedures for preservation of evidence, de bene esse depositions, and even presuit discovery, see Rule 4:11-1, help ensure that cases will be tried on the basis of reality rather than supposition.

Theer, another asbestos case, is generally cited as precluding third-party injuries because it rejected medical surveillance for a wife of a person exposed to asbestos fibers. Plaintiff contended that she also was exposed from handling and washing her husband's clothes which were coated with asbestos fibers. Rejection of such secondhand exposure was a categorical value judgment by the Court, limiting medical surveillance. A reading of the brief discussion, however, indicates that the rejection was also based upon causation issues in that the plaintiff was a smoker, and it was difficult to determine whether the cause was asbestos or smoking. This issue was later treated in *Dafler v. Raymark*

Indus., 259 N.J. Super. 17 (App. Div. 1999), which required apportionment between the multiple causes for the cancer that developed: asbestos exposure and smoking. Where there is a single injury and multiple causative factors, they must be apportioned, but the burden to prove the apportionment other than on an equal basis is squarely placed upon the defendant. But there is an implied requirement that each factor must be a possible proximate cause of the injury, meaning that each must be a possible substantial factor in the causation equation. ■