

TOXIC AND HAZARDOUS SUBSTANCES LITIGATION

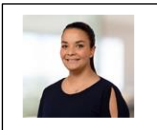
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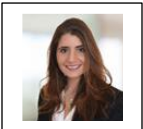
In France, May 2010 marked the creation by case law of the specific loss relating to anxiety suffered by employees exposed to asbestos on professional sites. Ten years later, the loss relating to anxiety is used in many cases involving "any hazardous substances" and has become the Sword of Damocles hanging over businesses of all sectors. Here is how this asbestos-related case law is becoming the new Toxic Tort trend in France and soon to be extended to the EU.

Anxiety to Develop a Disease in the Future: A New Toxic Tort Trend

ABOUT THE AUTHORS



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ABOUT THE COMMITTEE

Member participation is the focus and objective of the Toxic and Hazardous Substances Litigation Committee, whether through a monthly newsletter, committee Web page, e-mail inquiries and contacts regarding tactics, experts and the business of the committee, semi-annual committee meetings to discuss issues and business, Journal articles and other scholarship, our outreach program to welcome new members and members waiting to get involved, or networking and CLE presentations significant to the experienced trial lawyer defending toxic tort and related cases. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



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By awarding compensation for the fear of seeing a risk becoming a reality, the French Supreme Court ruled in line with and even participated in the development of a society that no longer accepts that entrepreneurial and economic business may give rise to a hazard in the future. Businesses must take this reality into account when anticipating future litigation risks because the debates surrounding this type of loss are only just starting.

Anxiety is no Longer Limited to Asbestos Litigation

For ten years, the French Supreme Court made the compensation awarded to employees for their anxiety of developing an asbestos-related disease ever more simple and even automatic. By doing so, the French Supreme Court limited the number of eligible plaintiffs to the employees of sites concerned by Ministerial orders listing sites triggering the right to the asbestos workers' early retirement allowance (ACAATA).

Ten years of cases involving thousands of employees against hundreds of businesses, most of whom stopped operating or transferred their activity outside of France, which were starting to run dry with many specialists who, in light of the completely exceptional nature of this case law with respect to the principles of ordinary law, were starting to think about turning the page on this type of claims.

This was before two decisions of the Plenary Assembly of the French Supreme Court handed down on April 5 and September 11, 2019. On April 5, 2019, the Plenary Assembly extended the loss relating to anxiety to all employees of all sites operating in France, whether or not they are listed on ACAATA lists (Plenary Assembly, April 5, 2019, no. 18-17.442). On September 11, 2019, it ruled that the loss relating to anxiety could be claimed by any employee exposed to a "*harmful or toxic substance*" (Plenary Assembly, September 11, 2019, nos. 17-24.879 to 17-25.623). At the same time, the loss relating to anxiety was also recognized in the scope of litigation involving health products, i.e. in a scope other than the employer/employee relationship. Its application has actually appeared in all types of litigation: in labor, environmental, consumer, industrial accident and even loss or misappropriation of personal data cases. It has even given rise to the concept of eco-anxiety, namely anxiety related to climate change.

This type of loss is now nearly automatically claimed every week. During the Covid-19 lockdown, many employees mentioned their anxiety due to them having to continue their work, like the employees of Amazon via their trade unions. Anxiety was also mentioned, this time in the report dated June 4, 2020 of the Investigation Commission of the French Senate in charge of assessing the role of the services of the State in the management of the environmental, health and financial consequences of the fire at the Lubrizol

factory on September 26, 2019 for local residents.

The Number of Cases Brought Before the Labor Courts is Bound to Increase

Litigation before the Labor Courts is at the origin of the recognition of the loss relating to anxiety. The Courts, trade unions and their Counsel are now accustomed to the management of such mass litigation. With the extension of the possible compensation for this loss to all potentially toxic or harmful substances, the Plenary Assembly has opened the door to many disputes.

If the Court rules that the principles of ordinary law must apply, these cases will be examined by courts that for the last ten years have dismissed these principles as soon as anxiety is claimed. The scientific debate further being ignored by these courts, it can be anticipated that the substances at stake will systematically be deemed harmful, without any reference to the exposure thresholds and relevant scientific studies.

This reality has not gone unnoticed by employees, whose claims have increased these past months with regards to different chemical substances and with the encouragement of the courts, like the Versailles Court of Appeal that, ruling on the measures taken by Amazon during the lockdown, indicated, on April 4, 2020, that Covid-19 created "*a particularly anxiety-inducing environment*" for the employees who still worked, even though such an

assertion was not necessary for the purpose of its reasoning.

Developing Litigation Against Businesses

It is also legitimate to think that a Labor Court judgment recognizing the anxiety of employees will become the starting point of civil disputes against the same business as manufacturer of the product containing the substance at stake. Guaranteeing the application of the principles of ordinary law, in particular the fact that the burden of proof must lie with the plaintiffs, will be essential for businesses. They will also have to require the organization of court-ordered expert operations so as to counter general assertions and clichés. This is the only option for businesses to thwart any attempt of the courts at creating presumptions against them, in the same line as those created in the scope of asbestos litigation.

The certainty of the possible development of a serious disease in the future will also have to be debated. Indeed, a distinction must be made between the fear related to innovative products (such as allegations of anxiety regarding the Linky meters, the 5G network or nanomaterials) and the fear related to substances for which neutral scientific studies and laws exist, as well as hindsight, at least time-related.

Furthermore, businesses will have to guard themselves against any argument aiming at having anxiety recognized on the sole ground that some people have developed a disease due to the substance, because the

legal grounds are different. The role of expert operations will again be essential. The Roundup case is noteworthy in this respect, in which it will be easy (but not legally grounded) to bring forward the agreement concluded by Bayer with US plaintiffs to justify awarding compensation for the anxiety of developing a serious disease as a result of the use of this product.

Uncontrollable Environmental Litigation?

The report dated June 4, 2020 of the Investigation Commission of the French Senate on the fire at the Lubrizol factory shows that the extension of the loss relating to anxiety beyond labor matters is encouraged at all levels. Indeed, the Commission indicates that *"anxiety is a concept that is taken into account in law and, in particular, through recent and evolving case law. Anxiety is a compensable loss, the recognition of which arose with the tragedy of asbestos workers and that the court has now extended mainly to employees exposed to toxic products, on the legal ground of the employer's obligations as defined by our Labor Code"*. It claims that the anxiety of the local residents stems from the false information given after the accident and the lack of information on the industrial risks and substances inhaled, hence openly encouraging actions on these grounds.

The actions brought by environment protection associations against businesses on the ground of their alleged breach of their environmental commitments also give rise to the question of anxiety (eco-anxiety).

Again, are concerned the businesses operating in the sectors identified by these associations as polluting sectors, such as the oil, textile, pesticide, plastic or automotive industries.

What about the State's Responsibility?

The new actions based on anxiety give rise to the question of knowing whether the State will really be held liable in this litigation or if, like in the asbestos, health or air pollution fields, the State's liability will certainly be recognized but the financial consequences will only be borne by businesses.

Indeed, in most cases, it is the content of the laws (their laxity according to plaintiffs) that is really being pointed at. Plaintiffs mainly allege that businesses should have taken additional measures to protect the population (accusing lobbies). The State should, therefore, be targeted and businesses should not hesitate to involve it, especially given that the number of plaintiffs may become uncontrollable.

What about Foreign Businesses Doing Business in France?

When doing business in France, companies need to understand that anxiety-related claims are not limited to the employee/employer sphere anymore. Indeed, as of now, all companies with an industrial plant where asbestos was used in the past could become the target of claims by all former and current employees.

This case law has now been applied to all industrial plants where any hazardous substance recognized as such by a Court was used.

But case law starts developing against companies placing products on the French market, irrespective of whether they have plants or employees in France. The anxiety damage has hence already been recognised in the life science context. There are pending claims relating to consumer products and threats of claims against manufacturers who would allegedly participate in climate change or air pollution, without them having operations in France.

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