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PRODUCTS LIABILITY AND THE VIRGINIA STATUTE OF LIMITATIONS — A CALL FOR THE LEGISLATIVE RESCUE SQUAD

*Robert I. Stevenson**

“It is the politicians whose minds have not been sufficiently prepared for anything unfamiliar to their ancestors.”

—John Maynard Keynes

In recent years a flood of federally-funded scientific breakthroughs have on almost a weekly basis established that some form of cancer¹ or other dreaded disease is “caused” by exposure to a man-made product often not previously suspected of having a toxic tendency.² Persons so afflicted then seek recovery from the product

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1. News reports seem sometimes to suggest that cancer in the United States is approaching pandemic proportions. Fortunately the medical facts are to the contrary.

Next to lung cancer, which is caused by chemicals in cigarette smoke, cancers of the colon (large intestine) and breast account for the greatest mortality, and these two diseases have hardly changed in frequency for decades. Changes in other types of cancer have occurred, however. Stomach cancer has been diminishing for several decades — nobody knows why. The death rate from cancer of the cervix has also fallen in the past thirty years. On the other hand, more deaths are being caused by cancers of the pancreas and nervous system. The leukemias increased in frequency from 1930 to 1950, but have not changed much since then. These facts suggest that changing environmental influences are at work, but they do not support the notion that our increasingly industrialized environment has, so far, produced an epidemic of new cancers in the general population.

But just because epidemiologists do not yet see evidence of a big rise in cancer deaths does not mean that it can't happen. Experience has taught us that there is a delay period; as a rule cancer usually appears ten to thirty years after exposure begins. A potent carcinogen brought into our chemical environment today would probably begin to show up as cancer deaths in the year 2000; a carcinogen introduced in 1960 could start to reveal itself any time now. The only way to be truly certain that a new chemical is carcinogenic for people is to find out over a period of time that it causes cancer. However, if the chemical were to produce cancer at fairly low rates, its effect on people might be undetected because so many other causes can contribute to the development of cancer.

G. JOHNSON & S. GOLDFINGER, HARVARD MEDICAL SCHOOL HEALTH LETTER BOOK 310 (1981).

2. The attempt to pin-point a single product as the “cause” of so complex a malady as cancer may be erroneous. See, e.g., Gori, *The Uncertain Business of Testing for Cancer*, Wall St. J., July 24, 1981, at 24, col. 3:

[C]ancer results from complex and vaguely understood interactions, and does not

manufacturer.³ Their basis in tort is either for negligence in producing so harmful (and thus defective) a product, or for having failed to warn of the danger, or for "strict liability" within Section 402A of the Restatement (Second) of Torts. Where, as in Virginia, there is uncertainty as to the acceptance of Section 402A as a matter of state law,⁴ an alternative basis is under the Uniform Com-

stem from discrete causes, as it is with flu or measles. Among the many factors that determine cancer, genetics is important. Different animal species, and even individuals within a species, can be susceptible or resistant, the final outcome being further influenced by diet, unknown contaminants, stress, diseases, natural radiation and many other disturbances of unpredictable dimensions.

Historically, however, mankind often seems more adept at discovering "causes" of terminal diseases than "cures." In the Middle Ages when Europe was decimated by the bubonic plague, physicians at the prestigious University of Paris attributed the cause to a "triple conjunction of Saturn, Jupiter and Mars in the 40th degree of Aquarius." B. TUCHMAN, *A DISTANT MIRROR - THE CALAMITOUS 14TH CENTURY* 106 (1978).

In addition to such standard afflictions as cancer, researchers sometimes unearth the "cause" of disorders which are themselves medically obscure. For example, during 1980, laboratory tests seemed to indicate that a rare, but serious malady known as toxic shock syndrome may be "caused" by certain tampons used in feminine hygiene. Subsequent scientific studies may prove the initial scare was as ill-founded as the 1981 coffee flurry involving pancreatic cancer. See Wall St. J., June 26, 1981, at 1, col. 1.

3. Nationwide, the quantity of this type of products liability litigation is staggering. In early 1980, it was estimated that there were pending nationally more than 3,000 asbestosis cases and that there were at least 500,000 more workers "at risk." Practicing Law Institute Seminar in New York City on Toxic Substances Litigation, reported in [1980] 8 PROD. SAFETY & LIAB. REP. (BNA) 142.

The damage claims are similarly staggering. In a class action consolidating the 1,500 federal cases involving the Dalcon Shield birth control device, the United States District Court noted that compensatory damages claimed exceed \$500 million. *In re "Dalcon Shield" I.U.D. Products Liability Litigation*, (N.D. Cal. June 25, 1981), reported in [1981] 9 PROD. SAFETY & LIAB. REP. (BNA) 570. The defendant in that lawsuit has reported that the amount claimed as punitive damages in all such suits aggregates \$2.35 billion. Richmond Times-Dispatch, Aug. 2, 1981, § F, at 12, col. 4.

4. Some commentators extol what has been referred to as the Virginia system of "strict liability in contract." See Speidel, *The Virginia "Anti-Privity" Statute: Strict Products Liability Under the Uniform Commercial Code*, 51 VA. L. REV. 804 (1965). Others believe this an inadequate substitute for § 402A. See Note, *Virginia Should Adopt Strict Tort Recovery in Products Liability Suits Involving Personal Injury*, 14 U. RICH. L. REV. 391 (1980).

Both systems appear to have serious flaws as a matter of sound products liability law. For example, the Uniform Commercial Code (UCC) allows the seller to exclude the implied warranty of merchantability, and this is routinely accomplished in the sale of high cost items. And § 402A, by eliminating the element of fault as the basic ingredient of liability, opens the door to an unprincipled reaching for a "deep pocket" with a lack of concern for the fact that it is the consumer who eventually shoulders the cost. Ordinary negligence law also is flawed in a state such as Virginia which insists on retaining the "all or nothing" approach of the contributory negligence defense rather than adopting the modern theory of comparative fault. The Virginia law reports are replete with cases holding that a plaintiff cannot recover in tort if he has himself been negligent. Where, however, a jury determines that the defendant's fault has been substantial, it is likely to overlook some lesser degree of fault on the part of the plaintiff—though it may utilize this factor in reducing the recovery. If this

mercial Code (UCC) for breach of the implied warranty of merchantability as to the fitness of the product for ordinary purposes.⁵

Typically it is a disease such as asbestosis that remains latent for many years⁶ and during the dormant period lacks symptoms discernible to the medical profession, let alone to the laity.⁷ The date

surmise is accurate, then there exists a comparative fault doctrine in fact, if not in legal theory.

5. See VA. CODE ANN. § 8.2-314 (Added Vol. 1965). In products liability practice in Virginia, a plaintiff's complaint routinely includes a count for breach of the implied warranty of merchantability. Thereafter, however, when such a case comes to trial, plaintiff's counsel just as routinely seems to concentrate exclusively on the elements of tort law. The complexity, because of the multiplicity of the several causes of action, is understandably bewildering to juries. Accordingly, it is questionable whether the implied warranty count is a worthwhile ingredient in such actions.

6. See, e.g., *Porter v. American Optical Corp.*, 641 F. 2d 1128, 1133 (5th Cir. 1981), where Circuit Judge Coleman discussed the difficulties regarding manifestation:

Continuous breathing of asbestos-laden air will cause an eventual concentration of the particles in the lung tissue. Once in the lung, the particles cannot be coughed out and remain there permanently. The noxious effect of these rock particles causes the body to set up an inflammation until eventually fibrosis occurs. Through fibrosis the body lays down scar tissue in the lung surrounding the asbestos fibers. With a large concentration of the fibers lodged in the lung cavities, scar tissue eventually replaces most of the healthy lung tissue, disrupting the intake of air into lung air sacs and causing a shortness of breath. A sufficiently high concentration and buildup of the condition will cause death. This process, called asbestosis, can also be a precipitating cause of other illnesses such as emphysema, bronchitis, and pneumonia.

Asbestosis is a cumulative and progressive disease. It does not occur overnight after breathing in a substantial number of asbestos particles during the day. Rather, the disease is a culmination of body reaction to the particles inhaled during years of exposure. The disease is slow in nature and may require from ten to twenty years from onset to fully manifest itself. Persons may develop asbestosis long after they have left contact with an asbestos environment. Continuous exposure to asbestos particles, however, prods the disease at a greater rate. Even though the body has begun a reaction to the fibers, inhalation of new fibers adds to the lung inflammation and accelerates injury. Due to this progressive nature, it is generally quite difficult, if not impossible, to assign manifestation of the disease to a specific date.

7. For some of the leading medical literature on asbestosis, see Selikoff, Bader, Bader, Churg & Hammond, *Asbestosis and Neoplasia*, 42 AM. J. MED. 487 (1967); Selikoff, Churg & Hammond, *The Occurrence of Asbestosis among Insulation Workers*, 132 ANN. N.Y. ACAD. SCI. 139 (1965). As an egregious modern instance, consider the many current lawsuits involving the synthetic drug, diethylstilbestrol, otherwise known as DES. Commencing in 1947, this prescription drug was used to prevent miscarriages until it was discovered in 1971 that some—but not all—prenatally exposed daughters of mothers who had taken DES develop cancerous vaginal abnormalities, which appear sometime after puberty. As a result, approximately 1,000 lawsuits have been filed against DES manufacturers. See Podgers, *DES Ruling Shakes Products Liability Field*, 66 A.B.A. J. 827 (1980).

So that DES sons won't feel discriminated against, researchers in 1980 were attempting to establish that if the sons were having infertility problems, their difficulty could be traced to the DES their mothers had taken during pregnancy. If so established, it will be interesting in jurisdictions having the "discovery" test for limitation accrual purposes to determine the

of the fateful exposure is usually not ascertainable because the plaintiff typically has been in the vicinity of the toxic product for a decade or more. And though the incubation period of the disease may be known medically within at least a broad range, that period will vary widely in individual cases. After a particular victim's disease becomes medically detectable, the date of diagnosis depends upon the expertise of the particular physician in what often is medically an esoteric area, and that date may itself precede the time when the person had any reason to suspect that he had a health problem and a need to consult a doctor.

Because of these medical peculiarities, lawsuits to recover for such injuries raise difficult legal questions regarding the statute of limitations. Although the problem is not new to the law,⁸ the difficulties have multiplied with the recent explosion of products liability lawsuits following each revelation of another allegedly toxic product. In Virginia, the snarls have been exacerbated because in suits brought in tort, the only mechanism for coping with a limitations problem is a statute which is substantially the same as the one enacted by the English Parliament in 1623⁹ in a period when it was a medical novelty to learn that the blood circulates. The results from applying so antique¹⁰ a mechanism to so modern a

earliest date when the sons should have discovered their infertility.

8. The issue surfaced initially in workmen's compensation situations such as *Urie v. Thompson*, 337 U.S. 163, 170 (1949). There, a locomotive fireman had to contend with a statute of limitations defense in a suit to recover under the Federal Employers' Liability Act for the pulmonary disease he had developed from inhalation of silica dust during his thirty years of employment by the railroad. It was held that the lawsuit was not time-barred on the ground that the limitation clock did not commence running until such time as "the accumulated effects of the deleterious substance manifested themselves to the individual plaintiff." See generally, *Estep & Allan, Radiation Injuries and Time Limitations in Workmen's Compensation Cases*, 62 MICH. L. REV. 259 (1963).

9. The original English statute was an Act for Limitations of Actions and for Avoiding Suits in Law, 1623, 21 Jac. I, ch. 16, § 3, IV Part II. St. of Realm 12.22. It barred certain designated lawsuits if not instituted within six years "after the cause of actions or suit." In Virginia, the first limitations statute, 1 VA. REV. CODE 488 (1819), reiterated the 1623 statute, but reduced the period to five years. Thirty years later, in VA. CODE § 11 (1849), the provision was reworded to bar actions brought more than five years "after the right to bring the action shall have accrued." Thereafter, no further changes were made until 1954 when the provision was amended to read: "Every action for personal injuries shall be brought within two years next after the right to bring the action shall have accrued." VA. CODE ANN. § 24 (1954). Such provision today is found—virtually without change—in VA. CODE ANN. § 8-01.243(A) (Repl. Vol. 1977). See note 11 *infra*.

10. The purpose of Parliament's enacting the 1623 Act is obscure. Some commentators have inferred that it was enacted "primarily to keep out of the King's courts what might be considered inconsequential claims, and incidentally, to minimize the hardship which suit in the King's courts imposed on poor defendants." *Developments in the Law: Statutes of Lim-*

medico-legal problem are as curious as if a Virginia manufacturer were today operating its furniture factory with only the unsophisticated wood-working tools in use at the founding of the Virginia colony, or if capital punishment in the state were still carried out via the headsman's axe used in 1618 in the execution of Sir Walter Raleigh.

In suits for personal injuries based on tort, section 8.01-243(A) of the Virginia Code replicates the original 1623 statute by starting the ticking of the limitations clock on the date when "the cause of action shall have accrued."¹¹ But whereas today most jurisdictions do not commence the ticking until the plaintiff discovered his tortious injury, or should reasonably have discovered it,¹² section 8.01-230 of the Virginia Code as in effect since 1977 has banned use of the "discovery" test.¹³ And unlike many other states, Virginia has

itations, 63 HARV. L. REV. 1177, 1178 (1950). If so, this purpose seems at odds with modern products liability lawsuits which, when brought against manufacturers of harmful products, are not usually "inconsequential" claims and do not involve financially "poor" defendants.

Over the course of three centuries, society's attitudes toward personal injury claims have, of course, changed materially. See Kelley, *The Discovery Rule for Personal Injury and Statutes of Limitations: Reflections on the British Experience*, 24 WAYNE L. REV. 1641 (1978).

11. VA. CODE ANN. § 8.01-243(A) (Repl. Vol. 1977) reads: "Unless otherwise provided by statute, every action for personal injuries, whatever the theory of recovery, . . . shall be brought within two years next after *the cause of action shall have accrued.*" (emphasis added).

12. Modern courts have said that the purpose of the traditional statute of limitations is "to compel the exercise of a right of action within a reasonable time." Street v. Consumers Mining Corp., 185 Va. 561, 575, 39 S.E.2d 271, 277 (1946). Because the "discovery" rule accords with this purpose of penalizing only a dilatory plaintiff, that rule has been adopted in most jurisdictions. See McKenna v. Ortho Pharmaceutical Corp., 622 F.2d 657 (3rd Cir. 1980); Borel v. Fibreboard Paper Prod. Corp., 493 F. 2d 1073 (5th Cir. 1976); Karjala v. Johns-Manville Prod. Corp., 523 F.2d 155 (8th Cir. 1975); Williams v. Borden, Inc., 637 F.2d 731 (10th Cir. 1980); Withers v. Sterling Drug, Inc., 319 F. Supp. 878 (S.D. Ind. 1970); Nolan v. Johns-Manville Asbestos, 85 Ill. 2d 161, 421 N.E.2d 864 (1981); Miller v. Beech Aircraft Corp., 204 Kan. 184, 460 P.2d 535 (1969); Louisville Trust Co. v. Johns-Manville Prod. Corp., 530 S.W.2d 497 (Ky. 1979); Harig v. Johns-Manville Prod. Corp., 284 Md. 70, 394 A.2d 299 (1978); Cannon v. Sears, Roebuck & Co., 374 Mass. 739, 374 N.E.2d 582 (1978); Acker v. Sorenson, 183 Neb. 866, 165 N.W.2d 74 (1969); Raymond v. Eli Lilly & Co., 117 N.H. 164, 371 A.2d 170 (1977); Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969); Iverson v. Lancaster, 158 N.W.2d 507 (N.D. 1968); Frohs v. Greene, 253 Or. 1, 452 P.2d 564 (1969); Wilkinson v. Harrington, 104 R.I. 1224, 243 A.2d 745 (1968).

13. VA. CODE ANN. § 8.01-230 (Repl. Vol. 1977) provides:

In every action for which a limitation period is prescribed, the cause of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person . . . and not when the resulting damage is discovered . . . (emphasis added).

In connection with the recodification of what is now Title 8.01, the Virginia Code Com-

not in products liability cases enacted a "statute of repose," which as a matter of substantive law imposes an outside cut-off date beyond which no lawsuit may be instituted, irrespective of the accrual date of the cause of action.¹⁴

Following the 1977 revision of what is now Title 8.01 of the Virginia Code, the first products liability case involving a limitations defense to reach the Virginia Supreme Court was *Locke v. Johns-*

mission in 1977 had recommended a "discovery" test in products liability cases. This took the form of a proposed § 8.01-249(4), which would in such cases have kept the limitation clock from ticking "until the injury or damage resulting therefrom is discovered or by the exercise of due diligence reasonably should have been discovered." The Commission stated that: "This change is more equitable to the plaintiff and addresses itself to the problem of latent defects and slow-developing injuries which may be discoverable only after the injury has occurred." VA. H.D. Doc. No. 14, 1977 Sess. 158-60. The Senate, however, rejected the proposal. *Richmond Times-Dispatch*, Feb. 3, 1977, § D, at 5. As a consequence, when later in 1977 the General Assembly enacted the anti-discovery rule in § 8.01-230, it in effect preempted to itself any future changes in this area of the law.

14. RESTATEMENT (SECOND) OF TORTS § 899, Comment g, at 445 (1979) reads:

In recent years special "statutes of repose" have been adopted in some states covering particular kinds of activity These statutes set a designated event for the statutory period to start running and then provide that at the expiration of the period any cause of action is barred regardless of usual reasons for "tolling" The statutory period in these acts is usually longer than that for the regular statute of limitations, but, depending upon the designated event starting the running of the statute, it may have run before a cause of action came fully into existence

In 1980, the Joint Subcommittee of the House and Senate Committees for Courts of Justice on Products Liability had recommended enactment of a six-year "statute of repose" in products liability actions. See VA. H.D. Doc. No. 14, 1980 Sess. The proposal was that the Virginia Code be amended by adding the following:

§ 8.01-246.1. Personal actions based on defective products.- Notwithstanding when the cause of action shall have occurred:

1. No action for the recovery of damages or for contribution or indemnity, for damages for personal injury, death or damage to property which based on negligence or upon Part 2 of Title 8.2 of the Uniform Commercial Code, arising out of the design, inspection, testing, marketing or manufacturing of a product or arising out of any alleged failure to warn or any alleged failure to properly instruct concerning the use of a product or upon any alleged breach of warranty, expressed or implied, shall be commenced later than six years after the manufacturer of the final product parted with its possession and control, or sold it, whichever occurred last.

2. Any action for personal injury, death or damage to property, arising out of a federal or State statute, rule or regulation requiring a manufacturer of a product to alter, repair, recall, inspect or issue warnings or instructions or to otherwise take any action or precaution for the benefit of persons who might be injured or damaged by using the product, which requirement arose after the manufacturer parted with possession and control of the product or sold it, whichever came last, must be commenced no later than six years after the manufacturer first came under the duty to alter, repair, recall, inspect or issue warnings or instructions about the product or otherwise to take any action or precaution for the benefit of persons using the product.

*Manville Corp.*¹⁵ The plaintiff, Douglas Locke, had been an industrial electrician who claimed to have contracted a latent case of mesothelioma while employed from 1948 to 1972 on a number of construction projects in Virginia, New York and North Carolina. This is a terminal carcinogenic disease of the lungs which derived, he claimed, as the result of inhalation of harmful emissions from asbestos insulation products manufactured by several defendants.¹⁶ He first experienced lung difficulties in November of 1977; his disease was medically diagnosed in the spring of 1978; and his lawsuit was instituted that summer. In the Circuit Court for the City of Richmond, the defendants had successfully contended that the action was time-barred no later than two years after the date (1972) when the plaintiff had last been exposed to the product.¹⁷ The Virginia Supreme Court, however, disagreed. Under the circumstances it rejected as the tort accrual date the "time of the wrong" on the ground that no matter how careless a defendant's conduct may have been and no matter how ultimately injurious it may prove to be, it only is tortious when someone because of it sustains a legally provable injury.¹⁸ Instead, the court, citing section 8.01-230 of the Virginia Code, adopted a tort accrual rule under which in a dormant illness situation the limitation period does not start running until the plaintiff's illness could *medically* have been diagnosed.¹⁹

15. 221 Va. 951, 275 S.E.2d 900 (1981).

16. *Id.* at 953, 275 S.E.2d at 902. See JOHNSON & GOLDFINGER, *supra* note 1, at 167:

Mesothelioma, another type of cancer, occurs mainly in people exposed to asbestos dust. These tumors arise from the membrane that lines the chest or abdominal cavity, and they are highly malignant. Although they are rare, mesotheliomas can occur even after a limited exposure to asbestos dust and may affect people who were not directly involved in handling the material, such as relatives of asbestos workers. A very long time — forty years or more — can elapse between exposure and the appearance of mesothelioma, although many cases appear earlier.

17. 221 Va. at 955, 275 S.E.2d at 903. For a recent comparable holding, see *Neubauer v. Owens-Corning Fiberglass*, 504 F. Supp. 1210 (E.D. Wis. 1980).

18. 221 Va. at 957-59, 275 S.E.2d at 904-05. See RESTATEMENT (SECOND) OF TORTS § 899, Comment c, at 441 (1979):

Statutes of limitations ordinarily provide that an action may be commenced only within a specified period after the cause of action arises. Although the courts have not been consistent in applying this limitation strictly, the interpretation of the statute as applied to torts has been such that the statute does not usually begin to run until the tort is complete A tort is ordinarily not complete until there has been an invasion of a legally protected interest of the plaintiff.

See also F. HARPER & F. JAMES, TORTS § 25.1, at 1300 (1956); W. PROSSER, LAW OF TORTS § 30, at 133 (4th ed. 1971).

19. 221 Va. at 959, 275 S.E.2d at 905. A comparable holding is *Cartledge v. Jopling*, [1962] 1 Q.B. 189 (C.A.), *aff'd*, [1963] A.C. 758. There, a limitation defense was raised against suits by industrial workers who had developed pneumoconiosis as the result of a long-time

The result of so unusual a tort accrual rule seems problematical.²⁰ At best, it poses a thorny question for courts and juries to resolve, and one where if there are the usual conflicts in medical expert testimony, the so-called "sympathy" element may play a significant role. At worst, the medical diagnosis accrual rule could bar a plaintiff's suit before he had reason to suspect that he had a physical condition which required medical attention — thus operating as in effect a judicially-created "statute of repose."

Esoteric legal rules such as the accrual rule adopted in *Locke* have a way of generating in their wake many other puzzling legal questions. For example, in such a disease-related products liability lawsuit, it could be a problem to determine which state's substantive law to apply. Traditionally this has been the law of the state "where the injury occurred."²¹ Pursuant to the *Locke* rule, the defendant's act only becomes tortious when the latent disease first becomes medically diagnosable. If such diagnosis should occur outside Virginia, it is possible that the diagnostic state's substantive law could be applicable. If Virginia accepted the "dominant contacts" rule, Virginia could, of course, be deemed the state with the most significant relationship to the cause of action because it was the state of the plaintiff's residence, and because it was one of the three states where the plaintiff was exposed to the toxic substance. But Virginia has firmly rejected the uncertainties of the "dominant contacts" rule.²²

In addition to such a conflicts of law puzzle, the *Locke* rule could generate a problem of jurisdiction over a defendant which was not "doing business" in Virginia. If because of medical diagnosis in another state the tort becomes completed there, the Virginia "long-arm" statute might be constitutionally insufficient to afford juris-

inhalation of dust-laden air. The suits were held to be time-barred on the basis that the limitation clock had commenced ticking when the disease first became medically discoverable by X-ray. The injustice of the *Cartledge* holding was noted by Parliament, which almost immediately enacted a "discovery" test in personal injury claims. See *The Limitation Act, 1963, c.47*.

20. The rule is unlikely to have any effect upon the numerous shipyard worker asbestosis cases presently pending in the United States District Court for the Eastern District of Virginia. That conclusion seems to follow from a recent ruling by the Court of Appeals for the Fourth Circuit that such a case is not governed by state substantive law, but falls instead within the admiralty jurisdiction of the federal courts and therefore is not subject to any state statute of limitations. *White v. Johns-Manville Corp.*, 662 F.2d 234 (4th Cir. 1981).

21. See RESTATEMENT (SECOND) CONFLICT OF LAWS § 146 (1964).

22. See *McMillan v. McMillan*, 219 Va. 1127, 1130, 253 S.E.2d 662, 644 (1979) (tort action in which the "dominant contacts" test was deemed too susceptible to inconsistency).

diction over the otherwise non-present defendant.²³

Locke also involved a warranty claim for the same injury, but the Virginia Supreme Court seemingly did not reach this aspect of the statute of limitations.²⁴ Here the accrual problem is not governed by section 8.01-230 of the Virginia Code, but by section 8.2-725, which comprises a part of the UCC.²⁵ Even though subsection (1) of the latter section prescribes a four-year period, the limitation period for products liability personal injury actions in Virginia has been recently reduced to two years.²⁶ And although subsection (2) of section 8.2-725 contains a "discovery" test, the test is appli-

23. See VA. CODE ANN. § 8.01-328.1(A)(3) (Repl. Vol. 1977). See also *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

24. In the Virginia Supreme Court's opinion in the *Locke* case, Justice Compton stated that the limitation issue was "governed by Code §§ 8.01-243(A) and -230." 221 Va. at 955, 275 S.E.2d at 903 (emphasis added). Though both sections are applicable to tort actions, § 8.01-230 is not applicable to warranty actions because of the following exclusion at the end of § 8.01-230: "except where . . . otherwise provided under . . . other statute." As appears from the Revisers' Notes, the term "other statute" was intended to have reference to § 8.2-725, which comprises a part of the UCC as adopted in Virginia.

25. VA. CODE ANN. § 8.2-725 (Repl. Vol. 1977) is the standard UCC version. It reads:

(1) An action for breach of any contract of sale must be commenced within four years after the cause of action has accrued

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

Rapp v. Whitlock Equip. Corp., 222 Va. 80, 279 S.E.2d 133 (1981)—seemingly without statutory support—reads a privity requirement into § 8.2-725 so as to avoid subjecting a plaintiff who is a third party beneficiary to that section's warranty limitation provisions. Instead, the court applies the general contractual limitations presently found in § 8.01-245 without any discussion of the still prevalent warranty accrual problem. A commentator has characterized another state court's similar conclusion as—with tongue in cheek—"a dazzling display of reasoning." See T. QUINN, UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST § 2-725 [A][10][b], at 2-525 (1978). It is conceivable that an implied warranty lawsuit might hereafter arise which was brought by both the buyer and by third party beneficiary for personal injuries sustained more than two years after the date of purchase. Presumably the *Rapp* case rationale, if extended to personal injury situations, would bar the buyer's cause of action, but would not bar that brought by the third party beneficiary.

26. VA. CODE ANN. § 8.01-246 (Repl. Vol. 1977), after designating limitation periods for various actions based on contract, reads: "Provided that as to any action to which § 8.2-725 of the Uniform Commercial Code is applicable, that section shall be controlling except that in products liability actions for injury to person . . . the [two year] limitation prescribed in § 8.01-243 shall apply."

The proviso reflects Virginia law in effect before the UCC became operative in the state on January 1, 1966. See, e.g., *Friedman v. Peoples Serv. Drug Stores, Inc.*, 208 Va. 700, 160 S.E.2d 563 (1968). It also reflects a ruling in a federal diversity case which arose after the UCC had become effective in Virginia. See *Tyler v. R. R. Street & Co.*, 322 F. Supp. 541 (E.D. Va., 1971).

cable only to certain express warranties and not to implied warranties, which are the norm in products liability cases.²⁷ The thrust of the UCC, therefore, is that regardless of an aggrieved party's lack of knowledge, his cause of action for breach of implied warranty accrues at the time the seller tendered delivery of the product to the buyer.²⁸ Accordingly, in a disease-related products liability lawsuit, an implied warranty cause of action can be time-barred by the UCC limitations even before (a) the plaintiff sustained a proveable injury, or (b) his exposure, or (c) his illness could medically have been diagnosed.²⁹

If Virginia tort and warranty law is to escape from this morass, the General Assembly must provide the rescue. Section 8.01-230 should be amended to make the "date of injury" accrual provisions applicable not only as they are now to tort, but also to personal injury actions for breach of implied warranty.³⁰ This will reinstate the Virginia rule which antedated the adoption of the UCC.³¹ In addition, there should be enacted a double-barreled approach to the limitations problem that will, in products liability actions for

27. The cases from other jurisdictions are legion holding that under § 2-275(2) of the UCC only an *express* warranty "explicitly extends to future performance." See Annot. 93 A.L.R.3d 690 (1979). That result follows from the fact that an *implied* warranty is inferred and thus is outside the "explicit extension" exception in § 2-275(2). See note 25 *supra*. There are products liability cases involving *express* warranties. See *Winston Indus. v. Stuyvesant Ins. Co.*, 55 Ala. App. 525, 317 So. 2d 493 (1975). They are, however, as rare as summer snowstorms in Virginia.

28. In products liability cases, § 8.2-725 reverses the rule which in pre-UCC days had prevailed in the state. See for example *Caudill v. Wise Rambler, Inc.*, 210 Va. 11, 168 S.E.2d 257 (1969), which held that a plaintiff's cause of action to recover for a personal injury resulting from the breach of a common law implied warranty accrued for limitation purposes as of the date of the injury rather than from the date of the sale of the warranted product.

29. When in 1951 the UCC was submitted for legislative enactment, it was not anticipated that it would have any particular impact in the area of products liability law. It was in this period that the provision which is now § 8.2-725 of the Virginia Code was written with an eye primarily to long-established commercial aspects of the law of sales. It was not until the 1960's that the citadel of privity fell and was incorporated into the UCC in the form of the third party beneficiary provision. VA. CODE ANN. § 8.2-318 (Added Vol. 1965). Though this allows the UCC to have a products liability aspect, the same does not mesh comfortably with the commercial law limitation provisions of § 8.2-725. Today, this lack of mesh is immaterial in most states because the wide-spread adoption in tort of the "strict liability" doctrine has, by eliminating contributory negligence, made tort law the normal legal basis in products liability litigation. In Virginia, however, it is significant. Because of the uncertainty as to the viability in Virginia of the "strict liability" doctrine as promulgated in § 402A of the RESTATEMENT (SECOND) OF TORTS, the UCC has a role in products liability cases in this state.

30. See note 13 *supra* for the text of VA. CODE ANN. § 8.01-230 (Repl. Vol. 1977).

31. See note 26 *supra*.

personal injuries, combine a "discovery" test for accrual with a ten-year "statute of repose" comparable to that recently enacted in this area by many states.³² The "discovery" test will correct the inequities to plaintiffs inherent in the absence of such a test and yet will bar any plaintiff who "sleeps on his rights."³³ And a "statute of repose" will correct the inequities to defendants³⁴ implicit in any products liability lawsuit where they are adjudged today for

32. See 5 ALA. CODE § 6-5-502 (Supp. 1982) ("10 years after the manufactured product is first put to use"); 4 ARIZ. REV. STAT. ANN. § 12-551 (1982) ("twelve years after the product was first sold for use or consumption"); 6 COLO. REV. STAT. § 13-21-403(3) (Supp. 1980) ("[t]en years after a product is first sold for use or consumption"); 27 CONN. GEN. STAT. ANN. § 52-577a (West Supp. 1981) ("ten years from the date that such party last parted with possession or control of the product"); 29 GA. CODE ANN. § 105-106 (Cum. Supp. 1981) ("10 years from the date of the first sale for use or consumption"); IDAHO CODE § 6-1303(2)(a) (Supp. 1981) ("harm caused more than ten (10) years after time of delivery, a presumption arises that the harm was caused after the useful life had expired"); ILL. ANN. STAT. ch. 83, §22.2(b) (Smith-Hurd Supp. 1980) ("12 years from the date of first sale, lease or delivery of possession by a seller or 10 years from the date of first sale, lease or delivery of possession to its initial user, consumer or other non-seller, whichever period expires earlier"); IND. CODE ANN. § 34-4-20A-5 (Burns Cum. Supp. 1981) ("ten [10] years after the delivery of the product to the initial user"); 4A KAN. STAT. ANN. § 60-513(b) (1976) ("ten years beyond the time of the act giving rise to the cause of action"); 7 KY. REV. STAT. § 411.310(1) (Supp. 1979) ("five (5) years after the date of sale to the first consumer or more than eight (8) years after the date of manufacture"); NEB. REV. STAT. § 25-224 (1978) ("ten years after the date when the product which allegedly caused the personal injury, death, or damage was first sold or leased for use"); 4A N.H. REV. STAT. ANN. § 507-D:2 (Supp. 1979) ("12 years after the manufacturer of the final product parted with its possession and control or sold it, whichever occurred last"); 5A N.D. CENT. CODE § 28-01.1-02 (Supp. 1981) ("within ten years of the date of initial purchase for use or consumption, or within eleven years of the date of manufacture"); OR. REV. STAT. § 30.905(1) (1979) ("eight years after the date on which the product was first purchased for use or consumption"); R.I. GEN. LAWS § 9-1-13(b) (Supp. 1981) ("[actions] shall be commenced within ten (10) years after the date the product was first purchased for use or consumption"); S.D. COMP. LAWS ANN. § 15-2-12.1 (Supp. 1981) ("six years after the date of the delivery of the completed product to its first purchaser or lessee who was not engaged in the business of selling such product"); TENN. CODE ANN. § 29-28-103 (Supp. 1980) ("ten years from the date on which the product was first purchased for use or consumption, or within one year after the expiration of the anticipated life of the product, whichever is the shorter"); UTAH CODE ANN. § 78-15-3 (Repl. Vol. 1977) ("six years after the date of initial purchase for use or consumption or ten years after the date of manufacture"). See also 2 PROD. LIAB. REP. (CCH) ¶ 94,926 (quoting amendment to WASH. REV. CODE § 3158 (effective July 26, 1981)) ("no claim . . . may be brought more than three years from the time the claimant discovered or in the exercise of due diligence should have discovered the harm and its cause").

Comparable statutes also have been enacted in Florida and North Carolina but have since been held to be unconstitutional. Though similarly challenged, Illinois, Mississippi and Tennessee statutes have been held not to be constitutionally deficient. See generally McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U.L. REV. 579 (1981).

33. See note 13 *supra* for the 1977 recommendations of the Virginia Code Commission.

34. See note 14 *supra* for the 1980 recommendations of the Joint Subcommittee of the House and Senate Committees for Courts of Justice on Products Liability.

conduct occurring a decade or more ago.³⁵

To illustrate the effect of such a suggested legislative program,³⁶ suppose thereafter a so-called DES daughter³⁷ were to institute a Virginia products liability lawsuit against the manufacturer which, more than a decade ago had supplied DES to her pregnant mother. In that lawsuit, the plaintiff's cause of action—either in tort or in implied warranty—would be deemed to have accrued when she discovered (or should have discovered) her injury, but would in any event—irrespective of the accrual date of the cause of action—be time-barred because it had not—and could not—have been instituted within ten years after the drug had been sold to her mother.³⁸ Yet, a suit instituted by an asbestos worker eight years after he had terminated his employment with a company and had ended his exposure to asbestos would not be barred under the suggested legislative program even if his disease could have been medically diagnosed ten years earlier.

35. Predictably, a "statute of repose" evokes strong arguments pro and con. Compare DEFENSE RESEARCH INSTITUTE, PRODUCTS LIABILITY POSITION PAPER 20 (1976), and Massery, *Date-of-Sale Statutes of Limitation—A New Immunity for Product Suppliers*, 1977 INS. L.J. 535 with Lambert, *Trends in Products Liability Litigation*, 16 TRIAL MAG. 82, 86 (1980), and Twerski & Weinstein, *A Critique of the Uniform Products Liability Act—A Rush to Judgment*, 28 DRAKE L. REV. 221, 243 (1978-79).

36. See Appendix for suggested changes.

37. See note 7 *supra*.

38. Maladies induced by DES apparently do not surface and cannot be diagnosed until more than a decade after the victim's mother took the drug to avoid a miscarriage. Given therefore a "statute of repose" with a ten year cut-off, the daughter's claim would be barred even before her cause of action accrued. This result would, of course, be anomalous if found in a statute of limitations which is intended only to penalize dilatory plaintiffs. The result does, however, comport with the purpose of a "statute of repose," which says that as a matter of policy there should be a specific time beyond which a defendant should no longer be subjected to protracted liability. Thus a "statute of repose" is intended as a substantive definition of rights as distinguished from a procedural limitation on the remedy used to enforce rights.

APPENDIX

PROPOSED CHANGES TO THE VIRGINIA CODE*

§ 8.01-230. Accrual of cause of action.

A. Except as otherwise provided in subsection B hereof, [I]n every action for which a limitation period is prescribed, the cause of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person, when the breach on contract or duty occurs in the case of damage to property and not when the resulting damage is discovered, except where the relief sought is solely equitable or where otherwise provided under § 8.01-233, subsection C of §§ 8.01-245, 8.01-249, or 8.01-250.

B. In every products liability action for personal injuries or for damage to property (other than to the product itself), the cause of action shall, whatever the theory of recovery, be deemed to accrue and the prescribed limitation period shall begin to run from the date the aggrieved party discovered the injury or damage and its probable wrongful cause, or should reasonably have discovered the same.

Explanation of Suggested Changes in § 8.01-230. The deletion in subsection A would in products liability lawsuits make applicable the “date of injury” tort accrual provisions of § 8.01-230 rather than those of § 8.2-275 of the Uniform Commercial Code. The provisions of subsection B would incorporate into § 8.01-230 a “discovery” test in all products liability actions, whatever the theory of recovery.

§ 8.01-243. Personal action for injury to person or property generally.

A. Unless otherwise provided by statute, every action for personal injuries, whatever the theory of recovery, except as provided in subsections B and C hereof, shall be brought within two years after the cause of action accrued.

B. Every action for injury to property, including actions by a parent or guardian of an infant against a tort-feasor for expenses of curing or attempting to cure such infant from the result of a personal injury or loss of services of such infant, shall be brought

* Italicized portions represent the author's proposals.

within five years next after the cause of action shall have accrued.

C. Every products liability action for personal injuries or for damage to property (other than to the product itself) shall, whatever the theory of recovery, be brought within ten years after the product was first sold or leased for use or consumption.

Explanation of Suggested Changes in § 8.01-243. Subsection C would impose a ten-year "statute of repose" in every products liability action, whatever the theory of recovery, commencing from the date the product was first sold or leased for use or consumption.

§ 8.2-725. Statute of limitations in contracts for sale.

(1) *Except as otherwise provided in § 8.01-246, and subject to subsection C of § 8.01-243, [A]n action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.*

(2) *Except as otherwise provided in subsection B of § 8.01-230, [A] cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.*

(3) *Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.*

(4) *This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this act becomes effective.*

Explanation of Suggested Changes in § 8.2-725. The amendments would make it clear in products liability lawsuits based on breach of implied warranty, (a) that the applicable limitation period is the two-year period mandated in § 8.01-246, and

(b) that the "discovery" test prescribed in § 8.01-230, and the "statute of repose" in § 8.01-243 override the standard U.C.C. provisions of § 8.2-275.

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