Civil Procedure - Limitations of Actions - Discovery Rule - Creeping Disease - Asbestosis

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CIVIL PROCEDURE—LIMITATIONS OF ACTIONS—DISCOVERY RULE—
CREEPING DISEASE—ASBESTOS—The Superior Court of Pennsylvania held that a physician’s tentative diagnosis of the suspected contraction of asbestosis by a worker was not sufficient to commence the running of the applicable statute of limitations, but that it activated a duty in the worker to determine with due diligence whether he had contracted asbestosis.


On April 6, 1984, Theodore Trieschock, Jr., who was employed by United States Steel from 1945 until 1962 as a pipefitter and service operator at the Pittsburgh Coke and Chemical Company, brought suit in the Common Pleas Court of Allegheny County against various manufacturers of asbestos-containing products.¹ Trieschock alleged that he had contracted asbestosis from his prolonged exposure to asbestos in his workplace.²

During November and December of 1981, Trieschock had undergone a series of tests and physical examinations conducted by Medetect at United States Steel.³ At his deposition, Trieschock indicated that at the time of this testing in 1981, he was aware that he had incurred some sort of breathing problem which he believed to be work-related.⁴ In March of 1982, Dr. Joseph C. Koch, a phy-

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1. _Trieschock v. Owens-Corning Fiberglas Co._, No. GD 84-5810 (Common Pleas Court, June 24, 1985).

In addition to Owens-Corning Fiberglas Co., Trieschock named the following twenty-three (23) corporations as defendants in his action:


2. _Id._

3. The examinations conducted by Medetect consisted of a hearing test, chest x-ray, urinary test, blood test and pulmonary function test. _Trieschock Deposition_, pgs. 30-31.

4. At his deposition, Mr. Trieschock testified about the results he received from the tests conducted by Medetect in 1981:

Q. Okay. Now, this paper indicates "All test results given to Mr. Trieschock as requested." Do you recall requesting a copy of your test results?

A. Yes.
sician employed by United States Steel, contacted Trieschock by telephone and informed him that after reviewing all of the x-rays forwarded to him by Medetect, he suspected that Trieschock had contracted asbestosis.\(^5\) In addition, Dr. Koch notified Trieschock that he had scheduled an appointment for him with Dr. Gregory Owens, a pulmonary specialist.\(^6\) On April 8, 1982, after that scheduled examination, Dr. Owens informed Trieschock that he had, in fact, contracted asbestosis.\(^7\)

Relying on admissions made by Trieschock at his deposition, defendant Eagle-Pincher Industries filed a motion for summary judgment on behalf of itself and all other defendants, asserting that the two year statute of limitations\(^8\) barred Trieschock's claim. Eagle-
Pincher's contention that it was entitled to summary judgment was based on the fact that for more than two years prior to the initiation of his cause of action, Trieschock possessed knowledge of his injury and was aware that the injury was caused by another party's conduct. The trial court granted the defendant's motion for summary judgment on the basis that Trieschock's deposition clearly established that he was aware, at least by March of 1982, of his alleged injury and that its cause was related to his exposure to asbestos in the course of his employment. Since Trieschock's lawsuit was not filed until April of 1984, more than two years after the discovery of his injury and its alleged cause, the trial court held that Trieschock's claim was barred by the applicable statute of limitations.

Trieschock then appealed to the Superior Court of Pennsylvania. In a 2-1 decision, a panel of the superior court reversed the trial court's grant of defendant's motion for summary judgment holding that a physician's tentative diagnosis of the suspected contraction of asbestosis was not sufficient to commence the running of the applicable statute of limitations. The court reasoned, however, that such diagnosis activated a duty on the part of Trieschock to determine, with due diligence, whether he had, in fact, contracted asbestosis.

Judge Brosky, writing for the majority of the court, began his analysis by discussing the rationale underlying the "discovery rule," a judicially-created exception to a literal application of the

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9. Defendant Eagle-Pincher relied on the standard enunciated by the Superior Court of Pennsylvania in Cathcart v. Keene Indus. Insulation, 324 Pa. Super. 123, 471 A.2d 493 (1984), as the basis for its summary judgment motion. In Cathcart, a shipyard worker and his wife brought actions against several defendants for alleged personal injuries relating to the worker's contraction of asbestosis. The court held that the two year statute of limitations begins to run when the plaintiff knows, or reasonably should know: (1) that he has been injured; and (2) that his injury has been caused by another person's conduct. Id. at 136, 471 A.2d at 500.


11. Id.


13. Id. at 268, 511 A.2d 866. Justice Popovich noted his dissent.
two year statute of limitations in cases in which a party, despite the exercise of due diligence, is unable to ascertain the existence of his injury or its cause. The "discovery rule" has been utilized in so-called "creeping disease" cases which involve a plaintiff who has contracted a disease from continuous exposure to a hazardous substance but, due to the disease's insidious character, such plaintiff has difficulty determining the precise nature and origin of the disease. Relying on the test first enunciated by the Superior Court of Pennsylvania in Cathcart v. Keene Industrial Insulation, Judge Brosky recognized that when an injury is due to a "creeping disease," the statute of limitations begins to run when the plaintiff knows or reasonably should know: (1) that he has been injured; and (2) that his injury has been caused by another party's conduct.

The superior court, in light of the standard announced in Cathcart, reduced the determinative issue on appeal to the question of whether or not the physician's notification to Trieschock, concerning the suspected contraction of asbestosis, was sufficient to establish, as a matter of law, that Trieschock knew or should have known that he had indeed contracted asbestosis. In resolving this issue, the superior court held that the physician's tentative diagnosis was not sufficient to commence the running of the applicable statute of limitations; instead, it activated a duty on the part of Trieschock to determine, with due diligence, whether or not he had, in fact, contracted asbestosis.

In concluding that the communicated "tentative" diagnosis was not sufficient to commence the running of the applicable statute of limitations, the superior court relied on two Arizona cases which involved the timeliness of workmen's compensation claims. In

17. Id. at 136-37, 471 A.2d at 500. In Cathcart, the superior court deviated from the three-pronged interpretation of the discovery rule announced in Volpe v. Johns-Manville Corp., 323 Pa. Super. 130, 470 A.2d 164 (1983), finding that it unnecessarily complicated the question of when the statute of limitations begins to run. In Volpe, the superior court held that before the statute of limitations begins to run, a plaintiff must have: (1) knowledge of the injury; (2) knowledge of the operative cause of the injury; and (3) knowledge of the causative relationship between the injury and the operative conduct. Id.
19. Id. at 268, 511 A.2d at 866.
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Mead v. American Smelting & Refining Co.,\textsuperscript{20} a worker was informed by his treating physician that he had contracted emphysema and other breathing disorders which the physician did not consider to be of sufficient magnitude to be compensable or disabling.\textsuperscript{21} The Arizona Court of Appeals, in holding that such a diagnosis did not activate the worker’s duty to file a claim, stated that “the Arizona’s Workmen’s Compensation Law does not place on the employee the duty of knowing the nature of his disability and its relation to his employment before these things are reasonably ascertainable by the medical profession.”\textsuperscript{22}

In Nelson v. Industrial Commission,\textsuperscript{23} a worker developed shortness of breath just prior to his death.\textsuperscript{24} Before the performance of exploratory surgery and a biopsy of fibrous tissues, the worker’s treating physicians were unable to diagnose the worker’s condition as asbestosis with any degree of certainty.\textsuperscript{25} The Arizona Supreme Court held that the claimant, under such circumstances,\textsuperscript{26} cannot be held to a higher standard of diligence than the physicians treating him in discovering the relationship of such claimant’s condition to his employment.\textsuperscript{27}

The superior court further relied on a Virginia workmen’s compensation case, Blue Diamond Coal Co. v. Pannell,\textsuperscript{28} wherein an attending physician after giving the claimant a percussary chest examination, reached a preliminary diagnosis of pneumoconiosis.\textsuperscript{29} The physician, however, without benefit of x-rays, was unable to make a confirming diagnosis.\textsuperscript{30} The Supreme Court of Virginia held that such a diagnosis was not sufficiently definite to com-

\textsuperscript{20} 1 Ariz. App. 72, 399 P.2d 694 (1965).
\textsuperscript{21} Id. The Arizona Court, in discussing the appropriate time for a worker to initiate his claim for disability, stated: “The time starts to run when the injury becomes manifest or when claimant knows or in the exercise of reasonable diligence should have known that he had sustained a compensable injury.” Id. at 697.
\textsuperscript{22} 399 P.2d at 698.
\textsuperscript{23} 120 Ariz. 278, 585 P.2d 887 (1978).
\textsuperscript{24} Id. at 888.
\textsuperscript{25} Id.
\textsuperscript{26} Id.
\textsuperscript{27} Id. at 891.
\textsuperscript{28} 203 Va. 49, 122 S.E.2d 666 (1961).
\textsuperscript{29} Id. at 668.
\textsuperscript{30} Id. The treating physician, Dr. Gabriel, stated:

In November or December, 1957, I voiced an opinion to Hubert Pannell, after giving him a percussary chest examination, the he may have pneumoconiosis and should therefore be x-rayed. I was not able to make a confirming diagnosis of pneumoconiosis without the benefit of x-rays and strongly urged him to have them taken.

122 S.E.2d at 668.
mence the running of the statute of limitations.\footnote{31}

In finding \textit{Mead}, \textit{Nelson} and \textit{Blue Diamond} to be persuasive, the superior court held that in cases which involve a “creeping disease,” a plaintiff is not required to have greater knowledge than his physician with respect to such plaintiff’s medical condition.\footnote{32} The \textit{Trieschock} court explained that if the treating physician is not reasonably certain as to the diagnosis of an individual’s condition, then such individual certainly cannot be held to have the requisite degree of knowledge which is necessary to commence the running of the applicable statute of limitations.\footnote{33}

Continuing with this line of reasoning, Judge Brosky recognized the existence of an affirmative duty on the part of a plaintiff who has been tentatively diagnosed as having asbestosis to determine, with due diligence, whether or not he has, in fact, contracted the suspected disease.\footnote{34} The superior court, in applying the above principles to the instant case, held that Trieschock clearly fulfilled his affirmative duty by acting with due diligence in following up on the suspicion of asbestosis by scheduling and keeping an appoint-

ment with a pulmonary specialist.\footnote{35} As such, the superior court concluded that Trieschock had received a definitive diagnosis of his condition by such specialist on April 8, 1982. Thus, Trieschock’s claim, initiated on April 6, 1984, was perfected within the two year limitations period.\footnote{36}

Generally, with respect to cases involving tortious injury, a statute of limitations begins to run when a cause of action accrues to the plaintiff.\footnote{37} In Pennsylvania, the courts had traditionally

\begin{footnotes}
\item[31] \textit{Id.}
\item[33] \textit{Id.} The court found that the information conveyed to Mr. Trieschock by Dr. Koch in March of 1982, that he suspected that Trieschock had contracted asbestosis, lacked sufficient certainty to start the statute of limitations running. 511 A.2d at 866.
\item[34] \textit{Id.} The court realized that in the absence of such a duty, a potential plaintiff with a tentative diagnosis could defeat the purposes served by the statute of limitations by waiting indefinitely before taking action to confirm the diagnosis. 511 A.2d at 866.
\item[35] \textit{Id.} The affirmative duty recognized by the court in \textit{Trieschock} seems to be an expansion and refinement of the duty imposed on a plaintiff in a “creeping disease” case by the court in \textit{Cathcart}. In \textit{Cathcart}, the superior court held that the burden is on the injured party once he discovers the cause of his injuries, whether it be caused by a specific event or a hazardous condition such as asbestos in a place of employment, to determine within the statutory period (unless there is fraud or concealment) the party or parties whose negligence or breach of duty was responsible for the event or condition. \textit{Cathcart}, 324 Pa. Super. at 139, 471 A.2d at 501.
\item[36] \textit{Id.}
\end{footnotes}
adopted a very narrow interpretation with respect to the commencement of applicable statutes of limitation, holding that a cause of action accrues to a particular plaintiff at the very moment that a tortious act has been committed regardless of whether or not such plaintiff knows or has reason to know of his injury. 38 Stringent adherence to this interpretation by Pennsylvania courts has often culminated in very harsh results with respect to particular plaintiffs, who despite the exercise of due diligence could not have known of the existence of an injurious condition. 39

The first Pennsylvania case that recognized the necessity of preventing injustice to an injured party in certain limited situations by tolling the applicable statute of limitations until such party knows or reasonably should know of his injury and its cause was Lewey v. Fricke Coal Co. 40 In Lewey, the defendant secretly removed bushels of coal from beneath the plaintiff's land in 1884; however, the plaintiff failed to discover that any coal had been taken until 1891. 41 The trial court held that the six year statute of limitations began to run upon removal of the coal and had therefore run by 1890, one year before the plaintiff knew of his injury. 42 In reversing the trial court's holding, the Supreme Court of Pennsylvania concluded that "the statute of limitations begins to run against an injury committed in or to a lower stratum from the time of actual discovery, or the time when discovery was reasonably possible." 43 The rule announced in Lewey, the so-called "discovery

38. See, e.g., Bernath v. Le Fever, 325 Pa. 43, 189 A. 342 (1937). In Bernath, the applicable statute of limitations provided, "Every suit hereafter brought to recover damages for injury wrongfully done to the person, in case where the injury does not result in death, must be brought within two years from the time when the injury was done and not afterwards." 12 Pa. 34 (repealed). The Pennsylvania Supreme Court, in interpreting this statute, concluded that "[i]t is too well established to require extensive discussion that the statute runs from the time when the injury was done even though the damage may not have been known, or may not in fact have occurred, until afterwards. 325 Pa. at 46, 189 A. at 343.

39. See Noonan v. Pardee, 200 Pa. 474, 50 A. 255 (1937); Moore v. Juvenal, 92 Pa. 484 (1880); Fleming v. Culbert; 46 Pa. 498 (1864). In Fleming, the Pennsylvania Supreme Court justified the harsh results to a blamelessly ignorant plaintiff on the grounds that statutes of limitations are creatures of the legislature, which had written them in terms of "injury" and "rights of action" and not in terms of "discovery or notice." The court, therefore, concluded that a judicial construction limiting a statute to notice of a right of action would be sheer legislation. 46 Pa. at 501.

40. 166 Pa. 536, 31 A. 261 (1895).
41. Id. at 542, 31 A. at 261.
42. Id.
43. Id. at 544-47, 31 A. at 262-63. The Court stated:
It seems to be the general doctrine in courts of law that the plaintiff is bound to know of an invasion of the surface of his close . . . What is plainly visible he must see at his peril, unless by actual fraud his attention is diverted and his vigilence put to
rule,” is predicated on the notion that when a party is unable to ascertain the existence of his injury, despite the exercise of due diligence, the applicable statute of limitations should not run against such party’s potential claim.

Not surprisingly, the “discovery rule” enunciated in Lewey was eventually interpreted to encompass several additional types of cases. One area in which the “discovery rule” has been extended involves tortious injuries arising from claims of medical malpractice. In Ayers v. Morgan, the Supreme Court of Pennsylvania analogized the hidden injury inside a patient to the undetectable subterranean injury in Lewey. As such, the Ayers court held that the applicable statute of limitations ran not from the time of the doctor’s negligent act, but from the time the plaintiff did know, or should have known, of the doctor’s negligence which proximately caused the plaintiff’s injury. Since Ayers, the Pennsylvania courts have continued to apply the “discovery rule” to medical malprac-

sleep. But ought this rule extend to a subterranean trespass? The surface is visible and accessible. The owner may know of its condition without trespassing on others and for that reason is bound to know. The interior of the earth is invisible and inaccessible to the owner of the surface. . . The law does not require impossibilities. The owner of the surface cannot see, and because he cannot see the law does not require him to take notice of what goes on in the subterranean estates below him. . . . He cannot reasonably be required to act until knowledge that action is needed is possible to him.

166 Pa. at 544-47, 31 A. at 262-64.

44. Pocono Intl' Raceway v. Pocono Produce, 530 Pa. 80, 468 A.2d 468 (1982).

45. The rule in Lewey has also been applied to other cases involving hidden subterranean injuries. See, e.g., Smith v. Bell Telephone Co., 397 Pa. 134, 153 A.2d 477 (1959) (sewer seepage into basement); Gotshall v. Langdon, 16 Pa. Super. 158 (1901) (underground mining); and Petrelli v. West Virginia-Pittsburgh Coal Co., 86 W. Va. 607, 104 S.E. 103 (1920) (underground mining).


47. Id. at 289, 154 A.2d at 792. In Ayers, the defendant surgeon failed to remove a surgical sponge from plaintiff’s abdomen following an operation. Although the plaintiff continued to suffer from abdominal pain for several years following the operation, he only discovered that the unremoved sponge was causing the pain in 1957 after he underwent further hospital tests. The Pennsylvania Superior Court reversed the lower court’s holding that the two year statute of limitations had run in 1950 thus barring the plaintiff’s suit, finding that the discovery rule applied.

The court, in discussing the difficulty of discovering a hidden or undetectable injury, stated:

Did the laws of nature prevent Ayers from ascertaining what was causing the pain in his abdomen? Certainly he could not open his abdomen like a door and look in; certainly he would need to have medical advice and counsel; certainly he would have to be dependent on those who with appropriate instruments and devices could pierce the wall of flesh which hid from his own eyes the cause of his wretchedness.

Id.

48. Id. at 293, 154 A.2d at 794.
tice cases in accordance with the decisions of other jurisdictions.

Another type of case in which the "discovery rule" has been applied is the "creeping disease" case, wherein a plaintiff has contracted a slowly developing disease from continuous exposure to a hazardous substance. In analyzing a "creeping disease" case, the courts of various jurisdictions have utilized three distinct approaches: the "first breath rule," the "last breath rule," and

49. See, e.g., Acker v. Palena, 260 Pa. Super. 214, 393 A.2d 1230 (1978) (negligently performed eye surgery disclosed to plaintiff by another ophthalmologist); Grubb v. Albert Einstein Medical Center, 255 Pa. Super. 381, 387 A.2d 480 (1978) (paralyzed patient confined to hospital unable to depose physician to determine the causal relationship between her injuries and manufacturer's product until after the limitations period); and Barshady v. Schlosser, 226 Pa. Super. 260, 313 A.2d 296 (1973) (plaintiff reasonably relied on reassurances of her ear surgeon for almost two years after the operation that adverse symptoms were temporary conditions).

50. See, e.g., United States v. Kubrick, 444 U.S. 111 (1979) (discovery rule applied to cause of action brought under the Federal Tort Claims Act); Yazzie v. Olney Levey, Kaplan & Tenner, 593 F.2d 100 (9th Cir. 1979) (discovery rule applied to a legal malpractice action alleging failure to prosecute properly the client's personal injury and wrongful death claims); Bayless v. Philadelphia Nat'l League Club, 579 F.2d 37 (3d Cir. 1978) (rule applied to action by former pitcher against a professional baseball club seeking damages for back injuries and mental illness resulting from pain killing drugs administered to him by team physician); Roman v. A.H. Robins Co., 518 F.2d 970 (5th Cir. 1975) (rule applied to a product liability action for physical problems caused by an adverse reaction to a drug); Greenberg v. McCabe, 453 F. Supp. 765 (E.D. Pa. 1978), aff'd, 594 F.2d 854 (3d Cir. 1979) (rule applied in a psychiatric malpractice action involving negligent treatment of plaintiff by defendant who engaged in a sexual relationship with plaintiff during therapy and improperly administered drugs); Thrift v. Tenneco Chem., Inc., 381 F. Supp. 543 (N.D. Tex. 1974) (rule applied in a products liability action against a drug manufacturer); Prince v. Trustees of the Univ. of Pennsylvania, 282 F. Supp. 832 (E.D. Pa. 1968) (rule applied in a wrongful death and survival action, negligence and breach of warranty actions for injection of a harmful drug); Raymond v. Eli Lilly & Co., 117 N.H. 164, 371 A.2d 170 (1977) (rule applied in a products liability action against a drug manufacturer for a dangerous oral contraceptive); Gilbert v. Jones, 523 S.W.2d 211 (Tenn. App. 1974) (rule applied in an action against a drug manufacturer for defective contraceptives); Gaddis v. Smith, 417 S.W.2d 577 (Tex. 1967) (rule applied in a medical malpractice action against two surgeons for failing to remove surgical sponges from inside plaintiff after a caesarian section); Franklin v. Albert, 381 Mass. 611, 411 N.E.2d 458 (1980) (rule applied in a medical malpractice action against a physician for failure to correctly diagnose Hogkin's disease); Morgan v. Grace Hosp. Inc., 149 W. Va. 783, 144 S.E.2d 156 (1965) (rule applied in a medical malpractice action where surgical sponge was left in patient's abdomen during surgery).


52. See Brown v. Tennessee Consol. Coal Co., 19 Tenn. App. 123, 83 S.W.2d 568 (1935), wherein plaintiff miners alleged that defendant employer's negligence in failing to provide a safe place in which to work by permitting rock dust to permeate the air, caused
most recently, the "discovery rule".  

In jurisdictions which have adopted the "first breath rule," the courts have reasoned that the applicable statute of limitations begins to run from the time of the plaintiff’s initial exposure to, or inhalation of, the dangerous substance notwithstanding the fact that such plaintiff may not discover the disease or its cause until many years later. New York is one of the few jurisdictions to still adhere to the "first breath rule" with reference to a cause of action to recover damages from the development of a latent occupational disease. In Schmidt v. Merchants Dispatch Transportation Co., the plaintiff contracted lung disease from his continued inhalation such plaintiffs to contract silicosis. The Tennessee court, citing WOOD ON LIMITATIONS (4th ed.) Vol: 26 179, concluded that:

In actions from injuries resulting from the negligence or unskillfulness of another, that statute attaches and begins to run from the time when the injury was first inflicted, and not from the time when the full extent of the damages sustained has been ascertained. The gist of the action is the negligence or breach of duty and not the consequent injury resulting therefrom.


53. See Wilson v. Hartzman, 373 So.2d 204 (La. App. 1979), cert. denied, 376 So.2d 961 (1979). The Louisiana court, in discussing the last breath rule, stated:

[T]he continuing and repeated wrongful acts are to be regarded as a single wrong which gives rise to, and is cognizable in a single action, rather than in a series of successive actions. Therefore, the date for commencing the accrual of prescription of an action based on the single wrong is the date of the last wrongful exposure.


54. For a succinct formulation of the discovery rule see Petri v. Smith, 307 Pa. Super. 261, 453 A.2d 342 (1982). In Petri, the Superior Court of Pennsylvania reasoned that the 'discovery rule' exception is premised on the concept that where the existence of an injury . . . cannot be reasonably ascertained, the statute of limitations does not begin to run until such time as the injury's existence is known or discovered, or becomes knowable or discoverable by the exercise of reasonable diligence.

Id. at 269, 453 A.2d at 346.

55. See supra note 51 and accompanying text.


57. 270 N.Y. 287, 200 N.E. 824 (1936).
of coal dust at his place of employment. The New York Court of Appeals held that the three year statute of limitations began to run from the moment that the defendant employer's negligence first caused the plaintiff to inhale the dangerous dust even though such plaintiff was ignorant of the existence of the injury until a substantially later time.

After forty years, the New York Court of Appeals has persisted in its application of the "first breath rule" in latent disease cases. In *Thorton v. Roosevelt Hotel*, the drug thorium dioxide, which was injected into the plaintiff's sinuses for exploratory purposes, caused fatal cancer to develop some twenty years later. Even though no symptoms developed until shortly before the plaintiff's death, the New York Court of Appeals held that the cause of action accrued at the time of the invasion of decedent's body and not at the time that the decedent's cancerous condition became apparent. Despite New York's continued adherence to the doctrine, the "first breath rule" has been widely criticized and abandoned in other jurisdictions due to its harsh results.

Other courts have employed the "last breath rule" in "creeping disease" cases, interpreting the plaintiff's extended exposure to a hazardous substance as a continuing tort for which the statute of limitations begins to run at the time of such plaintiff's last exposure to the substances causing the disease. In *Garrett v. Raytheon Co.*, the Alabama Supreme Court held that the one year

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58. 270 N.Y. at 297, 200 N.E. at 825.
59. 270 N.Y. at 300-01, 200 N.E. at 827. The court stated:
   There can be no doubt that a cause of action accrues only when the forces wrongfully put in motion produce injury . . . That does not mean that the cause of action accrues only when the injured person knows or should know that the injury has occurred. The injury occurs when there is a wrongful invasion of personal or property rights and then the cause of action accrues. Except in cases of fraud where the statute expressly provides otherwise, the statutory period of limitations begins to run from the time when the liability for wrong has arisen even though the injured party may be ignorant of the existence of the wrong or injury. Consequential damages may flow later from an injury too slight to be noticed at the time it is inflicted. No new cause of action accrues when such consequential damages arise. So far as such consequential damages may be reasonably anticipated, they may be included in a recovery for the original injury, though even at the time of trial they may not yet exist.
270 N.Y. at 300-01, 200 N.E. at 827.
61. Id.
64. See supra note 52 and accompanying text.
65. 368 So.2d 516 (Ala. 1979).
statute of limitations began to run against the plaintiff’s cause of action for injuries suffered as a result of radium exposure “on the last day on which the plaintiff was exposed to the dangerous conditions which caused the injury.” The Alabama Supreme Court concluded that, absent fraudulent concealment, plaintiff’s ignorance of the tort or injury did not postpone the running of the statute until the tort or injury was discovered.

A vast majority of the jurisdictions which have addressed the issue, including the United States Supreme Court, have applied the “discovery rule” with respect to “creeping disease” cases. A well reasoned expression of the “discovery rule” was enunciated by the Kentucky Supreme Court in Louisville Trust Co. v. Johns-Manville Products Corp., wherein it stated that:

We believe that the proper formulation of the rule and the one that will cause the least confusion is the one adopted by the majority of courts: a cause of action will not accrue under the discovery rule until the plaintiff discovers or in the exercise of reasonable diligence should have discovered not only that he has been injured but also that his injury may have been caused by defendant’s conduct.

After initially indicating that it might adopt the “last breath rule,” the Pennsylvania Supreme Court, in Ciabattoni v. Bird-
sboro Steel Foundary & Machine Co.,\textsuperscript{72} joined the majority of jurisdictions in applying the "discovery rule" in cases that involve a "creeping disease."

In developing the "discovery rule," the Pennsylvania courts have formulated several tests which delineate the level of knowledge that a particular plaintiff must possess before the statute of limitations commences. The first clearly articulated standard was announced by the superior court in Volpe \textit{v.} Johns-Manville Corp.,\textsuperscript{73} wherein the Court held that before a statute of limitations begins to run against a plaintiff, such plaintiff must have: (1) knowledge of his injury; (2) knowledge of the operative cause of his injury; and (3) knowledge of the causative relationship between the injury and the operative conduct.\textsuperscript{74} A few years later, the superior court modified what it termed the "overly complicated" Volpe test in Cathcart \textit{v.} Keene Industrial Insulation,\textsuperscript{75} holding that the statute of limitations begins to run when a plaintiff knows or reasonably should know: (1) that he has been injured; and (2) that his injury has been caused by another party's conduct.\textsuperscript{76} Significantly, this formulation of the phases of knowledge that a plaintiff must possess before the limitations period begins to run against him is in conformity with the standards employed by various other jurisdic-

occurs. If the relation is continuous as in that of master and servant and the default is likewise continuous until the cumulative effect produces disability in the form of occupational disease, total or partial, the master's failure to perform his duty is regarded as a single wrong continuing so long as the employment continues. Such wrong must therefore be redressed by an action brought within two years, and not thereafter from the time when the employment terminates. It is conceivable that this may in some cases be a hardship, but it is one which the court cannot correct.

\textit{Id.} 72. 386 Pa. 179, 125 A.2d 365 (1956). In \textit{Ciabottoni}, a silicosis case brought under the Occupational Disease Act of 1939, the Pennsylvania Supreme Court stated: "The year within which a claim must be filed runs from the date when the compensable disability due to the occupational disease begins. The date is necessarily a variable one depending upon when the pertinent medical diagnosis is completely established to the knowledge of the claimant." \textit{Id.}

73. 4 P.C.R. 290 (Phila. C.P. 1980). This three part test which was initially articulated by the superior court in Hunsicker \textit{v.} Conner, 318 Pa. Super. 418, 465 A.2d 24 (1983), is commonly referred to as the Volpe Test.


76. \textit{Id.} at 136, 471 A.2d at 500.
tions which have addressed the problem. 77

In light of previous applications of the "discovery rule" by various Pennsylvania courts, the superior court's holding in Trieschock is inconsistent with Pennsylvania law and constitutes a misinterpretation of the underlying purposes of the "discovery rule." According to the Pennsylvania Supreme Court in Ayers v. Morgan, 78 "the purpose of the discovery rule is to prevent injustice to victims who even with the exercise of due diligence could not know of their injury and its cause within two years after the breach occurred." Once an injured party knows or has reason to know of his injury, however, the special protection of the "discovery rule" is no longer necessary. In this event, the general policy underlying the statute of limitations requires that such injured party be treated like every other potential plaintiff with a personal injury claim, i.e., he should be provided with a two year period in which to investigate and initiate his claim. 79

In recognizing and applying this principle in the medical malpractice area, the Superior Court of Pennsylvania, in DeMartino v. Albert Einstein Medical Center, 80 reasoned that:

Once the patient is aware or should have reasonably become aware that medical treatment is causing him personal injury the statute begins and the

77. See Nolan v. Johns-Manville Asbestos, 85 Ill.2d 161, 52 Ill. Doc. 1, 421 N.E.2d 864 (1981). In Nolan, the Illinois court stated: "We are of the opinion that the cause of action accrues when the plaintiff knows or reasonably should know of an injury and also knows or reasonably should know that the injury was caused by the wrongful acts of another." 421 N.E.2d at 868. See also Harig v. Johns-Manville Prod. Corp., 384 Md. 70, 394 A.2d 299 (1978) (malignant mesothelioma); Karjala v. Johns-Manville Prod. Corp., 523 F.2d 155 (8th Cir. 1975) (asbestosis); and Barel v. Fibreboard Paper Prod. Corp., 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974).


79. See, e.g., Ulakovic v. Metropolitan Life Ins., 339 Pa. 571, 16 A.2d 41 (1940), wherein the Pennsylvania Supreme Court described the underlying philosophy of the statute of limitations stating:

It has always been the policy of the law to expedite litigation and not to encourage long delays. From this fact arose the various statutes of limitations, and the reasons why the law is unfavorable to delayed litigation are self-evident. If any person has a right which he wishes enforced, he should enforce it promptly. The person against whom the right is to be enforced might be greatly prejudiced by the plaintiff's long delay. The entire aspect of the parties on both sides may change with the lapse of time.

Id. at 575, 16 A.2d at 42. See DeMartino v. Albert Einstein Medical Center, 313 Pa. Super. 492, 460 A.2d 295 (1983). In DeMartino, the superior court concluded that "the statute of limitations has as its policies and purposes the stimulation of the prompt pursuit of legal rights and the avoidance of the inconvenience and prejudice resulting from deciding stale cases on stale evidence." Id. at 501, 460 A.2d 299 (1983).

prospective plaintiff is required to begin doing those things for which the statute of limitations specifically provides time: an opportunity to select and consult with a lawyer, investigation, initiation of suit, discovery, and joinder of additional parties, etc. It is during this two year period that the medical malpractice plaintiff, like any other plaintiff pursuing a legal claim, makes the decision whether or not to pursue any legal rights he may possess.\textsuperscript{81}

The Superior Court of Pennsylvania has also noted the limited nature of the "grace period" which the "discovery rule" affords to potential plaintiffs in "creeping disease" cases. In Yarosik \textit{v. Keene Building Products Corp.},\textsuperscript{82} the superior court affirmed the lower court's grant of defendant's motion for summary judgment on the basis of Judge Silvestri's "articulate and well-reasoned opinion" in which he stated that:

Plaintiff-husband, however, would have this court rule that the statute of limitations did not begin to run until he was definitely diagnosed as having silicosis in February, 1984. This is not the interpretation given to the discovery rule. The limitations period is tolled only until the victim knows he is injured and knows that the injury is the result of another's conduct. The knowledge attributed to the plaintiff in order to commence the running of the limitations period is not equal to the proof of his cause of action and all the items of damages for which he seeks recovery that he would need to produce at trial. Plaintiff-husband does not contend that he was 'unable' to discover his injury but rather claims only that he did not know that he suffered from silicosis until he was informed of such in February, 1984. There does not need to be such an unequivocal diagnosis in order to begin the running of the statute of limitations. It is sufficient that the plaintiff knew

\begin{itemize}
\item \textsuperscript{81} \textit{Id.} at 502, 460 A.2d at 300. The superior court continued by stating that a potential plaintiff need not have knowledge that he has a cause of action in order for the statute to run. In the absence of fraud or concealment the statute begins to run when a tort is ascertainable. \textit{Id.}
\item \textsuperscript{82} 356 Pa. Super. 625, 512 A.2d 1296 (1986). In Yarosik, the plaintiff, who worked as a bricklayer from 1936 until 1982, was exposed to asbestos, silicia and other fibrogenic materials during the course of his employment. Such plaintiff alleged that since he was informed on February 22, 1984, that he was suffering from silicosis, his complaint filed on June 6, 1984, was perfected within the two year statute of limitations. One of the plaintiff's examining physicians, Dr. Matthew Hadley, submitted an affidavit in which he indicated that his impressions and diagnosis following Mr. Yarosik's last visit and examination on October 14, 1968, were pneumoconiosis and chronic fibrous granulomatous disease of the right upper lobe of the lung. In addition, another examining physician, Dr. Skezas, testified during her deposition that she admitted Mr. Yarosik to the hospital in December of 1976 for his lung problems because she felt that he needed medical treatment for apparent pleurisy and pneumoconiosis. The trial court relied on the statement of the two examining physicians in finding that the plaintiff's claim was barred by the two year statute of limitations. In so holding, the court stated that as early as 1966, when plaintiff was examined by Dr. Hadley and no later than 1976, when he was admitted to the hospital in the care of Dr. Skezas, plaintiff knew or should have known that he had been injured and that his injury was the result of his exposure to dust and other particulate matter during the course of his employment. \textit{Id.}
\end{itemize}
of his injury and knew the cause thereof.\textsuperscript{85}

Even prior to the \textit{Yarosik} decision, there was a general consensus among the various panels of the superior court that the level of knowledge attributed to the plaintiff in order to commence the running of an applicable statute of limitations is not equal to the proof regarding such plaintiff’s cause of action.\textsuperscript{84} As such, it is not necessary that a plaintiff know with absolute certainty that he has a viable cause of action, \textit{i.e.}, that someone is legally culpable, before the statute of limitations begins to run against his claim.\textsuperscript{85} An excellent illustration of this consensus is provided by the decision of the superior court in \textit{Volpe v. Johns-Manville Corp.}.\textsuperscript{86} The foundation for the superior court’s holding in \textit{Volpe} was based on the opinion of the trial court, authored by Judge Takiff, in which he concluded that:

Once a plaintiff possesses the salient facts concerning the occurrence of his injury and who or what caused it, he has the ability to investigate and pursue his claim... [such that]... [p]ostponing the commencement of the limitations period until he has actually done so would nullify the justifiable rationale of the statute of limitations and permit prosecution of stale claims.\textsuperscript{87}

\textsuperscript{83} Id. In addition, the court emphasized that in order to commence the statute of limitations plaintiff need only know that he was injured and know that his injury was caused by another’s conduct. \textit{Id.}

\textsuperscript{84} See DeMartino v. Albert Einstein Medical Center, 313 Pa. Super. 492, 460 A.2d 295 (1983). In \textit{DeMartino}, the court stated that a potential plaintiff need not have knowledge that he has a cause of action for the statute to run. \textit{Id.} at 503, 460 A.2d at 300. See also \textit{Volpe v. Johns-Manville Corp.}, 323 Pa. Super. 130, 469 A.2d 164 (1983). In \textit{Volpe}, Judge Takiff stated that the statute of limitations should not be precluded from running against plaintiffs who have asbestosis or other creeping diseases until they become aware of their legal claim. \textit{Id.}

\textsuperscript{85} See, \textit{e.g.}, Grabowski v. Turner & Newall Ltd., 516 F. Supp. 114 (E.D. Pa. 1980), \textit{aff’d per curiam}, DaMato v. Turner & Newall Ltd., 651 F.2d 908 (3d Cir. 1981), wherein the court concluded that when a plaintiff knows a cause and source of his injury, his lack of knowledge about the legal basis for a prospective claim will not toll the statute of limitations. When plaintiff knew or should have known that his injury was caused by exposure to asbestos, the statute began to run. 516 F. Supp. at 120.

\textsuperscript{86} 323 Pa. Super. 130, 470 A.2d 164 (1983). In \textit{Volpe}, the plaintiff, a welder who contracted asbestosis while working in a naval shipyard, brought an action against asbestos manufacturers and distributors. The trial court found that in December, 1973, Mr. Volpe knew of his injury, asbestosis, the operative cause of his injury, inhalation of asbestos dust and fibers, and the causal connection between his injury and his exposure to asbestos at work. Yet Volpe did not file his complaint until September of 1977, well over three years after Mr. Volpe knew all he needed to know to bring an action. Once Volpe knew these facts, he had the ability to investigate and pursue his claim. The running of the statute of limitations cannot be postponed until a claimant actually does pursue a suit without contravening the very purpose of limitations on actions. \textit{Id.} at 141, 470 A.2d at 170.

\textsuperscript{87} 4 P.C.R. 290 (Phil. C.P. 1980). See Grabowski v. Turner & Newall Ltd., 516 F.
In *United States v. Kubrick*, the United States Supreme Court adopted a similar interpretation of the "discovery rule" to that employed by the Superior Court of Pennsylvania in *Volpe* and *Yarosik*. Although *Kubrick* is factually divergent, since it involved the Federal Tort Claims Act, the Supreme Court's analysis is illuminating in that it addresses the fundamental conflict inherent in all "discovery rule" cases. Specifically, the Supreme Court stated that:

We cannot hold that Congress intended that accrual of a claim must await awareness by the plaintiff that his injury was negligently inflicted. A plaintiff such as Kubrick, armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community. To excuse him from promptly doing so by postponing the accrual of his claim would undermine the purpose of the limitations statute.

In writing for the majority of the superior court in *Trieschock*, Judge Brosky ignored the weight of this body of precedent in holding that, in order for the statute of limitations to begin to run, the plaintiff must have a definitive diagnosis by his physician which

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Supp. 114 (E.D. Pa. 1980), *aff'd per curiam*, DaMato v. Turner & Newall Ltd., 651 F.2d 908 (3d Cir. 1981). In *Grabowski*, the superior court concluded that where a plaintiff knows the cause or source of his injury, his lack of knowledge about the legal basis for the prospective claim will not toll the statute of limitations. *Id.* at 120. See, e.g., *Staiano v. Johns-Manville Corp.*, 304 Pa. Super. 280, 450 A.2d 681 (1982), wherein the superior court, citing *Volpe*, held that once a plaintiff possesses the salient facts concerning the occurrence of his injury and who caused it, he has the ability to investigate and pursue his claim. Here it is enough that plaintiff knew that his asbestosis was caused by the inhalation of asbestos dust emanating from the asbestos products on the worksite. "We find no reason to postpone the statute until a plaintiff has in addition discovered who manufactures the products that he knows have injured him. Indeed, to do so would nullify the justifiable rationale of the statute of limitations and permit the prosecution of stale claims." *Id.* at 288-89, 450 A.2d at 685. See also *Hunsicker v. Connor*, 318 Pa. Super. 418, 476 A.2d 24 (1983). In *Hunsicker*, the superior court applied the *Staiano* standard in concluding that on October 14, 1976, appellant possessed all of the salient facts concerning the occurrence of his injury and who or what caused it and was thus able to investigate and pursue his claim. He was then required to do "all those things that a statute of limitations is meant to provide for: an opportunity to select and consult with a lawyer, investigation, initiation of suit, discovery, joinder of additional parties, etc." *Id.* at 422-23, 465 A.2d at 26.

*88.* 444 U.S. 111 (1979). In *Kubrick*, the court of appeals held that under the Federal Tort Claims Act, 28 U.S.C.A. § 2401(b), the statute of limitations commenced for a medical malpractice claim when the plaintiff became aware of the legal repercussions flowing from his injury. In reversing the holding of the court of appeals, the United States Supreme Court stated that "a cause of action accrues when a plaintiff knows both the existence and the cause of his injury and not at a later time when he also knows that the actions inflicting the injury may constitute medical malpractice." 444 U.S. at 113.

*89.* *Id.*

*90.* *Id.* at 123.
indicates that his condition was caused by a certain product.\textsuperscript{91} In addition to this unconventional interpretation of the "discovery rule," Judge Brosky further provided that a prospective plaintiff who has received a tentative diagnosis of suspected asbestosis has a "reasonable period of time" in which to obtain a definitive diagnosis before the statute of limitations begins to run against his claim.\textsuperscript{92} The practical effect of this holding is to stretch the "discovery rule" beyond its intended purpose of tolling the statute of limitations until a potential plaintiff knows or has reason to know of his injury and its cause. In essence, such an interpretation provides a plaintiff with two limitations periods: (1) one which begins to run from the time when a plaintiff discovers that he has been injured by the wrongful conduct of another and ends when such plaintiff obtains a definitive diagnosis of his condition and its causation; and (2) a second period consisting of the two additional years provided by the Pennsylvania statute of limitations.\textsuperscript{93}

The analysis employed by the \textit{Trieschock} court is clearly contrary to traditional interpretations of the "discovery rule."\textsuperscript{94} It is evident that once a plaintiff knows or has reason to know of his injury and its cause, such plaintiff is then on the same footing as

\textsuperscript{91} 354 Pa. Super. 263, 511 A.2d 184 (1986). Judge Brosky indicated that "a plaintiff in a creeping disease case should not be required to have greater knowledge than his physicians about his medical condition. If those physicians are not reasonably certain as to his diagnosis, then he certainly cannot be bound to have the knowledge necessary to start the statute of limitations running." \textit{Id.} at 286, 511 A.2d at 866.

\textsuperscript{92} \textit{Id.} In discussing this "reasonable period of time," Judge Brosky explained that while the tentative diagnosis of suspected asbestosis was not sufficient to start the running of the statute of limitations, it should be considered to have activated a duty on applicant's part to determine with due diligence, whether he did, in fact, have that disease . . . . In the instant case, it is apparent that the appellant did act with due diligence in following up on the suspicion of asbestosis diagnosis. He saw a specialist and was definitely diagnosed the month after the first tentative diagnosis. What is more, appellant did perfect his claim within the two year statute of limitations. \textit{Id.} at 268-69, 511 A.2d at 866.

\textsuperscript{93} \textit{Id.} The superior court's characterization of the ultimate issues in \textit{Trieschock} resulted in the creation of two limitation periods for a potential plaintiff in a "creeping disease" case.

The court stated:

First, with what degree of certainty must a plaintiff be aware of a medical condition in order to start the statute of limitations period running? Second, does a tentative preliminary diagnosis—insufficient to start the statute running—activate a duty to make, with due diligence, further inquiries into the cause of his condition?

\textit{Id.} at 265, 511 A.2d at 864.

all other potential plaintiffs with respect to personal injury claims. At this time, the special protection afforded by the "discovery rule" should cease and the potential plaintiff should be provided with two years in which to investigate the viability of his legal claim. As part of this investigatory period, an individual would consult with a physician who could provide him with a definitive diagnosis of his medical condition. By granting an undefined "reasonable period" in which a plaintiff can obtain a definitive diagnosis before the statute of limitations begins to run, the Trieschock court creates an unnecessary delay which permits the prosecution of stale claims. In addition, the superior court's analysis produces an atmosphere of uncertainty in which future courts will ultimately be required to render ad hoc decisions based on the complex facts that accompany each "creeping disease" case.

In the principal case, Trieschock, by his own admission, was aware in December of 1981 that he had a work-related breathing problem. In January of 1982, Trieschock took an early retirement because of his problem. At his deposition, Trieschock stated that in March of 1982, his physician, Dr. Koch, informed him that all indications pointed to the contraction of asbestosis. It is clear that by December of 1981, or certainly by March of 1982, Trieschock knew or had reason to know of his injury and its cause. At this time, Trieschock, like all other prospective plaintiffs, had two years in which to investigate and pursue his claim. In delaying the initiation of his claim until more than two years after becoming aware of his injury, Trieschock's cause of action should be barred by the applicable statute of limitations.

Finally, in addition to misconstruing the underlying purposes of the "discovery rule," the superior court's opinion was devoid of any Pennsylvania precedent to support its unconventional position. Relying on three dissimilar workmen's compensation cases from Arizona and Virginia, Judge Brosky attempted to alter an interpretation of the "discovery rule" which had remained unchanged since

96. See supra note 3 and accompanying text.
97. Q. But at the time, did you believe that you had a work-related breathing problem?
A. Yes. I had two buddies die, so I thought I had the same problem. I retired January 31, 1982, and my birth date wasn't until April 23, 1982, when I was 62 years old, so I retired three or four months ahead of time because of the problems I was having. Trieschock Deposition, pg. 38.
98. See supra note 4 and accompanying text.
In essence, Judge Brosky blindly extracted language from *Mead*, *Nelson* and *Blue Diamond* which indicated that an employee cannot be held to a greater level of knowledge as to his injury and its relationship to his employment than is reasonably ascertainable by the medical profession. Based on this language, Judge Brosky concluded that in order for the statute of limitations to begin to run, a plaintiff must have a sufficiently definite diagnosis of his medical condition. In reaching this decision, Judge Brosky ignored the numerous Pennsylvania precedents which held that once a plaintiff knows or has reason to know of his injury and its causation, the statute of limitations begins to run against his claim regardless of whether he has a definitive diagnosis. In fact, several Pennsylvania Superior Court cases have indicated that the very purpose of providing a limitations period is to enable the prospective plaintiff to obtain a definitive diagnosis and consult with an attorney to determine if he has an actionable claim.

Contrary to the superior court's opinion in the principal case, the trial court's analysis in *Trieschock* more accurately reflects the underlying purposes of the "discovery rule" and affords necessary deference to existing Pennsylvania precedent in the above area.

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101. 1 Ariz. App. 72, 399 P.2d 694 (1965). In *Mead*, the court wrote: "In our opinion, the Arizona Workmen's Compensation Law does not place upon the employee the duty of knowing the nature of his disability and its relation to his employment before these things are reasonably ascertainable by the medical profession." 399 P.2d at 698.

102. 120 Ariz. 278, 585 P.2d 887 (1978). In *Nelson*, the Arizona Supreme Court, in approving of the intermediate appellate court's rule in *Mead*, stated:

In this case before us, the facts upon which the hearing officer based his award indicate that the deceased developed a disability related to shortness of breath shortly prior to death. His treating physicians were unable to diagnose his condition as asbestosis prior to exploratory surgery and biopsy of fibrous tissue; in fact, a tentative diagnosis of carcinoma had been made. A claimant under such conditions cannot be held to a higher standard of diligence than the physicians treating him in discovering the relationship of his condition to his employment. 585 P.2d at 891.


104. *Trieschock*, 354 Pa. Super. 263, 511 A.2d 863 (1986). Judge Brosky stated: We find *Mead*, *Nelson* and *Blue Diamond* persuasive. A plaintiff in a creeping disease case should not be required to have greater knowledge than his physicians about his medical condition. If those physicians are not reasonably certain as to his diagnosis, then he certainly cannot be bound to have the knowledge necessary to start the statute of limitations running.

105. See supra notes 79-82 and accompanying text.

106. See supra notes 83-88 and accompanying text.
Judge Silvestri, who authored the trial court's opinion, emphasized that the requisite level of knowledge attributed to a plaintiff in order to commence the running of the applicable statute of limitations is not equal to the proof of such plaintiff's cause of action. On this basis, Judge Silvestri concluded that the limitations period is tolled only until the victim knows that he is injured and knows that his injury is the result of another's conduct. Such victim, however, need not be definitively diagnosed as having contracted a latent occupational disease.

Unquestionably, the "discovery rule" performs a legitimate and useful function in "creeping disease" cases by alleviating the injustice to a plaintiff who, despite the exercise of due diligence, is unable to ascertain the existence of his injury and its cause. It is important, however, to recognize that the "discovery rule" must not be read too liberally so as to provide a potential plaintiff with an unlimited time in which to act. In failing to limit the scope of the "discovery rule," the panel of the superior court in Trieschock undermines the fundamental purpose of the statute of limitations and allows the prosecution of stale claims. This decision could have dangerous repercussions in future prosecutions of "creeping disease" cases by injecting additional uncertainty into an already volatile and unsettled area. The Trieschock court should have adopted the trial court's analysis, which achieves a proper balance of the interests involved while maintaining a consistency in the area which affords notice to all interested parties of the standard which will be employed in a "creeping disease" case.

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107. Trieschock, No. GD 84-5810 (Common Pleas Court, June 24, 1985).
108. Id.
109. See supra notes 95-97 and accompanying text.