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Viii. Torts

General Assembly's interest in providing compensation for insured motorists injured by negligent, uninsured motorists.[105]

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VIII. TORTS

Successive Asbestos-Related Diseases and Virginia's Statute of Limiations: Joyce v. A.C. and S., Inc.

In Virginia the number of plaintiffs seeking compensation for asbestos-related illnesses has increased significantly in recent years.[1] Typically, a person exposed to asbestos is unaware that any harm has occurred until he develops an asbestos-related disease.[2] The period between the exposure to asbestos and the development or discovery of the disease, however, may be twenty or more years.[3] Consequently, an important procedural issue in

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105. *See supra* notes 84-86 and accompanying text (supporting conclusion that Virginia General Assembly intended uninsured motorist coverage to compensate injured insureds).

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1. *See, e.g.,* Roehling v. Nat'l. Gypsum Co. Gold Bond Bldg. Prod., 786 F.2d 1225 (4th Cir. 1986) (pipefitters developed mesotheliama due to asbestos exposure at jobsite); Joyce v. A.C. & S., Inc., 785 F.2d 1200 (4th Cir. 1985) (personal injury action for pleural effusion and parenchymal asbestosis); Oman v. Johns-Mansville Corp., 764 F.2d 224 (4th Cir. 1985) (shipyard worker's action for asbestosis); Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor v. Newport News Shipbuilding and Dry Dock Co., 737 F.2d 1295 (4th Cir. 1984) (claimant suffered from asbestosis). *See generally,* D. HENSLER, W. FELSTINER, M. SELVIN & P. EBENER, ASBESTOS IN THE COURTS 1 (1985)[hereinafter ASBESTOS IN THE COURTS] (discussing large number of pending asbestos claims in state and federal trial courts). Since the early 1970s plaintiffs in courts around the country have filed over 30,000 claims for injuries due to asbestos exposure and may file tens of thousands more asbestos claims over the coming decades. ASBESTOS IN THE COURTS *supra* at 1.; T. WILLGING, ASBESTOS CASE MANAGEMENT: PRETRIAL AND TRIAL PROCEDURES 11 (1985) (District Court for Eastern District of Virginia is one of ten federal courts with 200 or more claims pending); Parrish, *Dimensions of the Problem,* 8 ST. CT. J. 5, 5 (1984) (heaviest concentration of asbestos claims occurs in areas where major United States Naval shipbuilding plants and government contract shipyards have employed large number of insulation workers).

2. *See* ASBESTOS IN THE COURTS, *supra* note 1, at 38 (in cases of asbestos-related diseases, plaintiffs do not know that they were injured until many years after initial exposure).

3. *See* 5B LAWYER MEDICAL CYCLOPEDIA 38.46h (C. Frandel 1972) (table listing periods between exposure to asbestos and development of several occupational diseases that result from exposure). Noncancerous occupational diseases associated with asbestos exposure, such as asbestosis may not develop for 10 to 25 years. *Id.* Other occupational cancers associated with asbestos exposure, such as mesothelioma, may not develop for 10 to 35 years after exposure. *Id.*

asbestos litigation is whether the plaintiff has filed the action within Virginia's two-year statute of limitations for personal injuries.[4] Under Virginia law, unless a plaintiff suffering from an asbestos-related illness files a complaint within two years after his cause of action accrues, the statute of limitation bars any recovery based on his illness.[5] In *Locke v. Johns-Mansville*[6] the Supreme Court of Virginia considered a cause of action for an asbestos-related disease and held that the cause of action accrued when medical evidence demonstrates that a disease exists, rather than when the plaintiff last was exposed to asbestos.[7] Also considering the unique situation of accrual in asbestos-related diseases, the Virginia General Assembly amended the Virginia Code in 1985 to provide that an action for asbestos-related diseases accrues when a physician diagnoses the victim's disease.[8]

Although addressing the accrual of a single asbestos-related disease action, neither the *Locke* court nor the General Assembly addressed the case of a worker developing several medically distinct asbestos-related diseases that become apparent at different times.[9] The practice of filing a complaint after each successive disease appears, however, would violate Virginia's single cause of action rule that permits a plaintiff only one cause of action for all harm resulting from a negligent defendant's act.[10] In *Joyce v. A. C. and S., Inc.*,[11] the United States Court of Appeals for the Fourth Circuit addressed the appropriate accrual date for causes of action that arise from separate and distinct asbestos-related diseases and also considered

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4. *See generally* W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 165 (5th ed. 1984) [hereinafter PROSSER AND KEETON]. In a negligence action a statute of limitations normally begins to run when the plaintiff has suffered an injury. PROSSER AND KEETON, *supra*, at 165. In products liability actions, however, the statute of limitations often begins to run before the plaintiff is aware that he has suffered injury. *Id.* Comment, *Preserving Causes of Action in Latent Disease Cases: The Locke v. Johns-Mansville Corp. Date of Accrual Rule*, 6 VA. L. REV, 615, 618 (1982) (discussing potential harshness of applying statute of limitations to latent disease injuries); Comment, *Statute of Limitations in Occupational Disease Cases: Is Locke v. Johns-Mansville a Viable Alternative to the Discovery Rule?* 39 WASH. & LEE L. REV. 263, 266 (1982)(asbestos disease cases in which two or three decades may separate plaintiff's exposure to asbestos and development of asbestos-related disease illustrate serious consequences to plaintiff regarding court's choice of statute triggering event).

5. *See* VA. CODE ANN. § 8.01-243(A) (Repl. Vol. 1985) (providing two-year statute of limitations period for all personal injury actions); VA. CODE ANN. § 8.01-230 (Rep. Vol. 1986) (providing that cause of action accrues from date of plaintiff's injury).

6. 221 Va. 951, 275 S.E.2d 900 (1981).

7. *See id.* at 959, 275 S.E.2d at 905 (*Locke* court holding that accrual date of asbestos-related disease is when competent medical evidence most clearly pinpoints date of injury).

8. *See* VA. CODE ANN. § 8.01-249(4) (Repl. Vol. 1986 Supp.) (action for injuries caused by asbestos-related disease accrues when physician first communicates to victim that disease exists).

9. *See infra* note 48 and accompanying text (*Locke* decision addresses only accrual of single cause of action for asbestos-related disease).

10. *See infra* notes 49-61 (discussing Virginia courts that adhere to indivisible cause of action rule).

11. 785 F.2d 1200 (4th Cir. 1985).

whether a plaintiff has a separate cause of action and a separate limitations period under Virginia law for each successive disease caused by the same asbestos exposure.[12]

In *Joyce* the plaintiff was exposed to asbestos when he was an employee at a DuPont plant in Martinsville, Virginia.[13] In 1970, because of his exposure to asbestos, Joyce began suffering from pleural thickening, an asbestos-related disease.[14] In 1980, a series of x-rays and tests conducted on Joyce revealed neither the advancement of the pleural thickening disease nor any pulmonary abnormalities.[15] One year later, however, a pulmonary specialist diagnosed mild pleural asbestosis in both lungs of Joyce, and Joyce underwent surgery.[16] After his surgery Joyce developed pleural effusion and parenchymal asbestosis, two distinct asbestos-related diseases.[17]

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12. *Id.* at 1203.

13. *See id.* at 1203. In *Joyce* the plaintiff worked as an insulator at a DuPont plant in Martinsville, Virginia and suffered exposure to asbestos for approximately eleven years; from 1952 to 1955 and, again, from 1964 to 1972. *Id.* In 1972 Joyce learned of the potential hazards of asbestos and requested a job transfer to avoid further exposure to the asbestos insulation. *Id.*

14. *See id.* In *Joyce* DuPont's medical director, following company policy, retained only an employee's initial X-ray and an employee's most recent X-ray, if the intervening X-rays demonstrated no changes. *Id.* at 1203 n.3. Accordingly, DuPont retained only Joyce's initial X-ray and Joyce's most recent X-ray until 1970, when the company physician noticed Joyce's pleural thickening. *Id.* Subsequently, the company physician began to save each of Joyce's annual physical examination X-rays. *Id.*; *see also* 3 ATTORNEY'S DICTIONARY OF MEDICINE p-182 (1986)[hereinafter ATTORNEY'S DICTIONARY]. The pleura is the membrane that lines the inner surface of the chest wall and also covers the lung. 3 ATTORNEY'S DICTIONARY, *supra*, at p-182. Pleural thickening is the swelling of the pleurae and is often one criterion for diagnosis of asbestosis. *Id.*; 4A ATTORNEY'S TEXTBOOK OF MEDICINE 205 C.17 (3d ed. 1986)[hereinafter ATTORNEY'S TEXTBOOK](radiologists use special classifications, including pathologic changes such as pleural thickening, for reading X-rays to diagnose asbestosis).

15. *Joyce*, 785 F.2d at 1202.

16. *Id.*; *see also* 4A ATTORNEY'S TEXTBOOK, *supra* note 14 at 205 C.00-C.50 (3d ed. 1986). Pleural asbestosis is a pneumoconiosis disease of the pleura or lining of the chest cavity. 4A ATTORNEY'S TEXTBOOK, *supra* note 14 at 205 C.00. Once asbestos enters the lungs, the body's normal clearance mechanisms clear away much of the asbestos. *Id.* at 205 C.50. Some asbestos, however, remains in the lung tissue and can continue to cause damage to the victim. *Id.*

17. *See Joyce*, 785 F.2d at 1203 (asbestos manufacturers agreed to characterize pleural effusion and parenchymal asbestosis as separate and distinct diseases rather than progressive stages of initial pleural thickening); *see also* 3 ATTORNEY'S DICTIONARY, *supra* note 14 at P-183 (1986). Pleural effusion is the development of fluid in spaces between the lungs and the chest wall. ATTORNEY'S DICTIONARY, *supra* note 14 at P-183. Pleural effusion which may occur with other asbestos-related lung diseases, particularly asbestosis and mesothelioma, may be the sole or primary clinical symptom of exposure to asbestos. *Id.* Chest pain and chronic onset of the disease are the most common symptoms of pleural effusion. *Id.*

Parenchymal asbestosis is a form of pneumoconiosis, a kind of lung disease contracted by prolonged inhalation of asbestos dust. *Id.* at P-45. Parenchymal asbestosis refers only to changes in the lung substance itself as opposed to pleural asbestosis which refers to changes in the lining of the chest cavity. *Id.* The symptoms are coughing, chest pains, shortness of breath, and fatigue after slight exertion. *Id.* Physicians have recognized all forms of asbestosis to be causes of cancer, especially cancer of the bronchial tubes and pleura. *Id.*

Joyce filed a diversity action in the United States District Court for the Western District of Virginia against the asbestos manufacturers and Joyce's employer, DuPont.[18] Joyce claimed that the manufacturers negligently had failed to warn him about the dangers of asbestos, fraudulently had misrepresented or concealed the hazards of asbestos, and were strictly liable to Joyce for damages resulting from the pleural effusion and parenchymal asbestosis diseases.[19] Joyce claimed that DuPont intentionally had not warned employees about the inherent dangers of asbestos and also had failed to discontinue the employees' exposure to asbestos products.[20] Joyce alternatively claimed that if the manufacturers prevailed on their statute of limitations defense, then DuPont fraudulently had concealed Joyce's medical condition from him during the limitations period.[21]

The manufacturers moved for summary judgment on the ground that Virginia's two year limitation period barred the suit.[22] The district court held that the initial pleural thickening triggered the statute of limitations and that, therefore, Joyce's action against the manufacturers concerning the later asbestos-related diseases was untimely.[23] The district court dismissed Joyce's claim against DuPont under the exclusivity provision of the Virginia Workers' Compensation Act.[24] After permitting limited discovery the district court dismissed Joyce's final claim that DuPont fraudulently had concealed his medical condition.[25] Joyce appealed the dismissals and the adverse

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18. *See Joyce*, 785 F.2d at 1202 (Joyce sued over twenty different manufacturers or distributors of asbestos insulation).

19. *See id.* n.4 (Joyce claimed to be in high risk category for mesothelioma lung cancer and other asbestos-related diseases); *see also* Joyce v. A. C. and S., Inc., 591 F. Supp. 449, 451 (1984). In *Joyce* plaintiff Joyce conceded that he was not attempting to recover from the asbestos manufacturers for his asbestos-related pleural asbestosis that appeared in 1970. *Joyce*, 591 F.Supp. at 451 n.3. Joyce asserted that, instead, he was attempting to recover only for the separate and distinct diseases of parenchymal asbestosis and pleural effusion that developed after January 11,1981, and, that therefore, he timely filed his complaint within the Virginia's two-year statute of limitations. *Id.*

20. *See Joyce*, 785 F.2d at 1206. In *Joyce*, plaintiff Joyce admitted that the Virginia Workers' Compensation Act provides the exclusive remedy for all occupational diseases and accidental injuries that an employee sustains in the course of employment. *Id.* Joyce argued that because DuPont's acts constituted an intentional tort, however, the Virginia Supreme Court would find that the exclusive remedy of the Act was not appropriate. *Id.* at 1206-07.

21. *Id.* at 1203. In *Joyce* plaintiff Joyce alleged separately that if the manufacturers succeeded on their statute of limitations defense, then DuPont must have known that Joyce suffered from pleural thickening. *Id.* at 1207. Joyce claimed that, therefore, DuPont intentionally had deprived him of his cause of action against the manufacturers for his asbestos-related diseases. *Id.*

22. *Id.*; *see supra* note 5 (Virginia has two year personal injury statute of limitations period).

23. *Joyce*, 785 F.2d at 1207.

24. *Id.*; *see* VA. CODE ANN. § 65.1-40 (1980 & Supp. 1986) (rights and remedy enumerated in Act exclude all other rights and remedies to injured worker).

25. *See Joyce*, 785 F.2d at 1208 n.16. The district court in *Joyce* granted DuPont's request for a protective order because Joyce sought to depose present and former DuPont employees without showing that they knew about DuPont's alleged fraudulent concealment of

summary judgment orders to the United States Court of Appeals for the Fourth Circuit.[26]

On appeal the Fourth Circuit in *Joyce* stated that the issue was whether Joyce's claim accrued when the pleural effusion and parenchymal asbestosis diseases first appeared or, instead, when Joyce developed the pleural thickening more than ten years earlier.[27] The Fourth Circuit noted that in Virginia a cause of action accrues when the plaintiff sustains an injury.[28] In determining when a plaintiff sustains injury in an asbestos-related claim, the Fourth Circuit relied upon the decision of the Virginia Supreme Court in *Locke v. Johns-Mansville.*[29] Applying *Locke*, the Fourth Circuit stated that an asbestos-related action accrues when the plaintiff first develops the disease.[30] Accordingly, the Fourth Circuit held that the development of Joyce's pleural thickening triggered the statute of limitations and, therefore, the Fourth Circuit affirmed the district court's finding that the action accrued more than two years before Joyce filed his complaint.[31]

In considering Joyce's claim that a plaintiff has a separate cause of action and a separate two-year limitations period for each distinct asbestos-related disease, the Fourth Circuit noted that the *Locke* court's accrual rule was consistent with Virginia's indivisible cause of action rule.[32] The Fourth

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Joyce's medical condition. *Id.* After limited discovery, the district court granted DuPont's motion for summary judgment because no genuine issue of material fact existed concerning Joyce's alleged claim of fraudulent concealment. *Id.* On Joyce's appeal to the Fourth Circuit Joyce asserted that the district court committed reversible error in limiting his discovery to individual plant physicians and to lower level safety employees rather than corporate personnel. *Id.*

26. *Id.* at 1203.

27. *See id.* at 1204 (Fourth Circuit in *Joyce* cited Virginia's two-year statute of limitations for personal injuries as controlling in case).

28. *Id.*

29. *Id.; see infra* notes 30-31 and accompanying text (discussing *Locke* court's holding that cause of action for asbestos-related diseases accrues when medical evidence demonstrates existence of disease).

30. *Joyce,* 785 F.2d at 1204; *see* Locke v. Johns-Mansville Corp. 221 Va. 951, 962, 275 S.E.2d 900, 907 (1981). The Virginia Supreme Court in *Locke* determined that the plaintiff's disease appeared when the tumor developed. *Id.* at 958-59, 275 S.E.2d at 906. By determining that the disease accrued when the tumor developed, the court declared that the statute of limitations did not bar the plaintiff's suit. *Id.* The *Locke* court's accrual rule ensures that all the essential elements of the plaintiff's cause of action, including injury, are present before the statute of limitations accrues. *Id.* at 957, 275 S.E.2d at 904. The Virginia Supreme Court held that a trial court should determine the time of injury from medical evidence that would pinpoint most clearly the date of injury. *Id.* at 959, 275 S.E.2d at 905.

31. *See Joyce,* 785 F.2d at 1205 (Fourth Circuit affirming district court's dismissal of Joyce's claim). In *Joyce* the Fourth Circuit determined that the medical evidence demonstrated that Joyce's pleural thickening occurred more than two years before Joyce filed his complaint and that, therefore, the action was untimely. *Id.* at 1205. Applying *Locke*, the Fourth Circuit held that Joyce's cause of action was complete and that the statute of limitations accrued with the initial pleural thickening. *Id.*

32. *Id.* at 1205. The Fourth Circuit in *Joyce* cited two Fourth Circuit cases and two Virginia cases to support its holding that under Virginia law the statute of limitations does

Circuit in *Joyce* determined that Joyce's only cause of action against the manufacturers for all his asbestos-related diseases accrued when Joyce initially developed pleural thickening.[33] The Fourth Circuit held that, therefore, the statute of limitations barred Joyce's claim against the asbestos manufacturers for damages arising from the successive pleural effusion and parenchymal asbestosis diseases.[34]

In addressing Joyce's argument that the district court erred in granting DuPont's motion to dismiss under the exclusivity provision of Virginia's Workers' Compensation Act, the Fourth Circuit acknowledged that the Virginia Supreme Court had not considered an intentional tort exception to the Act.[35] The Fourth Circuit found, however, that even if Virginia recognized an intentional tort exception to the Act, DuPont's alleged conduct was insufficient to qualify as an intentional tort in the jurisdictions that recognize exceptions.[36] Therefore, the Fourth Circuit affirmed the district

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not accrue separately for each set of damages. *See* Brown v. American Broadcasting Co. Inc., 704 F.2d 1296, 1300 (4th Cir. 1983) (general rule in Virginia is that limitations period begins to run when initial injury is sustained, and later development of more substantial injuries does not extend limitations period); Large v. Bucyrus-Erie Co., 707 F.2d 94, 97 (4th Cir. 1983) (limitations period begins to run when plaintiff sustains initial injury, even though injury is relatevely slight); Richmond Redev. and Housing Auth. v. Laburnum Constr. Corp., 195 Va. 827, 839, 80 S.E.2d 574, 581 (1954) (when injury sustained is due to wrongful conduct of another, statute of limitation attaches at once, regardless of substantial damages developing in future); Louisville and Nashville R.R. v. Saltzer, 151 Va. 165, 171, 144 S.E. 456, 457 (1928) (any injury, however slight, completes cause of action and statute of limitations begins to run); *see also supra* note 10 (Virginia's indivisible cause of action rule does not afford personal injury plaintiff separate causes of action caused by same tortious conduct of defendant).

33. *Joyce,* 785 F.2d at 1205. The *Joyce* court reasoned that under *Locke*, the pleural thickening triggered the statute of limitations. *Id.* The Fourth Circuit held that, therefore, under Virginia's indivisible cause of action rule, Joyce's only cause of action for all asbestos-related harm also accrued on that date. *Id.*

34. *Id.* The Fourth Circuit in *Joyce* discussed the indivisible cause of action theory in traumatic injury cases in which all damages are usually apparent immediately. *Id.* The *Joyce* court noted that in cases that involved latent injuries like asbestosis, however, the rule is often harsh and unfair to the plaintiff because it precludes the plaintiff from recovering for serious illnesses that develop more than two years after the initial harm. *Id.*

35. *See id.* at 1206 n.11. (Virginia Supreme Court has determined that Act considers injuries resulting from intentional acts of third persons or other employees as accidental, provided they arise in course of employment); *see also supra* note 24 (discussing district court's disposition of Joyce's intentional tort exception to Act).

36. *Joyce,* 785 F.2d at 1206. The Fourth Circuit in *Joyce* noted that the Virginia legislature modeled the Virginia Workers' Compensation Act after a similiar statute in Indiana. *Id.* at 1207. The *Joyce* court stated that Indiana has adopted the majority rule that limits the intentional tort exception to the Act to situations when the employer intends to injure the plaintiff. *Id.* The Fourth Circuit cited two examples to support its finding that the employer must intend to injure an employee to claim an exception to the Act. *Id.*; *see also* Blade v. Anaconda Aluminum Co., 452 N.E.2d 1036, 1038 (Ind. App. 1983) (assertion that employer created unsafe working conditions does not demonstrate that employer intended to harm plaintiff); Cunningham v. Aluminum Co. of Am., Inc., 417 N.E. 2d 1186, 1190 (Ind. App. 1981) (Indiana court held that mere knowledge and appreciation of risk was not equivalent of intent to harm).

court's holding that the Virginia Workers' Compensation Act provided the exclusive remedy for Joyce's claim against DuPont.[37]

The dissent in *Joyce*, like the *Joyce* majority, examined the *Locke* decision and other Virginia precedent, but concluded that Joyce's asbestos-related diseases accrued within Virginia's two-year limitations period.[38] The dissent argued that the district court erred in granting summary judgment for the manufacturers because a dispute of fact existed concerning the date of legal injury to Joyce.[39] The dissent stated that courts should distinguish a cause of action from a right of action before applying a statute of limitations.[40] In the dissent's view, the cause of action was Joyce's exposure to asbestos and the right of action was the matured diseases of pleural effusion and parenchymal asbestosis.[41] Stating that the medical evidence failed to pinpoint a disease that matured outside the statute of limitations, the dissent maintained that the *Joyce* majority unnecessarily decided whether the Virginia Supreme Court would permit a separate cause of action and a

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37. *See Joyce*, 785 F.2d at 1207 (Fourth Circuit predicting that Virginia Supreme Court would follow Indiana rule and that, therefore, Joyce's complaint failed to establish intentional tort). The Fourth Circuit in *Joyce* considered Joyce's alternative claim of corporate concealment and held that Joyce's discovery failed to demonstrate that DuPont intentionally had concealed Joyce's medical condition. *Id.* at 1207-08.

38. *See id.* at 1209 (Swygert, J., dissenting) (*Joyce* dissent applying *Locke* to facts in *Joyce*); *see also infra* notes 39-42 (discussing dissent's argument that Joyce's cause of action had not accrued).

39. *Joyce*, 785 F.2d at 1209 (Swygert, J., dissenting). The dissent in *Joyce* argued that the *Locke* court had established that the medical evidence must prove the existence of a disease with a reasonable degree of certainty. *Id.* at 1210. Unlike the *Joyce* majority, the dissent found that the medical evidence failed to pinpoint when Joyce initially suffered from pleural thickening. *Id.* at 1210-12. The dissent noted that although a DuPont physician informed Joyce of his pleural thickening, DuPont's medical director knew of no connection between pleural thickening and asbestosis. *Id.* at 1211. Accordingly, in the dissent's opinion, a dispute of fact existed concerning the date Joyce developed his pleural thickening and the district court, therefore, incorrectly granted summary judgment. *Id.*

40. *Id.* The dissent in *Joyce* cited *First Virginia -Colonial v. Baker* to illustrate its proposition that the distinction between a cause of action and a right of action is crucial to the issue of the statute of limitations. *Id.*; *see* First Virginia-Colonial v. Baker, 225 Va. 72, 82, 301 S.E.2d 8, 13 (1983).

41. *Joyce* 785 F.2d at 1209 (Swygert, J., dissenting). The *Joyce* dissent reasoned that the progressive nature of asbestos-related diseases is not analogous to traumatic accidents when the injury and right of action occur immediately. *Id.* The dissent distinguished *Joyce* from *Brown v. American Broadcasting Co., Inc.*, a case relied on by the Fourth Circuit, to support the argument that *Locke* did not depart from the single indivisible cause of action rule. *Id.*; *see* Brown v. American Broadcasting Co., Inc., 704 F.2d 1296, 1300 (4th Cir. 1983)(*Locke* decision did not afford plaintiff separate cause of action and limitations period). The dissent explained that the plaintiff in *Brown* suffered immediate injury when the American Broadcasting Company aired the defamatory broadcast. *Joyce*,785 F.2d at 1209 (Swygert, J., dissenting). Stating that Joyce's injuries from the later asbestos-related diseases were not immediate as the plaintiff's injury in *Brown*, the dissent concluded that Joyce's cause of action for the successive diseases was not complete until the physician diagnosed Joyce as having the pleural effusion and parenchymal asbestosis diseases. *Id.*

separate limitations period for each distinct asbestos-related disease that originated from the same exposure to asbestos.[42]

Although disagreeing on the accrual date of Joyce's pleural thickening, the dissent and the *Joyce* majority correctly agreed that the decision of the Virginia Supreme Court in *Locke v. Johns-Mansville* governs the accrual date of an asbestos-related disease.[43] The *Locke* court determined for the first time the accrual date of latent disease injuries and defined the statutory term "injury" as positive physical or mental hurt to the plaintiff.[44] According to the *Locke* court, a cause of action for an asbestos disease accrues when competent, medical evidence can pinpoint the date of injury from exposure to asbestos.[45] The Virginia Supreme Court in *Locke* held that, therefore, a plaintiff's cause of action accrued when the disease first developed, rather than when the plaintiff last was exposed to asbestos.[46] The Fourth Circuit in *Joyce*, after considering the medical evidence according to the *Locke* standard, determined that Joyce's pleural thickening developed more than two years before Joyce filed his claim and that, therefore, Joyce had not filed his claim within Virginia's two year limitations period.[47]

Although the *Joyce* court correctly relied on *Locke* to determine the accrual date of a single asbestos-related disease, the *Locke* court did not address whether a plaintiff would have a separate cause of action and a separate limitations period for each successive disease arising from the same asbestos exposure.[48] The weight of authority in Virginia, however, demonstrates that the *Joyce* court correctly rejected Joyce's claim of a separate cause of action for each distinct disease.[49] In *Richmond Redevelopment and*

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42. *Joyce*, 785 F.2d at 1209.

43. *See id.* at 1203-04 (majority applying *Locke*); *id.* at 1209 (dissent applying *Locke*) *see* Locke v. Johns-Manville, 221 Va. 951, 962, 275 S.E.2d 900, 907 (1981) (establishing accrual date for asbestos-related diseases); *supra* notes 7 & 29 (courts determine accrual of asbestos-related diseases on medical evidence that establishes existence of disease).

44. *See Locke,* 221 Va. at 957, 275 S.E.2d at 904 (*Locke* court defining injury as actual physical or mental harm to plaintiff, not merely legal invasion of plaintiff's rights).

45. *See id.* at 959, 275 S.E.2d at 905 (stressing that crucial fact is precise date plaintiff suffered injury). The Virginia Supreme Court in *Locke* stated that the precise date the plaintiff's tumor began to form was unknown and that the evidence did not show that the plaintiff's injury occurred earlier than the onset of the tumor's symptoms. *Id.* The *Locke* court held that, therefore, the plaintiff had filed his complaint within statute of limitations period. *Id.* at 958-59, 275 S.E.2d at 905.

46. *Id.* at 959, 275 S.E.2d at 905.

47. *Joyce*, 985 F.2d at 1202.

48. *See id.* at 1204-05 (Fourth Circuit explaining that *Locke* does not apply to several, medically distinct asbestos-related diseases).

49. *See* Granahan v. Pearson, 782 F.2d 30, 33 (4th Cir. 1985) (Virginia law does not permit division of plaintiff's cause of action); Brown v. Am. Broadcasting Co., Inc., 704 F.2d 1296, 1300 (4th Cir. 1983)(statute of limitations accrues against all damages when cause of action is complete, even if plaintiff's damages do not arise until future date); Kriesel v. Berkshire Assoc., Inc., 452 F.2d 491, 494 (4th Cir. 1971)(under Virginia law, courts may not split single cause of action into several suits); Snyder v. Exum, 227 Va. 373, 377, 315 S.E.2d

Housing Authority v. Laburnum Construction Corp.,[50] for example, the Virginia Supreme Court expressed the general rule that for the statute of limitations, there is but a single, indivisible cause of action.[51] In *Laburnum* the defendant negligently installed a gas pipeline which, several years later, exploded and caused extensive damage to the plaintiff's building.[52] The *Laburnum* court determined that the plaintiff's injury occurred when the defendant initially installed the defective pipeline, and that the plaintiff's difficulty in ascertaining the harm warranted no exception to the single, indivisible cause of action rule.[53] The *Laburnum* court held that, accordingly, the statute of limitations barred the plaintiff's subsequent claim for property damages.[54]

Since *Laburnum* the Fourth Circuit in *Brown v. American Broadcasting Co., Inc.*[55] held that the Virginia Supreme Court in *Locke* did not afford a personal injury plaintiff separate causes of action for distinct injuries caused by the same tortious conduct.[56] In *Brown* the plaintiff alleged that an American Broadcasting Company (A.B.C) telecast had defamed her and had injured her reputation.[57] The plaintiff filed her complaint more than two years after A.B.C. broadcasted the program but argued that under *Locke* the statute of limitations did not accrue until she learned about the defamatory television broadcast.[58] Affirming the district court's dismissal of the plaintiff's claim, the Fourth Circuit in *Brown* noted that under Virginia law the statute of limitations does not accrue separately for each set of damages that results from a defendant's negligent act.[59] The *Brown* court found that under *Locke* a statute of limitations accrues when all the

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216, 218 (1984)(courts must determine whole cause of action in one action); Deal v. C.E. Nix & Son, Inc., 206 Va. 57, 141 S.E.2d 683 (1965)(same); *see also infra* notes 51-62 and accompanying text (discussing cases in support of indivisible cause of action rule).

50. 195 Va. 827, 80 S.E.2d 574 (1954).

51. *Id.* at 839, 80 S.E.2d at 581.

52. *Id.* at 830, 80 S.E. 2d at 576.

53. *Id.* at 838, 80 S.E.2d at 581; *see Comptroller of Va. ex. rel. Va. Military Inst. v. King*, 217 Va. 751, 759, 232 S.E.2d 895, 900 (1977) (difficulty in ascertaining injury is irrelevant to Virginia's indivisible cause of action rule).

54. *Laburnum*, 195 Va. at 838, 80 S.E.2d at 581.

55. 704 F.2d 1296 (4th Cir. 1983).

56. *See id.* at 1300 (discussing *Locke* court's rule regarding date of accrual in asbestos-related disease cases). In *Brown* the Fourth Circuit determined that the *Locke* decision did not help the plaintiff avoid the limitations defense. *Id.*; *see supra* note 23 (under *Locke*, statute of limitations begins to run if all elements of cause of action are present).

57. *Id.* at 1299. In *Brown* the plaintiff appeared briefly on an American Broadcasting Company (A.B.C.) telecast that detailed the fraudulent sale of insurance to the elderly. *Id.*

58. *See Brown*, 704 F.2d at 1300 (Brown argued that despite defendant's earlier negligent act, statute of limitations commenced only when Brown actually suffered injury).

59. *Id.* The *Brown* court cited two Virginia Supreme Court cases to support the determination that the statute of limitations did not accrue separately for each set of damages. *See* Street v. Consumers Mining Corp., 185 Va. 561, 566, 39 S.E.2d 271, 272 (1946)(cause of action accrued upon initial wrong, not upon serious damage); Louisville & Nashville R.R. Co. v. Saltzer, 151 Va. 165, 170, 144 S.E.2d 467, 458 (1928)(upon recognizable injury, cause of action accrued for all of plaintiff's damages that resulted from defendant's negligent act).

elements of a cause of action exist, including the essential element of injury.[60] The *Brown* court held that the plaintiff, therefore, suffered immediate injury upon the initial broadcast of A.B.C.'s program and that her cause of action was complete on that date.[61] The *Brown* court concluded that, accordingly, Virginia's two-year statute of limitations barred the plaintiff's claim.

Although Virginia precedent suggests that a plaintiff does not have separate causes of action for each distinct injury caused by the same tortious act, Virginia courts have allowed exceptions to the indivisible cause of action rule.[62] In *Carter v. Hinkle*[63] the Virginia Supreme Court considered the consequences of injury to person and property caused by the negligent operation of an automobile.[64] In *Carter* the plaintiff filed two separate actions against the defendant, one for property damage and the other for personal injuries.[65] After obtaining a judgment and recovering for the property damage in the first action, the plaintiff instituted another action for the personal injuries that he sustained in the same accident.[66] The defendants in *Carter* argued that the satisfaction of the judgment in the property damage action barred Hinkle's right to bring the second action for personal injuries.[67] Reversing the lower court's dismissal of Hinkle's personal injury claim, the *Carter* court reasoned that it is essential in certain cases, such as automobile accidents, to allow one action for personal injury and another action for property damage.[68] Therefore, the *Carter* court held that the plaintiff had two separate rights of action which arose from a single cause of action and that the two rights of action accrued at different times.[69]

Other courts construing Virginia's personal injury statute also have split causes of action to allow a plaintiff to maintain suit.[70] For example, in

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60. *Brown*, 704 F.2d at 1300.

61. *See id.* (Fourth Circuit determining that all necessary elements of cause of action were present upon televised broadcast).

62. *See infra* notes 64-75 and accompanying text (discussing cases that recognize exception to Virginia's indivisible cause of action rule).

63. 189 Va. 1, 52 S.E.2d 135 (1949).

64. *Id.* at 3, 52 S.E.2d at 136.

65. *Id.*

66. *Id.*

67. *Id.*

68. *See id.* at 12, 52 S.E.2d at 140 (finding support for splitting plaintiff's cause of action from injuries to person and property that result from automobile accidents).

69. *Id.* at 11, 52 S.E.2d at 140. The Virginia Supreme Court in *Carter* followed the minority of courts that hold that two distinct causes of action may arise from a single tort. *Id.* at 12. The *Carter* court reasoned that a person who sustained physical injury and injury to property could consolidate both claims but concluded that Virginia law did not require the person to do so. *Id.* at 12.

70. *See, e.g.*, Barnes v. Sears, Roebuck & Co., 406 F.2d 859, 860 (4th Cir. 1969)(sale of defective bicycle gave rise to immediate cause of action for property damage, and also, gave rise to potential tort cause of action for personal injuries caused by same defective bicycle); Sides v. Richard Machine Works, Inc., 406 F.2d 445, 445 (4th Cir. 1969)(allowing

Caudill v. Wise Rambler, Inc.,[71] the Virginia Supreme Court considered the negligent sale of an automobile that had a defective steering mechanism which eventually injured the plaintiff.[72] The plaintiff in *Caudill* filed her complaint more than two years after the sale of the automobile and, in defense, the defendant asserted Virginia's two-year personal injury statute of limitations.[73] Reversing the lower court's dismissal of the plaintiff's claim, the *Caudill* court split the defendant's negligent acts of selling the defective automobile into two causes of action, one cause for property damage, and another cause for personal injuries.[74] The *Caudill* court reasoned that although the statute of limitations for the property damage cause of action would begin to run at the date of sales, the statute of limitations for physical harm should not begin to run until the date of the plaintiff's injuries.[75] The *Caudill* court held that, therefore, Virginia's two-year limitations period did not bar the plaintiff's action for her personal injuries.

Although Virginia courts have recognized exceptions to the indivisible cause of action rule in cases that involved property damage and subsequent personal injury, the Fourth Circuit correctly held that these exceptions did not extend Joyce a separate cause of action for each distinct disease caused by the same asbestos exposure.[76] The Fourth Circuit in *Granahan v. Pearson*[77] held that Virginia law would not allow a plaintiff to split a personal injury cause of action.[78] In *Granahan* a physician failed to remove the plaintiff's intrauterine device (I.U.D.) despite the signs of a pelvic inflammatory disease.[79] The plaintiff developed tubal blockage that, eventually, led to her sterility.[80] Five years after her last visit to her physician, the plaintiff sued her physician for damages based on injuries that resulted from the physician's negligence.[81] Affirming the district court's finding that Virginia's two-

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plaintiff one action for personal injury and another action for property damage resulting from gasoline locamotive that derailed on overhead track); Caudill v. Wise Rambler, Inc. 210 Va. 11, 12-13, 168 S.E.2d 257 (1969)(cause of action for negligent sale of automobile that had defective steering mechanism split into property damage claim and personal injury claim).

71. 210 Va. 11, 168 S.E.2d 257 (1969).

72. *Id.* at 13, 168 S.E.2d at 260.

73. *Id.* at 12, 168 S.E.2d at 259.

74. *Id.* at 12-13, 168 S.E.2d at 259-60. The Virginia Supreme Court in *Caudill* determined that the alleged breach of an implied warranty of fitness occurred when the plaintiff purchased the automobile. *Id.* at 13, 168 S.E.2d at 260. The *Caudill* court also determined that the plaintiff had a potential tort action that would accrue at the time of injury. *Id.*

75. *Id.*

76. *See infra* notes 77-83 and accompanying text (noting cases in which courts have found that plaintiff may not split personal injury cause of action).

77. 782 F.2d 30 (4th Cir. 1985).

78. *Id.* at 32-33.

79. *Id.* at 31.

80. *Id.*

81. *Id.* In *Granahan* the plaintiff went to another doctor who diagnosed Pelvic Inflammatory Disease (PID). The plaintiff claimed that Dr. Pearson's negligence in failing to remove her I.U.D. device caused her tubal blockage and subsequent sterility. *Id.* Granaham argued that under *Locke* her cause of action did not accrue until she learned of her sterility and, that therefore, she filed her complaint within Virginia's two-year limitations period. *Id.* at 32.

year limitations period barred the plaintiff's claim, the Fourth Circuit in *Granahan* stated that to survive a challenge based on the statute of limitations, the plaintiff had to prove that her sterility was a separate and distinct injury from her pelvic inflammatory disease.[82] The *Granahan* court held that even if the plaintiff could prove that her injuries were separate and distinct, however, Virginia law does not permit such a division.[83] Accordingly, the Fourth Circuit in *Granahan* dismissed the plaintiff's claim against the physician.

The Fourth Circuit in *Joyce* correctly followed Virginia precedent and did not apply a separate statute of limitations to each of Joyce's separate diseases.[84] The *Granahan* court's adherence to Virginia's single indivisible cause of action rule in a case that involved medically distinct injuries suggests that the Fourth Circuit correctly held that the Virginia Supreme Court would not afford a plaintiff a separate cause of action and a separate limitations period for each distinct asbestos-related disease that resulted from the same asbestos exposure.[85] The *Joyce* court's adherence to Virginia's indivisible cause of action rule, however, illustrates the particular inequities to plaintiffs suffering from several medically distinct asbestos diseases.[86] In jurisdictions that apply Virginia's single, indivisible cause of action rule, the plaintiff, after a physician's initial diagnosis of any asbestos-related disease, must sue within two years for damages based on the present disease.[87] The plaintiff, however, could not sue for damages based on other asbestos-related diseases that may develop in the future because Virginia courts would not permit him to recover damages for special or conjectural future injuries.[88] On the other hand, if the plaintiff waits until medical

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82. *Id.*

83. *See id.* at 32-33 (holding that statute of limitations does not accrue separately for each set of damages). The Fourth Circuit in *Granahan* cited two previous Fourth Circuit decisions to support its determination that in Virginia a statute of limitations runs against all injuries, including injuries that do not occur until a future date. *See* Large v. Bucyrus-Erie Co., 707 F.2d 94, 97 (4th Cir. 1984) (plaintiff's illness apparent more than two years before filing complaint and, therefore, plaintiff's cause of action was untimely); Brown v. American Broadcasting Co., 704 F.2d 1296, 1300 (4th Cir. 1983) (plaintiff's initial injury completed cause of action and, therefore, triggered statute of limitations); *see also supra* notes 51-62 and accompanying text (discussing cases that follow Virginia indivisible cause of action rule).

84. *See supra* note 83 and accompanying text (Virginia precedent supporting Fourth Circuit's holding that Virginia law provides no exception to single indivisible cause of action rule in personal injury actions).

85. *See supra* notes 32-33 and accompanying text (Fourth Circuit permitting no exception to indivisible cause of action for Joyce's successive asbestos-related diseases).

86. *See supra* notes 81-85 and accompanying text (no exception to indivisible cause of action in personal injury cases); *see also supra* notes 51-62 and accompanying text (cases following indivisible cause of action rule).

87. *See infra* note 88 (cases discussing American rule against recovering damages for speculative or conjectural future injuries).

88. *See Phillips v. Stewart*, 207 Va. 214, 221, 148 S.E.2d 784, 786 (1966). The Virginia Supreme Court in *Phillips v. Stewart* denied damages that were not the natural and proximate result of the defendant's conduct. *Id.*; *see Smith v. Wright*, 207 Va. 482, 485, 151 S.E.2d

evidence demonstrates that subsequent diseases have developed, the statute of limitations triggered by the initial asbestos-related disease would bar his claim.[89]

In *Joyce v. A.C. and S., Inc.* the Fourth Circuit held that the Virginia Supreme Court would not afford a plaintiff a separate cause of action and a separate limitations period for each successive disease caused by the same asbestos exposure.[90] Because Virginia courts have not recognized an exception to Virginia's indivisible cause of action rule in cases involving only personal injuries, the initial diagnosis of an asbestos-related disease triggers the statute of limitations for all future asbestos-related illnesses.[91] Although favoring plaintiffs suffering from a single asbestos-related disease, neither the Virginia Supreme Court in *Locke* nor the Virginia General Assembly has addressed the potential unfairness to plaintiffs suffering from several medically distinct diseases that occur at different times.[92] The Virginia Supreme Court and the Virginia General Assembly should recognize that applying the indivisible cause of action rule to latent asbestos-related disease cases may be inequitable and, accordingly, modify the rule to permit separate limitations periods for each disease.[93]

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359,361 (1966)(burden is on plaintiff to prove by preponderance of evidence that injuries to property were attributable to defendant's negligent act); *Diggs v. Lail*, 201 Va. 871, 876, 114 S.E.2d 743, 747 (1960)(if evidence of injury to plaintiff only speculative, then plaintiff cannot recover). *See generally*, 5C MICHIE'S JURISPRUDENCE 13-15, 47-51 (Repl. vol. 1983). The damages recoverable in any case must be certain, both in their nature and in respect to the cause of injury. MICHIE's at 47. Damages that are uncertain, contingent, or speculative cannot be recovered. *Id.* at 48.

89. *See supra* notes 27-31 and accompanying text (Fourth Circuit holding that initial asbestos-related disease triggered statute of limitations).

90. *See supra* notes 32-34 and accompanying text (Fourth Circuit in *Joyce* determined that Virginia's indivisible cause of action would not permit splitting of actions).

91. *See supra* notes 81-85 and accompanying text (discussing Virginia cases that provide no exception to indivisible cause of action in personal injury actions).

92. *See supra* notes 7-8 and accompanying text (1985 amendment and *Locke* decision address only accrual of single asbestos-related diseases).

93. *See supra* notes 82-88 and accompanying text (analysis to support that Virginia legislature or Virginia Supreme Court should modify single indivisible cause of action rule).