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Statutes Of Limitations In Occupational Disease Cases: Is Locke V. Johns-Manville A Viable Alternative To The Discovery Rule?

STATUTES OF LIMITATIONS IN OCCUPATIONAL DISEASE CASES: IS *LOCKE V. JOHNS-MANVILLE* A VIABLE ALTERNATIVE TO THE DISCOVERY RULE?

The traditional purpose of statutes of limitations in negligence cases is to protect the defendant from stale claims, old evidence, and lax plaintiffs.[1] Statutes of limitations protect the defendant by allowing the plaintiff only a fixed period of time after a certain event has occurred in which to file suit against the defendant.[2] Although statutes of limitations for negligence actions in general operate on the principle of protection for the defendant,[3] they differ among jurisdictions in their form,[4] and consequently, in their impact on the plaintiff's right to maintain suit versus the defendant's right of repose.[5]

One major distinguishing feature among statutes of limitations is the event used to mark the beginning of the running of the statutes.[6] Most jurisdictions follow one of three rules in determining the time that the statute of limitations begins to run.[7] In jurisdictions that follow the negligent act rule, the statute of limitations begins to run when the defendant allegedly commits a wrongful act.[8] Injury rule jurisdictions

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[1] *See* Barnes v. Sears, Roebuck & Co., 406 F.2d 859, 862 (4th Cir. 1969) (statutes of limitations are created to protect defendants from non-diligent plaintiffs). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 144 (4th ed. 1971) [hereinafter cited as PROSSER]. Statutes of limitations protect the defendant in three ways. First, the statutes serve an evidentiary purpose by preventing errors by the trier of fact based upon stale or incorrect evidence. Second, the statutes serve a diligence purpose by encouraging the plaintiff to bring his suit promptly. Last, the statutes serve a personal certainty purpose by allowing potential defendants safely to assume that they are free from suit after a reasonable time period has elapsed. Comment, *Occupational Carcinogenesis and the Statute of Limitation: Resolving Relevant Policy Goals*, 10 ENVT'L L. 113, 122-24 (1979) [hereinafter cited as *Occupational Carcinogenesis*]. *Accord*, Kelley, *The Discovery Rule for Personal Injury Statutes of Limitations: Reflections on the British Experience*, 24 WAYNE L. REV. 1641, 1644-45 (1978) [hereinafter cited as Kelley].

[2] *See Occupational Carcinogenesis, supra* note 1, at 124-25.

[3] *See* note 1 *supra.*

[4] *See* text accompanying notes 7-10 *infra* (statutes of limitations differ in event chosen to begin running). Personal injury statutes of limitations also differ in length among jurisdictions. Most statutes run from one to three years. *See* 4 AM. JUR. TRIALS 600-01 (1966).

[5] *See* text accompanying notes 12-23 *infra.* The defendant's right to be free from suit after a reasonable time often is called the defendant's right of repose. *See* PROSSER, *supra* note 1, at 144.

[6] Comment, *Developments-Statutes of Limitation*, 63 HARV. L. REV. 1177, 1200-05 (1950) [hereinafter cited as *Developments*]; *see Occupational Carcinogenesis, supra* note 1, at 128 (listing events that mark running of statutes of limitations in occupational disease cases).

[7] *See Developments, supra* note 6, at 1200-05; text accompanying notes 8-10 *infra.*

[8] *See, e.g.*, Schwartz v. Heyden Newport Chem. Corp., 12 N.Y.2d 212, ____, 188

disregard the time of the negligent act and begin the statute's running instead on the date the plaintiff sustained an injury as a result of the defendant's negligence.[9] Discovery rule jurisdictions focus on the date the plaintiff detects either the injury or the injury and the cause of the harm.[10]

The importance of the choice among the three rules is not apparent in cases in which the negligent act, the injury, and the discovery coincide since the statute of limitations begins to run at the same time under any of the rules.[11] When the three events of negligence, injury, and discovery do not coincide, however, the choice of events to start the statute's running assumes tremendous significance.[12] Occupational disease cases in which two or three decades may separate the plaintiff's exposure to the harmful substance and the development or discovery of the disease illustrate the serious consequences to the plaintiff of the choice of statute-triggering events.[13]

N.E.2d 142, 143 (1961), *cert. denied*, 374 U.S. 808 (1963); Brown v. Tennessee Consol. Coal Co., 19 Tenn. App. 123, ____, 83 S.W.2d 568, 577 (1935).

[9] *See, e.g.*, Barnes v. Sears, Roebuck & Co., 406 F.2d 859, 861 (4th Cir. 1969); Caudill v. Wise Rambler, Inc., 210 Va. 11, 13, 168 S.E.2d 257, 259 (1969); Plazak v. Allegheny Steel Co., 324 Pa. 422, 429-30, 188 A. 130, 133 (1936).

[10] *See, e.g.*, Daniels v. Beryllium Corp., 211 F. Supp. 452, 456 (E.D. Pa. 1962); Burns v. Bell, 409 A.2d 614, 616 (D.C. 1979); Harig v. Johns-Manville Prod. Corp., 284 Md. 70, 71, 394 A.2d 299, 300 (1978); Dalton v. Dow Chem. Co., 280 Minn. 147, ____, 158 N.W.2d 580, 583 (1968). A majority of states now have some form of discovery rule. 409 A.2d at 616. The term "discovery rule" does not refer to a single standard. "Discovery rule" encompasses a group of subtle, but important variations on the point when the discovery statute begins to run. One variation of the discovery rule refers to the date the plaintiff actually discovered his injury. *See* Strickland v. Johns-Manville Int'l. Corp., 461 F. Supp. 215, 217 (S.D. Tex. 1978). Some jurisdictions use the time the plaintiff discovered or should have discovered his injury to trigger the statute of limitations. *E.g.*, Urie v. Thompson, 337 U.S. 163, 169 (1949); Burns v. Bell, 409 A.2d at 616; *see* Novak v. Triangle Steel Co., 197 Neb. 783, ____, 251 N.W.2d 158, 160-62 (1977) (emphasizing difference in result between use of "discovered" and "should have discovered"). A third variation on the discovery rule provides that the statute of limitations does not begin to run until the plaintiff learns of his injury and of the occupational nature of his disease. United States Nat'l. Bank v. Davies, 274 Or. 663, ____, 548 P.2d 966, 970 (1976). A few courts applying a discovery rule have intimated that statutes of limitations should begin to run on the date the plaintiff discovers he has a cause of action for his injury against the defendant. Bridgford v. United States, 550 F.2d 978, 981 (4th Cir. 1977); Foil v. Ballinger, 601 P.2d 144, 147 (Utah 1979).

[11] *See Developments*, *supra* note 6, at 1200.

[12] *Id.* The issue of when the statute of limitations period begins becomes complex when considerable time intervenes between the wrongful act and the consequent harm. *Id.*; *see* text accompanying notes 14-23 *infra*.

[13] *See* 5B LAWYER'S MEDICAL CYCLOPEDIA (C. Frankel, ed. 1972) § 38.46h [hereinafter cited as LAWYER'S MEDICAL CYCLOPEDIA] (table listing periods between exposure to harmful substance and serious development or appearance of disease for several occupational diseases). Occupational cancers such as mesothelioma and tracheal adenomas generally do not develop until 10 to 35 years after exposure to the harmful substance. *Occupational Carcinogenesis*, *supra* note 1, at 115. Other non-cancerous occupational diseases such as asbestosis and silicosis take from 10 to 25 years to develop fully. *See* LAWYER'S MEDICAL CYCLOPEDIA, *supra*, § 38.46h. The period of time between exposure to a substance and development of a disease is called the latency period. *Id.*

In jurisdictions that follow the negligent act rule, the statute of limitations may bar an occupational disease plaintiff from suit long before his disease first develops.[14] The negligent act of the defendant in exposing the plaintiff to the harmful substance can take place years before the disease develops because of the lengthy latency periods for most occupational diseases.[15] The statute of limitations in negligent act jurisdictions thus may bar a plaintiff's cause of action before the injury, one of the necessary elements of a negligence cause, exists.[16]

Occupational disease victims in injury rule jurisdictions may fare little better than their negligent act rule counterparts.[17] Injury rule courts have difficulty determining when the injury occurred in occupational diseases, which usually develop over a long period of time.[18] Consequently, rather than try to pinpoint the date the disease developed, many injury rule jurisdictions have adopted the time of the plaintiff's last exposure to the harmful substance as the definition of injury.[19]

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[14] *See, e.g.*, Schwartz v. Heyden Newport Chem. Corp., 12 N.Y.2d 212, 188 N.E.2d 142 (1961) (cause for loss of eye barred because defendant's negligent act occurred long before plaintiff's consequent loss of eyesight), *cert. denied*, 374 U.S. 808 (1963); Brown v. Tennessee Consol. Coal Co., 19 Tenn. App. 123, ____, 83 S.W.2d 568, 580 (1935) (cause for silicosis barred before disease developed because of long latency period). Courts originally used the date of negligence rule to protect defendant manufacturers from liability to avoid hindering industrial growth. *Occupational Carcinogenesis, supra* note 1, at 129.

[15] *See* note 13 *supra*.

[16] *See* note 14 *supra*. Proof of an injury is one of four factors that must be present before a cause for negligence accrues. *See* 12A MICHIE'S JURISPRUDENCE, Limitation of Actions § 23 (1978). The four factors include a legal obligation that the defendant owes to the plaintiff, a breach of that obligation, negligence by the defendant, and an injury to the plaintiff. *Id.* Statutes of limitations should not begin to run until all four elements of a cause exist. *See* PROSSER, *supra* note 1, at 144. If an occupational disease plaintiff must sue within a few years after the defendant negligently exposed the plaintiff to a harmful substance, the plaintiff probably will not have developed the disease or sustained any tangible harm. Thus the case against the defendant will be difficult or impossible to prove. *See* note 13 *supra*.

[17] *See* Augustus v. Republic Steel Corp., 100 F. Supp. 46, 49 (N.D. Ala. 1951) (defining injury as last exposure barred suit by occupational lung disease plaintiff), *rev'd on other grounds*, 200 F.2d 334 (5th Cir. 1952); Schmidt v. Merchants Despatch Transp. Co., 270 N.Y. 287, 302, 200 N.E. 824, 828 (1936) (per curiam) (plaintiff barred by last exposure rule before aware of disease).

[18] *See Occupational Carcinogenesis, supra* note 1, at 130. *See generally* Comment, *Asbestos Litigation: The Dust Has Yet to Settle*, 7 FORDHAM URB. L. J. 55, 82 (1978) [hereinafter cited as *Asbestos Litigation*] (not possible to tell with certainty when asbestos fibers cause injury).

[19] *See, e.g.*, Garrett v. Raytheon Co., 368 So.2d 516, 521 (Ala. 1979); Schmidt v. Merchants Despatch Transp. Co., 270 N.Y. 287, 302, 200 N.E. 824, 828 (1936); Plazak v. Allegheny Steel Co., 324 Pa. 422, 429-30, 188 A. 130, 134 (1936). Courts applying an exposure theory construe the date of the plaintiff's last exposure as the date of his last employment. *Occupational Carcinogenesis, supra* note 1, at 130-31. *But see* Zimmerer v. General Elec. Corp., 126 F. Supp. 690, 692-93 (D. Conn. 1954) (time of plaintiff's first exposure to harmful substance began running of statute of limitations in occupational disease case). The last exposure theory of injury arises from the idea that each new breath of the harmful substance constitutes a new tort by the defendant. *Asbestos Litigation, supra* note 18, at 82. The statute of limitations thus runs from the last breath (exposure) of the harmful substance. *Id.*

Another variation on the injury rule is the time of disability of the plaintiff. Jeffery

Because of the possible long lapse of time between exposure and manifestation of disease,[20] the victim's disease may not develop in time for him to maintain suit within the statute of limitations period after exposure to the harmful substance has ended.[21]

The discovery rule is the most favorable rule for occupational disease plaintiffs since the statute of limitations in discovery rule jurisdictions does not begin to run until the plaintiff realizes he has contracted the disease.[22] If the plaintiff is diligent in filing suit after he discovers the disease, he will be able to maintain his action regardless of when the defendant committed the negligent act or when the plaintiff's last exposure to the substance occurred.[23] Because of the inequities that the negligent act and injury rules work on occupational disease plaintiffs,[24] the modern trend in occupational disease cases has been toward the adoption of the discovery rule to protect the diligent plaintiff.[25] The United States Supreme Court expressed a preference for the discovery rule in a 1949 occupational silicosis case, *Urie v. Thompson*.[26] Since *Urie*,

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Stone Co. v. Raulston, 242 Ark. 13, ____, 412 S.W.2d 275, 277 (1967). This variation is rather rare and appears mostly in workmen's compensation cases. *See Occupational Carcinogenesis, supra* note 1, at 133; text accompanying notes 64-67 *infra* (new interpretation of injury rule in Virginia).

[20] *See* note 13 *supra*.

[21] *See* note 17 *supra* (suits barred by exposure rule). *Cf.* Osborne Mining Co. v. Davidson, 339 S.W.2d 626, 630 (Ky. 1960) (plaintiff who sued immediately after date of last employment not barred from suit even though he knew of disease long before suit). *Osborne* points out the arbitrariness of an exposure rule. In some cases, the statute of limitations bars the plaintiff before he has contracted a disease. *See* note 17 *supra*. In others, like *Osborne*, a plaintiff may know of his disease, put off filing suit for several years, and still be able to maintain suit if he continues working for the same employer. 339 S.W.2d at 630. Contrary to the purpose underlying statutes of limitations, the *Osborne* situation encourages nondiligence in filing suits. *See Occupational Carcinogenesis, supra* note 1, at 122; note 1 *supra*.

[22] *See, e.g.*, Urie v. Thompson, 337 U.S. 163, 169 (1949); Strickland v. Johns-Manville Int'l. Corp., 461 F. Supp. 215, 218 (S.D. Tex. 1978); Harig v. Johns-Manville Prod. Corp., 284 Md. 70, 71, 76-77, 394 A.2d 299, 301, 306 (1978). In *Urie, Strickland*, and *Harig*, a discovery rule allowed the occupational disease plaintiffs to maintain suits several years after the defendants' negligent acts and after the plaintiffs' last exposure to the harmful substances. 337 U.S. at 169; 461 F. Supp. at 218; 284 Md. at 71, 394 A.2d at 301.

[23] *See* note 22 *supra* (plaintiffs that filed suit immediately after discovery of disease allowed to maintain suits).

[24] *See* text accompanying notes 14-21 *supra*.

[25] *See Occupational Carcinogenesis, supra* note 1, at 136 n.127.

[26] 337 U.S. 163 (1949). The *Urie* plaintiff inhaled silica dust for many years during his employment with the defendant railroad. *Id.* at 165. The plaintiff did not discover he had contracted silicosis, a lung disease caused by the inhalation of silica dust, as result of breathing the dust, for almost thirty years. *Id.* The plaintiff filed suit against the defendant shortly after he discovered his injury, but the defendant asserted that the statute of limitations barred the plaintiff's claim. *Id.* at 169. The defendant urged the Supreme Court to apply an exposure rule that would have barred the plaintiff's claim. *Id.* The *Urie* Court refused to apply an exposure rule, however, and stated that in occupational disease cases, a rule dating the time of the cause accrual as the time the plaintiff discovered or should have discovered his injury was the only equitable rule to apply. *Id.* at 170. The Court stressed the possible long lapse of time between exposure to a substance and the manifestation of the

an increasing number of jurisdictions have turned to an occupational disease discovery rule to benefit plaintiffs who remain blamelessly ignorant of their rights[27] until long after the defendant's negligent act.[28] These jurisdictions have accepted the policy argument that statutes of limitations should not bar plaintiffs who diligently file suit within a short time after they become aware of their injury, even though the defendant may face liability years after his negligent act.[29]

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disease. *Id.* at 169. According to the Court, to adopt a rule other than the discovery rule would be tantamount to arguing that the plaintiff's blameless ignorance of his injury constituted a waiver of his right to sue. *Id.* Thus, the Supreme Court refused to allow the statute of limitations to bar the plaintiff's cause of action before the plaintiff was aware the cause had accrued. *Id.* at 171. Because *Urie* dealt with liability under the Federal Employer's Liability Act, the case is not binding precedent for state tort actions. *Id.* at 165. The *Urie* court made clear, however, that it considers the discovery rule the preferred rule in occupational disease cases. *Id.* at 169; *see* text accompanying notes 126-32 & 136-39 *infra*; *Occupational Carcinogenesis*, *supra* note 1, at 152-56 (advantages of discovery rule in occupational disease cases).

[27] The phrase "blamelessly ignorant" appears most notably in Urie v. Thompson, 337 U.S. 163, 170 (1949), and has appeared subsequently in a very recent statute of limitations case. *See* Wollman v. Gross, 637 F.2d 544, 548 (8th Cir. 1980), *cert. denied*, 50 U.S.L.W. 3278 (Oct. 13, 1981). The phrase "blamelessly ignorant" refers to the plaintiff who does not discover his injury for some time through no fault of his own, but who may be time-barred from bringing his suit by strict statutes of limitations. 337 U.S. at 169.

[28] *See* note 22 *supra* (occupational disease cases following discovery rule). Jurisdictions that follow the discovery rule in occupational disease cases include California, Connecticut, Kansas, Illinois, Kentucky, Indiana, Michigan, Minnesota, and Oregon. Annot., 1 A.L.R. 4th 117 (1980). A majority of states now follow a discovery rule in medical malpractice cases. Burns v. Bell, 409 A.2d 614, 616 (D.C. 1979). Medical malpractice cases are comparable to occupational disease cases because a malpractice plaintiff, like an occupational disease plaintiff, may not be aware of the harm done until years after the defendant's negligent act. *See* Hawks v. DeHart, 206 Va. 810, 812, 146 S.E.2d 187, 188 (1966) (plaintiff's action barred because plaintiff not aware of needle left in neck by surgeon for several years after surgery).

[29] *See* Strickland v. Johns-Manville Int'l. Corp., 461 F. Supp. 215, 217 (S.D. Tex. 1978) (blamelessly ignorant occupational disease plaintiff should not be barred from suit by statute of limitations); United States Nat'l. Bank v. Davies, 274 Or. 663, ____, 548 P.2d 966, 969-70 (1976) (statute of limitations should not run until plaintiff learns of harm). *See generally Developments*, *supra* note 6, at 1205.

Discovery rule proponents point out that a plaintiff-oriented discovery rule furthers the recognized purposes of statutes of limitations. *See* note 1 *supra*. First, a discovery rule promotes plaintiff's diligence in filing suit. *See Asbestos Litigation*, *supra* note 18, at 79. A plaintiff cannot be diligent in bringing an action until he is aware of his injury. A discovery rule insures that the statute of limitations will not run until the plaintiff knows of his injury. *See* Urie v. Thompson, 337 U.S. 163, 169 (1949). To bar a plaintiff before he is aware of his injury by the use of a strict negligent act or injury rule does not promote diligence, but merely penalizes a blamelessly ignorant plaintiff by depriving him of a remedy for his harm. *Asbestos Litigation*, *supra* note 18, at 79.

A discovery rule also may aid in the accuracy of evidence presented to the court on the questions of harm and damages. *See Asbestos Litigation*, *supra* note 18, at 80. The full extent of harm to the plaintiff in occupational disease cases only may become apparent years after the plaintiff's exposure to the harmful substance. *See* note 13 *supra* (long latency periods for occupational cancers); note 107 *infra* (long development periods for certain non-

Virginia is one of the states whose legislature has not accepted the arguments in favor of the discovery rule[30] for occupational disease cases.[31]

cancerous pulmonary diseases). The plaintiff in a discovery rule jurisdiction will have to file suit and thus introduce evidence of his disease only after the manifestation of the disease. *See* text accompanying note 10 *supra*. In contrast, under a negligent act or first exposure rule, a plaintiff would have to file suit immediately after the defendant's negligent act in order to preserve his claim for injury regardless of the lack of any overt physical damage. *See* text accompanying notes 14-16 *supra*. In a jurisdiction following time of last exposure, the plaintiff would have to file suit immediately after he quit work, again regardless of the lack of physical damage. *See* text accompanying notes 19-21 *supra*. The extent of injuries that the negligent exposure to the harmful substance caused would be entirely speculative. *See* Brief for Appellant at 15-16, Locke v. Johns-Manville Corp., 221 Va. 951, 275 S.E.2d 900 (1981) [hereinafter cited as Brief for Appellant]. Even if the court allowed a suit with no evidence of tangible damage, these plaintiffs could recover at most for the increased risk of contracting an occupational cancer or disease. *See Asbestos Litigation, supra* note 18, at 63 (brief exposure to asbestos increases risk of cancer); *Developments, supra* note 6, at 1201 (evidence of harm usually necessary to maintain negligence suit). In fact, most asbestos workers never contract an occupational disease. *See* LAWYER'S MEDICAL CYCLOPEDIA, *supra* note 13, § 38.65a (one in five current and former asbestos workers probably will die from lung cancer; one in ten will die of cancer of gastrointestinal tract; one in twenty will die of malignant mesothelioma). These suits by exposed plaintiffs would waste court time and result in incomplete recovery for plaintiffs that later did contract a disease. *Cf.* Note, *The Application of the Statute of Limitations to Actions for Tortious Radiation Exposure*: Garrett v. Raytheon Co., 31 ALA. L. REV. 509, 515-16 (1980) [hereinafter cited as *Radiation Exposure*] (discussing similar proof problems of exposure rule in occupational disease context).

Finally, discovery rule adherents argue that most occupational disease defendants are not entitled to the freedom from suit that statutes of limitations provide. *See Asbestos Litigation, supra* note 18, at 79-80; *Developments, supra* note 6, at 1205. Discovery rule proponents maintain that manufacturers of harmful substances have been aware of the possibility of injury to workers for years and should be prepared to litigate claims whenever the consequences of their negligence appear. *Asbestos Litigation, supra* note 18, at 80. Potential occupational disease defendants also carry insurance to deal with harm to workers from deleterious substances and are thus best equipped to bear the financial burden of injury. *See Occupational Carcinogenesis, supra* note 1, at 124.

Arguments against the discovery rule traditionally emphasize the role of statutes of limitations as provisions of repose for defendants. *See* Hawks v. DeHart, 206 Va. 810, 814, 146 S.E.2d 187, 189 (1966) (plaintiff's ignorance of rights did not create discovery rule exception to strict statute of limitations that protect defendant). Opponents of the discovery rule also argue that the discovery rule is unmanageable because it requires the jury to make a subjective determination of when the plaintiff should have discovered his injury. *See* Comment, *Accrual of Statutes of Limitations: California's Discovery Exceptions Swallow the Rule*, 68 CALIF. L. REV. 106, 116 (1980) [hereinafter cited as *California's Discovery Exceptions*]; text accompanying notes 129-32 *infra*. A recent argument against the discovery rule stresses the increase in manufacturers' insurance rates as a result of plaintiff-oriented discovery rules. *See* Comment, *Limiting Liability: Products Liability and a Statute of Repose*, 32 BAYLOR L. REV. 137, 143-44 (1980) [hereinafter cited as *Limiting Liability*]. A recent decision increasing the scope of insurer's liability for occupational disease cases supports the insurance argument. *See* Keene Corp. v. Insurance Co. of N. Am., No. 81-1179 (D.C. Cir. Oct. 1, 1981). Courts, however, normally cite the failure of their state's legislature to adopt a discovery rule rather than the increase in insurance rates as their reason for refusing to apply a discovery rule. *See Asbestos Litigation, supra* note 18, at 78.

[30] *See* note 29 *supra*.

[31] *See* Large v. Bucyrus-Erie Co., 524 F. Supp. 285, 289 (E.D. Va. 1981); Locke v. Johns-Manville Corp., 221 Va. 951, 275 S.E.2d 900, 905 (1981); Street v. Consumer Mining Corp., 185 Va. 561, 566, 39 S.E.2d 271, 272 (1946).

Virginia courts[32] follow a two year statute of limitations for personal injury cases that begins to run from the date of injury to the plaintiff.[33] The Virginia Supreme Court recently faced the task of applying the potentially inequitable injury rule[34] to an occupational disease case, *Locke v. Johns-Manville Corp.*,[35] in which three decades separated the first negligent act by the defendant and the plaintiff's discovery of the resultant disease.[36]

In *Locke*, the plaintiff suffered repeated exposure to asbestos dust from the defendant's insulation products in the course of his employment as an electrical technician from 1948 to 1977.[37] From 1972 to 1977, Locke enjoyed excellent health with no visible signs of respiratory or other ailments.[38] On November 1, 1977, Locke experienced chest pains and sought medical attention,[39] but chest x-rays taken as late as April 14, 1978, were normal.[40] Additional x-rays taken on May 22, 1978, however, showed an "abnormality" in the lungs, and surgery in June led to a diagnosis of malignant mesothelioma.[41] Locke filed suit in July 1978

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[32] References in this note to Virginia courts mean the Virginia Supreme Court, federal district courts, and federal circuit courts of appeals applying Virginia law.

[33] VA. CODE § 8.01-230. Section 8.01-243 of the Virginia Code provides that plaintiffs must bring personal injury actions within two years from the time the cause accrued. VA. CODE § 8.01-243. Section 8.01-230 of the Code provides that the cause of action shall accrue, and the limitation period shall run, from the date the plaintiff sustains injury. VA. CODE § 8.01-230; *see* Barnes v. Sears, Roebuck & Co., 406 F.2d 859, 862 (4th Cir. 1969); Sides v. Richard Mach. Works, Inc., 406 F.2d 445, 446 (4th Cir. 1969); Caudill v. Wise Rambler, Inc., 210 Va. 11, 13, 168 S.E.2d 257, 258 (1969). *Barnes*, *Sides*, and *Caudill* formally adopted the injury rule in Virginia statute of limitations cases before the Virginia General Assembly codified the rule in the above statutes. 406 F.2d at 862; 406 F.2d at 446; 210 Va. at 13, 168 S.E.2d at 258.

Some pre-1969 Virginia personal injury statute of limitations cases indicated that the plaintiff's cause accrued at the time of the negligent act. *See* Hawks v. DeHart, 206 Va. 810, 813, 146 S.E.2d 187, 189 (1966); Street v. Consumer Mining Corp., 185 Va. 561, 566, 39 S.E.2d 271, 272 (1946). Although the Virginia courts have not overruled expressly cases like *Hawks* that follow the negligent act rule, the injury rule is now the law of the state. *See* VA. CODE § 8.01-230. Consequently, attorneys must cite negligent act rule cases like *Hawks* with care to avoid the negligent act language. *See* Brief for Appellee at 7, Locke v. Johns-Manville Corp., 221 Va. 951, 275 S.E.2d 900 (1981) (incorrect use of *Hawks*).

[34] *See* text accompanying notes 17-21 *supra*.

[35] 221 Va. 951, 275 S.E.2d 900 (1981).

[36] *Id.* at 954, 275 S.E.2d at 902.

[37] *Id.*, 275 S.E.2d at 902. The asbestos industry has had warnings of the hazard of asbestos to workers since the 1930's. *Asbestos Litigation*, *supra* note 18, at 80. In fact, asbestos-related personal injury actions have outnumbered other dangerous substance cases in civil litigation outside the scope of workmen's compensation. LAWYER'S MEDICAL CYCLOPEDIA, *supra* note 13, § 38.65a.

[38] 221 Va. at 954, 275 S.E.2d at 902.

[39] *Id.*, 275 S.E.2d at 902.

[40] *Id.*, 275 S.E.2d at 902.

[41] *Id.*, 275 S.E.2d at 902. Malignant mesothelioma is a cancerous tumor in the chest, lungs, or abdomen resulting from exposure to asbestos. *Asbestos Litigation*, *supra* note 18, at 58. Mesothelioma is always fatal, usually within three to eighteen months after the onset of symptoms. 221 Va. at 955, 275 S.E.2d at 903. Mesothelioma has a latency period of up to

against eight manufacturers that supplied his employers with asbestos insulation materials.[42] Locke alleged that the defendants were negligent in failing to warn him of the dangers of asbestos and in failing to test the safety of the insulation material.[43] Locke further contended that the defendants breached express and implied warranties by selling unsafe products and by failing to label the asbestos materials in the proper manner.[44] Locke asserted that, as a result of the defendants' negligence and breach of warranty, Locke inhaled harmful asbestos fibers that caused him to contract a fatal disease.[45]

The plaintiff's most recent exposure to asbestos occurred over five years before he filed suit.[46] Consequently, the defendants pled Virginia's two year statute of limitations for personal injury claims.[47] The defendants later moved for summary judgment on the ground that the action was not timely.[48] After consideration of the plaintiff's depositions and written proffers of medical evidence, the trial court granted the motion for summary judgment in November 1978.[49] Locke appealed the adverse order to the Virginia Supreme Court.[50]

The Virginia Supreme Court stated that the crucial issue in the case was determining the date the plaintiff allegedly sustained injury from the asbestos dust.[51] Locke argued that he did not have a legally provable injury before late 1977 or early 1978 when the disease appeared in tangible form.[52] Locke maintained that his injury was the cancer itself, not the exposure to the asbestos dust over several years.[53] Locke argued that he could not have maintained an action before he had medical evidence of his disease because he could not have proven he was injured.[54] Finally,

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35 years in some cases. *Occupational Carcinogenesis, supra* note 1, at 115. *See generally* note 13 *supra*.

[42] 221 Va. at 954, 275 S.E.2d at 902. Locke decided to sue the insulation manufacturers in a civil personal injury action. Workers that have contracted an occupational disease normally have two choices for monetary recovery. *Occupational Carcinogenesis, supra* note 1, at 121. They may sue for workmen's compensation under the applicable state statutes, or they may sue the manufacturer or seller of the product for damages. *Id.*

[43] 221 Va. at 955, 275 S.E.2d at 903.

[44] *Id.*, 275 S.E.2d at 903.

[45] *Id.*, 275 S.E.2d at 903.

[46] *Id.* at 954, 275 S.E.2d at 902.

[47] *Id.* at 953, 275 S.E.2d at 902; *see* note 33 *supra* (Virginia's two year personal injury statute of limitations period).

[48] 221 Va. at 953, 275 S.E.2d at 902.

[49] *Id.*, 275 S.E.2d at 902.

[50] *Id.*, 275 S.E.2d at 902. Although Locke died before the Virginia Supreme Court heard his appeal, the court proceeded as though the death had not occurred. *Id.* at 954, 275 S.E.2d at 902 n.1.

[51] *Id.* at 958-59, 275 S.E.2d at 904.

[52] *Id.* at 954, 275 S.E.2d at 902; Brief for Appellant, *supra* note 29, at 14-18.

[53] 221 Va. at 956, 275 S.E.2d at 903; Brief for Appellant, *supra* note 29, at 26; *see* text accompanying notes 9 & 17-21 *supra* (discussing exposure theory interpretation of injury).

[54] 221 Va. at 956, 275 S.E.2d at 903; *see* note 16 *supra*. The *Locke* plaintiff proffered medical evidence to show that a tumor caused by asbestos normally does not develop for

Locke stressed that statutes of limitations should not bar rights before the rights accrue, but should only bar causes of action after a reasonable time has elapsed in which to bring suit.[55] Because the defendants' definition of injury as exposure to the harmful substance would bar most causes of action before injury occurred,[56] Locke contended that the defendants' position was unjust, inequitable, and contrary to legislative intent.[57]

The defendants in *Locke* argued that the trial court was correct in ruling that the latest possible date of injury was Locke's last exposure to the asbestos in 1972.[58] According to the defendants, Locke's "injurious events" were his repeated exposures to the dust over the years of his employment, not the appearance of the cancerous tumor.[59] The defendants maintained that their alleged breaches of duties to warn and test coincided with the injurious events, rather than with the development of the injury, and that the two year statute of limitations thus barred Locke's suit.[60] Finally, the defendants asserted that Locke's proposed definition of injury as the manifestation of the tumor was tantamount to asking for judicial adoption of a discovery rule.[61]

The Virginia Supreme Court accepted Locke's argument and held that the plaintiff had filed suit within the statute of limitations period.[62] The court reversed the trial court's decision for summary judgment and remanded the case for further proceedings on the merits.[63] In so ruling, the Virginia Supreme Court expressly held that the statutory term "injury" means positive physical or mental hurt to the plaintiff, not just a legal wrong or invasion of the plaintiff's interests.[64] The supreme court indicated that the trial court was to determine the time of the hurt from medical evidence that would pinpoint most clearly the date of the injury.[65] From the scant evidence before it, the supreme court speculated that Locke sustained his injury either when his symptoms first appeared

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quite some time after exposure and that not all people exposed to asbestos develop any asbestos-related disease. 221 Va. at 958, 275 S.E.2d at 905. Thus, the plaintiff argued that he could not have proven a medical injury, cancer, before the manifestation of the tumor.

[55] 221 Va. at 956, 275 S.E.2d at 903; Brief for Appellant, *supra* note 29, at 14.

[56] *See* text accompanying notes 19-21 *supra*.

[57] Brief for Appellant, *supra* note 29, at 27.

[58] 221 Va. at 956, 275 S.E.2d at 903.

[59] *Id.*, 275 S.E.2d at 904.

[60] *Id.*, 275 S.E.2d at 904.

[61] *Id.*, 275 S.E.2d at 904. In his brief, Locke denied that he was urging the court to adopt a discovery rule and stated that he merely was advocating a definition of injury that focused on the manifestation of the tumor. Brief for Appellant, *supra* note 29, at 27.

[62] 221 Va. at 958-59, 275 S.E.2d at 905.

[63] *Id.* at 962, 275 S.E.2d at 907.

[64] *Id.* at 957, 275 S.E.2d at 904. In using the phrase "positive physical or mental hurt", the *Locke* court tried to distinguish between a tangible injury such as a tumor, and a legal invasion of rights, such as the negligent exposure to a harmful chemical. *Id.*, 275 S.E.2d at 904.

[65] 221 Va. at 959, 275 S.E.2d at 905.

in 1977 or when the abnormality appeared on the x-rays in May 1978.[66] The court noted, however, that it had not adopted a discovery rule for personal injury statute of limitations cases in Virginia.[67]

In construing the statutory term "injury", the *Locke* court relied on four Virginia cases dealing with statutes of limitations in both personal injury and property damage situations.[68] The court used the cases to demonstrate that a cause of action cannot accrue until the plaintiff's injury exists and can be proven.[69] According to the four cases, the statute of limitations cannot run until the plaintiff sustains a recognizable injury and a cause of action thus accrues.[70] The *Locke* court then distinguished four other Virginia cases that the defendants cited which hold that the term "injury" refers to the first incidence of harm to the plaintiff, not to later, consequential damages flowing from the original hurt.[71] The court

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[66] *Id.*, 275 S.E.2d at 905. The *Locke* court based its speculation of when Locke's injury occurred on mere allegations by the plaintiff of what the plaintiff intended to prove at trial. *Id.* at 954, 275 S.E.2d at 902. The court concluded that only the medical evidence at trial would allow a complete determination of when the injury occurred. *Id.*

[67] 221 Va. at 959, 275 S.E.2d at 905-06. To support its statement that the *Locke* opinion did not adopt a discovery rule, the *Locke* court hypothesized that a doctor could testify at trial that in certain occupational disease cases the disease existed long before the plaintiff experienced symptoms or otherwise discovered his disease. *Id.*, 275 S.E.2d at 905. The statute of limitations would run then from the date the disease developed, even if it barred the plaintiff, and not from the time of plaintiff's awareness of harm. *Id.*, 275 S.E.2d at 906; *see* text accompanying notes 114-132 *infra* (whether *Locke* court adopted a discovery rule).

[68] Barnes v. Sears, Roebuck & Co., 406 F.2d 859 (4th Cir. 1969) (negligence action for personal injuries caused by defective bicycle); Sides v. Richard Mach. Works, Inc., 406 F.2d 445 (4th Cir. 1969) (negligence action for personal injuries sustained when industrial locomotive derailed); Caudill v. Wise Rambler Inc., 210 Va. 11, 168 S.E.2d 257 (1969) (warranty action for personal injuries from crash caused by defective car); Louisville & N. R.R. v. Saltzer, 151 Va. 165, 144 S.E. 456 (1928) (negligence action for property damage to plaintiff's lands caused by railroad company's change in flow of river).

[69] 221 Va. at 957-58, 275 S.E.2d at 904-05; *see* Barnes v. Sears, Roebuck & Co., 406 F.2d 859, 862 (4th Cir. 1969) (plaintiff not harmed by defective bicycle until physical injury sustained); Sides v. Richard Mach. Works, Inc., 406 F.2d 445, 447 (4th Cir. 1969) (plaintiff not harmed by defective locomotive until physical injury occurred); Caudill v. Wise Rambler Inc., 210 Va. 11, 13, 168 S.E.2d 257, 259 (1969) (plaintiff not harmed by defectively designed car until physical injury to plaintiff occurred); Louisville & N. R.R. v. Saltzer, 151 Va. 165, 169, 144 S.E. 456, 458 (1928) (land not harmed by change in flow in river until flooding occurred).

[70] 221 Va. at 958-59, 275 S.E.2d at 905; *see* Barnes v. Sears, Roebuck & Co., 406 F.2d 859, 862 (4th Cir. 1969); Sides v. Richard Mach. Works, Inc., 406 F.2d 445, 447 (4th Cir. 1969); Caudill v. Wise Rambler Inc., 210 Va. 11, 13, 168 S.E.2d 257, 258 (1969); Louisville & N. R.R. v. Saltzer, 151 Va. 165, 169, 144 S.E. 456, 458 (1928).

[71] 221 Va. at 961-62, 275 S.E.2d at 907; Comptroller of Va. *ex. rel.* Va. Mil. Inst. v. King, 217 Va. 751, 232 S.E.2d 895 (1977) (defective architectural design was initial harm to building and subsequent water damage was consequential damage); Hawks v. DeHart, 206 Va. 810, 146 S.E.2d 187 (1966) (surgeon's leaving needle in plaintiff's neck was original harm and subsequent pain was consequential damage); Richmond Redev. & Hous. Auth. v. Laburnum Constr. Corp., 195 Va. 827, 80 S.E.2d 574 (1954) (defective installation of pipeline was original harm and subsequent explosion was consequential damage); Street v. Consumers Mining Corp., 185 Va. 561, 39 S.E.2d 271 (1946) (initial development of disease was initial harm and subsequent increase in severity of symptoms was consequential damage).

insisted that in the latter four cases the plaintiffs had sustained injuries at an early date, even though they did not discover the injuries until later, more serious damages appeared as a direct result of the original harm.[72] The *Locke* court pointed out, in contrast, that Locke's injury was not complete until the tumor developed.[73] The court reasoned that the plaintiff's ongoing contact with the harmful asbestos was not the original injury and that the tumor was, therefore, not a mere consequential damage resulting from the original harm.[74] Thus Locke's injury, and not just his discovery of the consequences of his injury, occurred within two years before he filed suit.[75]

In *Locke*, the Virginia Supreme Court appeared to face a choice between an application of the exposure interpretation of the injury rule and judicial adoption of a discovery rule.[76] A strict date of last exposure

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[72] 221 Va. at 961-62, 275 S.E.2d at 906-07. The *Locke* court satisfactorily distinguished two of the defendants' four cases, Hawks v. DeHart, 206 Va. 810, 146 S.E.2d 187 (1966) and Street v. Consumers Mining Corp., 185 Va. 561, 39 S.E.2d 271 (1946). *Id.*, 275 S.E.2d at 907. In *Hawks*, a surgeon negligently left in the plaintiff's neck a needle that she did not discover for sixteen years. 206 Va. at 811, 812, 146 S.E.2d at 187, 188 (1966). The *Hawks* court held that the plaintiff's suit, filed one year after discovery of the injury, was untimely, because the plaintiff suffered an injury when the needle was left in sixteen years prior to discovery. 206 Va. at 812-13, 146 S.E.2d at 189-90. The *Hawks* court defined injury as the date the needle was left in the plaintiff's neck and suggested that, had she known of the injury, the *Hawks* plaintiff could have sued immediately for negligence. 206 Va. at 813, 146 S.E.2d at 189. The *Locke* court distinguished *Hawks* on the ground that the needle had injured the *Hawks* plaintiff on the earlier date, but the plaintiff had not discovered her injury until much later. 221 Va. at 961-62, 275 S.E.2d at 907. The *Locke* plaintiff, on the other hand, was not injured until a later date, when his tumor first appeared. 221 Va. at 958-59, 275 S.E.2d at 905.

The *Locke* court distinguished *Street*, an earlier occupational disease case, on the basis of factual evidence in *Street* that showed that the silicosis of which the plaintiff complained had developed ten to fifteen years prior to suit. 185 Va. at 565, 39 S.E.2d at 272. In *Locke*, the plaintiff proffered medical evidence that suggested the tumor developed shortly before the plaintiff filed suit. 221 Va. at 954-55, 275 S.E.2d at 902-03.

The remaining two cases that the *Locke* court analyzed, Richmond Redev. & Hous. Auth. v. Laburnum Constr. Corp., 195 Va. 827, 80 S.E.2d 574 (1954), and Comptroller of Va. *ex. rel.* Va. Mil. Inst. v. King, 217 Va. 751, 232 S.E.2d 895 (1977), pose a greater problem for the court. By analogy, these cases could have justified the *Locke* court's adoption of an exposure rule. *See* text accompanying notes 85-87 *infra*. *Laburnum* and *King* represent the idea that once a thing has incurred even a small amount of damage, the cause accrues and the statute of limitations begins to run. 217 Va. at 759, 232 S.E.2d at 900; 195 Va. at 838-39, 80 S.E.2d at 581. Consequential damages are unimportant. *See* note 71 *supra*. The *Locke* court did not explain why Locke's initial exposure to asbestos dust was not the initial harm and the tumor merely a consequential damage. *See* note 87 *infra*.

[73] 221 Va. at 959, 275 S.E.2d at 905-06.

[74] *Id.* at 959, 275 S.E.2d at 906.

[75] *Id.* at 962, 275 S.E.2d at 907.

[76] *See California's Discovery Exceptions*, *supra* note 29, at 124; text accompanying notes 17-21 *supra* (discussing exposure theory). Injury rule courts generally have two choices in occupational disease cases, strict exposure interpretation of an injury rule or judicial adoption of a discovery rule. *California's Discovery Exceptions*, *supra* note 29, at 124. Virginia courts repeatedly have refused to adopt a discovery rule in the absence of legislative action, even in the face of inequities to plaintiffs. *See, e.g.*, Barnes v. Sears,

rule would have barred the *Locke* plaintiff from suit since his last exposure to the asbestos dust occurred five years before he discovered his injury,[77] but would have protected the defendants' right of repose.[78] Judicial adoption of a discovery rule would have allowed the plaintiff to maintain suit,[79] but would have usurped the lawmaking function of the Virginia legislature.[80] The *Locke* court avoided both unattractive alternatives by defining the statutory term injury as manifestation of the tumor, thereby rendering a positive result for the plaintiff.[81]

In defining the term injury as tumor manifestation in order to benefit the plaintiff, the *Locke* court ignored impressive medical and legal authority that would have supported an exposure interpretation of injury.[82] Several jurisdictions have adopted a date of exposure theory in

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Roebuck & Co., 406 F.2d 859, 862-63 (4th Cir. 1969) (court refused to adopt discovery rule in hidden defect products liability case); Morgan v. Schlanger, 374 F.2d 235, 239 (4th Cir. 1967) (court noted injustice of injury rule to malpractice plaintiff but refused to adopt discovery rule in medical malpractice case).

[77] *See* 221 Va. at 954, 275 S.E.2d at 902.

[78] *See* text accompanying note 5 *supra*. Under a date of last exposure rule, a defendant would be certain of freedom from suit by an occupational disease plaintiff two or three years after the plaintiff's employment with the defendant ended. *See* note 19 & text accompanying notes 19-21 *supra*.

[79] *See* 221 Va. at 954, 275 S.E.2d at 902. The *Locke* plaintiff brought suit within one month after he discovered the nature of his disease. *Id.*, 275 S.E.2d at 902.

[80] *See* note 76 *supra* (Virginia courts opposed to judicial legislation).

[81] 221 Va. at 958, 275 S.E.2d at 905.

[82] The *Locke* court in effect manipulated the term "injury" by rejecting an exposure interpretation of injury that carried much supporting medical and legal authority and creating its own new definition of injury in order to reach a favorable result for the plaintiff. *See* 221 Va. at 958-59, 275 S.E.2d at 906. A California commentator has used the phrase "manipulation of the term 'date of injury'" to describe a California court's reasoning in an occupational disease case similar to *Locke*. *See California's Discovery Exceptions, supra* note 29, at 109. In *Associated Indem. Corp. v. State Indus. Accident Comm'n*, the California District Court of Appeals faced the problem of a silicosis plaintiff's suing years after his first exposure to the harmful substance. 124 Cal. App. 378, ____, 12 P.2d 1075, 1077 (Cal. Ct. App. 1932). Silicosis is an occupational pulmonary disease that takes several years to develop after inhalation of silica dust. LAWYER'S MEDICAL CYCLOPEDIA, *supra* note 13, § 33.48a. The California court dealt with an injury rule similar to Virginia's. 124 Cal. App. at ____, 12 P.2d at 1077. In order to allow the plaintiff's suit, the court defined injury as the time when the accumulated effects of the deleterious substance manifested. *Id.* Rather than adopt a discovery rule outright, the court "manipulated" the time of injury to reach a verdict for the plaintiff. *California's Discovery Exceptions, supra* note 29, at 109.

The *Locke* and *Associated Indemnity* courts' opinions are plaintiff-oriented in that both courts reached favorable results for the plaintiff by creating their own definitions of injury. 221 Va. 951, 961, 275 S.E.2d 900, 905-07; 124 Cal. App. 378, ____, 12 P.2d 1075, 1077. The courts' actions are plaintiff-oriented in that they shift the focus of the event that triggers the statute of limitations to the plaintiff rather than the defendant. 221 Va. at 957, 275 S.E.2d at 904. Under an exposure rule, the focus is on the defendant's negligent act of exposing the plaintiff to a harmful substance. *See* notes 17-21 *supra*. In contrast, a manifestation of disease rule focuses on the effect of the substance on the plaintiff and disregards the defendant's negligent act. 221 Va. at 957, 275 S.E.2d at 904. The *Locke* and *Associated Indemnity* manifestation rules thus suggest a shift away from the traditional emphasis on the defendant and his right to repose after his negligent act. *See* text accompanying note 1 *supra*. In

asbestos related cases based on medical evidence showing that the body sustains injury when the victim breathes the asbestos fibers and the fibers settle into his lungs.[83] Irritation of the lungs can occur after the first intake of asbestos dust, long before a specific disease develops.[84] The *Locke* court also could have relied on Virginia property damage case law, which indirectly would support a ruling that the plaintiff sustained harm at the time of his exposure to the dust and not at the time of manifestation of the tumor.[85] Virginia property damage law defines injury as the first occurrence of harm, not as the date on which consequential damages appear.[86] The court could have reasoned by analogy that Locke sustained injury after his first intake of asbestos dust, and that the subsequent disease was a mere consequential damage of the initial harm.[87]

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their focus on the plaintiff, the *Locke* and *Associated Indemnity* rules resemble a discovery rule, which emphasizes the plaintiff's awareness of harm rather than the defendant's negligent act. *See* note 10 *supra*. *But see* text accompanying notes 96-120 *infra* (discussing differences between *Locke* rule and discovery rule).

[83] *See* note 19 *supra*. Jurisdictions that have used an exposure rule in occupational disease cases include Connecticut, Indiana, Louisiana, New Jersey, Pennsylvania, and Tennessee. Annot., 1 A.L.R. 4th 117 (1980).

[84] *See Asbestos Litigation*, *supra* note 18, at 63.

[85] *See* notes 86-87 *infra*.

[86] *See* Comptroller of Va. v. King, *ex. rel.* Va. Mil. Inst., 217 Va. 751, 759, 232 S.E.2d 895, 900 (1977); Richmond Redev. & Hous. Auth. v. Laburnum Constr. Corp., 195 Va. 827, 838-39, 80 S.E.2d 574, 581 (1954); Louisville & N. R.R. Co. v. Saltzer, 151 Va. 165, 170-71, 144 S.E. 456, 457 (1928). In *Saltzer*, a case involving property damage caused by a change in the flow of a river, the Virginia Supreme Court stated that whenever a plaintiff incurs any injury, however slight, as a result of the defendant's action the cause of action then accrues. 151 Va. at 170-71, 144 S.E. at 457, *quoted in* Locke v. Johns-Manville Corp., 221 Va. at 960, 275 S.E.2d at 906. Once a cause has accrued from a slight injury, the date of further, more substantial injury becomes unimportant. 151 Va. at 170-71, 144 S.E. at 457.

Virginia courts have reaffirmed the idea of the insignificance of consequential damages in two recent property damage cases, *Richmond Redevelopment and Housing Authority v. Laburnum Construction Corp.*, *supra*, and *Comptroller of Virginia ex. rel. Virginia Military Institute v. King*, *supra*. In *Laburnum*, the defendant negligently installed a gas pipeline in the plaintiff's building. 195 Va. at 829-30, 80 S.E.2d at 576. The pipeline exploded several years later, damaging the building extensively. *Id.* at 830, 80 S.E.2d at 576. The court held that the injury had been done to the building at the time of negligent pipeline installment and that the subsequent explosion was only a consequential damage from the original harm. *Id.* at 838-39, 80 S.E.2d at 581. The *Laburnum* court noted that the plaintiff's difficulty in ascertaining the injury warranted no exception to the general injury rule. *Id.* at 838, 80 S.E.2d at 581.

In *King*, the plaintiff's building suffered external water damage as a result of the defendant architect's defective plans for the building. 217 Va. at 756, 232 S.E.2d at 898. The court, again relying on the idea of consequential damages, held that the injury occurred when the defective building plans were approved and not when the building developed the water damage. *Id.* at 759, 232 S.E.2d at 900. In both *Laburnum* and *King*, the court deemed the statute of limitations to run from the original injury and not from the time of the later damage. *Id.*, 232 S.E.2d at 900; 195 Va. at 839, 80 S.E.2d at 581.

[87] *See* text accompanying notes 83 & 84 *supra* (lungs injured when victim breathes asbestos dust). The *Locke* court could have ruled that the initial irritation of the plaintiff's lungs constituted the original injury and that the subsequent scarring or cancer of the lungs

The strong plaintiff-orientation inherent in the *Locke* court's choice of a manifestation of tumor theory over a well-supported exposure theory prompted the *Locke* defendants to charge that the court had adopted a camaflaged discovery rule.[88] The *Locke* court's dictum, which closely links the dates of the plaintiff's symptoms and diagnosis of the disease with the date the statute of limitations would begin to run, supports the defendants' contention.[89] Discovery rule courts frequently use the date of the plaintiff's symptoms or diagnosis of illness to pinpoint the date of the plaintiff's discovery of his disease.[90] The fact that *Locke* is the most recent case in a decade-long liberalization of Virginia personal injury statute of limitations law further supports the defendants' argument.[91]

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was merely a consequence of the original injury. By applying the consequential damages reasoning, the *Locke* court then could have found that the time of injury was the date of exposure to the fibers, rather than the date of manifestation of the disease.

The *Locke* court did not mention the analogy between occupational disease cases and consequential damage property cases that could have supported an exposure theory of injury. Perhaps the court felt that Virginia's five year statute of limitations for property damage cases adequately protects property plaintiffs, but that personal injury plaintiffs like *Locke* need greater protection. *See* VA. CODE § 8.01-243(B) (five year statute of limitations for property cases). The court also may have decided that property damage cases were inappropriate precedent for personal injury, occupational disease cases. The *Locke* court did, however, explain briefly its general rejection of an exposure rule in occupational disease cases. 221 Va. at 955, 275 S.E.2d at 903. The court explained that the dates of the plaintiff's exposures to the asbestos fibers bore no medical relationship to when or if the plaintiff would contract mesothelioma. *Id.* The court may have noted from the plaintiff's brief the unintentional result that a time of exposure rule could bring in occupational disease cases. *See* note 29 *supra*; Brief for Appellant, *supra* note 29, at 15-16. Although most exposed workers never contract an occupational disease, they would feel obligated to file suit after exposure to the harmful substance in order to preserve their suit, perhaps by claiming an increased risk of cancer due to their exposure. *See* note 29 *supra*. If allowed, the suits would either result in windfalls for plaintiffs that never contracted a disease or in incomplete recovery for plaintiffs that subsequently did develop occupational diseases. *Id.* Most courts would not allow the suits for cancer risk, since the plaintiff could not prove a tangible injury until the disease developed. *Id.*

[88] 221 Va. at 959, 275 S.E.2d at 905.

[89] *Id.*, 275 S.E.2d at 905 (date of Locke's injury coincided with either date of symptoms or date of diagnosis).

[90] *See, e.g.*, Karjala v. Johns-Manville Prod. Corp., 523 F.2d 155, 160-61 (8th Cir. 1975) (date of symptoms and diagnosis as time of plaintiff's discovery for statute of limitations purposes); Ricciuti v. Voltarc Tubes, Inc., 277 F.2d 809, 812 (2nd Cir. 1960) (date of diagnosis as time of plaintiff's discovery for statute of limitations purposes); McCoy v. Johns-Manville, No. 81-136 (D.D.C. Dec. 31, 1981) (statute of limitations runs from date of diagnosis).

[91] The first indication of a liberalization trend in Virginia personal injury statute of limitations law occurred in three 1969 products liability cases. *See* Barnes v. Sears, Roebuck & Co., 406 F.2d 859 (4th Cir. 1969); Sides v. Richard Mach. Works, Inc., 406 F.2d 445 (4th Cir. 1969); Caudill v. Wise Rambler Inc., 210 Va. 11, 168 S.E.2d 257 (1969). *Barnes*, *Sides*, and *Caudill* involved the negligent sale of defective products that eventually caused personal injuries to the plaintiffs. 406 F.2d at 860; 406 F.2d at 446; 210 Va. at 11, 168 S.E.2d at 258. The *Barnes*, *Sides*, and *Caudill* defendants argued that the plaintiffs sustained injury on the dates of the sales of the defective products and that the statute of limitations thus should begin to run on the dates of the sales. 406 F.2d at 862; 406 F.2d at 446; 210 Va. at 12, 168

The court's choice of manifestation over exposure,[92] in conjunction with the discovery rule dictum[93] and the personal injury liberalization trend,[94] raises the issue of whether the *Locke* court in effect adopted a discovery rule for occupational disease cases.

Although the *Locke* rule yields the same equitable result for the plaintiff that a discovery rule would yield on the same facts,[95] the *Locke* court was correct in the assertion that it did not adopt an occupational disease discovery rule.[96] The two rules fundamentally differ in their theoretical focal points. Whereas the *Locke* rule focuses on the time that the plaintiff contracts his disease, an event beyond the plaintiff's control,[97] a discovery rule stresses the plaintiff's diligence in filing suit after he is aware of his injury.[98] The *Locke* rule tries to insure that all the technical requirements of a cause of action, including injury, are present before the statute of limitations runs.[99] In addition to insuring that

S.E.2d at 259. Because the plaintiffs in all three cases brought suit more than two years after the sale of the products, the defendants asserted that Virginia's two year personal injury statute of limitations barred the plaintiffs' claims. 406 F.2d at 862; 406 F.2d at 446; 210 Va. at 12, 168 S.E.2d at 259. The courts disagreed with the defendants, however, and split the defendants' negligent acts of selling defective goods into two causes of action in order to allow the plaintiffs to maintain suit. 406 F.2d at 862; 406 F.2d at 446; 210 Va. at 13, 168 S.E.2d at 259. The courts stated that the sale of the defective products gave the plaintiffs immediate causes of action for property damage to the products. 406 F.2d at 862; 406 F.2d at 446; 210 Va. at 13, 168 S.E.2d at 259. The sales of the defective products, however, also gave rise to potential tort actions that accrued when the plaintiffs sustained physical harm as a result of the defective products. 406 F.2d at 862; 406 F.2d at 446; 210 Va. at 13, 168 S.E.2d at 259. Thus, the courts reasoned, that while the statute of limitations for the property damage causes would begin to run at the date of sales, the statute of limitations for physical harm to the plaintiffs should not begin to run until the dates of the plaintiffs' injuries. 406 F.2d at 862; 406 F.2d at 446; 210 Va. at 13, 168 S.E.2d at 259.

Virginia courts also have liberalized statute of limitations rules for professional malpractice plaintiffs by creating a flat exception to the injury rule. The Virginia courts have adopted a continuing treatment rule for statute of limitations periods in dental and legal malpractice cases. *See* Fenton v. Danaceau, 220 Va. 1, 225 S.E.2d 349 (1979) (per curiam); Farley v. Goode, 219 Va. 969, 252 S.E.2d 594 (1979); McCormick v. Romans & Gunn, 214 Va. 144, 198 S.E.2d 651 (1973). Under a continuing treatment rule, the statute of limitations runs not from the time of injury, which the plaintiff may not discover for years, but from the time of termination of the defendant's professional services to the plaintiff. 214 Va. at 148, 198 S.E.2d at 654; *see* Zepkin, *Virginia's Continuing Negligent Treatment Rule:* Farley v. Goode *and* Fenton v. Danaceau, 15 U. RICH. L. REV. 231 (1981) (discussion of medical malpractice rule in Virginia).

[92] *See* text accompanying notes 82-86 *supra.*

[93] *See* text accompanying notes 89-90 *supra.*

[94] *See* note 91 *supra.*

[95] *See* note 90 *supra.* A discovery rule would begin the statute's running either at the time of symptoms or the time of diagnosis. *Id.* Both Locke's symptoms and his diagnosis of mesothelioma occurred within the statutory two year period before he filed suit. 221 Va. at 954, 275 S.E.2d at 902.

[96] *See* 221 Va. at 959, 275 S.E.2d at 905.

[97] *Id.*, 275 S.E.2d at 905.

[98] *See* text accompanying notes 22-24 *supra*; text accompanying notes 148-51 *infra.*

[99] 221 Va. at 957, 275 S.E.2d at 904 (need for injury element before cause accrues); *see* note 16 *supra* (elements of cause of action).

all elements of a cause of action are present, a discovery rule promotes even greater fairness to the plaintiff by insuring that the plaintiff is aware of his injury before the statute of limitations bars his cause.[100]

The practical effect of the theoretical differences is that the *Locke* rule will not operate as broadly for plaintiffs' benefit as a discovery rule would in many occupational disease cases. In order for the *Locke* rule to achieve a result similar to that of a discovery rule, the symptoms of the occupational disease must occur shortly after the disease first develops.[101] The victim must be able to discover his disease through the rapid onset of symptoms almost immediately after the disease comes into existence.[102] If this pattern of sudden development of the disease followed by immediate symptoms occurs, the date of development of the disease that the *Locke* rule stresses will be close to the date the plaintiff discovers the disease from symptoms or diagnosis. Thus, under either the *Locke* rule or a discovery rule, the statute of limitations would begin to run from approximately the same date.[103] Locke's disease, mesothelioma, follows the quick-development, immediate symptom pattern,[104] which accounts for the misleading impression from the *Locke* case that the *Locke* rule and the discovery rule are essentially the same.[105]

Many occupational diseases, however, do not appear suddenly, accompanied by severe symptoms.[106] Most common non-cancerous occupational pulmonary diseases like asbestosis and silicosis develop gradually over a long period of time.[107] Significant symptoms may not appear until the later stages of the disease.[108] Thus, several years normally separate

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[100] *See* note 10 & text accompanying notes 22-23 *supra.*

[101] Two examples of diseases in which the *Locke* rule will operate like a discovery rule are highly undifferentiated lung cancer and beryllium pneumonitis. *See* LAWYER'S MEDICAL CYCLOPEDIA, *supra* note 13, §§ 33.39 & 33.55. In both diseases, the illness develops quite rapidly, accompanied by severe symptoms. *Id.* Thus, the development of the disease will occur immediately prior to the victim's discovery of the disease through symptoms. The statute of limitations would run from the date of development of disease under *Locke* and from the date of discovery under a discovery rule. Since the two dates nearly will coincide, the two rules will operate alike.

[102] *See* note 101 *supra.*

[103] *Id.*

[104] 221 Va. at 954, 275 S.E.2d at 902; *see* note 41 *supra* (description of mesothelioma). In mesothelioma cases, the tumor usually develops quickly after a 20-35 year latency period. *See* LAWYER'S MEDICAL CYCLOPEDIA, *supra* note 13, § 33.53.

[105] *See* text accompanying notes 82-95 *supra.*

[106] *See* LAWYER'S MEDICAL CYCLOPEDIA, *supra* note 13, § 33.47. Many irritating substances cause such a slow and gradual inflammatory reaction in the lungs that the pulmonary disease may not manifest for several years after exposure. *Id.*

[107] *See* note 106 *supra.* Silicosis, a lung disease that the inhalation of silica dust causes, is characterized by gradual development. LAWYER'S MEDICAL CYCLOPEDIA, *supra* note 13, § 33.48a. Asbestosis, scarring of the lungs caused by inhalation of asbestos dust, also develops very slowly. *Id.* § 33.53. Other occupational diseases that develop gradually include talc pneumoconiosis and byssinosis. *Id.* §§ 33.54 & 33.59a.

[108] *See* LAWYER'S MEDICAL CYCLOPEDIA, *supra* note 13, §§ 33.48(a) & 33.53. Silicosis may exist extensively throughout the lungs and produce no symptoms. LAWYER'S MEDICAL

the initial development of the disease and the plaintiff's discovery of the disease through symptoms.[109] In cases in which the disease develops gradually, the statute of limitations under *Locke* would run from the date the disease first existed.[110] Because the gradual development disease plaintiff may not discover his disease for years after the disease begins to develop,[111] he often will not file suit within the statute of limitations period. In contrast, the statute of limitations would not run under a discovery rule until the plaintiff became aware of his injury, regardless of when the disease developed.[112]

A few unique diseases such as coal worker's pneumoconiosis (CWP), which may develop in two distinct stages, also highlight the differences between the *Locke* rule and a discovery rule.[113] The first stage of CWP is simple CWP and is normally non-symptomatic.[114] In some cases, simple CWP develops at an unascertainable time into the second stage of the disease, complex CWP, which involves severe symptoms and may be fatal.[115] Under the *Locke* rule, a court hearing a complex CWP case would have to decide whether to use the development date of the simple or of the complex form of the disease to trigger the statute of limitations.[116] If the court used the development of the simple form of the

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CYCLOPEDIA, *supra* note 13, § 33.48a. Asbestosis usually has progressed to an irreversible stage by the time symptoms appear. *Id.* § 33.53. Chest x-rays do not show signs of asbestosis until the disease is well established. *Id.*; *see also Occupational Carcinogenesis*, *supra* note 1, at 119 (early diagnosis of cancer rare).

[109] *See* note 13 *supra* (development periods for non-cancerous occupational diseases extend up to 25 years).

[110] 221 Va. at 958-59, 275 S.E.2d at 905 (statute of limitations runs from date of development of disease).

[111] *See* note 108 *supra.*

[112] *See* text accompanying note 10 *supra.*

[113] *See* R. GRAY, 4A ATTORNEY'S TEXTBOOK OF MEDICINE (3d ed. 1981) §§ 205 B.21 & 205 B.22 [hereinafter cited as GRAY]. Coal workers' pneumoconiosis (CWP) is the best example of a two-stage pulmonary disease. Medical authorities divide CWP into two distinct forms of a pneumoconiosis (dust-related lung disease), simple and complex. *Id.*

Another disease, byssinosis, also may change from a simple intermittent form to a more serious permanent form over a period of time, although medical authorities do not formally divide byssinosis into simple and complex categories. *Id.* § 205 E.20.

[114] GRAY, *supra* note 113, § 205 B.21.

[115] *Id.*, § 205 B.22.

[116] Simple CWP and complex CWP are similar forms of pneumoconiosis, but medical commentators often treat them as separate diseases. GRAY, *supra* note 113, §§ 205 B.21 & 205 B.22. Simple CWP and complex CWP have entirely different symptoms and prognoses. *Id.* Since complex CWP has severe symptoms and consequences, and simple CWP usually has no symptoms, complex CWP probably would be the subject of an occupational disease plaintiff's suit rather than simple CWP. *See id.* A court using the *Locke* manifestation rule will have to decide if the two diseases are so similar that the court should use the date of development of the simple CWP to trigger the statute of limitations. Use of nonsymptomatic simple CWP to trigger the limitations statute probably would bar most occupational disease plaintiffs. *See id.* If the court decides the diseases are not sufficiently related to use the date of development of simple CWP as manifestation of the injury, the court will have to use the development date of complex CWP, which is difficult to ascertain. *Id.*

disease to trigger the statute, the plaintiff would be barred from suit if he did not bring the action until symptoms appeared in the second stage of the disease.[117] If the court used the development date of the complex CWP, the plaintiff might be aware of his disease in time to maintain a suit since severe symptoms usually accompany complex CWP.[118] Under a discovery rule, the statute of limitations would run from the date the plaintiff discovered the pneumoconiosis, regardless of when the two stages of the disease developed.[119] Thus, the difference in results from the application of the *Locke* rule and a discovery rule to several types of occupational diseases refutes the *Locke* defendants' charges that the *Locke* court in effect adopted a disguised discovery rule.[120]

The difference in focal points that leads to the dissimilarity of the two rules makes a discovery rule preferable to the *Locke* rule in both operation and result. The focus of the *Locke* rule on when the plaintiff contracted the occupational disease[121] results in a heavy dependence upon complex medical testimony concerning the time the disease developed.[122] Since many occupational diseases develop over a long period of time, the medical expert will have to exercise his own judgment in determining when the disease first developed.[123] The potential result in a case in which the medical evidence is not clear, as in *Locke*, is a battle of medical experts, each opining a different date for the start of the disease.[124] A judge and jury, operating without the benefit of detailed medical knowledge of occupational diseases, will have difficulty assimilating the evidence to determine precisely when the disease developed and, thus, whether the plaintiff filed a timely suit.[125]

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[117] *See* note 116 *supra*.

[118] *Id.*

[119] *See* note 10 *supra*. Under a discovery rule, the peculiar development of CWP would be irrelevant. *See* text accompanying note 113 *supra*. The statute of limitations would begin to run when the plaintiff discovered his disease through symptoms or diagnosis, which would probably be some time after complicated CWP occurred. *See* note 116 *supra*.

A problem might arise in the application of a discovery rule to CWP in the situation in which a plaintiff discovered he had simple CWP, did not sue, contracted complex CWP, and then sued. The court would have to decide whether the plaintiff discovered his injury and, thus, should have sued when he discovered the simple CWP even though the complex CWP might never have developed. *See* GRAY, *supra* note 113, §§ 205 B.21 & 205 B.22. Because simple CWP usually has no symptoms, however, victims are unlikely to discover CWP until the complex form develops. *Id.*

[120] *See* notes 82-87 *supra*.

[121] 221 Va. at 959, 275 S.E.2d at 905.

[122] *Id.* at 958, 275 S.E.2d at 905 (time of hurt to be established by competent medical evidence pinpointing date of development of disease within reasonable degree of medical certainty).

[123] *See* text accompanying note 13 *supra*.

[124] *See Asbestos Litigation*, *supra* note 18, at 82. Doctors cannot determine with certainty the date asbestos fibers damage the body. *Id.*

[125] Too much reliance by a jury on medical testimony can encroach on the jury's fact finding function. *Cf.* C. FRIEND, THE LAW OF EVIDENCE IN VIRGINIA 389 (1977) (how much

In contrast, a rule that stresses the date of the plaintiff's discovery of his injury eliminates emphasis on confusing medical evidence that varies with the type of disease.[126] In a discovery rule jurisdiction, therefore, the testimony at trial concerning the date the plaintiff discovered his disease probably will be factual and straightforward. The plaintiff probably would testify about the date he noticed symptoms or sought medical help, or a physician would testify about the date of the medical exam or diagnosis.[127] A problem with the discovery rule develops, however, in jurisdictions in which the statute-triggering event is when the plaintiff discovered or "should have discovered" his injury. The phrase "should have discovered" is meant to bar non-diligent plaintiffs who ignore symptoms or do not seek medical advice in time to file suit against possible wrongdoers.[128] The phrase, however, can create a difficult factual judgment for a court or jury. The objective "should have discovered" standard forces the trier of fact to set a specific date when the plaintiff's symptoms became severe enough that he should have sought medical help.[129] The advantage of even an objective discovery rule, however, is that the judge and jury can use common sense or experience to make the judgment and do not need the extensive medical knowledge about occupational diseases that judges and juries applying the *Locke* rule will require.[130]

In addition to the drawbacks in regard to dependence on medical testimony, the *Locke* rule may lead to less uniform or equitable results in occupational disease cases than would a discovery rule. The *Locke* rule's emphasis on the date the disease develops is likely to bar many occupational disease plaintiffs since medical evidence may indicate the disease developed long before symptoms occurred.[131] Thus, the type of disease rather than a lack of diligence may bar plaintiffs from suit.[132] The

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medical expert should be able to testify at trial about ultimate fact in question). Jurors are supposed to accept or reject expert testimony as they see fit. *Id.* Decisions on the acceptance or rejection of testimony are difficult when complex medical testimony is involved. *Id.*

[126] Because the date the plaintiff developed his disease is unimportant in discovery rule jurisdictions, complex medical testimony is not necessary. *See* text acompanying note 10 *supra.*

[127] *See, e.g.*, Karjala v. Johns-Manville Prod. Corp., 523 F.2d 155, 156 (8th Cir. 1975) (plaintiff testified about dates of symptoms and diagnosis); Harig v. Johns-Manville Prod. Corp., 284 Md. 70, 72-73, 394 A.2d 299, 301 (1978) (plaintiff testified about dates of symptoms).

[128] *See* PROSSER, *supra* note 1, at 144 (standard for determining when plaintiff "should have discovered" his injury is reasonable diligence in obtaining medical advice).

[129] *See California's Discovery Exceptions*, *supra* note 29, at 116. One criticism of an objective discovery rule is that the rule creates an "unmanageable" decision for the trier of fact about whether the plaintiff discovered his injury within a reasonable time. *Id.*; *see* note 29 *supra.*

[130] *See* text accompanying note 125 *supra.*

[131] *See* text accompanying notes 106-12 *supra.*

[132] *See* text accompanying notes 101-20 *supra.* If symptoms appear quickly after the development of the disease and the plaintiff diligently files suit, the statute of limitations

effect of *Locke*, therefore, could be to favor certain occupational disease victims, such as those with sudden disease development and immediate symptoms, over others with gradual development diseases.[133]

In contrast, a discovery rule distinguishes plaintiffs on the basis of their diligence rather than their disease.[134] Differences among diseases in regard to when the disease develops in relation to when symptoms appear, which are critical under the *Locke* rule,[135] are irrelevant under a discovery rule.[136] Plaintiffs in discovery rule jurisdictions would have the benefit of a uniform statute of limitations standard based on their diligence, rather than on events that they cannot control, such as when the disease developed.[137]

In view of the problems with the *Locke* rule, such as the heavy dependence on medical testimony[138] and the emphasis on the nature of the plaintiff's disease,[139] the rule's viability as a fair alternative to a discovery rule in injury rule jurisdictions is doubtful. The *Locke* rule's arbitrary emphasis on the time the plaintiff developed his disease,[140] rather than on the degree of the plaintiff's diligence,[141] may create more problems in Virginia occupational disease cases than it solves.[142] Admittedly, the *Locke* rule is preferable to an exposure definition of injury for

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will not bar his claim. *See* text accompanying notes 101-05 *supra*. If the plaintiff's symptoms do not occur until long after the disease exists, however, the *Locke* rule will bar the suit because the plaintiff will not be aware of his cause in time to file an action. *See* text accompanying notes 106-12 *supra*.

[133] *See* text accompanying notes 101-20 *supra*.

[134] *See* text accompanying notes 22-29 *supra*.

[135] *See* text accompanying notes 101-20 *supra*.

[136] *See* text accompanying notes 112 & 119 *supra*.

[137] *See* text accompanying notes 22-29 *supra*. The one factor that could create an exception to the idea that all diligent discovery rule plaintiffs will be allowed to maintain suit is a faulty diagnosis. *See* P. BARTH, WORKER'S COMPENSATION AND WORK RELATED ILLNESSES AND DISEASES 124 (1980) [hereinafter referred to as BARTH]. Most discovery rules hold a plaintiff to be aware of his injury at the time he experiences symptoms or receives a diagnosis, even if his condition has been misdiagnosed. *Id.* The statute of limitations begins to run from the date of awareness of injury. *Id.*; *see* 221 Va. at 954, 275 S.E.2d at 902 (Locke's condition was initially misdiagnosed); GRAY, *supra* note 113, § 205 C.20 (mesothelioma is easily misdiagnosed as metastatic growth from earlier undetected cancer). Thus a discovery rule statute of limitations may bar the plaintiff even though, because of a misdiagnosis of the nature of the disease, he is not aware that he has a possible cause of action. BARTH, *supra*, at 124. Most doctors, however, would connect the possible causal link between lung diseases and the nature of plaintiff's employment. *See* GRAY, *supra* note 113, § 205 C.40. Some jurisdictions have solved the problem of faulty diagnoses by not beginning the statute of limitations until the plaintiff is aware of the occupational nature of his injury. *See* note 29 *supra*.

[138] *See* text accompanying notes 122-25 *supra*.

[139] *See* text accompanying notes 101-20 *supra*.

[140] 221 Va. at 959, 275 S.E.2d at 905.

[141] *See* text accompanying notes 133-39 *supra*.

[142] *See* text accompanying notes 121-25 & 131-33 *supra* (problems with the *Locke* rule include possible confusion of juries because of medical testimony and non-uniform results based on type of disease).

both plaintiffs and defendants.[143] Under an exposure rule, the plaintiff may have to file suit before he knows he has contracted a disease and thus would face tremendous proof of damages problems in court.[144] On the other hand, an exposure rule could allow a plaintiff to recover unfairly from a defendant if the plaintiff discovers his disease, but continues working and does not file suit until years later when he leaves his job and suffers his last exposure to the harmful substance.[145] Although the plaintiff-oriented *Locke* rule[146] is preferable to an exposure rule that can lead to unfair results for both plaintiffs and defendants, the *Locke* rule cannot produce the consistently equitable results for the plaintiff that a discovery rule could yield because of the *Locke* rule's undesirable focus on the date the plaintiff's disease developed.[147]

Considering the flaws in the exposure rule and *Locke* rule alternatives, the legislatures in negligent act and injury rule jurisdictions, including Virginia, should adopt a discovery rule that focuses on the plaintiff's diligence in order to deal with the increasing numbers of occupational disease cases.[148] Since potentially harmful substances like asbestos are necessary in our industrial system, and since workers must handle such substances, state legislatures should fashion a means of shifting the pecuniary risk of harm of negligent manufacturers that expose workers to injurious substances without adequate protection or warning. The only way to insure allocation of risk to the negligent manufacturers on a case by case basis is to allow litigation on the merits between the injured victim and the accused manufacturer. In turn, the only way to insure deserving plaintiffs uniform and consistent accessibility to a trial on the merits is to adopt a diligence-based discovery rule.[149]

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[143] *See* text accompanying notes 144-45 *infra*.
[144] *See* text accompanying note 21 *supra*.
[145] *See* note 21 *supra*.
[146] *See* text accompanying notes 82-94 *supra*.
[147] *See* text accompanying notes 131-37 *supra*.
[148] *See* text accompanying notes 121-37 *supra*; *see* note 28 *supra*.
[149] *See* notes 26 & 28 *supra*.