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THE INDUSTRIAL REVOLUTION and technological development have brought concomitant legal problems unheard of at the common law. Fundamental principles of law evolved to incorporate the changes necessary to rule over a new way of life. Some of the problems of industrialization have been solved, others are in a state of flux, while myriad others are as yet unknown. This article concerns itself with one of the incidents of complex industrial progress—insidious disease, as viewed in the light (or dark) of the statute of limitations.

Insidious diseases are those which develop slowly and imperceptibly. Usually they are diseases that develop after the continual deposit of minute and infinitesimal amounts of dust or particles of the offending substance. In contrast to the injuries that follow immediately after the usual form of trauma, the latent and obscure effects of a negligent act are not discernible and may go undiscovered for some number of years. There is ample scientific data to show that systemic changes resulting from insidious diseases occur long after cessation of exposure. Commonly diseases of this nature develop from ten to fifteen years later.[1] Illustrative are cases in which long term contact with a noxious substance first resulted in an illness five years after the plaintiff had ceased using the deleterious material,[2] or in which air pollution resulted in berylliosis which was first manifested nine years after the last subjection to the noxious fumes.[3] In these actions each defendant raised the defense of the statute of limitations to bar the litigation. The respective defendants moved for summary judgment. The motion was denied in each instance, premised upon the interpretation that an action of this nature does not accrue until the illness first becomes manifest.

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1 Mancuso, Medical Aspects of Occupational Diseases, 18 Ohio St. L. J. 612 (1958).

2 Ricciuti v. Voltarc Tubes, 277 F. 2d 809 (2d Cir., 1960).

3 Brush Beryllium Company v. Meckley, 284 F. 2d 797 (6th Cir., 1960). Plaintiff's complaint filed in 1959 alleged that she was subjected to deleterious materials emanating from defendant's plant during the period from 1941-1945. The disease of berylliosis, however, did not manifest itself until 1958.

The circumstances which give rise to diseases of an insidious nature prevent accurate determination, even in retrospect, of when the harm to the plaintiff actually happened. Notwithstanding the impossibility of early detection, courts until recently followed the then accepted rule that the limitation period must be measured either from the date of the negligent act or from the termination of employment.[4]

Statutes of Limitation

In order to preserve a right to a remedy for this form of injury, some courts have taken the position that a cause of action accrues, and the statute begins to run, when the insidious disease results.

At this juncture it becomes pertinent to note the reasons for enactment of the limitations statute, and to determine whether the interests of justice are served through modification of the concepts in order to cope with the problem of insidious diseases. Statutes of limitation were enacted in England as early as 1236 A.D., and in Rome as early as 424 A.D.[5] At the present time general statutes of limitation are found in every state. These statutes take many forms and govern most types of actions. The obvious purpose of the statutes is to prevent suits upon fraudulent or stale claims, where much evidence and many witnesses are no longer available.[6] The prevailing view is that valid claims are not usually allowed to remain neglected over a period of years with no attempt to enforce them. Further, there was a desire to relieve courts of the burden of adjudicating stale or tenuous claims.[7]

A typical statute of limitations reads:

> An action for bodily injury to person and property shall be brought within two years after the cause thereof arose.[8]

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[4] Note, 34 Tex. L. Rev. 480 (1956). This article does not undertake to discuss claims presented under statutes providing recovery for occupational injuries as a part of Workmen's Compensation Acts. Due to the vast differences in the acts from jurisdiction to jurisdiction it is difficult to generalize. The reader is advised to look to his own state to determine if this question is specifically answered by statute.

[5] Pollock and Maitland, History of English Law 81 (2d ed. 1898); Sohn, The Institute of Roman Law 318-22 (3d ed. 1907).

[6] Comment, Developments in the Law—Statutes of Limitations, 63 Harv. L. Rev. 1177 (1950).

[7] *Ibid.*

[8] Ohio Rev. Code, Sec. 2305.10.

In enacting the statutes, legislatures refrained from defining or describing with particularity when "the cause thereof arose." Faced with the task of determining the meaning of this phrase, courts have stated that:

> A cause of action may be said to accrue when there coexists (1) a demand capable of present enforcement; (2) a suable party against whom it may be enforced; (3) a party in being who has a present right to enforce it . . . No one will contend that a cause of action can accrue unless it accrues in favor of someone in being and against someone in being.[9]

In the process of judicial interpretation the foregoing rationale was overlooked by some courts. These courts held that it was only the negligent act, not the damages, which constituted accrual of the cause of action.[10] The first exposure, said these courts, caused the action to accrue and the statute of limitations to run. This approach allowed the court to pinpoint with a relative degree of certainty a definite time. By adding the proper period as provided for limitation to that act, the court would dismiss the suit on the theory that the time for commencing the action had elapsed. In doing so, the courts overlooked the fact that "the occurrence of an injury, without more, does not constitute actionable negligence." [11] The elements upon which a cause of action for negligence depends are a duty, the breach of that duty, and the injury suffered as a consequence of the breach. All elements must be present before an action can be maintained, and in the case of insidious diseases, neither the breach of duty nor the injury are evidenced for some years. Further, until the disease is ascertained no litigable claim will arise. Illustrative is the *Meckley* case,[12] where it was not until her doctor diagnosed her condition as berylliosis that the plaintiff could first become aware of who the defendant would be. It is not negligence alone which gives rise to the claim, but negligence in combination with the damage that ensues. Therefore, until there is damage there is no claim,[13] and a statute prescribing the time within which the action must be filed cannot be used as a device to preclude recovery in an action never before maintainable.

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[9] Tobias v. Richardson 5 C. C. (n.s.) 74, aff'd. 72 Ohio St. 626 (1905).

[10] Note, 34 Tex. L. Rev. 480 (1956); Field v. Gazette Publishing Co., 187 Ark. 253, 59 S. W. 2d 19 (1933); Street v. Consumers Mining Corp., 185 Va. 561, 39 S. E. 2d 271, 167 A. L. R. 886 (1946).

[11] 38 Am. Jur., Limitations of Actions 672.

[12] Meckley v. Brush Beryllium Co., *supra* n. 3.

[13] U. S. v. Reid, 251 F. 2d 691 (5th Cir., 1953).

A Changing Concept

A realistic approach to the problem of insidious diseases was reached in the landmark case of *Urie v. Thompson.*[14] Plaintiff alleged that in 1940 he was forced to cease work as a fireman on a steam locomotive because of a pulmonary disease diagnosed as silicosis. This permanently disabling affliction had been caused by continuous inhalation of silica dust blown or sucked into the cabs of the locomotives on which he worked. The injurious concentration of silica dust in the air arose from the railroad's use of excessive amounts of sand beyond that which was needed to provide traction for locomotive wheels.

The defendant contended that Urie, having been exposed to silica dust since approximately 1910, must unwittingly have contracted silicosis long before 1938, and hence his cause of action must be deemed to have accrued longer than three years[15] before the institution of the action. In the alternative, the defendants argued that each inhalation of silica dust was a separate tort and therefore Urie's claim was limited to inhalation within three years of filing suit. In disposing of the railroad's contentions the court stated:

> We do not think the human legislative plan intended such consequences to attach to blameless ignorance. Nor do we think those consequences can be reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights. The record before us is clear that Urie became too ill to work in May of 1940 and that diagnosis of his condition was accomplished in the following weeks. There is no suggestion that Urie should have known he had silicosis at any earlier date. It follows that no specific date of contact with the substance can be charged with being the date of injury, inasmuch as the injurious consequences are the product of a period of time rather than a point of time; consequently the afflicted employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves.[16]

Logically this view is the most reasonable due to the virtual impossibility of detection at the initial stages.

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[14] 337 U. S. 163 (1949).

[15] 45 U. S. C. A., Sec. 56.

[16] Urie v. Thompson, 337 U. S. 163 (1949).

The statute of limitations starts to run when the disease is first manifested, or, in the exercise of due care, might have been ascertained. This has been held to be as early as the instance in which a person became aware of difficulty in breathing[17] or as late as an autopsy.[18] When the individual became apprised of his disease, or, as a reasonable man, should have known that his health was undermined, is a question of fact.[19] Whether this is the date of diagnosis, of manifestation of symptoms or of disability, is one phase of this subject as yet unresolved.

As a practical matter it may be said that the statute ran from the time of positive diagnosis, where that was the first time the disease manifested itself and made possible a recognition of a causal relation between the exposure and the disease.[20]

Negligence Theory

Prior to the *Urie* decision the majority of cases ruled that the period of limitations ran either from the occurrence of negligence or exposure. Under the statutes the right of action was deemed to accrue when the wrong was committed, and in the absence of a concealment the mere ignorance of the injured party of the existence of the actionable wrong would not suspend the running of the statute.[21] The courts, in accepting this theory, adopted a doctrine, wholly impractical in diseases of an insidious nature, that injuries arise when "first inflicted," and that subsequent development of disease therefrom does not give rise to a cause of action,[22] since it is merely the natural result of that which has already occurred.[23]

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[17] Piukhula v. Pillsbury Astoria Flouring Mills Co., 150 Or. 304, 42 P. 2d 921 reh. den. 150 Or. 333. 44 P. 2d 162 (1935).

[18] McGhee v. Chesapeake & Ohio R. Co., 173 F. Supp. 587 (W. D. S. D. Mich. 1959).

[19] Hutchison v. Semer, 361 P. 2d 803, reh. den. 362 P. 2d 704 (Or. Sup. Ct., 1961); cf., Coots v. Southern Pacific Co., 49 Cal. 2d 805, 322 P. 2d 460 (1958). In which the court held that an action was not barred when the case was filed more than three years after the plaintiff knew he had dermatitis which was traceable to the chemical solution with which he workd, but less than three years after the work terminated. Cf. Daniel v. Beryllium Corp., 211 F. Supp. 452 (E. D. Penn. 1962), in which the court held that the limitation ran from the date when the illness was diagnosed, and limitations statutes were not tolled by reason of defendant's continuing wrong.

[20] Urie v. Thompson, *supra* n. 16.

[21] Street v. Consumers Mining Corp., 185 Va. 561, 39 S. E. 2d 271 (1946); Scott v. Rinekart & Dennis Co., 116 W. Va. 319, 180 S. E. 276 (1935).

[22] *Ibid.*

[23] Wiersycki v. Pratt & Letchworth Co., 151 Misc. 207, 271 N. Y. S. 36 (1934).

This rule has become firmly entrenched and is still adhered to in a few states. In the case of *Schwartz v. Heyden Newport Chemical Corporation*[24] it was held that an action against a manufacturer of a carcinogenic drug was barred because the drug had been administered fourteen years earlier, notwithstanding the fact that the patient instituted suit within three years from his discovery of cancer. The court maintained that "in actions of negligence, damage is of the very gist and essence of the plaintiff's cause" and such damage accrues when the harmful substance is introduced into the body,[25] not when it is discovered. However, the dissent in the *Schwartz* case stated:

> As the complaint stands, the limitation periods have run since the pleading says no more than that patient did not learn of the dangerous qualities of the preparation until 1958, fourteen years after the injection. From his brief and oral argument, however, it seems that his theory of action is that the carcinogenic qualities of the injection were not discovered by him until after the 1957 surgical operation. If that be the fact, it would be unreasonable and perhaps unconstitutional to hold that his time to sue expired before it was possible for him to learn of the wrong.[26]

Although the negligence theory survives in some states, the strong dissent in the *Schwartz* case indicates that even in these jurisdictions, courts are looking objectively at this problem.

Last Exposure Theory

Since insidious diseases may develop long after exposure has ceased, rendering it impossible to state at precisely what time they first came into existence, many cases, in an attempt to escape the rigor of the theory that negligence accrues at the time the tortious act, have evolved the "last exposure" doctrine.[27] Under this approach, the continuing negligence is re-

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[24] 12 N. Y. 2d 212, 188 N. E. 2d 148 (1963), affg. 15 A. D. 2d 650, 224 N. Y. S. 2d 270, affg. 30 Misc. 2d 663, 219 N. Y. S. 2d 98 (5 to 2 decision); 31 U. S. L. Week 2383 (Ct. App. N. Y. 1/23/63).

[25] *Ibid.*

[26] *Id.* at p. 2384.

[27] Maty v. Grasselli Chem. Co. 89 F. 2d 456 (3 Cir., 1937), rev'd. on other grounds, 303 U. S. 197 (1938); Hercules Powder Co. v. Bannister, 171 F. 2d 262 (6th Cir., 1948); Farrar v. St. Louis-San Francisco R. Co., 361 Mo., 408, 235 S. W. 2d 391 (1950). Fawkes v. Penn. R. R. Co., 264 F. 2d 397 (3d Cir., 1959), was an action brought under the Federal Employers' Liability Act for traumatic arthritis, resulting from a series of jolting impacts caused by an air hammer the plaintiff had used from 1924 until 1952. The court held that the action was not barred as the limitation did not begin to run before the employee was relieved of the jolting work.

garded as a single wrong against which the limitation period commences to run only from the time of cessation of the wrong.

In situations where a breach of duty occurred on the part of the defendant, and the negligence was continuous until the cumulative effect produced disability, it was regarded as a single wrong continuing for the length of exposure.[28] This rule also produced some rather harsh results. Commonly, diseases of the type under discussion fail to develop for some number of years. In instances of that nature, the statute ran from the date of termination of employment[29] or subjection to the injurious elements,[30] and precluded recovery notwithstanding lack of knowledge on the part of the injured party.[31]

The fallacy of the position taken by the courts in accepting the "exposure doctrine" was met in the *Urie* case. Reasoning that acceptance of the alternative defense would mean that the injured party would be barred from suit if he left the company, or even showed that he merely transferred to another form of work wholly unrelated to the cause of his disease, the court simply held the position to be untenable.

In addition to the third and current theory that the cause of action occurs only upon manifestation of injury, a discussion of insidious diseases would be incomplete without reference to the fourth theory regarding the statute of limitations. The English courts hold that only that portion of the disease that occurred within their six year statute is compensable.[32] Expert medical testimony to distinguish the effects within, from those beyond, the statutory period, is admitted into evidence, and that portion of the disease contracted within the statutory period then

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[28] Rowe v. Gathe Corp., 126 F. 2d 61 (7th Cir., 1942), cert. den. 317 U. S. 702 (1942); Plazak v. Allegheny Steel Co., 324 Pa. 422, 188 A. 130 (1936).

[29] *Ibid.*

[30] Farrar v. St. Louis-San Francisco R. Co., 361 Mo. 408, 235 S. W. 2d 391 (1950).

[31] This is similar to the law of medical malpractice cases. The statute of limitations begins to run in a cause of action for malpractice upon the termination of the physician-patient relation, whether, within the time limited by the statute, the act constituting malpractice is known or unknown. DeLong v. Campbell, 157 Ohio St. 22, 104 N. E. 2d 177 (1952); Gillette v. Tucker, 67 Ohio St. 106 (1902); cf. 9 Wes. Rev. L. R. 86 in which the author makes a plea for a realistic approach to the use of statutes of limitations.

[32] Clarkson v. Modern Foundries Ltd., 1 W. L. R. 120 (1957); cf. Grant v. Fisher Flouring Mills Co., 181 Wash. 567, 44 P. 2d 193 (1935), in which an employee was injured by exposure to nitric acid and chlorine gas fumes and the court allowed recovery but limited damages to injuries sustained to the period of three years prior to the commencement of the action.

determines the basis for recovery. If it can be proved that a material aggravation of the disease occurred within the last six years, the injured party may recover for nearly all of his damage. This method, which ultimately produces a near proper result, has been strongly criticized by an English law journal.[33] This article concluded that the English courts fail to recognize that a cause of action of this type cannot possibly accrue until the disease is diagnosed.[34]

Conclusion

Premised upon practical considerations and logic, a cause of action accrues in respect to negligent acts exposing one to an insidious disease, only after the disease has become manifest. It necessarily follows that limitations cannot run until the disease has been diagnosed. However, until recently this was not the majority view.

Through what can best be characterized as misapplication of general negligence rules, recovery by the injured party was often precluded. In an effort to alleviate this harsh rule, the "last exposure theory" was evolved. Under this theory a defendant's repeated acts of negligence were viewed as a single wrong, causing the statute to commence to run when either employment or exposure ceased.

Finally, courts have recognized, and have taken as a more tenable position, that the cause first accrues when the existence of the disease has been ascertained, regardless of when the last exposure occurred. Absent this view, a condition of *damnum absque injuria* would exist. The individual would be punished for his lack of knowledge about something that he could not know. For statute of limitation purposes in respect to insidious diseases, courts now have undertaken to adopt and apply a fair and reasonable standard to meet the exigencies of the situation. Recent cases conclude that the statute of limitation begins to run and the cause of action accrues when a disease is first manifest.

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[33] 102 The Solicitors' Journal, 39 (1958).

[34] *Ibid.*