



# Newsletter

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## *Toxic and Hazardous Substances Litigation*

### In This Issue

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## **Louisiana Supreme Court Restricts Recovery for Asbestos Exposure Claimants**

*By Quentin F. Urquhart, Jr. and Jeanette M. Engeron*

In *Bonnette v. Conoco, Inc.*, 2001-C-2767 (La. 01/28/03), 2003 WL 183764, the Louisiana Supreme Court recently clarified the rights of asbestos claimants by holding that a plaintiff may only recover for increased risk of contracting cancer where the exposure to asbestos is “significant.” The court further held that damages for mental anguish damages for fear of contracting cancer may only be recovered where there is a “likelihood of genuine and serious mental distress arising from special circumstances.” Finally, the court held that the plaintiff had failed to prove that the defendant engaged in a “wanton and reckless for public safety” because it had complied with the relevant regulations of the state environmental protection agency.

### **A. Background**

As part of a 1994 construction project, Conoco undertook the demolition and excavation of a local refinery site. Conoco contracted with various dump truck services to remove the soil from the site of the excavation project. One of the truck driving companies, Daigle Brothers, Inc. sold excavated soil from this refinery site to plaintiffs for use in their lawns. A class action petition was subsequently filed by residents who discovered that there was asbestos containing material in the soil originating from the project site. Plaintiffs sought both compensatory and punitive damages. Among the compensatory damages sought by plaintiffs were damages for “emotional fears worrying about the presence of the dirt on their property and the contaminants therein.”<sup>1</sup>

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The trial court awarded the property owners damages for increased risk of a future injury, damages for fear of cancer and punitive damages. Furthermore, the trial court found that the plaintiffs' property suffered a 10% diminution in value due to the contaminated soil. Conoco appealed the judgment of the trial court. The court of appeal affirmed the award and Conoco applied for writ of certiorari to the Louisiana Supreme Court.

**B. Recovery of Compensatory Damages for "Physical Injury and Increased Risk of Developing Asbestos Related Cancer" Rejected Where Exposure was Only "Slight"**

In beginning its examination of this issue, the court first noted that it found "no manifest error in the trial court's conclusion that the plaintiffs were exposed to an asbestos fiber count that slightly exceeded that of normal ambient air and that it is more probably than not that plaintiffs have suffered a slightly increased risk of developing an asbestos-related disease."<sup>2</sup> It then framed the issue before it as follows:

In this case, then, we are confronted with the question of whether Louisiana law permits the recovery of compensatory damages for a "slight" exposure to asbestos, which placed plaintiffs at a "slightly" increased risk of contracting cancer in the future, in the absence of evidence that any plaintiff currently has cancer, or any other asbestos-related condition.<sup>3</sup>

Conoco argued that the court of appeal erred in affirming an award of damages for any increased risk of future injury as the plaintiffs had not experienced any compensable injury. In addressing this issue, the Louisiana Supreme Court began by reviewing jurisprudence from

other states which revealed that a majority of jurisdictions have not recognized a cause of action for increased risk of future injury when the potential for the occurrence of future injury is speculative or merely "possible."<sup>4</sup>

In *Bourgeois v. A.P. Green Industries, Inc.*, 97-3188 (La. 7/8/98), 716 So.2d 355 the Louisiana Supreme Court had previously allowed recovery of *medical monitoring costs* to plaintiffs suffering an increased risk of contracting a serious latent disease when they could successfully prove by competent expert testimony that they had suffered a "significant exposure to a hazardous substance and the increased risk of developing such a disease is significant."<sup>5</sup> However, in *Bonnette*, the court refused to extend that rationale to allow the recovery of *compensatory damages* for a "slightly" increased risk of developing cancer. The court found that "it would be nonsensical to allow a plaintiff to recover compensatory damages for an increased risk of developing an asbestos-related disease upon less proof than that required for recovery of medical monitoring expenses."<sup>6</sup>

Having set forth the applicable standard for recovery, the court conducted a thorough review of the testimony adduced at trial and concluded that, at best, the plaintiffs experts had demonstrated: "(1) that the soil, air, and dust samples showed the presence of a small amount of asbestos; (2) that it is possible that activities performed by plaintiffs could have resulted in the release of asbestos fibers; (3) that if loose fibers were in fact released, it is possible that some of those fibers were respirable; and (4) that if some of the fibers were respirable, it is possible that plaintiffs could have inhaled asbestos fibers during the period that the soil remained on the property."<sup>7</sup> Based on this evidence, the court thus concluded that the plaintiffs exposure to asbestos fibers beyond those found in ambient air levels was only slight and that any increased risk of developing an asbestos related health conditions was also only "slight." Under those circumstances, the court found that recovery of

damages for physical injury and any increased risk of developing an asbestos related cancer was not warranted.

**C. Recovery of Damages for Mental Anguish Disallowed in the Absence of “Special Circumstances” Demonstrating the Likelihood of Genuine and Serious Mental Distress**

Conoco further argued that the trial court erred in awarding past, present, and future mental anguish damages. More specifically, Conoco contended that the plaintiffs’ fear, if any, was unreasonable due to the insignificant amount of asbestos that they had allegedly inhaled and its insignificant effect on their risk of contracting any future disease. In reviewing this issue, the Louisiana Supreme Court noted that the problems inherent in awarding damages for mental disturbance in the absence of manifest physical injury had been specifically confronted by the United States Supreme Court in *Metro-North Commuter Railroad Co. v. Buckley*, 521 U.S. 424, 434, 117 S.Ct. 2113, 138 L.Ed.2d 560 (1997) where the Court was faced with the issue of whether the Federal Employers’ Liability Act (“FELA”) allowed a worker who had been exposed to asbestos, but did not have any symptoms of a disease, to recover damages for fear of developing a disease in the future. The Court held that the plaintiff could not recover under FELA for negligent infliction of emotional distress unless, and until, he had manifested symptoms of a disease. The Louisiana Supreme Court further considered the practical problems involved in attempting to properly evaluate and compensate a person for their “fear” following exposure to asbestos:

A person exposed to asbestos can certainly develop serious health problems, but he or she also may not. The difficulty in predicting whether exposure will cause any disease and if so, what disease, and the long latency period

characteristic of asbestos-related diseases, make it very difficult for judges and juries to evaluate which exposure claims are serious and which are not. This difficulty in turn makes liability unpredictable, with some claims resulting in significant recovery while virtually indistinguishable claims are denied altogether. Some claimants would inevitably be overcompensated when, in the course of time, it happens that they never develop the disease they feared, and others would be undercompensated when it turns out that they developed a disease more serious even than they feared.... Indeed, most Americans are daily subjected to toxic substances in the air they breathe and the food they eat. Suits for mental anguish damages caused by exposure that has not resulted in disease would compete with suits for manifest diseases for the legal system’s limited resources. If recovery were allowed in the absence of present disease, individuals might feel obliged to bring suit for such recovery prophylactically, against the possibility of future consequences from what is now an inchoate risk. [footnote omitted]. This would exacerbate not only the multiplicity of suits but the unpredictability of results.<sup>8</sup>

Against this backdrop, the Louisiana Supreme Court determined that the trial court did in fact err in its analysis of the emotional distress claims. The trial court had sought to determine whether the plaintiffs’ claims of developing cancer were “reasonable.” However, the court found that the correct standard to be utilized was whether there was a “likelihood of genuine and serious mental distress arising from special circumstances. . .”<sup>9</sup> This standard originated in

the case of *Moresi v. State, Dept. of Wildlife & Fisheries*, 567 So.2d 1081 (La. 1990) wherein it was held that a defendant generally was not liable for emotional injuries unaccompanied by physical injury. However, there were noted exceptions to this general rule where there was said to be “the especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious.”<sup>10</sup> Because the plaintiffs in *Bonnette* failed to demonstrate that they experienced any “genuine and serious mental distress” from the asbestos containing soil placed on their property, recovery for past, present and future mental anguish was denied.

**D. “Wanton and Reckless” Standard for Award of Punitive Damages Not Met Where Defendant Complied with DEQ Regulations**

The Louisiana Supreme Court further rejected the award of punitive damages that was made by the trial court and affirmed by the court of appeal. The punitive damage award was made under Louisiana Civil Code Article 2315.3. This article, which has since been repealed by the Louisiana Legislature, allowed recovery of punitive damages if the plaintiff could demonstrate: (1) that the defendant's conduct was wanton and reckless because it “proceeded in disregard of a high and excessive degree of danger, either known to him or apparent to a reasonable person in his position, or that the defendant engaged in ‘highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent;’ (2) that the danger created by the defendant's wanton or reckless conduct threatened or endangered public safety; (3) that the defendant's wanton or reckless conduct occurred in the storage, handling or transportation of hazardous or toxic substances; and (4) that the plaintiff's injury was caused by the defendant's wanton or reckless conduct.”<sup>11</sup>

The court conducted a detailed review of the evidence with respect to Conoco's conduct and concluded that it simply failed to demonstrate that Conoco's actions were wanton or reckless as required by the statute. The Court reached this finding despite the fact that a Conoco employee noted the presence of asbestos on the site, failed to inform anyone, and failed to perform additional testing. The court, however, noted that Conoco was not in violation of any of the regulations that had been promulgated by the Louisiana Department of Environmental Quality (DEQ). Because Conoco acted in accord with DEQ regulations, the Court was unable to find that defendant's conduct was unreasonable or that there was an extreme departure from ordinary care. The award of punitive damages was therefore reversed.

**E. Award for Diminution of Property Values Affirmed**

The last issue addressed by the Louisiana Supreme Court was whether the trial court's award of 10% diminution of property value was warranted. Having reviewed the evidence from the competing experts, the court found that the trial court was within its discretion in determining that the “stigma effect” of the asbestos contaminated soil on the subject properties was 10% and it affirmed that award.

**F. Implications of *Bonnette v. Conoco***

*Bonnette* represents a significant step in helping to restrict and clarify the extent to which persons who do not have “real” personal injuries may recover compensatory damages or damages for fear of future injury. The Louisiana Supreme Court has made it clear that recovery for such injuries should not be allowed in the absence of significant and compelling evidence. Although issued before the United States Supreme Court's recent decision in *Norfolk & Western Railway Co. v. Ayers*, 2003 WL 888363 (2003), *Bonnette* appears to be entirely consistent with that opinion

because the United States Supreme Court recognized the right of asbestos claimants to recover for fear of cancer only where the plaintiff is able to demonstrate that the alleged fear is both “genuine and serious.”<sup>12</sup>

Louisiana’s interpretation of the “wanton and reckless” standard in regards to punitive damages is also significant. The Louisiana Supreme Court found that compliance with DEQ regulations at the time of these events prevented a finding that Conoco’s conduct was wanton and reckless. The Court reached this result despite the fact that an employee had actual knowledge of the presence of asbestos in the excavated soil, failed to inform anyone, and failed to perform additional testing. Thus, compliance with state regulations may provide a shield for claims for punitive damages.

**Endnotes**

1. Id. at 2.
2. Id. at 8.
3. Id.
4. Id.
5. Id.
6. Id.
7. Id. at 11.
8. Id. at 13 , quoting *Temple-Inland Forest Products Corp. v. Carter*, 993 S.W.2d 88 (Tex.1999).
9. Id. at 13.
10. Id. at 12, quoting *Moresi v. State, Dept. of Wildlife & Fisheries*, 567 So.2d 1081, 1096 (La. 1990).
11. Id. at 14, citing *Billiot v. B.P. Oil Co.*, 93-1118 (La. 9/29/94), 645 So. 2d 604, 613.
12. *Norfolk & Western Railway Co. v. Ayers*, 2003 WL 888363 at 13 (2003).