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The Statute of Limitations for Radiation Injuries: Maughan v. SW Servicing, Inc.

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THE STATUTE OF LIMITATIONS FOR RADIATION INJURIES: *MAUGHAN V. SW SERVICING, INC.*

Wrongful death suit filed alleging that leukemia that led to deaths of plaintiffs' children and spouses between 1960 and 1973 was caused by radiation emanating from a uranium processing plant. Given the complexities of cancer causation, the 10th Circuit Court of Appeals concluded that the discovery rule should be liberally applied. Thus, in cases involving suspected carcinogens, the statute of limitations will be tolled until the plaintiff knows or should know of facts supporting the likelihood that one particular suspected carcinogen was the cause of his cancer, and has identified the likely source of his exposure to that carcinogen.

STATEMENT OF THE CASE

Actions for injuries from radiation exposure confront our legal system more frequently than ever before and with more complex issues. Actions founded upon radiation exposure often present a case of latent injury because a victim may not discover the effects of contamination until many years after exposure.[1] The latent nature of radiation injuries results in the possibility that any action for redress of injuries may be barred by the statute of limitations by the time a plaintiff learns of his injuries. Such was the case in *Maughan v. SW Servicing, Inc.*,[2] where the 10th Circuit Court of Appeals held that cases involving suspected carcinogens present exceptional circumstances requiring application of the discovery rule.

Maughan concerned a vanadium[3] processing plant that was built di-

1. Bodily injury may result from two types of exposure: either a sudden massive exposure to radiation, or chronic low-level contamination. A massive exposure to radiation generally causes obvious signs of injury within a short time. G. HUTTON, LEGAL CONSIDERATION ON IONIZING RADIATION 25-29 (1966). While some damage to the cells occurs at the time of radiation exposure, *id.* at 29, chronic exposure to lower levels of radiation usually does not manifest symptoms in the victim until years after the exposure. S. ESTEP, W. PIERCE, & E. STASON, ATOMS AND THE LAW 23 [hereinafter cited as ATOMS]. The period of latency, during which no significant clinical symptoms appear, may extend for 20 or more years. Bloom, Christovich, Cope, Cull, DeJarnette, & McNeal, *The Statute of Limitations Problem in Relation to Atomic Energy Liability,* 26 INS. COUNSEL J. 347, 354 (1959); see Frenkel, *Clinical Aspects of Nuclear Radiation Exposure,* 5 FORUM 188, 196 (1970). Cancer, fetal damage, genetic damage, sterility, and a decreased life expectancy are among the possible results of radiation exposure. ESTEP, *supra,* at 28-35.

2. 758 F. 2d 1381 (10th Cir. 1985).

3. Vanadium is a soft, ductile, silver-grey metal. THE NEW COLUMBIA ENCYCLOPEDIA, (W. Harris and J. Levey, eds. 1975). It forms numerous compounds, including vandates and complex organic compounds. The principal use of vanadium is in alloys, especially with steel. In the United States vanadium ores are mined in Arizona, Colorado, and Utah. *Id.*

rectly adjacent to a small community in Monticello, Utah in 1940.[4] The plant was conveyed to the United States Government which used it to process uranium when the ore was discovered in the area in the late 1940's.[5] In 1956, SW Servicing, Inc. took over the operation under a contract with the Atomic Energy Commission (AEC). The plant closed in 1960 after the supply of uranium ran out.[6] Between 1961 and 1962 the mill was dismantled and the land revegetated.[7]

Beginning in 1956, six Monticello residents, mostly children, contracted and eventually died of leukemia.[8] The last known death occurred in 1973.[9] Because Monticello is a small town, this incidence of leukemia is greater than statistically probable.[10]

Consequently, decedent's heirs and relatives filed a wrongful death suit on August 28, 1980, alleging that the leukemia which led to the deaths of their children and spouses was caused by radiation emanating from the mill operated by SW Servicing, Inc.[11] Defendants moved for and were granted summary judgment on the ground that the statute of limitations for wrongful death actions had run.[12] The United States District Court for the District of Utah stated, ". . . [p]laintiffs had knowledge of both the deaths and the cause"[13] and "[t]he effect of the radiation exposure in the decedents ceased to be latent at the time the leukemia was diagnosed."[14] The court then summarily concluded this case ". . . was no different than a typical wrongful death case."[15] The 10th Circuit reversed, holding that in cases involving suspected carcinogens, the statute of limitations must be tolled until the plaintiff knows or should know of the following. First, plaintiff must recognize the facts supporting the likelihood that one particular suspected carcinogen was the cause of his cancer, and second, plaintiff must identify the likely source of his exposure to that carcinogen.[16]

4. Brief for Appellants at 2-3, Maughan v. SW Servicing, Inc., 758 F. 2d 1381 (10th Cir. 1985). Monticello is located in the southeastern part of Utah, less than 100 miles from the four corners area.

5. *Id.* at 3.

6. *Id.*

7. Brief for Appellees at 6, Maughan v. SW Servicing, Inc., 758 F. 2d 1381 (10th Cir. 1985).

8. Brief for Appellant at 3. Between 1960 and 1967, there were four childhood leukemia deaths in Monticello. Between 1968 and 1973, three more cases of leukemia were diagnosed. (As of July, 1978, one former resident was battling for his life in Salt Lake City, Utah.)

9. *Maughan v. NL Industries*, No. 80-0475, slip. op. at 2 (D. Utah June 29, 1982).

10. In the 1960s, Monticello had a population of approximately 1900. The statistical probability of such an outbreak is less than one in a thousand. Thus, this outbreak represented a leukemia cluster. Public Health Service Report EPI-67-48-2, Ex. 33, p. 4.

11. 758 F. 2d at 1383.

12. *Id.* The parties stipulated that, pursuant to UTAH CODE ANN. § 78-12-36(l) (1953), the statute of limitations was tolled as to the minor plaintiffs and their claims were timely filed.

13. *Maughan v. NL Industries*, No. 80-0475, slip op. at 7 (D. Utah, June 29, 1982).

14. *Id.* at 6.

15. *Id.* at 7.

16. *Id.* at 1387.

This case note will examine the articulation, application, and implication of the "discovery rule" presented in *Maughan*. The analysis begins with a review of the court's opinion. This will be followed by a review of the basic principles underlying the statute of limitations and discovery rule. Next, Utah decisions applying the discovery rule will be analyzed to determine whether *Maughan* is a consistent step in the development of the rule. Finally, an analysis of *Maughan* and its significance will be presented.

THE COURT'S OPINION

The court of appeals in *Maughan* began its opinion by noting that Utah has adopted statutes of limitations "to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."[17] The court then stated the general rule that the statute of limitations begins to run upon the happening of the last event necessary to complete the action, regardless of whether the plaintiff knows of the existence of the cause of action.[18] If the court had chosen to apply this rule, then the statute would have begun to run at the death of each victim and the claims would thus be time barred.

Instead, the court described and applied the "discovery rule," as defined by Utah courts, which tolls the statute of limitations under the following circumstances:

(1) When the discovery rule has been adopted by statute in that particular area of law;

(2) When "a party has concealed facts or misled the potential plaintiff, the statute is tolled until the plaintiff knows or should know of the relevant facts"; and

(3) When "there are exceptional circumstances that would make application of the general rule irrational or unjust. . . ."[19]

In this case, Utah has not adopted the discovery rule by statute; and there are no allegations of concealment or misrepresentation.[20] Thus, the court of appeals indicated that plaintiffs' claim "is time barred unless it presents an 'exceptional circumstance' to which the Utah Supreme Court would apply the discovery rule."[21]

To determine whether exceptional circumstances are present the court

17. 758 F. 2d 1381, 1383 (10th Cir. 1985), (citing Myers v. McDonald, 635 P.2d 84,86 (Utah 1981)), (quoting Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 34849 (1944)).

18. 758 F. 2d at 1384, *see* Becton Dickinson & Co. v. Reese, 668 P.2d 1254 (Utah 1983).

19. 758 F. 2d at 1384.

20. *Id.*

21. *Id.*

invoked a balancing test.[22] This balancing methodology encompasses a weighing of the hardship that the statute of limitations would impose on the plaintiffs given the facts of the case, against the possible prejudice to the defendant from the difficulties of proof caused by the passage of time.[23]

This court concluded that "cases involving suspected carcinogens present 'exceptional circumstances,' justifying application of the discovery rule for three reasons."[24] First, the court found that the scientific data concerning causation of cancer is very complex.[25] That is, there are many suspected causes of cancer and even if a plaintiff "attempts to determine the cause of the disease, he is confronted with a mass of complex, controversial and rapidly changing scientific data and opinions."[26] Second, the knowledge and understanding of the potential plaintiffs and potential defendants is significantly different.[27] Hence, a person who suffers from cancer may not understand that the illness may have been caused by unnatural elements. Finally, the long latency period of the disease makes it difficult for a plaintiff to determine whether he was exposed to potential carcinogens, and if so, when and where the exposure occurred.[28] Because of these three factors the court concluded that the hardship imposed by the statute of limitations for wrongful deaths outweighs the difficulties of proof caused by the passage of time; therefore, the court tolled the statute.

In addition, the court of appeals noted that a rule which encourages the filing of lawsuits when one develops cancer but has no knowledge of its cause, is inconsistent with the position that unfounded claims should be discouraged.[29] That is, to rule that the statute begins to run at the time the disease develops would encourage the parties who have relevant information to delay disclosure until after the statute has run.[30] Moreover, the court of appeals deferred to the Utah legislature which has explicitly tipped the balance in favor of tolling where a potential plaintiff is under a disability, regardless of the difficulties of proof.[31] The court found the balance in cases involving suspected carcinogens to be similarly in favor of tolling.

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22. *Id.*
23. *Id.*
24. *Id.* at 1385.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at 1385-1386.
29. *Id.* at 1386.
30. *Id.*
31. *Id.(citing to* UTAH STAT. ANN. *§ 78-12-36).*

Because the court held the discovery rule tolls the statute of limitations until the plaintiff knows or should know of the facts constituting the cause of action, the question arises as to when plaintiffs should have been aware of the existence of their cause of action. It is settled law in the majority of circuits that the issue of when a plaintiff knows or should have known of the cause of action is a question of fact for the jury.[32] Thus, the court of appeals remanded the case for a determination as to when the survivors knew or should have known of the facts constituting their cause of action.[33]

LEGAL BACKGROUND

History

Statutes of limitations are characteristically based on the proposition that persons who sleep on their right to commence a lawsuit may lose that right after a specified period of time.[34] Thus, a statute of limitations can effectively deprive a person of the opportunity to pursue an otherwise valid claim.[35] Because the common law imposes no limit on the time in which an action must be brought, any time limitation placed on the action is the result of statutory enactment.[36]

Statutes of limitations are designed to protect a defendant against a claim after memories have faded, witnesses have died or disappeared, and evidence has been lost.[37] They are based primarily on policy considerations of fairness to the defendant.[38] Thus, statutes of limitations serve three purposes: (1) providing repose for the defendant;[39] (2) en-

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32. *See infra* note 103 and accompanying text.

33. 758 F.2d at 1389.

34. *See, e.g.*, Order of R.R. Telegraphers v Railway Express Agency, 321 U.S. 342 (1944). In *Railway Express*, the United States Supreme Court determined that the statute of limitations did not bar a wage claim that was commenced in a timely manner but not filed until seven years later. *Id.* The Court found that the justification for a statute of limitations is the right of a defendant to be free of stale claims even if those claims are just. *Id.*

35. Chase Sec. Corp. v. Donaldson, 325 U.S. 304 (1945). The Court in *Donaldson* noted that some jurisdictions view statutes of limitations as "extinguishing the claim and destroying the right" to bring an action, while others view statutes of limitations as doing no more than cutting "off resort to the courts for enforcement of the claim." *Id.* at 313.

36. The defense of laches is different from the defense of statute of limitations. Laches is a doctrine peculiarly applicable to suits in equity, and is independent of the statute of limitations, which, unless otherwise provided by law, applies to legal actions only. *See e.g.*, Jones v. McGonigle, 327 Mo 457, 37 SW 2d 892 (1931).

37. Order of Railroad Telegraphers v. Railway Express, 321 U.S. at 349 (1944). *See* United States v. Kubrick, 444 U.S. 111, 117 (1979) (purpose of statute of limitations "is to encourage the prompt presentment of claims").

38. Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1965) (applying a federal statute of limitations). *Developments in the Law-Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950).

39. *See, e.g.*, Order of R.R. Telegraphers v. Railway Express, 321 U.S. at 349 (1944) ("[e]ven if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation. . . .").

couraging diligence on the part of the plaintiff in asserting his or her rights;[40] and (3) safeguarding against adjudication based upon stale evidence.[41]

This casenote is concerned with tort actions[42] for which most statutes state that the statutory period will begin to run when a cause of action "accrues."[43] Until the 1950s, courts consistently held that a cause of action accrued on the occurrence of a tortious act, regardless of the tort victim's knowledge of the injury.[44] Shortly thereafter courts became concerned that a strict application of limitation statutes left those plaintiffs that were blamelessly ignorant of their causes of action and latent injuries without a legal remedy.[45]

As early as 1949, the United States Supreme Court recognized that mechanical application of statutes of limitations could lead to inequitable results when the plaintiff was unaware of his injury until after the statutory period had run.[46] In *Urie v. Thompson*,[47] a steam locomotive fireman filed suit under the Federal Employers' Liability Act,[48] alleging that his continuous inhalation of silica dust had caused disability. The *Urie* Court,

40. Taylor, *Occupational Disease: A Defense Attorney's Point of View*, 12 FORUM 297, 300-01 (1976) (plaintiff's diligence is required because, at some point, the filing of a complaint becomes so distant from the situation which gave rise to the claim as to make the burden of defense intolerable).

41. *See, e.g.*, United States v. Kubrick, 444 U.S. 111, 117 (1979) ("[T]he search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise").

42. Other actions such as contract actions have different statutes of limitations.

43. *Developments in the Law-Statutes of Limitations*, 63 HARV. L. REV. 1177, 1200 (1950). A typical statute of limitations states that the period within which a suit may be brought is calculated from the time the "cause of action accrues." *Id.* Legislatures have adopted a concept delineating the combination of facts or events that create a cause of action. *Id.* The occurrence of the last of these requisite facts is, therefore, the point at which the cause of action accrues. *Id.*

44. *See, e.g.*, Wilcox v. Plummer, 29 U.S. (4 Pet.) 172, 181 (1830) (statute of limitations begins to run on date of attorney's negligent act, not when loss is discovered); Pickett v. Aglinsky, 110 F.2d 628, 629 (4th Cir. 1940) (cause of action accrued at time doctor left sponge in patient, not when it was discovered); Kennedy v. Johns-Manville Sales Corp., 135 Conn. 176, 178-79, 62 A. 2d 771, 772 (1948) (cause of action for negligent installation accrued when insulation was installed, not when walls cracked and leaked); Schmidt v. Merchants Despatch Transp. Co., 270 N.Y. 287, 300, 200 N.E. 824, 827 (1936) (cause of action accrues when injury occurs; injury was defined as wrongful invasion of personal rights. Thus, plaintiff's negligence claim for pneumonconiosis arose the first time he breathed dust that caused disease).

45. *See, e.g.*, Yoshizaki v. Hilo Hosp., 50 Hawaii 150, 153, 433 P.2d 220, 223 (1967) (to bar plaintiff's action before he is aware that he has a claim is patent injustice.); Myrick v. James, 444 A. 2d 987, 994 (Me. 1982) (manifest injustice to bar plaintiff's claim because he is unaware of medical malpratice until after limitations period); Franklin v. Albert, 381 Mass. 611, 616, 411 N.E. 2d 458, 463 (1980) (unjust to punish "blameless ignorance" by ruling a malpractice action is timebarred before the plaintiff reasonably could have known he has suffered a harm). *See generally* Annot., 80 A.L.R. 3d 368, 387-400 (1961) (discussion of various approaches to adopting discovery rule).

46. *See* Urie v. Thompson, 337 U.S. 163 (1949).

47. *Id.*

48. Employers' Liability Act, 45 U.S.C. § 51-60 (1982).

declaring that a plaintiff should not be deprived of a remedy merely because of his blameless ignorance of his condition, held that the action did not accrue until "'effects of the deleterious substance [manifested] themselves.'"[49]

Influenced by *Urie*, many jurisdictions have adopted a "discovery rule" for cases in which an injury does not manifest itself for a considerable amount of time after the defendant's actions.[50] The "discovery rule" delays the accrual of a cause of action to the time the plaintiff discovered, or in the exercise of reasonable diligence should have discovered, the injury for which the defendant was responsible.[51] Initially, most jurisdictions limited use of the discovery rule to medical malpractice cases;[52] but gradually use of the discovery rule has been extended to other situations in which strict application of the statute of limitations would preclude plaintiffs from litigating over injuries sustained.[53] That is, the time for

49. 337 U.S. at 170 (quoting Associated Indem. Corp. v. Industrial Accident Comm'n, 124 Cal. App. 378, 381, 12 P.2d 1075, 1076 (1932)). Although the Court did not decide *Urie* as a due process case, that issue is at least implicated in the decision. Indeed Justice Faulkner, in Garrett v. Ratheon Co., 368 So.2d 516, 524 (Ala. 1979), argued that the result reached by the majority was contrary to art. 1, section 13 of the Alabama constitution which provides that "'every person, for any injury done him, in his . . . person . . . shall have a remedy by due process of law. . . .'" Garrett v. Ratheon Co., 368 So. 2d at 524 (1979) (Faulkner, dissenting).

50. *See, e.g.*, Karjala v. Johns-Manville Corp., 523 F. 2d 155 (8th Cir. 1975) (asbestosis); Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974), (mesothelioma); Fort Myers Seafood Packers, Inc. v. Steptoe & Johnson, 381 F.2d 261 (D.C. Cir. 1967) *cert. denied*, 390 U.S. 946 (1968), (attorney malpractice); Grigsby v. Sterling Drug Inc., 428 F. Supp. 242 (D.D.C. 1975), aff'd mem., 543 F.2d 417 (D.C. Cir. 1976) *cert. denied*, 431 U.S. 967 (1977), (latent side effects of drug); Miller v. Beech Aircraft Corp., 204 Kan. 184, 460 P.2d 535 (1969) (emphysema and pulmonary fibrosis); Harig v. Johns-Manville Prods. Corp., 284 Md. 70, 394 A. 2d 299 (1978) (mesothelioma). But cf. Garrett v. Raytheon Co., 368 So. 2d 516 (Ala. 1979) (denying judicial adoption of discovery rule for injuries resulting from radiation exposure); Thornton v. Roosevelt Hosp., 47 N.Y. 2d 780, 391 N.E. 2d 1002, 417 N.Y.S. 2d 920 (1979) (refusing to apply foreign-objects discovery rule to radium injected into plaintiff's body).

51. The term "discovery rule" encompasses subtle variations among jurisdictions on the event that triggers the statute of limitations. In Raymond v. Eli Lilly & Co., 117 N.H. 164, 371 A. 2d 170 (1977), the court noted that while the discovery rule usually is phrased in terms of the injured party's discovery of both his injury and the relationship between his injury and the tort feasors's conduct, in some cases courts stated simply that the statute of limitations began running under the discovery rule when the plaintiff discovered his injury. *Id.* at 174. The *Raymond* court found that in cases using the latter formulation of the rule, the nature of the "injury" alerts plaintiffs that their rights have been violated. *Id.* at 174. The court concluded that the former formulation of the rule was preferable in latent disease cases because injury and discovery of a causal relationship do not occur simultaneously. *Id.* at 170-71, 371 A. 2d at 174.

52. Comment, *Preserving Causes of Action in Latent Disease Cases*, 68 VA. L.REV. 615, 624 (1982) [hereinafter cited as *Latent Disease Cases*]; *see, e.g.* Burke v. Washington Hosp. Center, 293 F. Supp. 1328 (D.D.C. 1968); Shillady v. Elliot Community Hosp., 114 N.H. 321, 320 A. 2d 637 (1974); GA CODE ANN. § 9-3-72 (1982); MO. ANN. STAT. § 516.105 (West. Supp. 1982); OHIO REV. CODE ANN. § 2305.11 (1981).

53. *See, e.g.*, Goodman v. Mead Johnson & Co., 534 F.2d 566 (3rd Cir. 1976) *cert. denied*, 429 U.S. 1038 (1977), (injuries caused by oral contraceptives); Brush Beryllium Co. v. Meckley, 284 F.2d 797 (6th Cir. 1960) (berylliosis); Harig v. Johns-Manville Prods. Corp., 284 Md. 70, 394 A. 2d 299 (1978) (mesothelioma).

filing suit may be tolled while a plaintiff is ignorant of his cause of action due to the inherently undiscoverable nature of the injury.[54] This expansion of the use of the discovery rule includes latent injury cases.[55]

Utah law

Utah law[56] imposes statutes of limitations for various actions.[57] Utah imposes a two year limit for wrongful death actions.[58] Most of the statutes were silent as to tolling provisions, so throughout the years, the Utah Supreme Court and the Utah Legislature have created tolling standards in a number of different situations.[59]

In fact, the Utah Supreme Court expressly adopted the discovery rule in *Christiansen v. Rees*.[60] This was a foreign object medical malpractice case in which the plaintiff filed the complaint after the traditional limitations period had run.[61] The court reviewed neighboring states' decisions and concluded that "the cause of action does not accrue until the patient learned of the presence of such foreign object in his body."[62]

The Utah Legislature responded to *Christiansen* and the modern trend in other jurisdictions by adopting a discovery rule for malpractice actions.[63] This statute was subsequently supplanted by the "Utah Health Care Malpractice Act,"[64] which retains the discovery rule.[65] Yet further

54. *See, e.g.*, Harig v. Johns-Manville Prods. Corp., 284 Md. 70, 79-80, 394 A. 2d 299, 305 (1978); Raymond v. Eli Lilly & Co., 117 N.H. 164, 170, 371 A.2d 170, 174 (1977) (discovery rule avoids "harsh and illogical consequences" by outlawing the plaintiff's claim before he could have known it existed).

55. *Latent Disease Cases, supra* note 52, at 625. For a summary of statutes and case law in each state, see McGovern, *The Status of Statutes of Limitations and Statutes of Repose in Product Liability Actions: Present and Future*, 16 FORUM 416, 422-423, 438-50 (1980).

56. Jurisdiction in *Maughan* is based on diversity of citizenship. The general rule is that a federal court will apply the applicable state statutory period of limitations, as would a state court, in a diversity of citizenship case. When a federal court adopts the state period of limitations, it will adopt, as a rule, the entire framework of the state's law, including statutory provisions relating to tolling and the like, and the judicial construction and interpretation thereof. *See, e.g.*, Security Trust Co. v. Black River Nat. Bank, 187 U.S. 211 (1902). Yet when a suit is in federal court on a federally created cause of action and there is a federal period of limitations applicable, the courts uniformly apply the federal period and, if they exist, the federal rules on tolling and other ancillary matters. *See, e.g.*, Burnett v. New York Cent. R.Co., 380 U.S. 424 (1964).

57. UTAH CODE ANN. § 78-12-1 (1953).

58. UTAH CODE ANN. § 78-12-28 (1953).

59. The Utah legislature has expressly adopted the discovery rule for actions for waste, trespass or injury to real property, taking or injuring personal property, and for fraud or mistake. UTAH CODE ANN. § 78-12-26 (1953). The Utah supreme court has held that proof or concealment or misleading by the defendant precludes the defendant from relying on the statute of limitations. *See, e.g.*, Rice v. Granite School District, 23 Utah 2d 22, 456 P.2d 159 (1969); Vincent v. Salt Lake County, 583 P.2d 105 (Utah 1978).

60. 20 Utah 2d 199, 200, 436 P.2d 435, 436 (1968).

61. *Id.* at 199, 436 P.2d at 435.

62. *Id.* at 200, 436 P.2d at 436.

63. UTAH CODE ANN. § 78-12-28 (1953).

64. UTAH CODE ANN. § 78-14-1-11 (1953).

65. UTAH CODE ANN. § 78-14-4 (1953).

refinement and interpretation was needed to precisely define the tolling standard.[66]

Consequently, in *Foil v. Ballinger,*[67] the Utah Supreme Court supplied a precise definition of the discovery rule, which is currently the accepted tolling standard in Utah.[68] This court held that "the statute begins to run when an injured person knows or should know that he has suffered a legal injury."[69] *Foil* concerned a medical malpractice action filed after the applicable statute of limitations had run.[70] In *Foil,* plaintiff contended that the limitations period did not commence at the time she was aware of her injury, which was shortly after the negligently performed operation. Rather, the limitations period began to run at the time plaintiff first became aware of the relationship between her injuries and the alleged negligent act.[71] Plaintiff did not become aware of the relationship until a medical panel issued a report indicating that the operation was the cause.[72] The supreme court agreed with plaintiff and reversed the summary judgment granted in favor of the defendant.[73] The court went on to define discovery of legal injury as "discovery of injury and the negligence which resulted in the injury."[74]

The *Foil* court discussed policy reasons supporting this tolling standard. That is, the court noted the difference in knowledge that often exists between plaintiff and defendant,[75] the prevention of the filing of unjustified lawsuits,[76] and the avoidance of the temptation to fail to disclose information about possible negligent acts,[77] as policy reasons behind its decision.

In 1981, the Utah Supreme Court extended the discovery rule to a

66. *See* Foil v. Ballinger, 601 P.2d 144 (Utah 1979).
67. *Id.*
68. *Id.* at 147.
69. *Id.* at 147.
70. *Id.* at 145.
71. *Id.* at 147.
72. *Id.* at 146.
73. *Id.* at 148.
74. *Id.* at 148.
75. "While the recipient may be aware of a disability or dysfunction, there may be, to the untutored understanding of the average layman, no apparent connection between the treatment provided by a physician and the injury suffered. Even if there is, [a connection], it may be passed off as an unavoidable side effect or a side effect that will pass with time. . . . But when injuries are suffered that have been caused by an unknown act of negligence by an expert, the law ought not be construed to destroy a right of action before a person even becomes aware of the existence of that right." *Id.* at 147.
76. ". . . to adopt a construction . . . that encourages a person who experiences an injury . . . and has no knowledge of its cause, to file a lawsuit against a health care provider to prevent a statute of limitations from running is not consistent with the inarguably sound proposition that unfounded claims should be strongly discouraged. One of the chief purposes of the Utah Health Care Malpractice Act was to prevent the filing of unjustified lawsuits. . . ." *Id.* at 148.
77. "The law should foster a fulfillment of the duty to disclose so that proper remedial measures can be taken and damage ameliorated." *Id.* at 148.

wrongful death case in *Myers v. McDonald.*[78] *Myers* concerned a ward killed in an automobile accident without any identification. Plaintiffs did not discover the cause of their ward's death until after the statute had run.[79] The court held that the policy against stale claims was outweighed by the unique circumstances of the guardian's hardship.[80]

With respect to latent injury cases, Utah and several other jurisdictions recognize exceptions to statutes of limitations that justify application of the discovery rule.[81] Applying the applicable statutory period without allowing for tolling requires a showing by defendant that each plaintiff knew or should have known both the cause of the injury and who negligently inflicted the injury after the statute had run. The final decision of whether a reasonable person in plaintiff's position knew or should have known the cause of the injury is a question of fact for the jury.[82]

78. 635 P. 2d 84 (Utah 1981).

79. In a wrongful death action, Utah courts will apply a two year statute of limitations. UTAH CODE ANN. § 78-12-28 (1953).

80. Plaintiffs alleged that despite their efforts to discover the whereabouts of their ward, they had no knowledge of his death and therefore had no knowledge that a cause of action existed until after the two year limitation period had expired. The court stated that plaintiffs had no alternative other than to bring their action after the statutory period had expired. 635 P.2d at 86-87.

81. Federal courts will toll the statute of limitations in latent injury cases, provided the court is interpreting the substantive state law as allowing for the application of the discovery rule. *See, e.g.*, Dawson v. Eli Lilly & Co., 543 F. Supp. 1330, 1339 (D.C.C. 1982), (Held, the purpose of the discovery rule is to prevent the accrual of a cause of action before one can reasonably be expected to know of the cause of action. Thus, the statute of limitations should not begin to run until one knows, or in the exercise of reasonable diligence should know, that the injury is the result of wrongdoing.); Williams v. Borden, Inc., 637 F.2d 731, 735 (10th Cir. 1980), (Held, the statute of limitations does not commence until the plaintiff knows, or as a reasonable person should know, that he has the disability and that the defendant caused it); Allen v. United States, 527 F. Supp. 476 (D. Utah 1981), (Held, in exceptional circumstances or causes of action where the application of the general rule would be irrational or unjust, the statute of limitations will be tolled until plaintiff knows or with due diligence should know of his cause of action). Although the trend today is toward use of the discovery rule in latent injury cases, some jurisdictions employ other standards to determine when a cause of action accrues. Under one such standard, often called the "first breath" rule, the plaintiff is considered to be injured and the statute of limitations commences when a toxic substance first enters the plaintiff's body. (*See* Comment, *Statutes of Limitations and the Discovery Rule in Latent Injury Claims; An Exception or the Law?*, 43 U. PITT. L. REV. 501, 505-06 (1982) ([hereinafter cited as *Exception or the Law*]. New York is one of the few jurisdictions that still uses this standard. *See, e.g.*, Thornton v. Roosevelt Hosp., 47 N.Y. 2d 780, 391 N.E. 2d 1002, (1972). Because latent diseases usually are not diagnosable until many years after the initial exposure, the "first breath" standard bars virtually all latent disease claims. This approach has been criticized by the commentators. See Birnbaum, *First Breath's ' Last Gasp: The Discovery Rule in Products Laibility Cases*, 13 FORUM 279, 284 (1977). This rule is similar to the old rule that a cause of action accrued on the occurrence of a tortious act, regardless of the tort victim's knowledge of the injury. *See supra* note 44 and accompanying text. Other jurisdictions, following the "last breath" doctrine, hold that when exposure to a toxic substance continues over a period of time, the cause of action accrues at the time of the last exposure. *See, Exception or the Law, supra*, at 507; *see, e.g.*, Garrett v. Raytheon Co., 368 So. 2d 516 (Ala. 1979); Everhart v. Rich's Inc., 229 Ga. 798, 194 SE 2d 425 (1972). Finally, the "continuing tort" rule is an analytical variation of the last breath doctrine. The continuing tort rule provides that each exposure to a harmful substance gives rise to a new cause of action. *See, Latent Disease Cases, supra* note 52 at 623.

82. *See, e.g.*, Dawson v. Eli Lilly & Co., 543 F. Supp. 1330 (D.C. 1982); Williams v. Borden, Inc., 637 F.2d 731, 738 (10th Cir. 1980); Ballew v. A.H. Robins Co., 668 F.2d 1325 (11th Cir.

ANALYSIS

Propriety of the Discovery Rule

The problem of limitations is serious in radiation exposure cases because exposure to radiation may cause no perceptible or significant injury at the time of exposure, but may manifest its impact in such serious ailments as cancer or leukemia perhaps as many as thirty years from the date of exposure.[83] Moreover, fetal damage, genetic damage, sterility, and a decreased life expectancy are among the possible results of radiation exposure.[84] Because a typical statutory limitation reduces the time between the accrual of the right and the commencement of the action to a relatively short fixed interval, many potential claimants are barred from recovery before they are even aware they have claims.[85]

For these reasons, the court's adoption of the discovery rule in this latent disease case is not surprising. The trend is clearly in the direction of tolling the statute of limitations until a plaintiff knows or should know of the injury for which the defendant is responsible.[86] This trend has received support from legal scholars, who assert that use of the discovery rule is equitable and consistent with basic principles of tort recovery.[87]

Moreover, the purposes of statutes of limitation[88] are not undermined if a claim for a latent illness is made when the illness is discovered or when its cause is discovered rather than when the injury or even last exposure occurs. The purpose of encouraging diligence on the part of plaintiffs is not furthered by a statute of limitations when the plaintiff is unaware of his injury until after the statutory period has run. Also, the evidentiary consideration justifying statutes of limitations does not apply with full force in latent disease cases, because evidence tends to develop

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1982) (reversing summary judgment for factual determination as to whether plaintiff should have known that her injuries were caused by an intrauterine device prior to the time when she was expressly informed of the casual connection by other plaintiffs and their attorney); Lundy v. Union Carbide Corp., 695 F. 2d 394 (9th Cir. 1982) (finding factual dispute as to whether plaintiff knew his condition was caused by exposure to asbestos, even though plaintiff himself had suggested, prior to expiration of the limitations period, that asbestos might be the cause); Renfroe V. Eli Lilly & Co., 686 F.2d 642 (8th Cir. 1982) (upholding refusal to grant summary judgment on question of whether plaintiff should have known that DES caused her cancer).

83. *See supra* note 1.

84. *See supra* note 1.

85. *See supra* note 44.

86. *See, e.g.*, Allen v. United States, 527 F. Supp. 476 (D. Utah 1981); Dawson v. Eli Lilly & Co., 543 F. Supp. 1330 (D.C. 1982); Williams v. Borden, Inc., 637 F. 2d 731 (10th Cir. 1980); Lundy v. Union Carbidé Corp., 695 F. 2d 394 (9th Cir. 1982).

87. *See, e.g.*, Demidovich, *Civil Procedure-Product Liability-Statute of Limitations-Survival and Wrongful Death Statutes-Manifestation of One Asbestos Related Disease Does Not Trigger the Statute of Limitations on All Separate and Later Manifested Diseases Endangered by the Same Asbestos Exposure*. 52 CINN. L. REV. 239, 250 (1983). Statutes of limitation tend to promote the peace and welfare of society, safeguard against fraud and oppression, and compel the settlement of claims within a reasonable period. *See* Baron v. Kurn, 349 Mo. 1202, 164 S.W.2d 310 (1942).

88. *See supra* notes 38-40 and accompanying text for listing of the purposes of statutes of limitations.

as time passes rather than disappear. Arguably, even repose in the sense of relief from uncertainty caused by potential liability is not always served by a typical statute of limitations in latent injury cases. For example, a defendant who is unaware that his product causes latent injuries cannot be said to gain repose from a time limit placed on his unforeseen liability.

One of the difficulties created by applying the "exceptional circumstances" test to determine application of the discovery rule is the case by case factual analysis required. The *Maughan* court did not define when a case will present such "exceptional circumstances" so as to justify application of the discovery rule. The opinion states: ". . . this court concludes that cases involving suspected carcinogens present exceptional circumstances. . . ."[89] Unfortunately, the court does not give any definitions of "suspected" or "carcinogens," nor does the opinion lay out any criteria for determining when an exceptional circumstance is present. Implicit in the court's reasoning is an indication that exceptional circumstances exist when there is complexity of data concerning causation of cancer, a disparity of knowledge between potential plaintiffs and defendants, and a long latency period of the disease.[90] The issues left unanswered by *Maughan* are whether exceptional circumstances always exist when the above three elements occur, whether carcinogen cases always present as a matter of law "exceptional circumstances" thereby invoking application of the discovery rule, and what criteria can be used to decide whether a particular situation presents an exceptional circumstance.

Policy

The *Maughan* court specifically looks at the consequences of applying the typical statute of limitations to these claims. That is, to rule that the right to make a claim commences as soon as an injured party becomes aware that a particular item is suspected of causing cancer is irrational because it forces injured parties to sue all sources of carcinogens simply to prevent the statute from running. that a particular substance is suspected to cause cancer.[91] This, in turn, would result in a dismissal of the suit on grounds of frivolity, Also, the purpose of statutes of limitation is to protect against actions which have grown old; they are not for the purpose of stimulating actions.[92]

The court, in effect, is applying notions of preservation of judicial economy and integrity. Moreover, the court implicitly reaffirms the policy of timely and truthful disclosure when it states that refusing to apply the

89. Maughan v. S.W. Servicing, Inc., 758 F.2d at 1385.
90. *Id.*
91. *Id.* at 1387.
92. *Id.* at 1387 (citing Allen v. United States, 588 F. Supp. 247, (D. Utah 1984)).

discovery rule will encourage parties with relevant information to delay disclosure until after the statututory period has expired.[93]

While the above are very important policy reasons mandating application of the discovery rule, other significant policy reasons do exist. The goal of a tort action is to place the economic burden of the injury on the party at fault.[94] Yet this practice of shifting the cost of injury is undermined absent a reasonable statute of limitations. Additionally, the use of the typical statute of limitation reduces employer incentives to eliminate radiation emissions from the environment.[95] That is, application of typical statutes of limitations releases the employer from a direct economic incentive to remove known carcinogenic emissions. Commencing the statute at the point in time when the victim discovers or reasonably should discover that he has an illness will retain a needed incentive to improve the health conditions of the environment.

Other Solutions

A system by which tort and wrongful death claims can be terminated more easily on the pleadings could be developed. Such a system has been developed and implemented successfully in California and Illinois. These courts require plaintiffs to state in their complaint the date of the discovery, the circumstances surrounding the discovery, and specific facts showing that the inability to make an earlier discovery was reasonable and not a result of the plaintiff's failure to investigate.[96] Under the California and Illinois approaches, mere assertions that the delayed discovery was reasonable are insufficient to withstand a motion to dismiss.[97] By allowing late claims to be dismissed as a matter of law, where they are insufficiently plead in the complaint, the expense, time, and frustration of discovery and further litigation would be avoided. This procedure may promote both the fairness and efficiency with which our judicial system is concerned.

Another solution is to prescribe longer statutes of limitations in radiation exposure cases. Idaho, for example, has the following statute of limitations for radiation injuries: three years from knowledge or when

93. Maughan v. S.W. Servicing, Inc., 758 F.2d at 1386.

94. Peters, *Occupational Carcinogenesis and Statutes of Limitation: Resolving Relevant Policy Goals*, 10 ENVTL. L. 113, 152 (1979).

95. *Id.* at 154.

96. *See* Saliter v. Pierce Bros. Mortuaries, 81 Cal. App. 3d Supp. 292, 297, 146 Cal. Rptr. 271, 274 (1978); Dujardin v. Ventura County Gen. Hosp., 69 Cal. App. 3d 350, 356, 138 Cal. Rptr. 20, 22 (1977); Pratt v. Sears Roebuck & Co., 71 Ill. App. 3d 825, 829, 390 N.E. 2d 471, 475 (Ill. App. 1979).

97. *See* Saliter v. Pierce Bros. Mortuaries, 81 Cal. App. 3d 292, 297, 146 Cal. Rptr. 271, 275 (1978); Pratt V. Sears Roebuck & Co., 71 Ill. App. 3d 825, 829, 390 N.E. 2d 471, 475 (1979).

the plaintiffs should have knowledge of the injury and the cause, but not more than thirty years from the last occurrence to which the injury is attributed.[98]

As the preceding discussion indicates, in the context of latent injury claims, the rigidity of statutes of limitations threatens unjust results in many cases. Statutes of limitations were developed to deal with the traditional concept of a cause of action, and therefore the strict application to nontraditional claims produces unnecessarily harsh results. Thus, when traditional legal concepts no longer conform with modern conditions, courts should exercise flexibility with respect to application of these rules. In latent injury cases, the use of the discovery rule is one such flexible and rational response.

CONCLUSION

Today, the necessity of the discovery rule is beyond question. Care must be taken in its articulation and application, however, to ensure the consistent, fair, and efficient operation of our judicial system. That is, while society recognizes the need to compensate persons injured by radioactive emission, this need does not support the implementation of a discovery rule that could lead to unlimited liability for defendants.

As *Maughan* indicates, in the case of suspected carcinogens, policies of recovery and statutes of limitations are conflicting. To resolve the conflict there must be a balancing of interests. Tolling a statute until a plaintiff knows or should know both the fact of death and the cause of death allows such a balance. The discovery rule is a necessary judicial tool in our complex and every changing society because it implements the optimal balance between compensating injured plaintiffs and preserving timely claims.

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98. IDAHO CODE § 5-243 (1949). Moreover, the problem of limitations in radiation exposure cases is dealt with abroad by nuclear liability laws in the Federal Republic of Germany and the United Kingdom which provide thirty years as the maximum limitation period for nuclear injuries. Cavers, *Improving Financial Protection of the Public Against the Hazards of Nuclear Power*, 77 HARV. L. REV. 644, 657 (1964).