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NOTES

WILSON V. JOHNS-MANVILLE SALES CORP.
AND STATUTES OF LIMITATIONS IN
LATENT INJURY LITIGATION:
AN EQUITABLE
EXPANSION OF THE DISCOVERY RULE

Litigation involving injuries caused by exposure to deleterious substances has multiplied at an ever-increasing rate in the last decade. Typically, an individual who is exposed to a toxic substance is unaware of the harm it might cause until an injury manifests itself many years later. Consequently, an important threshold procedural issue in any latent injury litigation is whether the action was filed within the time limit prescribed by the applicable statute of limitations. Courts have rejected the traditional rule that a limitations period commences at the time of the harmful exposure, and have opted for the more equitable "discovery rule." Under this rule, the statute of limitations begins to run when a person discovers or, in the exercise of reasonable diligence, should have discovered the injury.

1. It is projected that lawsuits involving latent diseases, which appear several years after initial exposure to a toxic substance, will dominate tort law in the 1980's. Twenty-five thousand lawsuits seeking damages for exposure to asbestos were filed through 1980. See Podgers, Toxic Time Bombs, 67 A.B.A. J. 139 (1981). In addition, 16,000 asbestos cases are currently pending, and asbestos cases are being filed at a rate of approximately 450 a month. Asbestos Lawsuits Spur War Among Insurers With Billions At Stake, Wall St. J., June 14, 1982, at 1, col. 6. See also Granelli, The Asbestos Case Explosion, NAT'L L.J., Oct. 19, 1981 at 1.


rule in order to provide recovery to latent injury victims.4

The application of the discovery rule in latent injury litigation is complicated further when a person, years after discovering one injury, discovers an entirely separate injury resulting from the same harmful exposure. A number of courts have continued the trend toward expansion of the discovery rule and have held that the limitations period begins upon discovery of the second injury.5 These courts, however, have failed to address the question whether application of the discovery rule to a second injury violates the well-established rule against splitting a cause of action.6 Recognizing this deficiency, in Wilson v. Johns-Manville Sales Corp.,7 the United States Court of Appeals for the District of Columbia Circuit recently offered a practical analysis of the statute of limitations and determined that application of the discovery rule to a second injury does not violate the rule against splitting a cause of action.

Henry Wilson, an asbestos insulation worker for over thirty years, suffered two separate injuries as a result of his exposure to asbestos materials. In 1973, he contracted asbestosis8, but continued to work in the insulation trade for two more years. In 1978, Wilson was diagnosed as having mesothelioma, a cancer affecting the lining of the lung.9 Three months


6. In accordance with public policy, and to prevent the defendant from suffering the hardship of unnecessary piecemeal litigation, a single cause of action cannot be split and made the subject of different actions. 1B J. MOORE, FEDERAL PRACTICE ¶ 0.410(2), at 1163-64 (2d ed. 1982). Splitting a cause of action is prevented by the doctrine of res judicata. The doctrine requires that all grounds upon which a single claim is based must be asserted and concluded in one action, and not renewed in a separate suit. C. WRIGHT, THE LAW OF FEDERAL COURTS § 78 (3d ed. 1976).

7. 684 F.2d 111 (D.C. Cir. 1982).


9. Mesothelioma is a cancer of the mesothelial cells which line the chest walls and surround the organs of the chest cavity. It is an extremely rare form of cancer, offers a poor prognosis for recovery, and is usually fatal. See STEDMAN'S MEDICAL DICTIONARY, supra
later Wilson died. His widow filed suit in federal court under the District of Columbia’s survival and wrongful death statutes against the designers, manufacturers, and distributors of asbestos products. The district court granted the defendant’s motion for summary judgment, and ruled that the three year statute of limitations period began when Wilson discovered that he had asbestosis. The court therefore held that his action was time-barred. The United States Court of Appeals for the District of Columbia Circuit reversed and held that the discovery of an asbestos-related disease did not commence the statute of limitations on claims concerning all separate, distinct, and later-manifested diseases that might be caused by the same asbestos exposure.

This Note will trace the evolution of the statute of limitations from the common law, and illustrate the traditional and modern procedures used to determine when a cause of action accrues. It will examine the ingenious statute of limitations analysis delineated in *Wilson*, and demonstrate its consistency with the recent trend toward the expansive application of the discovery rule in latent injury litigation. Finally, this Note will comment on the potential impact of *Wilson* upon the manufacturers and exposure victims of toxic substances.

I. THE EXPANSIVE INTERPRETATION OF STATUTES OF LIMITATIONS IN LATENT INJURY LITIGATION

At common law, courts recognized perpetual rights to a cause of action in contract and tort. Elaborate procedural requirements reduced the likelihood of untimely suits. Therefore, it was not until more convenient forms of action emerged that the need for a statute of limitations arose. The Limitations Act of 1623 established different limitations periods for

note 8, at 861. Like asbestosis, this disease manifests itself many years after inhalation begins. See I. Selikoff & D. Lee, Asbestos and Disease, 241-44 (1978).


11. Wilson, 684 F.2d at 112.


13. At common law, the complicated procedures of filing a claim discouraged many people from pursuing actions at all, much less pursuing an action at a later date. In addition, if a party to the action died, the action became invalid. Thus, if a person sought to file a tort claim, the individual usually filed within the prescribed time limit. Id. See also Atkinson, Some Procedural Aspects of the Statute of Limitations, 27 Colum. L. Rev. 157 (1927).

14. 21 Jac. I., ch. 16 (1623). The purpose of the Act was to keep inconsequential claims out of the King’s court and to minimize the hardship which suits in the King’s court imposed on poor defendants. Developments, supra note 12, at 1178.
different causes of action.\textsuperscript{15} Most early American state legislatures adopted the Act with only slight variations.\textsuperscript{16}

The purpose of a statute of limitations is to protect defendants and courts from stale claims by encouraging plaintiffs to bring suit in a timely fashion.\textsuperscript{17} Timely adjudication ensures that fresh evidence is used to decide questions of fact and that essential witnesses are available to testify.\textsuperscript{18} In addition, statutes of limitations allow potential defendants to plan economic activity free from the threat of distant liability.\textsuperscript{19}

A statute of limitations commences to run when an individual's right of action first accrues.\textsuperscript{20} Traditionally, courts have held that an action first accrues when a person is initially exposed to a harmful substance, even if the person, as in latent injury actions, remains blamelessly ignorant of the tort or the harm it produces until long after the limitations period has expired.\textsuperscript{15}

15. Actions of trespass quare clausum fregit, debt, detinue, replevin, and actions on the case or for account were limited to six years. Actions for trespass, assault, battery, wounding, and imprisonment had to be filed within four years; actions on the case for words were required to be filed within two years. The shorter period for torts involving injuries to the person indicates the early recognition of the unreliability of the evidence of such claims, as well as the general disfavor of personal injury actions. Kelley, Discover Y Rule for Personal Injury Statutes of Limitations: Reflections on the British Experience, 24 WAYNE L. REV. 1641, 1646 (1978).

16. Each state has statutes of limitations that govern the time for bringing suit for the majority of actions. These statutes usually fix time limits for filing suits to recover interests in land, suits on oral and written contracts, actions for injuries to the person or property, and "all other actions." While the language varies among the states, most statutes provide either that "all actions . . . shall be brought within" or "no action . . . shall be brought more than" a certain period of time after "the cause thereof accrued." See, e.g., D.C. CODE ANN. § 12-301(8) (1981); CONN. GEN. STAT. § 52-584 (1958); N.J. STAT. ANN. § 2A: 14-2 (1951). The limitations statutes usually include provisions for postponement, suspension, or extension of the period in specified circumstances. Certain felonies, however, such as murder, manslaughter, arson, and forgery do not have a statute of limitations. Developments, supra note 12, at 1179.

17. The primary consideration of a statute of limitations is fairness to the defendant. There should be a time when a defendant can reasonably expect to be free of ancient obligations. He should not have to defend a claim when "evidence has been lost, memories have faded, and witnesses have disappeared." Railroad Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 349 (1944). Statutes of limitations also relieve the courts of the burden of adjudicating inconsequential or tenuous claims. Id.


19. "The foundation of the acquisition of rights by lapse of time is to be looked for in the position of the person who gains them, not in that of the loser." Holmes, The Path of the Law, 10 HARV. L. REV. 457, 477 (1897). But see Comment, Occupational Carcinogenesis and Statutes of Limitations: Resolving Relevant Policy Goals, 10 ENVTL. L. 113 (1979) (the evidentiary purpose of the statute of limitations is unduly harsh in occupational cancer cases).

pired.\textsuperscript{21} One of the earliest cases to apply the traditional construction of a statute of limitations in a latent injury context was \textit{Schmidt v. Merchants Despatch Transportation Co.}\textsuperscript{22} In \textit{Schmidt}, the plaintiff alleged that he had contracted pneumoconiosis\textsuperscript{23} as a result of inhaling industrial dust while employed by the defendant. The New York Court of Appeals held that the cause of action accrued when the plaintiff inhaled the harmful dust, even though the injury was not then apparent.\textsuperscript{24} Although the court held that Schmidt's cause of action accrued at his initial exposure to the harmful substance, the court provided that in a timely filed cause of action, consequential damages that are reasonably anticipated may be included in the amount of recovery.\textsuperscript{25} The court noted, however, that the doctrine of res judicata bars a new action if the consequential damages manifest themselves at a later date.\textsuperscript{26}

Recognizing the inherent injustice of requiring plaintiffs to file suit before they are aware of any actual injury, courts have formulated alternative theories to determine when a cause of action accrues.\textsuperscript{27} The application of the discovery rule stands as a significant development in the area of

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\item \textsuperscript{22} 270 N.Y. 287, 200 N.E. 824 (1936).
\item \textsuperscript{23} Pneumonconiosis is a chronic fibrous reaction in the lungs due to the inhalation of dust. See \textit{Stedman's Medical Dictionary}, supra note 8, at 1108, 1110.
\item \textsuperscript{25} The traditional American rule is that recovery of consequential damages, damages based on future consequences, may be recovered only if such consequences are "reasonably certain." Courts generally require that a plaintiff prove that there is a greater than 50\% chance that the future damages will occur. See, e.g., Thompson v. Underwood, 407 F.2d 994, 997 (6th Cir. 1969); Jordan v. Bero, 210 S.E.2d 618, 629 (W. Va. 1974). See also \textit{Restatement (Second) of Torts} § 910, comment a (1965); King, \textit{Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences}, 90 Yale L.J. 1353, 1371-72 (1981).
\item \textsuperscript{26} See C. Wright, supra note 6, at 386.
\item \textsuperscript{27} See, e.g., Urie v. Thompson, 337 U.S. 163 (1949) (a cause of action accrues when the "accumulated effects" of the exposure manifest themselves); Goodman v. Mead Johnson & Co., 534 F.2d 566 (3rd Cir. 1976) (a cause of action accrues when a person discovers the injury, its cause, and that the injury was negligently inflicted by another); Grigsby v. Sterling Drug, Inc., 428 F. Supp. 242 (D.D.C. 1975) (a cause of action accrues when a person discovers the injury and its cause).
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limitation statutes.28 The rule dictates that a cause of action accrues when a person discovers or, in the exercise of reasonable diligence, should have discovered the injury which gives rise to the cause of action.29 Therefore, before a statute of limitations begins to run, a person must have notice of the cause of action—an awareness either that an injury has occurred or that another person has committed a legal wrong which ultimately may result in bodily harm.30

The major impetus in the development of the discovery rule was the United States Supreme Court's decision in Urie v. Thompson.31 In Urie, a railroad fireman contracted silicosis as a result of his exposure to silica dust over a thirty-year period. He filed suit under the Federal Employers' Liability Act (FELA) against the trustee of the Missouri Pacific Railroad. The Court rejected the railroad's contention that the three-year limitations period began when Urie was exposed to silica dust in 1910.32 This interpretation conflicted with Congressional intent to provide relief to injured employees under FELA. To resolve this dilemma, the Court reasoned that Urie's cause of action did not accrue until the accumulated effects of the silica dust manifested themselves in 1940.33 Because Urie filed suit in 1941, the Court held that his claim was timely.

29. See supra note 3 and accompanying text.
30. Few problems of knowledge arise in ordinary personal injury actions because some impact or trauma caused by an immediate blow notifies a plaintiff of the violation of his or her rights. Developments, supra note 12, at 1204. See Estep & Van Dyke, supra note 21, at 764.
32. 45 U.S.C. § 51 (1976). Section 1 of the Federal Employers' Liability Act provides in pertinent part:
   Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
   Id.
33. 337 U.S. at 169. For a discussion of the traditional rule of accrual, see supra notes 20-25 and accompanying text.
34. 337 U.S. at 170 (quoting Associated Indem. Corp. v. State Indus. Accident Comm'n, 124 Cal. App. 378, 381, 12 P.2d 1075, 1076 (1932)). Courts have interpreted the Urie decision as the discovery rule, which holds that a cause of action does not accrue until "the plaintiff either knew or had reason to know of the disease." Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1101 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974). See Stoelenson v. United
In adopting the discovery rule, the Supreme Court recognized that Congress intended to compensate occupational disease victims under FELA. Therefore, a mechanical analysis of the statute of limitations that would define accrual at an unrecorded moment in the development of the disease had to be rejected. In the Court’s view, charging a person with knowledge of a latent disease before its manifestation would force him to waive his rights to recovery if he later discovered a disability. Convinced that the Act was intended to afford plaintiffs with more than a “delusive remedy”, the Court refused to deny relief because of Urie’s “blameless ignorance.” Thus, the Supreme Court’s use of the discovery rule revolutionized the traditional interpretation of statutes of limitations by extending relief to those employees who suffered injuries years after their exposure to a harmful substance.

Urie established that a plaintiff’s notice of his injury is essential in latent injury litigation to the accrual of a cause of action. When applying the discovery rule, the courts disagree, however, as to what constitutes sufficient notice. Three theories of accrual have been acknowledged. The oldest approach, reflected in Urie, maintains that a cause of action accrues when the plaintiff discovers the injury. This approach was first utilized in asbestos litigation in Borel v. Fibreboard Paper Products Corp.

Borel, an asbestos insulation worker who contracted asbestosis and mesothelioma as a result of his thirty-year exposure to asbestos, sued several manufacturers of asbestos insulation materials in 1969. Borel died before trial, and his widow was substituted as the plaintiff under the applicable wrongful death statute. Relying on Urie v. Thompson, the United States, 629 F.2d 1265, 1269 (7th Cir. 1980); Ricciuti v. Voltarc Tubes, Inc., 277 F.2d 809, 813 (1960).

35. 337 U.S. at 169.
37. 337 U.S. at 170. The Court rejected the theory that each breath of silica dust was a fresh cause of action. Justice Rutledge reasoned that application of such a rule would bar Urie’s suit if he had left employment of the railroad, or if he had been transferred to work involving no exposure to silica dust, more than three years before discovering the disease. The majority opinion established that Congress, in enacting FELA did not intend to attach such consequences to “blameless ignorance.” Id.
39. Borel named as defendants eleven manufacturers of asbestos insulation materials used by him during his working career. Four manufacturers settled the case with Borel before trial and the trial court instructed a verdict as to the fifth manufacturer. The remaining defendants were Fibreboard Paper Products Corporation, Johns-Manville Products Corporation, Pittsburg Corning Corporation, Philip Carey Corporation, Armstrong Cork Corporation, and Ruberoid Corporation, a Division of GAF Corporation. Id. at 1086.
States Court of Appeals for the Fifth Circuit stated that Borel’s action was not time-barred because his claim did not arise until Borel discovered the injuries in 1969. In reaching its conclusion, the court followed the rule previously utilized in cases involving injuries from exposure to other harmful substances and applied it to a case involving an asbestos victim.

The discovery rule was not only broadly applied, but also liberally interpreted. In *Grigsby v. Sterling Drug, Inc.* the United States Court of Appeals for the District of Columbia Circuit extended the time limits of the discovery rule by holding that the limitations period does not commence until the plaintiff discovers the injury and its cause. Grigsby, a physician, suffered a substantial hearing loss in 1968 after her prolonged use of a pharmaceutical product manufactured by the Sterling Drug Company. She did not file suit, however, until 1974. The court concluded that a statute of limitations begins to run when a plaintiff learns or, in the exercise of due diligence, could have learned, that the injuries were caused by an undisclosed defect in the defendant’s product. Although the full extent of Grigsby’s injuries had not yet become known, the court held that she had sufficient notice of the injury and its cause in 1968. Therefore, the court dismissed her case because she filed suit two years after the statute of limitations had expired.

In *Karjala v. Johns-Manville Products Corp.*, the United States Court of Appeals for the Eighth Circuit expanded the discovery rule to com-

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41. The court traced the recognition of asbestosis as a disease from the 1930’s through to the medical studies on asbestos insulation workers reported in the 1950’s. 493 F.2d at 1088-89. *See, e.g.*, Cooke, *Fibrosis of the Lungs Due to the Inhalation of Asbestos Dust*, 2 BRIT. MED. J. 147 (1924); Selikoff, Bader, Bader, Churg, & Hammond, *The Occurrence of Asbestosis Among Insulation Workers*, 132 ANN. N.Y. ACAD. SCI. 139 (1965).

42. 493 F.2d at 1101.
43. *Id.* at 1102. The court noted that asbestos is a harmful product, and provided a detailed review of its effects. The court concluded that the manufacturer had a duty to warn of the dangers associated with asbestos exposure. *Id.* at 1103.
46. Grigsby took 500 milligrams per week of Aralen, an anti-malarial drug, between September 1966 and October 1968. In October 1968, a specialist examined her and concluded that the “most likely cause” of her hearing loss was the toxicity of the Aralen. 428 F. Supp. at 244.
47. By 1974, Grigsby’s condition worsened and became an obstacle in her career. *Id.*
48. *Id.* at 243-44.
49. The court concluded that the statute of limitations was not precluded from running because Grigsby’s impairment did not interfere with her job. *Id.* at 244.
50. *Id.* at 244-45.
51. 523 F.2d 155 (8th Cir. 1975).
mence the statute of limitations at the time the plaintiff discovered not only the injury and its cause, but also that the injury was wrongfully inflicted by another.\textsuperscript{52} Karjala, who worked as an asbestos insulator for eighteen years, discovered he had asbestosis in 1966.\textsuperscript{53} In 1971, he filed suit against Johns-Manville Products Corporation, an asbestos manufacturer. Relying on \textit{Borel}, the court of appeals established that the asbestos manufacturer had a duty to warn of the dangers associated with asbestos products.\textsuperscript{54} The court stated that the six year statute of limitations\textsuperscript{55} did not begin to run until damage had resulted from the alleged breach of duty.\textsuperscript{56} The court acknowledged that in personal injury actions this occurs when a person discovers both the injury and that the injury was caused by the defendant's tortious act. Expanding upon \textit{Urie}, the court held that the statute of limitations commenced running when the injury manifested itself in a way which supplied evidence of the causal relationship to the manufactured product.\textsuperscript{57}

In \textit{Goodman v. Mead Johnson \\& Co.}\textsuperscript{58} the Third Circuit adopted this

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\item \textsuperscript{52} \textit{Id.} \textit{See also} Ennixious v. United States, 563 F.2d 418 (10th Cir. 1977); Goodman v. Mead Johnson \\& Co., 534 F.2d 566 (3rd Cir.), \textit{cert. denied}, 429 U.S. 1038 (1976); Karjala v. Johns-Manville Prods. Corp., 523 F.2d 155 (8th Cir. 1975). \textit{But see} Kubrick v. United States, 444 U.S. 111 (1979). In \textit{Kubrick}, the expansion of the discovery rule was rejected in a medical malpractice context. The Court held that in medical malpractice cases filed under the Federal Tort Claims Act, 28 U.S.C. § 2401(b), the cause of action accrues when a patient acquires possession of the critical facts of injury and cause. 444 U.S. at 122-24. \textit{But cf.} Stoleson v. United States, 629 F.2d 1265 (7th Cir. 1980). The court in \textit{Stoleson} held that, in latent injury actions, a cause of action accrues when the plaintiff is aware of the injury, the cause, and the possibility that one's legal rights have been invaded. The court distinguished \textit{Kubrick} on the grounds that medical science acknowledged Kubrick's treatment as inadequate and thus Kubrick was not blameless for his ignorance and delay in filing his claim. 629 F.2d at 1269-70. \textit{See generally} Note, \textit{Stoleson v. United States: FTCA—Expanding the Discovery Rule in Occupational Disease Cases}, 14 J. MAR. L. REV. 873 (1981).

\item \textsuperscript{53} Between 1948 and his resignation in June, 1966, Karjala was exposed to large quantities of asbestos dust. In 1959, after Karjala began to feel congestion, a shortness of breath, loss of appetite and general weakness, he was x-rayed for tuberculosis. The x-ray showed no evidence of tuberculosis, but revealed "possible asbestosis." In 1963, Karjala had a tumor removed from his right lung and in 1966 another x-ray revealed asbestosis. Upon advice of his doctor, he quit his job. 523 F.2d at 156.

\item The court stated that failure to provide such warnings renders the product unreasonably dangerous and subjects the manufacturer to liability for damages under strict liability in tort. \textit{Id.} at 158. \textit{See generally} \textit{RESTATEMENT (SECOND) OF TORTS} §§ 388, 394, 402A (1965) (in order to prevent a product from being unreasonably dangerous, the seller must warn the buyer of the risk involved).\textsuperscript{54}

\item The applicable Minnesota statute, \textit{MINN. STAT. ANN.} § 541.05(5) (Supp. 1975), set six years as the period within which an action for personal injuries resulting from a defective product must be brought.

\item \textsuperscript{56} 523 F.2d at 160.

\item \textsuperscript{57} \textit{Id.} at 160-61.

\item \textsuperscript{58} 534 F.2d 566 (3rd Cir. 1976), \textit{cert. denied}, 429 U.S. 1038 (1976).
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expansive interpretation of the discovery rule. The plaintiff in *Goodman* brought a negligence and breach of warranty action against the manufacturer of an oral contraceptive. She claimed that she had contracted thrombophlebitis\(^{59}\) and breast cancer as a result of her use of the drug.\(^{60}\) Goodman discovered that she had thrombophlebitis in 1967 and was diagnosed as having breast cancer in 1969. She brought suit against the manufacturer in 1971. While the action was pending, Goodman died and her husband, substituted as the real party in interest, filed an amended complaint which included a wrongful death claim. The United States Court of Appeals for the Third Circuit reversed the district court's summary judgment\(^{61}\) and held that a genuine issue of material fact existed as to the date of discovery of the several claims.\(^{62}\)

At the outset, the *Goodman* court established that although a plaintiff's action for the wrongful death of a spouse is independent of the deceased's personal injury claim, it is valid only if the personal injury claim was filed within the limitations period.\(^{63}\) In order to determine whether Goodman's action was time-barred, the court reviewed the limitations period for personal injury actions.\(^{64}\) Applying New Jersey law, the court ruled that the statute did not begin to run until the injured party knew not only of the existence of the injury and its cause, but also that the injury was negligently caused by the defendant.\(^{65}\) Treating the thrombophlebitis claim and the cancer claim as two separate actionable claims, the court acknowledged that the thrombophlebitis action was time-barred by the three-year statute of limitations, but held that a genuine issue of material fact existed as to when Mrs. Goodman might have maintained a claim for cancer.\(^{66}\) Therefore, the court reversed the order granting summary judgment.

The court recognized the rule against splitting a cause of action,\(^{67}\) but

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59. Thrombophlebitis is a condition of inflammation which affects the vein wall; it may occur in multiple sites simultaneously or at intervals. *See Stedman's Medical Dictionary*, supra note 8, at 1449.

60. Mrs. Goodman used an estrogen compound, Oracon, from April 4 through June 19, 1967. 534 F.2d at 568.

61. The district court held that the various claims asserted were barred by the statute of limitations applicable to personal injuries. 388 F. Supp. 1070, 1073-75 (D.N.J. 1974).

62. 534 F.2d at 568.

63. *Id* at 569-70. The applicable statutory provision is found at N.J. STAT. ANN. 2A: 14-2 (West 1951).

64. 534 F.2d at 570-71.

65. *Id* at 570.

66. *Id* at 574-75.

67. The district court held that the cancer claim was barred by virtue of the discovery in June of 1967 of the thrombophlebitis claim. The district court reasoned that if it looked to the separate dates of discovery it would permit the splitting of a cause of action for a single personal injury. 388 F. Supp. at 1074-75. The court of appeals reviewed the district court's
deemed it inapplicable because the thrombophlebitis and the cancer were the results of an exposure to two different risks, stemming from two separate chains of causality. By characterizing the injuries in this manner, the court avoided addressing the question of whether application of the discovery rule to the cancer claim would violate the rule against splitting a cause of action.

In *Martinez-Ferrer v. Richardson-Merrell*, however, the California Court of Appeals did address the rule against splitting a cause of action in a latent injury context. Martinez began taking MER/29, an anticholesterol drug, in 1960. Six months later, he developed macula edema, a retinal swelling, and severe dermatitis. After determining that MER/29 caused the illness, Martinez discontinued the drug, and five months later, both illnesses improved. Between 1961 and 1975 Martinez experienced no complications. In 1976, however, he developed cataracts, and filed a products liability action against Richardson-Merrell, the manufacturer of MER/29. The trial court granted the company's motion for summary judgment, concluding that the action was time-barred because the one-year statute of limitations commenced when Martinez discovered the illnesses in 1961. The California Court of Appeals reversed the summary judgment, and held that Martinez was not time-barred as a matter of law from bringing suit for the injury he discovered in 1976.

Focusing on the rule against splitting a cause of action, the court holding and acknowledged that "[the rule against splitting a cause of action in New Jersey is well settled."

It is possible to infer from the court's holding that if it determined that the cancer claim was filed within two years after it was discovered, the court would have addressed the cancer claim as a separate action. See *Goodman*, 534 F.2d at 574.

The trial court reasoned that the statute began to run when Martinez knew or should have known that he had suffered an injury as the probable result of ingesting MER/29. The trial court stated that Martinez possessed the elements of a cause of action necessary to bring suit when he discovered the illnesses in 1961. *Id.* at 321, 164 Cal. Rptr. at 593.

The court noted that in reversing the summary judgment, it had not addressed the statute of limitations question, the real issue on appeal. The court realized that, on remand, the question before the trial court would be whether Martinez could proceed against the defendants on the theory that his cataracts were caused by MER/29, even though his action was filed years after he knew or should have known that he had suffered some injury from that product. *Id.* at 322, 164 Cal. Rptr. at 594.

The court acknowledged that *Calvin v. Thayer*, 150 Cal. App. 2d 610, 310 P.2d 59 (1957), demonstrated the traditional concept of what constitutes a cause of action for personal injuries. The *Calvin* court held that the statute of
phasized that the definition of a cause of action for a personal injury involving a direct trauma is not appropriate in cases where ingestion of a harmful substance may result in life-threatening injuries decades later.76 The court noted various developments indicating a trend away from strict adherence to the rule against splitting a cause of action. First, the court referred to the statute of limitations applicable to nuisance cases, and noted that a plaintiff may elect to treat a permanent nuisance as a temporary one and bring successive claims upon it without encountering a plea of merger.77 The Restatement of Judgments also provides an exception to the general rule against splitting a cause of action when an "extraordinary reason" is present,78 or if the first judgment is not a just fulfillment of a statutory or constitutional plan.79 Thus, the Martinez court recommended exceptions to the rule against splitting a cause of action in an effort to avoid a "miscarriage of justice" in latent injury actions.80

In 1981, the United States District Court for the District of Columbia also permitted a cause of action to be adjudicated upon discovery of a second injury. In Fearson v. Johns-Manville Sales Corp.,81 an asbestos insulation worker filed a claim in 1973 under a workers compensation program after a physician informed him that he had asbestosis. Fearson received a $50,000 settlement for his claim. Subsequently, he was diagnosed as having bronchogenic carcinoma, a cancer of the lung. Fearson

limitations commences to run when the "plaintiffs [acquire] knowledge of the facts constituting their cause of action." Id. at 616, 310 P.2d at 62. However, the court noted that Calvin illustrated the injustice of the general rule when applied to Martinez. Martinez would have been forced to argue for speculative damages on the possibility of his contracting cataracts, had he brought suit in 1962 for dermatitis and macula edema. The court admitted that Martinez "would have been laughed out of court" had he argued for such speculative damages. Martinez, 105 Cal. App. 3d at 323, 164 Cal. Rptr. at 595.

76. Id. at 324, 164 Cal. Rptr. at 595.
77. Id. at 326, 164 Cal. Rptr. at 596-97. The court stated the nuisance cases demonstrated a recognition that "under certain circumstances a plaintiff need not put all of his eggs in one basket, particularly when he does not know how many eggs" he will eventually have. Id.
79. 105 Cal. App. 3d at 327, 164 Cal. Rptr. at 597. The Martinez court stated simply that Martinez's case fit well within both exceptions. Id.
80. The court acknowledged that these developments revealed a trend away from strict adherence to the rules governing a cause of action and toward a set of rules which enable the plaintiff to recover for a just claim without prejudicing the defendants or violating established rules of law, such as the doctrine of res judicata. Id. The court, however, did not explain the method by which a court could extend relief to the plaintiff without splitting a cause of action.
82. Id. at 673.
died within three months, and his wife filed survival and wrongful death actions in 1980 based upon her husband's death due to the cancer.

In contrast to the Martinez court, the Fearson court did not rely on carving out a new exception to the rule against splitting a cause of action. Instead, it expressly denied that the alleged wrongful act gave rise to only one cause of action. It stated that Fearson's awareness of an injury in 1973 did not sufficiently notify him of the impending development of cancer four years later. 83 Relying on Grigsby, the court applied the discovery rule, but expanded its application and held that Fearson's wife had a separate cause of action based upon the discovery of cancer in 1979. 84 The court reasoned that the alternative, barring a claim based on the second injury, would force a person to seek speculative damages for all possible future injuries upon diagnosis of any minimal problem. 85 The court, however, by electing the least restrictive alternative, eluded the question of whether the extension of the discovery rule to a second injury violates the rule against splitting a cause of action.

II. Wilson v. Johns-Manville Sales Corp.: Defining Discovery Rule Application in Multiple Injury Litigation

In an effort to determine whether application of the discovery rule to a second injury violates the rule against splitting a cause of action, the United States Court of Appeals for the District of Columbia Circuit recently provided a practical analysis of the statute of limitations in latent

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83. The court denied that the cancer was simply a maturation of the harm from exposure to asbestos. The court rejected the theory that Fearson had only one, indivisible cause of action which arose from the exposure to asbestos and that the action accrued when the asbestosis was diagnosed in 1973. Id. at 673-74. See supra note 6 and accompanying text.

84. Fearson, 525 F. Supp. at 674. The Fearson court affirmed notice as an element necessary to trigger the running of a statute of limitations by asserting that a new cause of action was created at the discovery of the second injury because the decedent did not know that he had cancer until it was diagnosed in 1979. Id. The court, however, did not explain why the extension of the discovery rule did not violate the rule against splitting a cause of action. It simply stated that because asbestosis and bronchogenic carcinoma are independent diseases, the fact that Fearson was diagnosed as having asbestosis in 1973 had no bearing on his cause of action based upon injury and death due to the discovery of cancer in 1979. Id. at 673-74.

85. The court referred to a hypothetical to illustrate its reasoning on this point:

Suppose an individual takes a drug which causes a skin rash which disappears in a few days and no legal action is brought because of the minimal harm caused. Years later, the individual discovers that he or she has cancer which resulted from use of the same product. Under the defendants' theory, the failure to sue for the skin rash would bar the suit for cancer. This exceeds the bounds of common sense as well as sound legal reasoning.

Id. at 674 n.4.
injury cases. In *Wilson v. Johns-Manville Sales Corp.*, the court extended the statute of limitations in order to provide relief to plaintiffs who, years after discovering one illness, discover an entirely separate injury.

From 1941 until 1973, Henry J. Wilson was steadily employed as an insulation worker at various construction sites in the metropolitan Washington, D.C. area. As an integral part of his employment, Wilson regularly handled and was otherwise exposed to asbestos products. In 1973, after he was x-rayed as part of his local union's routine program, Wilson was told he had contracted asbestosis. Subsequently, Wilson's health rapidly declined. After Wilson suffered two heart attacks in 1974 and a collapsed lung in 1975, his doctor ordered him to retire. In February of 1978, Wilson was hospitalized and diagnosed as having mesothelioma, a cancer affecting the lining of the lung. On May 17, 1978, Wilson died from malignant mesothelioma. One year later, Wilson's widow brought a survival and wrongful death action against Johns-Manville Corporation in federal court.

Upon completion of discovery, Johns-Manville moved for summary judgment contending that Wilson was barred from action by the three-year statute of limitations. Because Wilson discovered that he had asbestosis in 1973, Johns-Manville argued that his cause of action accrued at that time and concluded that his 1979 action was time-barred. The district court granted Johns-Manville's motion, but provided no written opin-

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86. 684 F.2d 111 (D.C. Cir. 1982).
87. The autopsy report stated:
The immediate cause of death of this 56 year old White male, HENRY J. WILSON, is bronchopneumonia . . . . The primary disease process suffered by this patient was a malignant mesothelioma originating in the right pleural space . . . . [I]t is my opinion that Mr. Wilson sustained heavy exposure to asbestos products and developed pulmonary asbestosis and malignant mesothelioma as a result of this exposure.
91. Johns-Manville also argued that Mrs. Wilson was estopped from denying that asbestosis was the cause of her husband's death. It stated that her admission that asbestosis was in part a cause of Henry Wilson's death clearly established that the action accrued no later than 1973, when the asbestosis diagnosis was made. The district court did not rule on the estoppel issue.

The court of appeals addressed the estoppel argument and held that damages due to asbestosis and mesothelioma were a basis for separate and distinct claims of relief. The court of appeals noted that on remand, a claim for relief due to the harm caused by mesothelioma could be pursued. The court acknowledged that, in contrast, any recovery for the harm caused by asbestosis was time-barred. Accordingly, Mrs. Wilson agreed to limit the action to damages caused by mesothelioma. *Wilson*, 684 F.2d at 114 n.14.
ion or memorandum explanation for its judgment. The United States Court of Appeals for the District of Columbia Circuit reversed the lower court's ruling.

Judge Ginsburg, writing for the court, acknowledged the mounting volume of litigation related to deaths and injuries caused by exposure to asbestos products. Turning to the statute of limitations, Judge Ginsburg stated that Mrs. Wilson's survival claim was timely only if Henry Wilson had a right of action which accrued within three years before the suit was filed.

Although the courts of the District of Columbia had previously applied the discovery rule solely to medical malpractice claims, the court stated that the district court implied the use of the rule in all cases in which an injury was not immediately apparent. It noted that federal courts, applying District of Columbia law, employed the discovery rule in latent injury actions. Finally, quoting the Supreme Court decision in Burnett v. New

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92. The court of appeals admonished the district court for disposing of the case in this manner. The court stated that without a written explanation, an appellate court has great difficulty in discerning the reasoning and authorities relied on by the district court. The court of appeals reviewed the transcript of oral argument on the summary judgment motion. From the transcript of the proceedings, the court discerned that the district court believed that Wilson's exposure to asbestos gave rise to only one cause of action which accrued when asbestosis was diagnosed. Id. at 115 n.16.

93. See supra note 1 and accompanying text. The court noted that members of both the House and the Senate have introduced bills which would provide a comprehensive, nationwide compensation scheme covering workers who die or are disabled or injured as a result of asbestos exposure. Wilson, 684 F.2d at 112 n.1. See S. 1643, 97th Cong., 1st Sess. (1981); H.R. 5735, 97th Cong., 2d Sess. (1982). Nonetheless, the court maintained that courts may not rely on proposed legislative solutions to avoid their obligation to resolve the cases before them in an equitable manner. Wilson, 684 F.2d at 112 n.1.

94. Citing Semler v. Psychiatric Inst. of D.C., 575 F.2d 922, 925 (D.C. Cir. 1978), the Wilson court noted that the Survival Act was "designed to place the deceased's estate in the position it would have been in had the deceased's life not been cut short." Wilson, 684 F.2d at 115 n.20. The court affirmed that a crucial determination in a survival claim is the date a cause of action accrued. Id. See also supra note 2 and accompanying text.

95. Wilson, 684 F.2d at 115-17. The court, however, did recognize that some courts still adhere to the traditional view that a cause of action accrues at the time of invasion of a plaintiff's body. Id. at 115. See, e.g., Steinhardt v. Johns-Manville Corp., 54 N.Y.2d 1008, 1010, 430 N.E.2d 1297, 1299, 446 N.Y.S.2d 244, 246 (1981).


97. The court stated that Burns v. Bell, 409 A.2d at 615, indicated that malpractice cases were only examples of tort claims in which the injury was not immediately visible. The court inferred that the Burns intent was to apply the discovery rule to all personal injury claims in which the harm was not readily apparent. Wilson, 684 F.2d at 116.

98. Id. In personal injury actions, a statute of limitations inquiry is a substantive question. Erie R.R. v. Thompkins, 304 U.S. 64 (1938), mandates that on nonfederal questions a federal district court apply the law of the forum in which it sits. See Guaranty Trust Co. v. York, 326 U.S. 99 (1945). Thus, in a personal injury context, statutes of limitations are
York Central Railroad, the court stated that the application of the discovery rule was widely supported in commentary when “the interests of justice require vindication of the plaintiff's rights.”

Having determined that the discovery rule was applicable in latent injury actions, the court then addressed Johns-Manville's central contention that Wilson had only one cause of action for all asbestos-related injuries. Johns-Manville asserted that the cause of action accrued when Wilson discovered that he was suffering from asbestosis in 1973, five years before he discovered that he had cancer. Focusing on the alleged wrongful conduct, the company argued that once some harm is apparent, a claim accrues not only for that harm but also for any harm that may develop in the future as a result of the wrongful exposure. Moreover, the company asserted that Wilson did not have the option to waive tort recovery for the asbestosis and bring suit for the mesothelioma when the condition developed in 1978. Johns-Manville concluded that, had Wilson sued between 1973 and 1976, he would have been barred from action in 1978 by the well-established rule that a claim for suit may not be split.

In its discussion, the court first established that it was not concerned with whether judgment on a claim for asbestosis pursued between 1973 and 1976 would have precluded a later claim based on mesothelioma in 1978. According to Judge Ginsburg, the doctrines of res judicata and considered substantive and in a diversity case, the District of Columbia federal courts are bound to apply the law which the courts of the District of Columbia would apply to the suit. Wilson, 684 F.2d at 116.


100. Johns-Manville argued that even if the discovery rule was applicable to the Wilson case, the survival claim was still barred by the three-year statute of limitations. Wilson, 684 F.2d at 117.


102. Wilson, 684 F.2d at 117.

103. Johns-Manville conceded, however, that asbestosis and mesothelioma are separate and distinct diseases, and that mesothelioma is not a complication of the asbestosis. Id. at 117 n.33. See also Goodman v. Mead Johnson & Co., 554 F.2d 566 (3rd Cir. 1976). The Goodman court stated that no evidence existed linking the thrombophlebitis and the carcinoma as the product of the same chain of causality. Id. at 574. See supra notes 67-68 and accompanying text.


105. Wilson, 684 F.2d at 117.
collateral estoppel,\textsuperscript{107} which concern the consequences of prior adjudication, would govern such a question. The court stated that instead the issue to be decided was whether manifestation of any asbestos-related disease triggered the running of the statute of limitations on all separate, distinct and later-manifested diseases resulting from the same asbestos exposure.\textsuperscript{108}

Focusing on the statute of limitations, the court distinguished the policies underlying the statute from the purposes served by the law of judgments.\textsuperscript{109} The rules of judgments, res judicata and collateral estoppel, prevent the cost and confusion of multiple lawsuits and simultaneously encourage reliance on adjudication by preventing inconsistent decisions.\textsuperscript{110} Statutes of limitations, on the other hand, motivate timely adjudication of claims by placing a time limitation on the commencement of litigation.\textsuperscript{111} Because no prior adjudication of Wilson's claims had occurred, the court addressed Wilson's action within the context of the statute of limitations.\textsuperscript{112} The court enunciated two considerations which underlie a statute of limitations.\textsuperscript{113} The first, characterized as repose, protects potential defendants from stale claims by allowing them to plan future business without the threat of distant liability.\textsuperscript{114} The second, identified as evidentiary,
encourages prompt adjudication to ensure that loss of evidence or unavailability of witnesses does not hinder litigation. Judge Ginsburg recognized that the value of repose would be best served by Johns-Manville's definition of a cause of action. Nonetheless, because the evidence in latent injury litigation tends to develop over time rather than disappear as in traditional personal injury litigation, the court maintained that the evidentiary considerations outweighed the repose value.

Once it determined that latent injury actions involved unique evidentiary considerations, the court reviewed the community interests embodied in personal injury and wrongful death claims. The court noted that providing a system of recovery which "sufficiently but not excessively" compensates latent injury victims, is an interest which the community seeks to advance. This interest, however, would be substantially undermined by a rule that limited the application of the discovery rule to the manifestation of a first injury. Similarly, the interest in providing a plaintiff with relief would be seriously impaired if a plaintiff were forced, upon discovery of one injury, to argue for speculative damages based on the probability of the manifestation of another injury. Pursuing relief under the "reasonably certain" standard, difficult in asbestos litigation,

115. Wilson, 684 F.2d at 119. See supra note 18 and accompanying text.
116. For a discussion of Johns-Manville's definition of a cause of action, see supra notes 100-04.
117. Wilson, 684 F.2d at 119. Although the traditional rule of accrual provides repose for potential defendants by protecting them from stale claims, there is little risk in latent injury actions that a defendant will be unfairly surprised. A manufacturer whose employees are exposed to toxic substances may expect that his employees will develop future injuries. In addition, the evidence regarding those injuries is more apparent over time as the disease manifests itself. Raymond v. Eli Lilly & Co., 117 N.H. 164, 173, 371 A.2d 170, 176 (1977). See Note, Statutes of Limitations and Pollutant Injuries: The Need for a Contemporary Legal Response to Contemporary Technological Failure, 9 Hofstra L. Rev. 1525, 1558 (1981). Also, defendants to latent injury actions need time to discover a probable causal connection between the injuries a plaintiff suffers, and the harmful substance the defendant manufactured. See Kidwell, The Duty to Warn: A Description of the Model of Decision, 53 Tex. L. Rev. 1375, 1381 (1975).
118. Wilson, 684 F.2d at 119. The court identified the interests involved as a plaintiff's interest in obtaining "at least adequate compensation" and a defendant's interest "in paying no more than that." Id.
119. Id. See generally Comment, supra note 19.
120. A plaintiff would be barred from action upon discovery of a second injury. Wilson, 684 F.2d at 119. If a manufacturer is liable for the delayed manifestation of the effects of his product, it is unjust to absolve him of that liability simply because the plaintiff suffered other different and independent effects for which he did not bring suit. Martinez-Ferrer v. Richardson-Merrell, Inc., 105 Cal. App. 3d 316, 324, 164 Cal. Rptr. 591, 595 (1980).
121. Wilson, 684 F.2d at 119. For a discussion of the "reasonably certain" rule, see supra note 25 and accompanying text.
122. The court notes that approximately 15% of asbestosis sufferers later contract pleural
would severely limit a plaintiff's chances for recovery. Thus, the court concluded that a potential defendant's interest in repose was outweighed by the community interest in providing fair recovery in latent disease cases.

Finally, Judge Ginsburg acknowledged that a concern for judicial economy influenced the court's decision. The court noted that under its application of the discovery rule, an injured party would not be forced to litigate upon diagnosis of an initial injury. Other sources of relief, such as workers compensation or private insurance, may provide adequate recompense for the initial illness. If no further disease developed, an individual would have no reason to file a claim. According to Johns-Manville, however, if a person was told that another more serious disease could manifest itself at a later date, but that a judicial remedy would be barred unless a current action was filed, the individual would almost certainly seek judicial relief. Therefore, the resultant incentive to litigate would aggravate the already overburdened judicial system. Because the court concluded evidentiary considerations, judicial economy, and the interests of plaintiff relief outweighed the defendant's interest in repose, it commenced the limitations period at the time Wilson discovered that he had cancer and thus held the survival action was timely.

mesothelioma and 12% contract peritoneal mesothelioma. See Selikoff, Churg & Hammond, Relation Between Exposure to Asbestos and Mesothelioma, 272 New Eng. J. Med. 560, 562 (1965). If a plaintiff did argue for damages for possible mesothelioma, the court predicted that Johns-Manville would argue that the probability of mesothelioma is far less than 50%, and is therefore too speculative to support a damage award. Wilson, 684 F.2d at 120. In addition, the court indicated the inequity of the "reasonably certain" rule among individual plaintiffs. Plaintiffs who sustain the future harm are undercompensated and those who elude it receive a windfall. Id. at 120 n.45.

The court suggested that recently some courts have revised the "reasonably certain" standard. Wilson, 684 F.2d at 119-20 n.44. The traditional standard has been replaced by a "simple probability" or "pro-rata" approach. Such an approach allows a plaintiff recovery equal to his chance of incurring the future harm. See, e.g., Jordan v. Bero, 210 S.E.2d 618, 640-41 (W. Va. 1974) (Neely, J., concurring); J. Stein, Damages and Recovery § 106 (1972); King, supra note 25, at 1381-87. The pro-rata approach is followed in England. See Cooper, Assessing Possibilities in Damage Awards—The Loss of a Chance or the Chance of a Loss, 37 Sask. L. Rev. 193, 196-97 (1971). The court maintained that the pro-rata approach did not eliminate the inequity to plaintiffs. Those who suffer future harm are undercompensated, and those who escape it are overcompensated. Wilson, 684 F.2d at 119-20 n.44.

Wilson, 684 F.2d at 120.

In Pearson v. Johns-Manville Sales Corp., 525 F. Supp. 671 (D.D.C. 1981), the plaintiff filed for damages due to asbestosis under the Workers Compensation Program and received a $50,000 settlement. Id. at 672. For a detailed discussion of Pearson, see supra notes 81-85 and accompanying text.

Wilson, 684 F.2d at 120.

Id.

Id. The court also held that the wrongful death action was timely because it was
III. \textit{Wilson} and its Effects on the Exposure Victims and the Manufacturers of Toxic Substances

The \textit{Wilson} court, in an unprecedented circuit court holding, offered toxic-exposure victims judicial relief. The court's procedure of affording relief began with a fundamental application of the discovery rule.\textsuperscript{129} After accomplishing this task with the assistance of District of Columbia precedent, the court ventured to apply the discovery rule to a second, although entirely separate injury. The court, in defining the application of the discovery rule, limited its holding to only those cases where no adjudication of the first injury has occurred. By restricting its holding to only those cases where there has been no former adjudication,\textsuperscript{130} the court created the opportunity to begin the limitations period upon discovery of a second injury.

In \textit{Urie}, the Supreme Court fulfilled Congress's intent in enacting the Federal Employers' Liability Act to furnish injured employees with an avenue of relief. The Court tolled the limitations period until the accumulated effects of the harmful substance manifested themselves.\textsuperscript{131} The foundation for the \textit{Urie} interpretation of the statute of limitations was the Court's assumption that the element of notice is essential to the accrual of a cause of action. The \textit{Wilson} court transcended the \textit{Urie} statute of limitations interpretation in order to recompense the new lot of latent injury litigants, who years after discovering one illness, discover another entirely separate injury.\textsuperscript{132}

\textit{Wilson} like \textit{Martinez}, provides relief by permitting a cause of action to be adjudicated upon discovery of a second injury. In contrast with \textit{Martinez}, however, \textit{Wilson} did not recommend a new exception to the rule against splitting a cause of action. Rather, the court focused on the doctrine of res judicata and emphasized that no prior adjudication of Wilson's first injury claim had occurred.\textsuperscript{133} Consequently, the \textit{Wilson} court was free to address Wilson's second injury claim strictly within the statute of limitations context. Therefore, the court artfully allowed recovery for mul-

\begin{footnotesize}
\begin{enumerate}
\item For a discussion of the policies underlying a statute of limitations, see supra notes 17-19 and accompanying text.
\item \textit{Wilson}, 684 F.2d at 117.
\item For a discussion of \textit{Urie}, see supra notes 31-38 and accompanying text.
\item \textit{Wilson}, 684 F.2d at 115-20.
\item \textit{Id.} at 118.
\end{enumerate}
\end{footnotesize}
multiple latent injury victims without creating ambiguous exceptions to the rule against splitting a cause of action.

The Wilson court's expansive application of the discovery rule will result in several immediate and long-range effects. The liberal interpretation of the limitations requirement will increase the probability of plaintiff recovery. The likelihood of recovery will in turn increase the amount of latent injury litigation. Unless the limitations period has expired on both injuries, a court following Wilson will be obligated to hold lengthy hearings on the merits of each case. Thus, the expansive application of the statute of limitations may exacerbate an already overburdened judicial system—the very result the Wilson court wished to avoid.

A further consequence of the Wilson court's expansive interpretation of the statute of limitations is that manufacturers of toxic substances may incur severe litigation expenses. Traditionally, product liability defendants have used summary judgment as an effective method to avoid the burden and expense of full litigation. Because Wilson allows a plaintiff to file suit within a reasonable time after discovery of the second injury, fewer defendants will succeed in establishing that a plaintiff is time-barred from pursuing a cause of action. This result will force defendants to actually litigate the statute of limitations issue, often a long and expensive process. The possibility of the associated costs may severely affect the manufacturers of toxic substances.

For instance, product manufacturers may face an increasing threat of financial insolvency. The striking escalation of latent injury litigation has already caused the manufacturers, insurers, and attorneys involved

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134. Because plaintiffs who failed to file for a first injury can now proceed with an action based on the second injury in spite of the rule against splitting a cause of action, Wilson 684 F.2d at 120, the likelihood of plaintiff recovery is increased.

135. Wilson, 684 F.2d at 120.

136. The Federal Rules of Civil Procedure provide that summary judgment shall be granted for the moving party if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The party moving for summary judgment carries the burden of proving that there exists no genuine issue of any material fact. 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2727, at 524-25 (1973). However, the adverse party may not rely merely upon general allegations to show the existence of a genuine issue for trial. He must set forth specific facts that establish the existence of such an issue. FED. R. CIV. P. 56(e). See, e.g., United States v. Diebold, Inc., 369 U.S. 654 (1963) (per curiam); Smith v. Pittsburg Gage & Supply Co., 464 F.2d 870 (3d Cir. 1972).

great alarm. With the addition of an entirely new group of claimants, who discover a second illness after failing to litigate a first injury, asbestos manufacturers could be held liable for billions of dollars in damage suits. Although most manufacturing companies are insured, expanded liability may exhaust their insurance. This will force a manufacturer to pay the liability and court expenses on all future litigation. Because most product manufacturers are unprepared to pay expanded liability and litigation expenses, they face financial instability and the threat of bankruptcy. In fact, only one day before Wilson was decided, an asbestos manufacturer, UNR Industries, confronted with 17,000 pending asbestos damage claims, filed for reorganization under chapter 11 of the Bankruptcy Act. The threat of insolvency of other major manufacturing companies has prompted Congress to consider federal legislation to aid exposure victims.

In contrast to the adverse effects upon the manufacturers of toxic substances, the Wilson decision has offset the harm suffered by latent injury victims. Plaintiffs who were previously time-barred from filing suit upon the discovery of a second injury may now obtain compensation under the Wilson theory that “damages occasioned by two distinct illnesses provide the foundation for separate and distinct claims of relief.”

Although Wilson provided plaintiff relief where it was inherently justifi-

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139. It was estimated that the future 52,000 asbestos suits would cost Johns-Manville approximately two billion dollars. Rotbart, supra note 137, at 3, col. 1.

140. Most asbestos manufacturers that have changed insurance companies are battling their prior insurers in the courts to determine which insurer is responsible for reimbursing the asbestos manufacturers for the expenses of the asbestos litigation. At issue is whether liability attaches when the worker first manifests symptoms of a disease or when he is first exposed to the products causing the injury. See Granelli, supra note 1, at 24. In 1981, the District of Columbia Circuit ruled that insurance coverage was triggered both at the time of exposure and manifestation and was also triggered while the asbestos fibers are “in residence.” See Keene Corp. v. Insurance Co. of North America, 667 F.2d 1034, 1044 n.20 (D.C. Cir. 1981), cert. denied, 102 S. Ct. 1644 (1982).


143. Wilson 684 F.2d at 114 n.14.
able, the court’s holding is sufficiently vague to question whether a plaintiff is able to sue for asbestos and mesothelioma in two separate suits, at different times, and recover damages for each action. Specifically stating that it did not intend to decide such an issue, the Wilson court nevertheless suggested that res judicata or collateral estoppel would apply to a case in which former litigation had occurred. The court stated, however, that “asbestosis and mesothelioma provide the basis for separate and distinct claims of relief.” This statement implies that a separate cause of action may be pursued for each distinct injury resulting from the same toxic exposure and, therefore, suggests that res judicata and collateral estoppel may not apply in latent injury litigation. Although Wilson left this issue for another court to decide, Judge Ginsburg, by expanding the application of the discovery rule, provides an equitable system of recovery for latent injury victims who, years after discovering one illness, discover another more damaging injury.

IV. Conclusion

The Court of Appeals for the District of Columbia Circuit in Wilson v. Johns-Manville Sales Corp. defined discovery rule application in the multiple injury context by commencing the limitations period upon discovery of a second injury. The interpretation of the discovery rule in Wilson will have diverse effects. The expansive application will provide relief to many toxic exposure victims who after waiving tort recovery for one injury, discover another illness resulting from the same harmful substance. On the other hand, this liberal interpretation will aggravate the already striking escalation of latent injury actions, thus increasing the likelihood of a product manufacturer’s financial insolvency. The impetus behind these effects is the desire to secure fair compensation for an individual who suffers serious harm. Such expansive application, however, may effectively abandon the doctrines of res judicata and collateral estoppel in latent injury litigation. Nonetheless, Wilson properly mandates that an individual exposed to toxic substances and subject to latent harm, will have an effective route to pursue in order to obtain just compensation.

Kim Marie Covello

144. Id. at 117.
145. Id. at 117-18.
146. Id. at 114 n.14.