



Awardable Damages in Environmental/Toxic Tort Cases

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Louisiana State Bar Association
4th Annual Class Action/Mass Tort Symposium
Friday, October 24, 2003

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by G. William Jarman
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I. Recovery for Physical Impacts from Toxic Chemicals

“Every act whatever of man that causes damage to another obliges him by whose fault it is to repair it.” La. Civ. Code art. 2315. This article forms the foundation upon which Louisiana tort law is built. In the case of physical impacts from toxic chemicals, a traditional tort analysis is appropriate. The difficulty in these cases, however, often arises in the area of proof, especially in the areas of causation and damages.

A. Actual Injuries

The following cases illustrate situations where plaintiff alleges actual exposure to a toxic substance that has resulted in present injuries or symptoms.

Lemaire v. Ciba-Geigy Corp., 1999-1809 (La. App. 1 Cir. 6/22/01), 793 So. 2d 336, writ denied, 2001-2153 (La. 11/16/01), 802 So. 2d 608. Plaintiff was employed by an environmental cleaning contractor at Ciba-Geigy’s St. Gabriel facility. In connection with the treatment of waste streams from the manufacture of herbicide, plaintiff’s employer was retained to clean filter ponds. Plaintiff testified that he would spend a “good part of the day” shoveling sludge and would become completely covered with the sludge. After two months at the facility, plaintiff began to experience nausea, vomiting, diarrhea, headaches, nostril burning, blood and protein in urine, and back pain associated with his kidneys. He was hospitalized twice. In addition to these physical impairments, plaintiff also developed a fear of cancer, anxiety and insomnia. The jury awarded general damages

¹This paper, originally prepared in connection with a presentation sponsored by the LSU Law Center on Advanced Environmental and Toxic Tort Issues in May 2002 and published by the LSU Paul M. Hebert Law Center’s Center of Continuing Professional Development, has been updated for use in this Symposium. This paper and presentation are intended (1) as an overview of the types of damages available in environmental/toxic tort cases and (2) as a survey of typical quantum results in those cases. The authors do not suggest that the damage cases addressed in this paper constitute an exhaustive list of every damage case that has been published at the appellate level or decided at the district court level. The list does comprise what the authors believe are the key cases interpreting the current laws as are applicable to personal injury and property damage cases in the environmental and toxic chemical arena.

²The authors gratefully acknowledge the work of their partners, Esteban Herrera, Jr. and J. Randy Young, in compiling an earlier list of many of the personal injury cases for internal use in the law firm. That useful work was the launching pad for the authors’ expansion of the research and summaries of significant cases in the areas discussed.

in the amount of **\$428,200**. Although the First Circuit recognized that the award “might be on the high side,” it was not an abuse of discretion by the jury.

***Sandbom v. BASF Wyandotte Corp.*, 95-0335 (La. App. 1 Cir. 4/30/96), 674 So. 2d 349.** Plaintiff was exposed to chemicals while cleaning a storage tank at the BASF chemical plant. After vacuuming the liquid contents of a tanker, plaintiff realized that the solid content could not be vacuumed. Without wearing protective gear, plaintiff entered the tank and used a pick (handed to him by a BASF employee) to manually break up the contents. Plaintiff’s injuries included dizziness, shortness of breath, chest pain, numbness in the arm, organic anxiety disorder, mixed brain disorder, panic attacks, memory problems and psychological problems. The court awarded him **\$250,000** in general damages.

***Haydel v. Hercules Transport, Inc.*, 94-1246 (La. App. 1 Cir. 4/7/95), 654 So. 2d 418, writ denied, 95-1172 (La. 6/23/95), 656 So. 2d 1019.** General damages of **\$25,000** awarded to plaintiff who experienced reactive airways dysfunctional syndrome (“RADS”) as a result of exposure to an ammonia release from a tanker truck. Approximately three gallons of anhydrous ammonia were discharged from a bleeder valve and vented to the air during off-loading of a tanker truck near Shriever, Louisiana in St. John the Baptist Parish. Plaintiff walked out of her home approximately 400 feet from the release, smelled ammonia and noticed a white cloud. She and her two daughters evacuated their home. She sought treatment several days after the incident and was diagnosed by her treating physician with irritant tracheal bronchitis and subsequently with RADS. She was also diagnosed by her doctors as having post-traumatic stress disorder. Kathy Haydel was awarded **\$25,000** general damages, plus \$19,695 medicals, and \$2,400 loss wages. Ms. Haydel’s daughters were awarded \$5,000 and \$2,500, respectively, for loss of consortium.

***Wisner v. Illinois Cent. Gulf R.R.*, 537 So. 2d 740 (La. App. 1 Cir. 1988), writ denied, 540 So. 2d 342 (La. 1989).** Jury awarded general damages of **\$2,200,000** to a 35-year-old state trooper who sustained injuries as a result of exposure to toxic chemicals while supervising the site of a train derailment as an emergency responder. The trooper’s injuries included: burning sensation in his eyes, nose, and throat on the day of the accident, headaches, coughing, difficulty swallowing and shortness of breath upon physical exertion, lung damage including chemical bronchitis, RADS, fibrous pleuritis, and interstitial fibrosis, 40-50% decrease in capillary function, severe depression, impotence, loss of vision, and fear of cancer. Also, the trooper’s stress test was comparable to that of a 60-year-old cardiac patient. The court also specifically recognized the “cancerphobia” claim as a recoverable element of emotional distress due to negligence of a defendant.

In affirming the general damage award, the court of appeal instructed on the role of prior awards in similar cases as precedents:

Prior awards have a limited role. Before a trial court’s award may be questioned, the reviewing court must look first, not to prior awards, but to the individual circumstances of the case before it. If after such review and an articulated analysis of facts, the reviewing court concluded the award is excessive, notwithstanding the

jury's "much discretion," the court may resort to prior awards in cases with facts and circumstances closely similar to the case before the court. However, such reliance should be based on the "mass" of prior awards involving truly similar injuries.

Stated another way, "[i]t is not the function of the appellate courts, including the Supreme Court, to standardize general damage awards across the state in cases with similar facts. Our purpose and our constitutional role is to guarantee by appellate review that the trial judge or jury in fulfilling its role has not so excessively abused its much discretion that our consciences would be shocked if such an award were allowed to remain untouched."

Wisner at 750 (citations omitted.)

***Warren v. Sabine Towing and Transportation Company, Inc.*, 2001-0573 (La. App. 3 Cir. 10/30/02), 831 So. 2d 517.** Plaintiff filed suit against twenty-six (26) defendants, including his employer and several petroleum and petrochemical manufacturers claiming he contracted myeloproliferative disorder, which evolved into acute myelogenous leukemia (AML), due to exposure to manufacturers' benzene and benzene-containing products during his thirty-nine year career with Sabine Towing. The court found that plaintiff's AML was caused by occupational exposure to the manufacturers' products and that the manufacturers had a duty to directly warn the seaman of the dangers of exposure to their products. The trial court awarded approximately \$5.8 million but the Third Circuit held as legal error the awarding of \$2.5 million in punitive damages, resulting in a gross award of approximately \$3.3 million. The Third Circuit also held the trial court in error for not assigning fault to the settling parties and underestimating the employer's fault.

***Lasha v. Olin Corp.*, 91-459 (La. App. 3 Cir. 3/2/94), 634 So. 2d 1354.** Truck driver brought suit against chemical plant owner alleging chlorine exposure. Rejecting the lower court's requirement that plaintiff prove causation to "a reasonable medical certainty," the Louisiana Supreme Court reversed a finding of no injury and remanded to the court of appeal to assess damages. The "reasonable medical certainty" requirement was deemed to increase the ordinary preponderance-of-the-evidence burden in a civil case which the Supreme Court found unacceptable. After remand, the court of appeal awarded **\$350,000** in general damages to the husband. He also suffered from depression and fear of cancer. The wife was awarded \$25,000 in loss of consortium, based upon uncontradicted "but sparse" testimony.

***Atkinson v. Celotex Corp.*, 93-924 (La. App. 3 Cir. 3/2/94), 633 So. 2d 383.** Consolidated action involved 12 plaintiffs who were exposed to asbestos-containing products in the course of their employment. General damages of **\$20,000-\$40,000** awarded to nine of the plaintiffs and those persons appealed. (Three plaintiffs received higher awards of \$100,000, \$100,000 and \$250,000 and did not appeal.) Injuries included pleural plaques (thickening of the lung lining), possible asbestosis and fear of cancer. The appellate court affirmed the \$20,000-\$40,000 awards.

***Lewis v. St. Francis Cabrini Hosp.*, 556 So. 2d 970 (La. App. 3 Cir. 1990).** General damages of \$27,500 awarded to plaintiff who took a sip of bleach from a cup inadvertently placed on his meal tray. Injuries included: vomiting, swallowing problems, hoarseness, depression, esophagus problems, and fear of cancer. On appeal, the Third Circuit found that award of \$55,000 was abuse of discretion.

***Hoerner v. Anco Insulations, Inc.*, 00-2333 (La. App. 4 Cir. 1/23/02), 812 So. 2d 45, writ denied, 2002-0965 (La. 6/21/02), 819 So. 2d 1023.** Plaintiff was occupationally exposed to asbestos for twenty-five years. Although his asbestosis was mild, his present symptoms included: shortness of breath, trouble breathing, and fatigue. These symptoms were expected to worsen. In addition, he expressed a fear of developing cancer. The Fourth Circuit affirmed the jury's award of \$450,000 in general damages.

***Egan v. Kaiser Aluminum & Chemical Corp.*, 94-1939 (La. App. 4 Cir. 5/22/96), 677 So. 2d 1027, writ denied, 96-2401 (La. 12/6/96), 684 So. 2d 930.** Plaintiff who had been exposed to asbestos containing products and who was diagnosed with mesothelioma sued several parties, including the manufacturer of asbestos products he had worked with for years. Plaintiff suffered from shortness of breath, chest pain and weakness. He also suffered pain in his side and became very concerned about his mortality following his diagnosis. The Fourth Circuit affirmed trial court's award of \$361,851 finding that even if the award was on the "high side," it was not an abuse of discretion. (Court of appeal noted that plaintiff had died after judgment was rendered by trial court.)

***Mistich v. Pipelines, Inc.*, 609 So. 2d 921 (La. App. 4 Cir. 1992), writ denied, 613 So. 2d 996 (La. 1993), cert. denied 509 U.S. 91, 113 S.Ct. 3020, 125 L.Ed.2d 709 (U.S. (La.) 1993).** A 35-year-old plaintiff, a welder, was diagnosed with Chronic Myelogenous Leukemia (CML). He alleged that the CML was caused by his exposure to gamma radiation over an eight-year period from x-rays used to detect leaks in pipeline welding. The plaintiff's causation case was apparently very strong in that exposure to gamma rays was one of two known causes of CML. The trial court awarded plaintiff \$2 million in compensatory damages for pain and suffering and mental pain and suffering.

***Smith v. Two R Drilling Co., Inc.*, 606 So. 2d 804 (La. App. 4 Cir.), writ denied, 607 So. 2d 560 (La. 1992).** Plaintiff awarded \$175,000 in general damages for injuries he sustained when he inhaled toxic fumes while cleaning out mud tanks on a drilling rig. Plaintiff's symptoms included severe depression, emotionally induced seizures and lumbar nerve irritation. The chemical was CL-920, a corrosive cleaning agent. The court of appeal speculated that since no one established that the cleaner had been properly diluted, the jury may have inferred that it was not, thus causing the injury. The plaintiff was awarded \$96,000 for future psychiatric care including treating the depression and the non-organic seizures.

***Richardson v. American Cyanamid Co.*, 99-675 (La. App. 5 Cir. 2/29/00), 757 So. 2d 135, writ denied, 00-0921 (La. 5/12/00), 761 So. 2d 1291.** Sulfur dioxide emission from American Cyanamid occurred during a startup and was carried across the Mississippi River to Kenner, Louisiana. Several residents complained to the Kenner fire department of an unidentified odor in their neighborhoods.

The units dispatched detected no odor. A class action petition was filed three days after incident. Plaintiffs alleged physical and psychological injuries and complained of diarrhea and nausea. Seven other suits were filed. A class was certified on September 24, 1994. A trial on the merits was held with six bellwether plaintiffs. After hearing the evidence, the trial court decertified the class and dismissed the six plaintiffs' claims. The Louisiana Fifth Circuit upheld the trial court's decision finding that the trial judge did not commit error in holding that the six plaintiffs failed to prove they were injured. After considering conflicting expert testimony, the trial court determined that "none of the severe and ongoing symptoms . . . could have resulted from this emission." Credibility concerns apparently played a part in the trial court's decision, as the Fifth Circuit made a point to refer to other cases where similar injuries resulted in an award for plaintiffs. *See Rivera and Adams* discussed herein.

***Oubre v. Union Carbide Corp.*, 99-63 (La. App. 5 Cir. 12/15/99), 747 So. 2d 212, writ denied, 00-0472 (La. 4/20/00), 760 So. 2d 346.** General damage award of **\$700,000** to a draftsman who was exposed to amine fumes from a leaking valve at Union Carbide's chemical plant in Taft, Louisiana (judge tried case). Plaintiff experienced nausea and sinus problems and ultimately underwent two sinus surgeries. The defendants argued that the plaintiff had a prior sinus condition that necessitated the surgery, but the court found that the plaintiff's sinus condition was aggravated by the exposure to amines. A \$1,000,000 award of punitive damages was reversed, however, because there was no proof that the defendant was acting in a reckless manner.

***Rivera v. United Gas Pipeline Co.*, 96-502 (La. App. 5 Cir. 6/30/97), 697 So. 2d 327, writ denied, 97-2030 (La. 12/12/97), 704 So. 2d 1196.** Natural gas spewed into the air for approximately one hour after pipeline coupling disengaged near LaPlace, Louisiana. Area schools and subdivisions were evacuated for several hours. Residents and property owners filed negligence class actions against the pipeline company and its construction contractor. Twenty-four (24) bellwether claims were tried, 12 picked by plaintiffs and 12 picked by defendants. Most of the plaintiffs complained of nausea and headaches as well as being scared and nervous. The jury awarded compensatory damages to five of the 24 bellwether plaintiffs ranging from **\$500 to \$3,000**. Two of the bellwethers were dismissed by directed verdict for failing to appear at trial. The court of appeal affirmed the damage awards, finding them to be at the low end of the spectrum but not an abuse of discretion. The court noted that much of the physical and mental injury alleged by the plaintiffs could easily be classified as minimal. In a related case consolidated with *Rivera* on appeal, natural gas spewed into the air for several hours after a pipeline was severed during construction work. Area businesses were evacuated and U.S. Highway 61 was closed. The jury awarded compensatory damages ranging from **\$100 to \$3,000** in general damages to 16 of 24 bellwether plaintiffs. The amount of the compensatory awards in this case was not discussed by the appellate court.

***Adams v. Marathon Oil Co.*, 96-693 (La. App. 5 Cir. 1/15/97), 688 So. 2d 75.** Large portions of ethyl mercaptan evaporated into the air during disposal operations at a refinery and created an offensive odor in adjacent neighborhoods near Garyville and Edgard, Louisiana in Terrebonne Parish. The trial included damage claims of 12 representative claimants selected by the parties. The trial judge granted judgments for plaintiffs and awarded damages ranging from **\$0 to \$500** per

plaintiff. The judge noted the short duration of exposure by the plaintiffs and characterized plaintiffs' symptoms as mild. According to the judge, while plaintiffs did suffer some physical discomfort and/or mental anguish, no bellwether plaintiffs sought treatment for psychic trauma and only one plaintiff sought medical treatment. The one plaintiff who sought medical treatment experienced vomiting and dizziness, but was treated summarily and required no further medical treatments.

***Manuel v. Shell Oil Co.*, 94-590 (La. App. 5 Cir. 10/18/95), 664 So. 2d 470, writ denied, 96-0141 (La. 3/8/96), 669 So. 2d 397.** General damages of **\$250,000** awarded to tanker man who was exposed to high levels of benzene concentrate on two occasions while supervising the loading of benzene onto a barge at an oil company facility. Injuries included: toxic hepatitis, toxic encephalopathy (disease of the brain), mild organic brain syndrome, bilateral polyps in the maxillary sinuses, anxiety and depression, fear of and increased risk of cancer.

***Jeffery v. Thibaut Oil Co.*, 94-851 (La. App. 5 Cir. 3/1/95), 652 So. 2d 1021, writ denied, 95-0816 (La. 5/5/95), 654 So. 2d 330.** Gas station customer was awarded **\$330,700** in general damages for injuries he sustained when he was doused by gasoline after the overhead hose broke while he pumped his gas. There was no water available at the gas station and it was 25-40 minutes before he was able to wash himself. He was diagnosed with chemical conjunctivitis of the eyes and began to experience headaches and emotional difficulties. He was also diagnosed with post-traumatic stress disorder. Defendants argued on appeal that an award in the range of \$35,000 was appropriate but court of appeal affirmed the larger award.

***Prestenbach v. Louisiana Power & Light Co., Inc.*, 93-656 (La. App. 5 Cir. 4/14/94), 638 So. 2d 234, reh'g denied.** General damages of **\$25,000** awarded to plaintiff who was a patron at a McDonald's located one block away from a transformer containing 1,400 gallons of mineral oil that ruptured sending clouds of smoke into the area, including the McDonald's parking lot. She was about to enter the restaurant when she heard the explosion. She ran to her car and fled the scene. Plaintiff had a history of medical and psychological problems. Alleged injuries included: aggravation of plaintiff's respiratory and psychological condition, inspiratory wheezing and rhonchus, hypoxemia, dry cough, aggravation of asthmatic condition, allergic reaction affecting eyes and face, fear of cancer. Appellate court found the jury's award of \$5,000 for general damages to be abuse of discretion and increased the general damage award to **\$25,000**.

***David v. Cajun Painting, Inc.*, 92-722 (La. App. 5 Cir. 1/25/94), 631 So. 2d 1176, writ denied 94-0972 (La. 6/3/94), 637 So. 2d 508.** Plaintiff was accidentally sprayed in the face with toxic paint while working as an electrician's helper at a refinery in Convent, Louisiana. Plaintiff inhaled the paint and was hospitalized within hours. He suffered respiratory disease and contracted permanent RADS as a result of the toxic inhalation. Jury awarded plaintiff **\$476,700**.

***Torrejon v. Mobil Oil Company, et al.*, Civil District Court, New Orleans, Dkt. No. 95-3284, Division L (November 14, 2002).** Plaintiff, individually and on behalf of her deceased spouse, sued Mobil Oil and manufacturers of asbestos-containing products alleging that her husband was exposed

to various asbestos-containing products while working on Mobil vessels from 1941-1949 and again in 1956. Her husband died from mesothelioma in 1994. The manufacturers of the asbestos-containing products either settled or entered into agreements with plaintiffs prior to trial. After a six-day trial in November 2002, the jury returned a unanimous verdict in favor of Mobil Oil Company resulting in a zero-dollar award to plaintiff. On April 16, 2003, however, the court granted plaintiffs' motion for JNOV and awarded plaintiff \$1,835,917.21 plus interest. The matter is currently pending before the Fourth Circuit Court of Appeal.

Ingram Barge Company - Baton Rouge Benzene Spill, United States District Court, Middle District of Louisiana, No. 97-226-A-1 and cases consolidated for discovery therewith (7/11/00). **\$41.7 million settlement** of class action lawsuit resulting from a chemical spill in the Mississippi River near Baton Rouge in March 1997. A barge carrying aromatic gasoline, consisting of benzene and various other constituents, capsized in the Mississippi River near downtown Baton Rouge. Benzene is allegedly flammable and causes cancer. Suit was pending in the Middle District of Louisiana and settlement was facilitated through two Special Masters appointed by the court. Information on the settlement is available through the Special Masters' allocation report and a newspaper article dated July 2000.

The settlement was \$41.7 million, for 17,205 claimants, for an **average award of approximately \$2,400 per plaintiff**. The settlement was allocated primarily based on zone awards determined pursuant to estimated exposure levels per claimant for the various zones, plus individual consideration of certain key claims. Details of the allocation are provided below. However, these allocations are net of attorney fees, class cost and liability reserves which totaled \$25.7 million, as compared to the allocation to claimants of \$16 million. The total settlement was actually 2.6 times the amount of the allocation to the claimants. (The attorney fee reserve was \$16.7 million and the class cost reserve was \$2 million.)

Net of attorney fees, class costs, and liability reserves, most of the claimants (82% of claimants) were awarded \$500 - \$1,000 each based on a zone analysis. Another significant group (14% of claimants) was awarded between \$1,000 - \$5,000 each based on a zone analysis. That represents 96% of all the awards. Only thirteen claimants received awards exceeding \$8,000, as follows: eight claimants received awards in the range of \$8,000 - \$25,000; three claimants received awards in the range of \$50,000 - \$75,000; one claimant received \$175,000; and one claimant received \$280,000. Again, this was net of attorney fees, class costs, and liability reserves.

The largest award of \$280,000 was for a woman who reportedly suffered some unspecified "extraordinary medical problems" as a result of the spill. Also, an area student received \$21,726, for aggravation of asthma diagnosed by Dr. Lee Roy Joyner, Jr. as "markedly deteriorated" between March 1997 and December 1998; and who was diagnosed as having an emotional adjustment disorder triggered by his exposure which created symptoms which were stubborn and persistent, but not severe.

Awards to some 26 evacuees who were ordered to leave their homes for as many as 11 days were set at a total of \$3,000 for each evacuee. No awards were given for voluntary evacuations or shelters in place.

Adams v. CSX (In re: New Orleans Train Car Leakage Fire Litigation), Civil District Court for the Parish of Orleans, State of Louisiana, No. 87-16374 (11/5/99). Butadiene leaked from railroad car, caught fire, and resulted in explosions in storm water sewer system. Area residents were evacuated for approximately two days. Plaintiffs alleged physical injuries including: rashes, watery eyes, digestive disorders and coughing. Plaintiffs also claimed emotional injuries caused by explosions and subsequent panic and confusion. Some 8,000 persons pursued claims.

In the first trial, twenty plaintiffs were selected by the parties - ten by each side. The jury awarded a total of **\$2 million** in compensatory damages to the 20 plaintiffs ranging from a low of \$20,000 to a high of \$300,000, with an average award of approximately **\$100,000** per individual plaintiff. Awards for pain and suffering ranged from \$5,000 to \$175,000. Awards for mental anguish ranged from \$5,000 to \$100,000. Awards for evacuation and inconvenience ranged from \$10,000 to \$20,000. The jury also awarded **\$3.4 billion** in punitive damages against CSX.

In the second trial, an additional twenty plaintiffs were selected. Two claimants received nothing, three claimants received a total of \$2,250, one claimant received \$100,000, and the remaining 14 claimants received a total of \$242,050. The average award for the group of 14 plaintiffs was **\$17,289**.

The trial court reduced the average compensatory awards from the first trial from **\$100,000 per plaintiff to \$35,700 per plaintiff** and also reduced the punitive award against CSX to **\$850 million**, according to a news article dated November 7, 1999. According to later reports, one group of defendants agreed to pay \$215 million in settlement and CSX agreed to pay \$220 million in settlement. The combined settlements resulted in a recovery of \$54,375 per plaintiff.

Rivere v. NPC Services, Inc., 19th Judicial District Court, Baton Rouge, Louisiana, Dkt. No. 33,561, Division A (July 26, 1999). Jury awarded plaintiff who claimed his lungs were damaged during cleanup of a hazardous waste site **\$8.2 million -- \$3.2 million compensatory damages and \$5 million punitive damages**. The amount of general versus special damages is not specified in the judgment. The plaintiff allegedly suffered lung damage from breathing chemicals that formed during an attempted hazardous waste remediation effort which he supervised on 17 occasions. The plaintiff's treating physician testified that a mark on his lungs more likely than not came from exposure to chemicals at the site. And, the plaintiff reportedly lost half the size of his lungs and 40% of their capacity. The defendants reportedly argued that the mark on the plaintiff's lung was probably caused by preexisting pleurisy; that plaintiff smoked two packs of cigarettes daily for 20 years; and that the plaintiff was a hypochondriac, obsessed with his body and was looking for a big payday by suing the chemical companies. Considering the \$8.2 million award, the jurors obviously rejected this defense. The case was settled on appeal for an undisclosed amount.

***Cooper v. Koch*, 1995 U.S. Dist. Lexis 21488 (E.D. La.)** Koch Nitrogen plant in Taft, Louisiana developed an ammonia leak which spread quickly over the St. Charles Parish area. Area residents reported minor medical problems such as sore throats and burning eyes causing them to miss one or two days of work. The court, in considering the value of the case for remand purposes, stated: “It is generally accepted that these claims are fear and fright cases which will result in compensatory awards of around **\$3,000 to \$10,000.**” *Cooper* did not involve an actual award of compensatory damages; rather, the court was making the point that the individual claims were worth less than the \$50,000 jurisdictional requirement. Further, *Cooper* involved a remand issue that was apparently addressed before any substantive discovery took place on the actual nature and extent of the plaintiffs’ claims. However, plaintiffs report that in the *Cooper* case, 8,000 claims were ultimately settled for \$35 million, which is an average of \$4,375 per claim. The settlement included some consideration of potential for punitive damages.

As an aside, the court stated that the defendants could not cumulate the potential punitive damage claims in order to meet jurisdictional amount, foreshadowing the Fifth Circuit’s opinion in *Ard v. Transcontinental Gas Pipe Line Corporation*, 138 F.3d 596 (5th Cir.), *reh’g en banc denied*, 145 F.3d 361 (1998). In a subsequent decision, the Fifth Circuit has indicated that the Fifth Circuit will allow the entire punitive damages claim to be divided equally among the joint plaintiffs for purposes of determining whether the jurisdictional amount is met. *H&D Tire and Automotive-Hardware, Inc. v. Pitney-Bowes Inc.*, 227 F.3d 326 (5th Cir. 2000), *cert. denied* 112 S.Ct. 214, 151 L.Ed.2d 152. The rule is apparently different for attorneys’ fees, at least in the class action context. As long as an independent statute provides a specific right for attorney’s fees, those fees will be attributed to class representatives pursuant to Code of Civil Procedure article 595 and can be used in determining the amount in controversy. *In Re Abbott Laboratories*, 51 F.3d 524, *reh’g en banc denied*, 65 F.3d 33 (5th Cir. (La.) 1995).

***Cauthron v. Conoco, Inc.* 95-743, 14th Judicial District Court, Parish of Calcasieu, Louisiana (10/24/97) consolidated with *Mizell v. Conoco, Inc.*, 95-1035, 14th Judicial District Court, Parish of Calcasieu, Louisiana (10/24/97).** Two contract workers at the Conoco Refinery in Lake Charles, sued Conoco, Vista Chemical Company, an adjacent plant, and Allwaste Environmental Services, Inc., for damages due to alleged exposure to ethylene dichloride (EDC) which was owned by Vista and being transported through Conoco’s pipeline that ran through Conoco property starting at the docks and then onto Vista’s property. The plaintiffs alleged that during the cleanup of the EDC spill, the contractor had moved contaminated dirt to a site that plaintiffs were working on, doing non-cleanup related activities. The alleged injuries were respiratory illness, mental distress, among others. Finding some fault as to all parties, the jury awarded Cauthron \$886,000 reduced by Conoco’s fault (Conoco had settled before trial) and Cauthron’s 10% fault. Mizell was awarded \$85,000 reduced by Conoco’s fault and Mizell’s 15% fault. Each of the plaintiffs was awarded **\$3.5 million** in punitive damages. Some of the jurors were interviewed post trial and it was learned that a significant number of the members of the jury were upset by the fact that EDC had gotten into the river where their children often swim and play. The jurors interviewed were not overly impressed with the plaintiffs’ claims but were angry with the defendant. These two cases settled while on appeal.

B. Medical Monitoring

Medical monitoring is included in this discussion of “recovery for physical impacts” because the legislature amended Civil Code article 2315 in 1999 to provide that “damages do not include costs for future medical treatment... unless such treatment [is] directly related to a manifest physical or mental injury or disease.” Although the legislature attempted to prevent all medical monitoring for asymptomatic plaintiffs by including in the comment to the amended version of article 2315 that the provisions were interpretive and thus retroactive, the Supreme Court in *Bourgeois II*, discussed below, determined that such a retroactive application would be unconstitutional because it would eliminate a plaintiff’s vested right in a cause of action that was pending prior to the 1999 enactment. In its holdings since *Bourgeois II*, the Supreme Court has effectively returned the law to its pre-revision state as it applies to long-latency diseases. Thus, as the following chronology shows, the amended version of La. Civ. Code art. 2315(B) will have application only in those cases where exposure has taken place after July 9, 1999.

***Bourgeois v. A.P. Green Industries, Inc.*, 2000-1528 (La. 4/3/01), 783 So. 2d 1251** (“*Bourgeois II*”) This was a class action brought by shipyard employees, who were allegedly exposed to asbestos, against the shipyard and various manufacturers and distributors of asbestos. The case is significant in that the Supreme Court held that the 1999 amendment to La. Civ. Code art. 2315, eliminating a cause of action for medical monitoring, was unconstitutional insofar as it sought to make the application of the amended article apply retroactively.

In *Bourgeois v. A.P. Green Industries, Inc.*, 97-3188 (La. 7/8/98), 716 So. 2d 355 (“*Bourgeois I*”), the Supreme Court had recognized that the reasonable cost of medical monitoring was a compensable item of damage under La. Civ. Code art. 2315. The Legislature’s response was to amend article 2315 to “interpret” the article in a different way. In the comments to article 2315, the Editor’s Note provides:

Section 2. The provisions of this Act are interpretative of Civil Code Article 2315 and are intended to explain its original intent, notwithstanding the contrary interpretation given in *Bourgeois v. A.P. Green Indus., Inc.*, 97-3188 (La. 7/8/98); 716 So. 2d 355, and all cases consistent therewith.

Section 3. The provisions of this Act shall be applicable to all claims existing or actions pending on its effective date and all claims arising or actions filed on and after its effective date.

Acts 1999, No. 989 became effective July 9, 1999.

***Edwards v. State ex rel. Dept. of Health and Hospitals for Southeast Louisiana State Hosp. At Mandeville, La.*, 2000-2420 (La. App. 1 Cir. 12/28/01), 804 So. 2d 886.** Alleging they were exposed to asbestos fibers at a state hospital over a lengthy period of time, plaintiffs brought a class

action suit seeking damages for medical monitoring. Although suit was filed after the amendment to Civil Code article 2315 which limited recovery of damages for medical monitoring to symptomatic plaintiffs, the exposure allegedly occurred long before the 1999 amendment. Relying on *Bourgeois II*, the First Circuit reversed the lower court's judgment sustaining defendants' exceptions of no cause of action finding that "application of the amendment to article 2315 to these plaintiffs could deprive them of their vested rights." *Edwards* at 888.

***Crooks v. Metropolitan Life Ins. Co.*, 2001-CA-0466 (La. 5/25/01), 785 So.2d 810 (La. 2001).** Defendants moved for summary judgment when, during discovery, plaintiffs admitted they did not suffer from any confirmed diagnosis pertaining to any specific medical condition related to asbestos exposure. During discovery, plaintiffs expressed their intention "to seek medical monitoring and/or medical treatment in the future for such problems if the symptoms manifest themselves." Significantly, plaintiffs filed an amended petition praying for medical monitoring damages on October 15, 1999, nearly three months after the legislative cut-off date. Citing the amended version of La. Civ. Code art. 2315, the district court granted defendants' motion since without a current diagnosis of any asbestos related disease, plaintiffs are precluded from recovering damages for future medical treatment and monitoring. The Court of Appeal reversed, however, holding that La. Civ. Code art. 2315 "cannot be applied in this case because its retroactive application deprives the plaintiffs of a previously vested right and is thus unconstitutional." In so holding, the Louisiana Supreme Court referred to it holding in *Bourgeois II*, but then explained "for the *Bourgeois II* holding to apply, the seven factors forming the *Bourgeois I* cause of action for medical monitoring must have converged prior to July 9, 1999." Therefore, the Court remanded the matter for a new hearing on the motion for summary judgment "at which time plaintiffs should be allowed to submit evidence demonstrating that the convergence of the factors forming the basis for their medical monitoring cause of action occurred prior to July 9, 1999."

The bottom line of this "to and fro" by the Legislature and the Supreme Court is that on a "going forward basis" for exposures occurring after July 9, 1999, symptoms of the disease for which medical monitoring is sought must be manifest in the plaintiff before medical monitoring can be a recoverable element of damages. If exposure occurred prior to 1999, however, damages for costs of medical monitoring may still be available.

C. Enhanced Risk of Disease

Generally, if a plaintiff can demonstrate that a substance to which he was exposed is capable of causing cancer and that defendants are responsible for the negligent exposure, plaintiff can then introduce evidence that he has an increased risk of cancer due to that exposure. *Wisner, supra*; *Raney, infra*. In Louisiana, such evidence has generally been introduced to prove that a plaintiff's fear of cancer is reasonable and justified. (See discussion on fear claims below.) Some courts have indicated that a plaintiff might be able to recover for an increased risk of disease where the plaintiff "can show that the toxic exposure more probably than not will lead to cancer." *Hagerty, infra*.; *Adams v. Johns-Manville Sales Corp.*, 783 F.2d 589, 592 (5th Cir. 1986); *Manuel v. Shell Oil Co.*, *supra*; *Wisner v. BASF Wyandotte, supra*.

***Bonnette v. Conoco, Inc.*, 2001-2767 (La. 1/28/03), 837 So. 2d 1219.** Plaintiffs purchased dirt from a contractor who had been hired by Conoco to remove soil from its property in connection with the construction of a new lube oil hydrocracker. The dirt contained asbestos particles. The trial court found that the plaintiffs' exposure to the asbestos gave them a "slight increased risk" of developing an asbestos-related disease. Among other awards, the trial court awarded 12 plaintiffs \$10,000 for increased risk of cancer and \$12,500 for mental anguish. Conoco argued that an actionable injury does not exist "unless there is significant exposure with a significantly increased risk" and plaintiffs "only suffered minimal exposure causing an unquantified risk." The plaintiffs responded that "inhaling a single asbestos fiber constitutes an actionable physical injury. The court suggested that plaintiffs are not required to prove a certain probability of suffering physical harm. Finding that the factfinder reasonably accepted plaintiffs' expert's testimony, the Third Circuit affirmed the trial court's decision. The Supreme Court reversed, finding that Louisiana law does not permit recovery for increased risk of future injury when the potential is speculative or slight. In so finding, the Court looked to the *Bourgeois I* factors for granting medical monitoring to asymptomatic plaintiffs, and noted that such plaintiffs must prove "they have suffered a significant exposure to a hazardous substance and the increased risk of developing such a disease is significant." *Bonnette* at 1231. The *Bonnette* court observed 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." *Id.*

***Hagerty v. L&L Marine Services, Inc.*, 788 F.2d 315, 319 (5th Cir. 1986), *reh'g en banc denied*, 788 F.2d 315 (5th Cir. 1986).** In an admiralty matter, the court found that "a plaintiff can recover only where he can show that the toxic exposure more probably than not *will* lead to cancer." *Id.* at 319. Plaintiff's failure to allege that he will "probably" develop cancer precluded an award for increased risk of cancer. A more complete discussion of this case is found in the next section.

II. Recovery for Non-Physical Impacts from Toxic Chemicals: Emotional Distress and Fear of Future Cancer or Other Disease

Under Louisiana law, there is no separately recognized claim for fear of cancer or other disease. Rather, fear of contracting a disease is considered a form of emotional distress. So, in order for a plaintiff to recover for his alleged fear of cancer, he must prove that he is entitled to recover damages for his emotional distress in the absence of accompanying physical injury. The Louisiana Supreme Court has established that a plaintiff cannot recover damages for emotional distress in the absence of physical injury, except under very limited circumstances. *White v. Monsanto Co.*, 585 So. 2d 1205 (La. 1991); *Clomon v. Monroe City School Bd.*, 572 So. 2d 571 (La. 1990); *Lejeune v. Rayne Branch Hospital*, 556 So. 2d 559 (La. 1990). The exceptions are few in number and the Supreme Court has moved very restrictively in this area to ensure all such exceptions have in common the special likelihood of genuine and serious mental distress arising from special circumstances which serve as a guarantee that the claim is not spurious. *Moresi v. Through Dept. of Wildlife and Fisheries*, 567 So. 2d 1081, 1096 (La. 1990).

Accordingly, the Louisiana Supreme Court has set administrative boundaries and guidelines on the types of emotional distress claims that a plaintiff may assert in the absence of physical injury. In considering these claims, the Supreme Court explained the following in *Lejeune v. Rayne Branch Hospital*:

. . . policy considerations dictate that the law should narrow the circle of plaintiffs who should be allowed recovery. The mere fact that a duty exists does not mean that it extends to everyone against all risks all of the time. A defendant cannot be expected to be liable to virtually everyone who may suffer in any manner from his negligent conduct. The law must place some reasonable limit to liability by ascertaining or defining the scope of the duty owed by the defendant.

* * *

Just as many other states have done, we find need to move restrictively in this area. It is for this reason that we are not inclined to rely simply on general principles of duty and negligence. Administrative boundaries or guidelines imposed jurisprudentially at the outset will facilitate application by the lower courts, ensure that there is no open-ended exposure of tortfeasors, and ensure as well that a policy of limited exposure to serious mental pain and anguish damages sustained by a limited class of plaintiffs will be permitted.

Lejeune, 556 So. 2d at 569 (citations and footnotes omitted.) Thus, the expressed intent and policy of the Louisiana Supreme Court in considering claims for emotional distress in the absence of physical injury are to ensure tortfeasors are not exposed to open-ended liability by limiting exposure to only serious mental pain and anguish claims. *Id.* at 569.

Based on the foregoing principles, the Louisiana Supreme Court has set forth the following limited exceptions where a plaintiff may assert a claim for emotional distress in the absence of physical injury:

1. Infliction of emotional distress based upon separate tort involving physical consequences to person or property of plaintiff, such as assault, battery, false imprisonment, trespass to land, nuisance or invasion of right to privacy. *See* Prosser & Keeton, Sec. 12 at page 60.
2. Infliction of emotional distress where plaintiff falls under “by-stander” recovery rule. *Lejeune v. Rayne Branch Hospital*, 556 So. 2d at 570.
3. Infliction of emotional distress where plaintiff is a direct participant in the accident causing emotional injury and the defendant owes a direct, specific statutory duty to plaintiff to refrain from the specific conduct that causes the accident. *Clomon v. Monroe City School Bd.*, 572 So. 2d at 578.

4. Intentional infliction of emotional distress. *White v. Monsanto*, 585 So. 2d at 1209; *Pitre v. Opelousas General Hospital*, 530 So. 2d 1151, 1161 (La. 1988).
5. Infliction of emotional distress when there is an “especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious.” *Moresi v. Dept. of Wildlife & Fisheries*, 567 So. 2d at 1096.

The so-called “*Moresi* exception” is a catchall category which encompasses cases which do not fall under the specifically delineated exceptions, but which, nonetheless, because of their special circumstances, have in “common the especial likelihood of genuine and serious mental distress . . . which serve as a guarantee that the claim is not spurious.” *Moresi*, 567 So. 2d at 1096. This language from *Moresi* has become the test for evaluating emotional distress claims. Consequently, if a plaintiff cannot fit himself or herself under this exception, he or she is not entitled to recovery.

With respect to fear of cancer claims, Louisiana courts and federal courts interpreting Louisiana law have allowed recovery for fear of developing cancer (“cancerphobia”) as an element of damages for negligence. First, plaintiffs must prove that defendants negligently exposed them to a carcinogen. Then, to recover for their fear of contracting cancer, plaintiffs must prove that they actually have a “particularized fear” of developing cancer. *Smith v. A.C. & S., Inc.*, 843 F.2d 854 (5th Cir. 1988). See also *Hagerty v. L & L Marine Services, Inc.*, 788 F.2d 315, *reh’g denied, en banc, and modified*, 797 F.2d 256 (5th Cir. 1986.) Plaintiffs must introduce evidence of their particular fears of cancer with some specificity, instead of generally indicating concern for their overall future health. See *Smith, supra* (holding that plaintiff’s introduction of testimony of his general concern for his future health accompanied by proof of his asbestosis and link between that condition and cancer were insufficient to satisfy his burden of proof). Cf. *Hagerty, supra* (holding that plaintiff met burden of proof when he introduced evidence that he knew the chemical to which he was exposed was a carcinogen and that he saw a doctor after the exposure who advised him to undergo periodic medical testing).

The following cases demonstrate how various Louisiana courts have approached claims for emotional distress and/or a fear of future disease:

Bonnette v. Conoco, Inc., supra. In this 2003 opinion, the Louisiana Supreme Court’s reaffirmed the rule of *Moresi* noting that a plaintiff “must prove their claim is not spurious by showing a particular likelihood of genuine and serious mental distress arising from special circumstances.” *Id.* at 1235. It was legal error when, instead of determining whether the plaintiffs’ met this standard, the lower court simply evaluated whether or not plaintiffs’ fear was “reasonable.”

Cutrer v. Illinois Cent. Gulf R. Co., 581 So. 2d 1013 (La. App. 1 Cir.), writ denied, 588 So. 2d 1120 (La. 1991). The entire town of Livingston was evacuated for 14 days due to a train derailment

and chemical spill in 1982. This suit involved claims of a family evacuated and required to cleanup the family-owned business. The district court combined mental anguish, evacuation and emotional distress into one category. There was evidence presented as to the stress the evacuation and cleanup caused the family. The district court award was \$50,000 to the adults involved in the evacuation and cleanup of a family-owned business. The First Circuit reduced the award to **\$35,000**, including the same categories as the lower court. The awards to the 3 children for the same 14-day period were \$6,968, \$7,500 and \$10,000, the court having taken into account individual efforts to assist in the cleanup. On a daily basis, these awards ranged from \$2,500 per day for the adults and \$498 per day for the children.

***McDonald v. Illinois Cent. Gulf R. Co.*, 546 So. 2d 1287 (La. App. 1 Cir.), writ denied, 551 So. 2d 1340 (La. 1989).** In suit arising out of same train derailment and evacuation that were at issue in *Cutrer, supra*, Mrs. McDonald was awarded **\$30,000** for mental anguish and Mr. McDonald was awarded **\$20,000** for his fear experienced as a result of the derailment and concern over the damage to his property. The court also separately awarded each plaintiff **\$5,000** for the inconvenience of the evacuation and ensuing cleanup of family-owned business.

***Emery v. Owens-Corporation*, 2000-2144 (La. App. 1 Cir. 11/9/01), 813 So.2d 441, writ denied 2002-0635 (La. 5/10/02), 815 So.2d 842.** Plaintiff was awarded \$200,000 for his past, present, and future mental anguish which included plaintiff's fear of contracting cancer. Plaintiff worked as an insulator in a refinery where he was exposed to asbestos-containing materials for approximately five years. Plaintiff developed a severe case of asbestosis involving advanced lung scarring at a relatively young age. Plaintiff's physician testified that plaintiff will most likely die of an asbestos-related disease.

***Dumas v. Angus Chemical Company*, 31-400 (La. App. 2 Cir. 1/11/99), 728 So. 2d 441, writ denied, 99-0751 (La. 4/30/99), 741 So. 2d 19.** Court granted summary judgment dismissal of claims of 267 plaintiffs brought in class action suit arising out of catastrophic explosion and fire at chemical plant in Sterlington, Louisiana. The 267 plaintiffs sought recovery of damages only for fear and fright and emotional distress, but were not located within a distance which would support a reasonable expectation of serious emotional distress in the absence of physical injury. The plaintiffs were all located more than one mile from the accident site and presented no evidence of physical impact from the explosion or emissions therefrom. The court held as a matter of law that these plaintiffs could not recover emotional distress damages and the plaintiffs' claims were dismissed. The Second Circuit affirmed the dismissal of those claims.

***Bartlett v. Browning-Ferris Industries*, 96-218 (La. App. 3 Cir. 11/6/96), 683 So. 2d 1319, writ denied, 97-0317 (La. 3/27/97), 692 So. 2d 394.** Plaintiffs sued claiming that the adjacent hazardous waste disposal facility was a nuisance under the applicable Civil Code provisions and that they feared contracting cancer due to the proximity of their home to the facility. The court reaffirmed that there is a cause of action for "cancerphobia", citing *Straughan v. Ahmed*, 618 So. 2d 1225 (La. App. 5 Cir.), writ denied, 625 So. 2d 1033 (La. 1993). In *Bartlett*, however, the court focused on the fact that plaintiffs did not demonstrate a "particularized fear of cancer." The husband testified that he

had no fears living in his house on property that adjoins the hazardous waste disposal facility. His wife testified that she did fear cancer because of the proximity of the house to the facility, but she admitted that she had never discussed this fear with her doctor. She also admitted that she did not have the fear until after she talked to her lawyer.

***Raney v. Walter O. Moss Regional Hosp.*, 629 So. 2d 485 (La. App. 3 Cir. 1993), writ denied, 94-0347 (La. 4/7/94), 635 So. 2d 1134.** Family members sued for damages for fear of contracting hepatitis “B” after wife of the lead plaintiff, and the mother of the other plaintiff children, became a carrier after having been pricked with contaminated needles at her job in the hospital. The court found that plaintiff’s claim for fear of contracting Hepatitis B was appropriate because there was a “real and genuine probability, albeit low” of contracting Hepatitis B. The court reasoned that “if there is **any** possibility of acquiring a disease, no matter how remote, a person's fear of acquiring that disease is compensable.” The court quoted the Louisiana Supreme Court:

While to a scientist in his ivory tower the possibility of cancerous growth may be so minimal as to be untroubling, we are not prepared to hold that the trier of fact erred in finding compensable this real possibility to this worrying workman, faced every minute of his life with a disabled and sometimes painful hand to remind him of his fear.

Raney at 491, quoting *Anderson v. Welding Testing Laboratory, Inc.*, 304 So. 2d 351 (La.1974).

***Asbestos v. Bordelon, Inc.*, 96-0525 (La. App. 4 Cir. 10/21/98), 726 So. 2d 926.** Court rejected fear of cancer claim when the plaintiff’s testimony “lack[ed] specificity” where no doctor had told him he had an asbestos-related disease and he had no fear until he talked with other plaintiffs.

***Vallery v. Southern Baptist Hosp.*, 630 So. 2d 861 (La. App. 4 Cir. 1993), writ denied, 94-0249 (La. 3/18/94), 634 So. 2d 860.** Although not an environmental case, *Vallery* is interesting in that it seemingly relaxes the standard for recovery for fear of contracting a disease. A hospital security guard and his wife filed suit against the hospital for damages due to their exposure to human immunodeficiency virus (HIV). The guard had to restrain a patient who ended up bleeding on the security guard. No one had told him that the patient had acquired immune deficiency syndrome (AIDS) and he did not have on any protective gear. He went home later that night and had sex with his wife. He only found out later about the patient’s illness. There were serious workers’ compensation issues which the court dealt with, but as to the wife’s claim, the court’s discussion is interesting. The court found that the wife could recover for the emotional distress and fear even though she had not been injured or actually exposed and that the hospital did owe a duty to the wife because “the harm which befell the plaintiff [is] easily associated with the type of conduct engaged in by the defendant. *Id.* at 868.

***Hagerty v. L & L Marine Services, Inc.*, 788 F.2d 315 (5th Cir.), modified on denial of reh’g en banc, 797 F.2d 256 (1986).** A seaman was drenched with dripolene, a chemical containing benzene, toluene and xylene. He suffered dizziness, leg cramps and stinging in his extremities after

his exposure. He testified that he was aware of the carcinogenic properties of the chemical, watched the dripolene absorb into his skin, and consulted with several doctors who recommended regular medical testing. He also left his job for fear of future accidents. Although decided under federal maritime law, these factors were found sufficient to establish particularity and reasonableness, as the court noted that “circumstances surrounding the fear-inducing occurrence may themselves supply sufficient indicia of genuineness.”

***Smith v. A.C.&S., Inc.*, 843 F.2d 854 (5th Cir. (La.) 1988).** A retired industrial sheetmetal worker sued for damages resulting from occupational exposure to asbestos. The Fifth Circuit said that no evidence of plaintiff’s fear of contracting cancer could come in absent some medical testimony that plaintiff had a greater than 50% chance of contracting cancer. Since *Smith*, some Louisiana courts have stated that *any* chance of contracting cancer is sufficient to support a fear claim. See *Raney, supra*.

***Williams v. Monsanto Co.*, 1997 WL 73565 (E.D. La. 1997).** Plaintiffs, some of whom were inside a chemical manufacturing facility and some who were outside at the time of a release of hydrochloric acid, filed suit against the company for bodily injuries and for emotional and psychological trauma and fear of a future illness, and for medical monitoring. The judge found on summary judgement that the plaintiffs who were outside the plant were not exposed to enough of a concentration of the acid to cause any adverse health effect, thus they were dismissed.

The following cases, discussed in Section I(A) of this paper dealing with physical impacts from toxic chemicals, also involve emotional distress or fear of cancer claims: *Lemoine v. Ciba-Geigy Corp.*, *supra*.; *Haydel v. Hercules Transport, Inc.*, *supra*.; *Wisner v. BASF Wyandotte Corp.*, *supra*.; *Lasha v. Olin Corp.*, *supra*.; *Manuel v. Shell Oil Co.*, *supra*.; *Jeffery v. Thibaut Oil Co.*, *supra*.; and *Prestenbach v. Louisiana Power & Light Co., Inc.*, *supra*.

III. Environmental Damage to Property

Louisiana law on the calculation of property damage awards in cases involving environmental pollution--where there is no contract between the landowner plaintiff and the defendant who has caused the damage--is not fully developed and has undergone significant changes in recent years. Historically, Louisiana courts have followed three approaches in arriving at property damage valuation: (1) the cost of restoration, if the thing damaged can be adequately repaired, (2) value differential, the difference in value prior to and subsequent to the damage, or (3) the cost of new replacement, less reasonable depreciation, if the value before and after the damage cannot be reasonably determined or if the cost of repair is more than the value. *Mouton v. State*, 525 So. 2d 1136, 1143 (La. App. 1 Cir.) *writ denied*, 526 So. 2d 1112 (La. 1988); *Coleman v. Victor*, 326 So. 2d 344, 347, n. 4 (La. 1976).^{3,4}

³ As a general matter, one injured through the fault of another is entitled to full indemnification for the damages caused thereby under Louisiana Civil Code article 2315. In such

Generally, the third method of valuation was used only if the value before and after the damage could not be determined or if the cost of repairs exceeded the value of the property. Further, the courts routinely held that “where land had been rendered useless, the proper measure of damages is the lesser of either the market value of the property and severance damages minus any residual value or the cost of restoration of the property to its condition prior to damage.” *Mouton, supra*. Thus, if the land was rendered useless and the cost of restoration exceeded the value of the land, the owner of the property was limited to recovery of only the market value of the land. 525 So. 2d at 1143. *Accord, Ewell v. Petro Processors of Louisiana, Inc.*, 364 So. 2d 604 (La. App. 1 Cir. 1978) *writ denied*, 366 So. 2d 575 (La. 1979).

In 1993, the Louisiana Supreme Court expressed a new rule, adopting the rule set forth in Section 929 of Restatement (Second) of Torts (1977), which provides that damages should include the difference between the value of the land before and after the harm, or at the owner's election in an appropriate case, the cost of restoration that has been or may be reasonably incurred. *Roman Catholic Church of Archdiocese of New Orleans v. Louisiana Gas Service Co.*, 618 So. 2d 874 (La. 1993) (emphasis added.) The comments to Section 929 provide that the costs of restoration are ordinarily allowable, but the courts will use diminution in value when the cost of restoration is disproportionate to the diminution in value, unless there is a reason personal to the owner for restoring the property to its original condition. In the latter case, damages will include the costs for repairs, even though that amount is greater than the total value of the property.

The Louisiana Supreme Court stated it this way:

[A]s a general rule of thumb, when a person sustains property damage due to the fault of another, he is entitled to recover damages including the cost of restoration that has been or may be reasonably incurred, or, at his election, the difference between the value of the property before and after the harm. If, however, the cost of restoring the property in its original condition is disproportionate to the value of the property

a case, the obligation of the defendant is to indemnify the plaintiff--to put him in the position that he would have occupied if the injury complained of had not been inflicted on him. Consequently, when property is damaged through the legal fault of another, the primary objective is to restore the property as nearly as possible to the state it was in immediately preceding the damage. Accordingly, the measure of damage is the cost of restoring the property to its former condition. *Coleman*, at 346-347.

⁴ *Mouton, supra*, involved a suit by a landowner-lessor against his lessee, an oilfield waste disposal operator, and various of the lessee's customers when wastes migrated to neighboring properties. The plaintiff appealed the lower court's finding that a claim for cleanup was part of a claim for damages. Plaintiff theorized that cleanup should be considered as a separate and independent cause of action. In the context of rejecting that argument, the First Circuit summarized the appropriate quantum analysis in the context of a property damage suit.

or economically wasteful, unless there is a reason personal to the owner for restoring the original condition or there is a reason to believe that the plaintiff will, in fact, make the repairs, damages are measured only by the difference between the value of the property before and after the harm.

Id. at 879-880 (emphasis added).

Stated differently, under *Roman Catholic Church*, Louisiana property damage claims based on tort theories of liability should be handled in the following manner:

1. Generally, the injured party is entitled to recover damages including the cost of restoration that has been or may reasonably be incurred.
2. However, at his option, the injured party may obtain the difference in value of the property before and after the harm.
3. If the cost of restoring the property to its original condition is disproportionate to the value of the property or economically wasteful, property damages are measured only by the difference between the value of the property before and after the harm, unless:
 - a. There is a reason personal to the owner for restoring the property to its original condition, or
 - b. There is reason to believe the plaintiff has, or will, in fact make the repairs.

In *Roman Catholic Church*, the Louisiana Supreme Court awarded the Archdiocese the full cost of restoration of its low-income housing apartment complex, as the award met the above-described standards. The court held that the reason personal to the Archdiocese for its restoration was the Archdiocese's object to acquire and maintain the facility to provide housing for its low-income parishioners and the fact that the Archdiocese's ownership was conditioned upon the removal of the complex from commerce and provision of housing for two hundred poor families for a 15-year period. The court also noted that the Archdiocese was clearly entitled to recover the full cost of restoration because it had, in fact, made the repairs by replacing the building to its original condition. *Id.* at 880. The court stressed that in choosing between the cost of repair measure and some other measure of damages, it is important to know how the property is used and what interest in it is asserted, so that the measure can be adopted that will afford compensation for any legitimate use that the owner makes of his property. *Id.*

Other courts have since applied *Roman Catholic Church* in awarding property damages. *See, Mossy Motors, Inc. v. Sewerage and Water Board of City of New Orleans*, 98-0495 (La. App. 4 Cir. 5/12/99), 753 So. 2d 269, *writ denied*, 99-2102 (La. 10/29/99), 749 So. 2d 638 (a car dealership that had its show room and offices damaged by public construction project held to be entitled to cost of restoration which was essentially the cost to rebuild and replace prior existing edifices; automobile business was “personal to the Mossy family,” as it had operated its family business at the same location for three generations); *Massie v. Cenac Towing Co., Inc.*, 2000-1596 (La. App. 5 Cir. 4/25/02), 796 So. 2d 14, *writ denied*, 2001-1511 (La. 8/31/01), 795 So. 2d 1213 (tug boat company held liable for \$30,500 in costs to restore 50 linear feet of levee damaged when a tugboat landed on the levee, even though per acre value of affected land was only \$364; landowner, a Georgia resident, held to have personal reason for restoration in that he had hunting lodge on property and breach of levee would allow saltwater intrusion to portion of property used for rice and crawfish farming).

Several courts began using the *Roman Catholic Church* analysis to support property damage awards where a contract existed between the landowner and the defendant. *See Abramson v. Florida Gas Transmission Co.*, 909 F.Supp. 410 (E.D. La. 1995) (property owner’s claims for property damage caused by natural gas pipeline reconditioning held to be limited to difference between value of properties before and after alleged harm by contractor; property owners held not to be entitled to remediation damages; approximate value of properties was only \$95,000, while estimate of remediation damages was \$2.7 million; and, plaintiffs had no reason personal to them requiring restoration of property to original condition); *St. Martin v. Mobil Exploration & Producing U.S., Inc.*, 1999 WL 5671 (E.D. La.), *aff’d* 224 F.3d 402 (5th Cir. 2000) (see discussion below); \$14 million originally sought for restoration rejected by trial court which limited plaintiffs to award of approximately \$10,000 per acre for approximately 24 acres (not 357 acres claimed by plaintiffs); purchase price/market value of affected acreage was \$245 per acre).^{5, 6} Now, after the Louisiana

⁵ The original restoration plan required refilling the entire marsh at a cost of \$39,000 per acre. The revised restoration plan, which was scaled down in both cost and scope, was equivalent to approximately \$10,000 per acre.

⁶ There is another case currently on appeal to the Louisiana First Circuit involving damages to marshland/wetlands, *Terrebonne Parish School Board v. Castex Energy, Inc.*, Thirty-Second Judicial District Court, Docket No. 126752. The trial judge awarded \$1,100,000 to the school board, a sum based on the least expensive of two remediation plans proposed, and ordered that the money be placed in the registry of the court. The trial court further assigned a Special Master to review the proposal and report to the court concerning whether the plan can be performed for the sum awarded. If the Special Master finds the plan can be completed for the sum awarded, or less, the money must be used to actually restore the property and the school board has two years to complete the work. Any sums in excess of the actual cost of the project are to be returned to the defendants. If the special master finds the plan cannot be completed for the sum awarded, the parties are ordered to return to the court for a determination of how the money shall be spent. The case to a large extent revolves around whether oil field operators/mineral lessees are obligated to backfill canals dredged in wetland oil fields. The case was argued to a five-judge panel of the First Circuit in November 2003.

Supreme Court's decision in *Corbello*, discussed below, a *Roman Catholic Church* analysis is no longer appropriate in a breach of contract case.

***Corbello v. Iowa Production*, 2002-0826 (La. 2/25/03), 850 So. 2d 686.** The *Corbello* case involved the issue of restoration of portions of a 320 acre tract of land in the Iowa Field in Calcasieu Parish, which was subject to both a mineral lease (1929) and a surface lease (1961). The surface lease contained a standard industry lease stipulation requiring the lessee to "reasonably restore the premises as nearly as possible to their present condition." The 320 acre tract had a total real estate market value of \$108,000. After expiration of the surface lease, the landowners brought suit against Shell to recover the cost of restoring the property to its original condition. After a two and one-half week jury trial, plaintiffs were awarded \$33 million to restore the property, \$28 million of which was for remediation of the Chicot aquifer, an award for a public harm. The Third Circuit affirmed the jury's award and writs were unanimously granted by the Supreme Court. The Supreme Court issued its decision in February 2003.

In upholding the jury's award of \$5 million for surface restoration and \$28 million for remediation of groundwater contamination, the Louisiana Supreme Court found that "the damage award for a breach of contract obligation to reasonably restore property need not be tethered to the market value of the property." *Corbello* at 693. In so finding, the Court put to rest the issue of whether or not a *Roman Catholic Church* analysis was appropriate in a breach of contract case. The court concluded that "damages to immovable property under a breach of contract claim should not be governed by the rule enunciated in *Church*. We find that the contractual terms of a contract which convey the intentions of the parties, overrule any policy considerations behind such a rule limiting damages in tort cases." *Corbello* at 694-695.

In response to the *Corbello* decision and the potential that a private litigant could be awarded a sum for restoration/remediation of groundwater and yet not use the money for that purpose, Act No. 1166 was passed during the 2003 legislative session. La. R.S. 30:2015.1 now requires the Louisiana Department of Natural Resources and the Department of Environmental Quality to be notified in the event any judicial demand includes a claim to recover damages for the evaluation and remediation of any contamination or pollution that is alleged to impact or threaten usable groundwater and provides those agencies a right of action to intervene in such a proceeding. Among other protections, the statute requires funds awarded for groundwater contamination to be placed in the registry of the court to ensure that the public's groundwater is remediated or restored. The Act is intended to be interpretive, remedial and procedural and applicable to all cases filed after August 1, 1993.

***St. Martin v. Mobil Exploration & Producing U.S., Inc.*, 1999 WL 5671 (E.D. La.), *aff'd* 224 F.3d 402 (5th Cir. (La.) 2000).** In 1992, Mr. and Mrs. St. Martin purchased a 7,000 acre tract of property in coastal Louisiana for \$245.00 per acre. Shortly thereafter, they sold all but a 2,400 acre tract to

the Nature Conservancy for their approximate purchase price. The St. Martins also donated \$140,000 to the Nature Conservancy in support of a marsh wildlife refuge. In 1995, the St. Martins filed suit against two oil companies claiming that gaps in the spoil banks along canals dredged by the oil companies had allowed water to flow into and out of the marsh, causing erosion of the interior marsh. Plaintiffs made claims under the canal servitude agreements, the mineral lease, and tort theories. The oil companies successfully moved for summary judgment on the issue of whether the St. Martins' could recover for marsh loss prior to their purchase of the property.

After a judge trial, the court found that forty acres of the marsh had been damaged after the St. Martins purchased the property and, of that amount, the oil companies were responsible for 24 acres of damage. (Sixty percent oil companies and 40 percent natural causes.) The judge found plaintiffs' proposed restoration plans, however, to be excessive (refilling the entire marsh) and ordered additional briefing on the issue. The court eventually awarded the plaintiffs \$240,000, or \$10,000 an acre, for the restoration of their property. Defendants appealed on several issues, including the reasonableness of the damage award under *Roman Catholic Church*.

Defendants argued that a \$10,000 per acre award for property with a market value of \$245 was unreasonable. The Fifth Circuit recognized that *Roman Catholic Church* allows restoration damages to exceed the property's value only where there is "a reason personal to the owner for restoring the original condition or there is a reason to believe that plaintiff will, in fact, make the repairs." *St. Martin*, 202 F.3d at 410. The court found that the St. Martins had demonstrated a genuine interest in the health of the marsh by donating labor and resources to the cause. In addition, the St. Martins lived adjacent to the marsh and used it for recreational purposes. Furthermore, Mr. St. Martin had been involved in other marsh restoration projects. Defendants also argued that plaintiffs' commercial motives for buying the property should not be rewarded, but the court found that the St. Martins demonstrated "a strong personal interest in the marsh and the possibility of an additional commercial interest does not foreclose damages under *Roman Catholic Church*." *St. Martin* at n. 11.

***Abramson v. Florida Gas Transmission Company*, 909 F. Supp. 410 (E.D. La. 1995).** Landowners sued natural gas pipeline company and the pipeline reconditioning project contractor for damages alleging breach of the temporary workspace contract, for negligence, and for property remediation. The "environmental" issue was the landowners' desire to have old pipeline coating consisting of mostly polyethylene plastic removed from the premises along with coal tar, presumably from pipeline joints. Significant here is that the court rejected the defendants' arguments that federal and state law barred any claim for remediation and that the landowners could only seek injunctive relief. The court also found that the cost of the remediation of this "ranch" property was \$2.7 million and when that number was compared with the value of the property, "the cost of restoring the property in its original condition is disproportionate to the value of the property." 909 F. Supp. at 420 (citing *Roman Catholic Church*) ". . . the Court finds that it would be economically wasteful to force remediation for any tort liability defendant may have." 909 F. Supp. at 420. Clearly, the federal district court recognized that the *Roman Catholic Church* methodology was to be used for tort claims. The court held that the landowners' damages on the tort claim against the contractor were

limited to the difference between the value of the property before and after the alleged harm, and the landowners were not entitled to the cost of remediation.

***Hazelwood Farm, Inc. v. Liberty Oil & Gas Corp.*, 2002-266 (La. App. 3 Cir. 4/2/03), 844 So. 2d 380.** Plaintiff landowner presented claims in contract and tort against the defendant oil company for alleged damages due to operations on the property. In the contract claim arising from an alleged bad faith breach of a 1926 oil and gas lease, the plaintiff was awarded \$2 million. On the tort claim, the jury found 60% third party fault (a subsequent operator) and determined that there was no reason to believe the plaintiff would restore the land and there was no reason personal to the plaintiff for such restoration. The jury concluded that the maximum value the plaintiff could recover in tort could not exceed \$304,000, the value placed on the property by the jury. Plaintiff was required to select his amount of recovery under the multiple theories raised so, of course, the contract award of \$2 million was selected. Relying on *Corbello* and a provision in the lease which provided that the defendant was “responsible for all damages caused by [its] operations,” the Third Circuit affirmed the verdict in its entirety since an award based on a breach of contract “need not be tethered to the value of the property.” *Hazelwood* at 387, citing *Corbello*.

***Grefer v. Alpha Technical Services, Inc.*, No. CA 97-15004, New Orleans Civil District Court for the Parish of Orleans, Louisiana (6/22/01).** In this case, retired Louisiana Judge Joseph Grefer and his three siblings claimed that ExxonMobil Corporation (“Exxon”), a number of other oil and gas companies, and Intercoastal Tubular Services, Inc. (“ITCO”) were responsible for the contamination of their land with naturally occurring radioactive material (“NORM”). The property in question, which had been owned by the Grefer family for over 100 years, was located adjacent to the Harvey Canal in Harvey, Louisiana, a heavily industrialized area. The Grefers had leased the property to ITCO, an oilfield services contractor which cleaned and refurbished drilling tubing, casing and other oil and gas production equipment. ITCO had contracted with Exxon to clean and refurbish its tubing and other equipment. It was estimated that ITCO had handled over 180,000 tons of pipe per year for Exxon.

Plaintiffs alleged that the NORM (including Radium-226 and Radium-228), which accumulated inside production tubing in the form of scale, had been dislodged from the inside of the tubing during the cleaning process. Plaintiffs alleged that millions of pounds of scale dust, all allegedly containing radioactive material, was deposited on the property and buried over the years. Plaintiffs contended that Exxon and other oil and gas companies, individually and through trade associations, had known since the 1950's that oil wells generated radioactive materials and that these materials accumulated as scale in the pipes. Exxon admitted that it knew of the so-called NORM phenomena in 1986 but did not warn ITCO until 1987. ITCO subsequently went out of business.

The plaintiffs sought \$56 million to clean up the property. Exxon contended that there was no substantial contamination warranting such an award. Exxon's position was that out of the 1.4 million square feet of property, less than 8/10 of 1% was contaminated with NORM that exceeded background levels. Exxon further contended that even the contamination which exceeded background levels did not pose a threat to human health.

Exxon conducted an extensive survey of the property at a cost of over \$330,000, which substantiated Exxon's claim of limited contamination. The Exxon survey consisted of over 1,000 bore holes on the property. According to Exxon there were only five small patches of land which needed remediation and that remediation could be accomplished for \$46,000.

Preceding trial, all producer defendants but Exxon settled. There were extensive pre-trial proceedings. Exxon sought to limit damages to the value of the property but this effort failed. Following five weeks of trial and one and a half days of deliberation, on May 22, 2001, the Orleans Parish jury awarded the Grefers **\$56 million for restoration of the property, \$145,000 in general damages, plus \$1 billion in punitive damages.** (Plaintiffs had asked for \$3 billion in punitive damages in their closing arguments.) Post-trial motions for relief from the verdict were denied. The case is now on appeal to the Louisiana Fourth Circuit Court of Appeal. Oral arguments were heard on September 4, 2003.

Simoneaux v. Amoco Production Company, 2003 WL 22220112 (La. App. 1st Cir. 9/26/03). Landowners brought suit claiming property damage allegedly caused by oil and exploration/production activities between 1957 and 1995. Landowners complained that the property was contaminated with NORM and sought damages for restoration/remediation of the property and fear of cancer, as well as punitive damages. Restoration/remediation plans proposed by plaintiffs' experts were in the tens of millions, while defendants' experts testified that the amount necessary for any cleanup was \$375,000. After a two-week jury trial, the jury awarded the plaintiffs' \$375,000 for restoration/remediation damages. No award was given for fear of cancer or punitive damages. Plaintiffs filed a motion for judgment notwithstanding the verdict. The judge granted plaintiffs' motion and increased the damage award to \$12,970,440. On appeal, the First Circuit reversed the trial court's decision to overturn the jury's damage award and reinstating the jury verdict. An application for rehearing is currently pending., the Court noted that and reinstated the jury verdict. The case was appealed to the Louisiana First Circuit Court of Appeal and oral arguments were heard in May 2003.

