

Environmental Justice and Community Advocacy: A Case Study for Toxic Tort Claims

INTRODUCTION

Establishing liability for polluters is complex. Tort claims and, in this case, toxic tort claims have long been a vehicle to address the gaps left by statutes.¹ Both strict liability and negligence claims can and have been adopted to hold polluters responsible, typically in cases involving exposure to asbestos² or inhalation of other toxic chemicals.³ *Butler v. Denka* is one such case, which was brought in the U.S. District Court for the Eastern District of Louisiana in October 2021.

*Butler v. Denka*⁴ raises a fundamental question: can citizens successfully sue a factory that caused multiple cancer illnesses in their community by emitting excessive pollution? In *Butler v. Denka*, the District Court denied plaintiff Juanea L. Butler's tort claim,⁵ finding that the defendant, Denka Performance Elastomer, LLC, did not owe the plaintiff a duty of care.⁶ The U.S. Court of Appeals for the Fifth Circuit upheld the decision. In later decisions, however, district courts have ruled differently in cases concerning the same geographical area in Louisiana. These courts recognized a duty of care based on Title 33 of the Louisiana Administrative Code⁷ and its sections relating to fugitive emission control.⁸

DOI: <https://doi.org/10.15779/Z38C24QP4C>

Copyright © 2024 Regents of the University of California.

1. See, e.g., Mark Latham et al., *The Intersection of Tort and Environmental Law: Where the Twains Should Meet and Depart*, 80 *FORDHAM L. REV.* 737, 749–751 (2011); MICHAEL DORE, *LAW OF TOXIC TORTS* § 2:1 (updated March 2023).

2. See, e.g., *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1081 (5th Cir. 1973).

3. Mark S. Dennison & Warren Freedman, *Handling Toxic Tort Litigation*, 57 *AM. JURIS. TRIALS* 395, I § 6 (originally published in 1995, updated February 2023).

4. *Butler v. Denka Performance Elastomer, LLC*, 16 F.4th 427, 432 (5th Cir. 2021).

5. Plaintiff Butler brought the claim both individually and as representative of all others similarly situated. *Id.* at 434.

6. *Id.* at 444, 446.

7. LA. ADMIN. CODE tit. 33, § III-905 (2013).

8. *Id.* § III-2121; see *Jones v. Evonik Corp.*, 620 F. Supp. 3d 508 (E.D. La. 2022); *Foster v. Evonik Corp.*, 620 F. Supp. 3d 482 (E.D. La. 2022); *Berthelot v. Union Carbide Corp.*, No. CV 22-793, 2022 WL 3280100 (E.D. La. 2022); *LeBeouf v. Evonik Corp.*, 620 F. Supp. 3d 463 (E.D. La. 2022).

Butler is one of many cases that aimed to provide relief to communities harmed by pollution. The area has been in the public spotlight for having some of the highest concentrations of toxic chemicals in predominantly Black communities.⁹ The health impacts on adjacent communities are so startling that the EPA addressed a letter to Louisiana state agencies, stating that “Louisiana residents who identify as Black and are living and/or attending school near the Denka facility have been subjected to adverse and disparate health impacts as a result of LDEQ’s [Louisiana Department of Environmental Quality] decisions.”¹⁰ However, in July 2023, the EPA announced that it had closed its investigation without taking further action under Title VI or other civil rights laws¹¹ after being challenged in federal court.¹² A tort claim could be part of a larger struggle to address this environmental injustice.

I. *BUTLER V. DENKA PERFORMANCE ELASTOMER, LLC*

A. *Background*

Pontchartrain Works Facility (PWF), is located in LaPlace, St. John the Baptist Parish, Louisiana.¹³ Starting in 1969, DuPont, one of the defendants, owned and operated the plant, which produced chloroprene, a chemical used to make neoprene.¹⁴ Neoprene, invented by DuPont in 1931, is used for many chemical and weather-resistant products.¹⁵ In 2015, DuPont sold the PWF plant to Denka Performance Elastomer, LLC, a Japanese company also named as a

9. See, e.g., *US: Louisiana’s ‘Cancer Alley,’* HUMAN RIGHTS WATCH (Jan. 25, 2024, 12:00 AM), <https://www.hrw.org/news/2024/01/25/us-louisianas-cancer-alley>; Michael Phillis, *Louisiana was open to Cancer Alley concessions. Then EPA dropped its investigation*, AP NEWS (Nov. 1, 2023), <https://apnews.com/article/epa-louisiana-cancer-alley-pollution-discrimination-915d957401318aaf57fc478afb29f9a>; Victor Blackwell et al., *Toxic tensions in the heart of ‘Cancer Alley’*, CNN (Oct. 20, 2017, 7:36 PM), <https://edition.cnn.com/2017/10/20/health/louisiana-toxic-town/index.html>.

10. Letter from EPA, Office of Environmental Justice and External Civil Rights, to Dr. Chuck Carr Brown, Secretary, Louisiana Department of Environmental Quality, & Dr. Courtney N. Phillips, Secretary, Louisiana Department of Health (Oct. 12, 2022), <https://www.epa.gov/system/files/documents/2022-10/2022%2010%2012%20Final%20Letter%20LDEQ%20LDH%2001R-22-R6%2C%2002R-22-R6%2C%2004R-22-R6.pdf>.

11. Letter from EPA, Office of Environmental Justice and External Civil Rights, to Roger Gingles, Secretary Louisiana Department of Environmental Quality, (July 27, 2023), <https://www.epa.gov/system/files/documents/2023-06/01R-22-R6%20and%2004R-22-R6%20Administrative%20Closure%20Letter%20for%20LDEQ%206.27.2023.pdf>.

12. Brentin Mock, *Court Ruling Could Set Back ‘Decades of Work’ in Polluted Black Communities*, BLOOMBERG (Feb. 6, 2024, 2:30 PM), <https://www.bloomberg.com/news/articles/2024-02-06/court-decision-blocks-epa-action-in-louisiana-s-cancer-alley>.

13. *Butler v. Denka Performance Elastomer, LLC*, 16 F.4th 427, 432 (5th Cir. 2021).

14. *Id.* at 432–33; *LaPlace, Louisiana - Background Information*, EPA (2016), <https://www.epa.gov/la/laplace-louisiana-background-information>.

15. EPA, *supra* note 14.

defendant in the case.¹⁶ DuPont retained ownership of the land and buildings while Denka operated the plant.¹⁷

In 2010, chloroprene was classified as a likely human carcinogen by the Environmental Protection Agency (EPA).¹⁸ It has been linked to symptoms such as headaches, respiratory irritation, and heart palpitations, as well as damage to the liver, circulatory system, immune system, and central nervous system.¹⁹ According to the EPA, exposure to concentration levels below 0.2 $\mu\text{g}/\text{m}^3$ constitutes an acceptable risk.²⁰ For comparison, Denka's own sampling at the plant showed chloroprene concentrations of an average concentration of 4.08 $\mu\text{g}/\text{m}^3$ to 6.65 $\mu\text{g}/\text{m}^3$ between August 2016 and March 2017.²¹ Furthermore, the EPA's National Enforcement Investigation Center found various areas of non-compliance by both defendants when it conducted an inspection under the Clean Air Act in June 2016, including "failure to monitor, keep and report records, and replace leaking valves."²²

At the time of the litigation, named plaintiff Juanea L. Butler was a resident of LaPlace, Louisiana and had lived and worked "within 5.5 miles of the PWF" since 1998.²³ She experienced symptoms and health conditions attributable to chloroprene, for which she sought medical treatment starting in April 2012 up until the time of the litigation.²⁴ The risk of contracting cancer near LaPlace, which is the site of numerous industrial facilities, has been estimated to be the highest in the country and somewhere between fifty²⁵ and allegedly 800 times²⁶ the national average. As with many factories and power plants, the pollution caused by PWF raises environmental justice issues.²⁷ Located on the "German Coast," St. John the Baptist Parish was founded in the 1720s on the fertile west bank of the Mississippi River.²⁸ The area, which is part of so-called Plantation Country, has a history of sugar cane plantations, which relied on the forced labor

16. *Butler*, 16 F.4th at 433.

17. *Id.*

18. *Id.*; EPA, IRIS TOXICOLOGICAL REVIEW OF CHLOROPRENE 96 (2010).

19. *Butler*, 16 F.4th at 433.

20. *Id.*

21. *Id.*

22. *Id.* at 433–34. St. John the Baptist Parish installed a control device and "reduced chloroprene emissions by 85% between 2014 and 2019." EPA, 2014 NATA EMISSIONS UPDATES (2020), https://www.epa.gov/sites/default/files/2018-08/documents/2014_nata_updates_to_emissions.pdf.

23. *Butler*, 16 F.4th at 434.

24. *Id.*

25. Oliver Laughland & Jamiles Lartey, *First Slavery, then a Chemical Plant and Cancer Deaths: One Town's Brutal History*, THE GUARDIAN (May 6, 2019), <https://www.theguardian.com/us-news/2019/may/06/cancertown-louisiana-reserve-history-slavery>.

26. *Acosta v. Denka Performance Elastomer, LLC*, No. CV 20-2323, 2022 WL 3214418 at *1 (E.D. La. Aug. 9, 2022).

27. James Wesley et al., *Uneven Magnitude of Disparities in Cancer Risks from Air Toxics*, INT. J. ENV'T RES. & PUB. HEALTH 9 (12), 4365–4385 (2012), <https://doi.org/10.3390/ijerph9124365>.

28. *History of St. John the Baptist Parish*, ST. JOHN THE BAPTIST PARISH, <https://www.sjbparish.gov/Visitors/History> (last visited July 8, 2023).

of enslaved Black people.²⁹ Historic sharecropping, abhorrent working conditions, and the legacy of the Jim Crow era, such as discriminatory zoning laws,³⁰ continue to disenfranchise Black, low-wage residents and even schoolchildren³¹ who inhabit the town.³² The 2020 census found that approximately 70 percent of St. John the Baptist Parish residents are non-white, with African Americans representing the largest racial group at 60 percent.³³ The average annual per-capita income in the area is \$28,447,³⁴ which is about 25 percent less than the national average.³⁵

Often referred to as “Cancer Town,”³⁶ or “Cancer Alley,”³⁷ the 85-mile strip along the Mississippi River has long received public attention, including by United Nations human rights experts.³⁸ Residents of this area are increasingly mobilizing against the approximately 150 oil refineries, plastics plants, and chemical facilities in their neighborhoods.³⁹ Opposition is being taken to the

29. Halle Parker, *(Plant)ation Country*, WWNO (Apr. 25, 2023, 8:40 PM), <https://www.wvno.org/podcast/sea-change/2023-04-25/plantation-country>; Dana Drugmand, *From Plantations to Petrochemicals: The historical roots of Louisiana's Cancer Alley can be found in slavery*, SIERRA CLUB (June 19, 2023), <https://www.sierraclub.org/sierra/plantations-petrochemicals-juneteenth>; *Environmental racism in Louisiana's 'Cancer Alley', must end, say UN human rights experts*, UNITED NATIONS (Mar. 2, 2021), <https://news.un.org/en/story/2021/03/1086172>.

30. Most recently: *Inclusive Louisiana v. St. James Par.*, No. CV 23-987, 2023 WL 7920808 (E.D. La. Nov. 16, 2023), in which a claim asserting that the 2014 Land Use Plan manifested environmental racism, was dismissed. Jennifer Hijazi, *Louisiana 'Cancer Alley' Civil Rights Claims Scrapped by Judge*, BLOOMBERG LAW (Nov. 17, 2023, 12:42 PM), <https://news.bloomberglaw.com/environment-and-energy/louisiana-cancer-alley-civil-rights-claims-scrapped-by-judge>.

31. NAACP Legal Defense Fund, *FAQs on Environmental Conditions of St. John the Baptist Parish Public Schools*, https://www.naacpldf.org/wp-content/uploads/LDF_02232021_StJohnFAQs-6.pdf; Maite Amorebieta et al., *Toxic school: How the government failed Black residents in Louisiana's 'Cancer Alley'*, NBC NEWS (Mar. 16, 2023, 5:05 PM), <https://www.nbcnews.com/news/us-news/toxic-school-government-failed-black-residents-louisianas-cancer-alley-rcna72504>.

32. See, e.g., Julia Mizutani, *In the Backyard of Segregated Neighborhoods: An Environmental Justice Case Study of Louisiana*, 31 GEORGETOWN ENV'T L. REV. 363 (2019); Bridgett Cecilia McCoy, *Critical Infrastructure, Environmental Racism, and Protest: A Case Study in Cancer Alley, Louisiana*, 53 COLUMBIA HUMAN RTS. L. REV. 582 (2022).

33. See *St. John the Baptist Parish P1: RACE - Census Bureau Table*, U.S. CENSUS BUREAU (2020), <https://data.census.gov/table?g=05000000US22095&tid=DECENNIALPL2020.P1>.

34. *QuickFacts: St. John the Baptist Parish, Louisiana*, U.S. CENSUS BUREAU (July 1, 2022), <https://www.census.gov/quickfacts/stjohnthebaptistparishlouisiana>.

35. \$37,638 as of 2021. U.S. Census Bureau QuickFacts: United States, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/INC910221> (last visited Nov. 26, 2023).

36. See, e.g., *Cancer Town*, THE GUARDIAN, <https://www.theguardian.com/us-news/series/cancer-town> (last visited Oct. 30, 2023) (referring to Reserve, Louisiana, directly adjacent to LaPlace).

37. *Environmental racism in Louisiana's 'Cancer Alley', must end, say UN human rights experts*, UNITED NATIONS, (Mar. 2, 2021), <https://news.un.org/en/story/2021/03/1086172>.

38. *Id.*

39. Numerous grassroot-organizations, among them Inclusive Louisiana, RISE St. James, Concerned Citizens of St. John, 350 New Orleans, Louisiana Bucket Brigade and The Descendants Project, have committed themselves to raising awareness to the issue by organizing talks, marches, petitions as well as lawsuits. See, e.g., Emilie Karrick Surrusco, *Cancer Alley Rises Up*, EARTHJUSTICE (Jan. 23, 2024), <https://earthjustice.org/feature/cancer-alley-rises-up>; Caroline Taylor, *350 New Orleans and its fight for environmental justice*, VIA NOLA VIE (Nov. 30, 2021), <https://www.vianolavie.org/2021/11/30/350-new-orleans-and-its-fight-to-save-louisianas-cancer-alley/>.

courts. For example, another twenty-three citizens from the same community in St. John the Baptist Parish sued Denka Performance Elastomer⁴⁰ and a number of lawsuits target polluting factories in the area.⁴¹

B. Case Analysis

Butler revolved around the issue of what, if any, duty of care the operator and owner of a highly polluting factory owe the surrounding community. The plaintiff alleged that such a duty existed and sought class certification, damages, and injunctive relief for state tort claims from both Denka and DuPont.⁴²

1. Strict Liability

Butler first asserted an environmental tort claim against DuPont, the former operating company and current owner of the land. Article 2317 of the Louisiana Civil Code states that liability applies in these claims “not only for the damage occasioned by our own act [but for] the things which we have in our custody.”⁴³ Such a thing that causes the injury must be “in the care, custody and control of the defendant.”⁴⁴ This can be proven (1) by a rebuttable presumption in case of ownership of a thing; and (2) in a case of non-ownership, when the defendant “exercises direction and control of the thing and derives some benefit from it.”⁴⁵ In this case, the “thing” refers to PWF’s neoprene production units.⁴⁶ Although DuPont had sold operational control to Denka, Butler argued that DuPont retained ownership over the land and thus likely retained some contractual control over the production of neoprene as well.⁴⁷ The court held that Butler failed to state a plausible duty and breach of that duty.⁴⁸ Accepting such obligations for the owner of the property who is no longer involved in the active operations would ultimately expand their responsibility.

Butler also based her strict liability claim against Denka, the operator of the facility, on article 2317 of the Louisiana Civil Code.⁴⁹ Although Denka is the owner and operator of the harm-causing factory, the company could only be found liable if it “knew or, in the exercise of reasonable care, should have known

40. *Acosta v. Denka Performance Elastomer, LLC*, No. CV 20-2323, 2022 WL 3214418 at *1 (E.D. La. Aug. 9, 2022).

41. *See, e.g., Ellis v. Evonik Corp.*, 604 F. Supp. 3d 356, 361 (E.D. La. 2022); *LeBeouf v. Evonik Corp.*, 620 F. Supp. 3d 463, 466 (E.D. La. 2022); *Jones v. Evonik Corp.*, 620 F. Supp. 3d 508, 512 (E.D. La. 2022).

42. *Butler v. Denka Performance Elastomer, LLC*, 16 F.4th 427, 432 (5th Cir. 2021).

43. LA. CIV. CODE ANN. art. 2317 (2023).

44. *Palermo v. Port of New Orleans*, 951 So. 2d 425, 438 (La. Ct. App. 2007).

45. *Coulter v. Texaco, Inc.*, 117 F.3d 909, 913 (5th Cir. 1997).

46. *Butler*, 16 F.4th at 442.

47. *See id.* at 441 (“Thus, Butler asserts, DuPont and Denka are both liable because ‘during separate periods of time, [they] have had ownership, care, custody, and control of the neoprene units of the PWF; and DuPont has maintained care, custody, and control of the PWF since 1969.’”).

48. *Id.* at 442.

49. *Id.* at 443.

of the ruin, vice, or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that [it] failed to exercise such reasonable care.”⁵⁰ Thus, the strict liability claim effectively requires a duty of care,⁵¹ blurring the line to a negligence claim.⁵²

2. Negligence

A negligent act “causes damages to another [obliging] him by whose fault it happened to repair it,”⁵³ so that “[e]very person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill.”⁵⁴ To prove negligence, the plaintiff needs to prove five elements. The first is a duty element, showing that “the defendant had a duty to conform his conduct to a specific standard.”⁵⁵

All three claims—the strict liability environmental tort claim against DuPont, and the strict liability environmental tort and negligence claims against Denka—therefore depend on the question of whether the two defendants owed a duty of care to Butler as well as the surrounding community.

Although Louisiana imposes “an almost universal duty . . . to use reasonable care to avoid injury to another,”⁵⁶ the plaintiff still must show they have “any law (statutory, jurisprudential, or arising from general principles of fault) to support the claim.”⁵⁷ Butler cited the EPA’s 2014 National Air Toxics Assessment (NATA) to establish a duty of care.⁵⁸ The assessment was based on the threshold of acceptable exposure to chloroprene of 0.2 $\mu\text{g}/\text{m}^3$,⁵⁹ which PWF’s emissions exceeded by a factor of twenty to thirty-three.⁶⁰ However, the EPA describes NATA as a screening instrument used to identify and better understand pollution and risk hazards.⁶¹ The Fifth Circuit affirmed the District Court’s dismissal of NATA as a legal standard, because it is “less than a federal regulation” and “even the EPA ‘disclaims’ it as an ‘absolute risk measure’ of toxicity.”⁶² The Fifth Circuit also rejected Butler’s claim based on Louisiana’s general duty of care “to use reasonable care to avoid injury to another.”⁶³ It

50. LA. CIV. CODE ANN. art. 2317.1; *see* *Bufkin v. Felipe’s La., LLC*, 171 So. 3d 851, 855 (La. 2014).

51. *Butler*, 16 F.4th at 443–44.

52. *Id.*; *Bd. of Comm’rs v. Tenn. Gas Pipeline Co.*, 850 F.3d 714, 729 (5th Cir. 2017).

53. LA. CIV. CODE ANN. art. 2315(A).

54. *Id.*, art. 2316.

55. *Butler*, 16 F.4th at 443 (citing *Lemann v. Essen Lane Daiquiris, Inc.*, 923 So. 2d 627, 633 (La. 2006)).

56. *Rando v. Anco Insulations, Inc.*, 16 So. 3d 1065, 1086 (La. 2009).

57. *Lemann*, 923 So. 2d at 633.

58. *Butler*, 16 F.4th at 444.

59. *Id.*

60. *Id.* at 433.

61. *Id.* at 444; 2014 NATA: *Assessment Results*, EPA (2018), <https://www.epa.gov/national-air-toxics-assessment/2014-nata-assessment-results>.

62. *Butler*, 16 F.4th at 444.

63. *Id.* at 444–45.

consequently dismissed both the strict liability claims and the negligence claim.⁶⁴

C. Judge Haynes's Dissent

Notably, Judge Haynes discussed a duty of care in his dissent in *Butler v. Denka*.⁶⁵ In doing so, he heavily relied on the reasoning in *Rando v. Anco Insulations Inc.*⁶⁶ *Rando* involved an employee who was diagnosed with mesothelioma after being exposed to asbestos at work.⁶⁷ Mesothelioma is a rare cancer caused by exposure to asbestos.⁶⁸ The case can be read as a precedent establishing a duty of care without a specific legal standard. The court held that an employer had a duty to protect his employees from asbestos exposure despite the absence of a law or regulation.⁶⁹ The court found an obligation existed if the employer “knew or should have known of the dangers of asbestos exposure at the time of [the plaintiff’s] employment.”⁷⁰ Applied to the facts of *Butler v. Denka*, Butler could have evoked a general duty to protect in the absence of a specific legal standard since NATA confirmed the danger of chloroprene. Nevertheless, the Louisiana Supreme Court has not yet addressed to what extent *Rando* can be applied outside of employment law.⁷¹ Haynes held that such an extensive interpretation should be deferred to the Louisiana Supreme Court rather than a federal court.⁷² He concluded that the called-for policy decision, weighing moral, social, and economic factors,⁷³ is a decision best suited for the state court.⁷⁴

II. ANALYSIS

The central question is how Butler, and plaintiffs similarly situated, can successfully claim compensation for health damages caused by pollution in their communities. Is there “any law (statutory, jurisprudential, or arising from general principles of fault) to support the claim that the defendant owed him a duty?”⁷⁵

64. See *Butler*, 16 F.4th at 446 (“[W]e agree with the district court that Butler fails to allege a duty, or a breach of such duty, based on Denka’s alleged ‘excessive’ chloroprene emissions.”).

65. *Id.* at 447.

66. See generally *Rando v. Anco Insulations, Inc.*, 16 So. 3d 1065 (La. 2009) (Note: *Rando* was abrogated while this In Brief was in press by *Pete v. Boland Marine & Mfg. Co., LLC*, 2023-C-00170 (La. Oct. 2023)).

67. *Id.* at 1072.

68. CENTERS FOR DISEASE CONTROL AND PREVENTION, *Mesothelioma*, <https://www.cdc.gov/cancer/mesothelioma/index.htm> (last visited Dec. 21, 2023).

69. *Rando*, 16 So. 3d at 1087.

70. *Id.*

71. *Butler v. Denka Performance Elastomer, LLC*, 16 F.4th 427, 447 (5th Cir. 2021).

72. *Id.*

73. *Lemann v. Essen Lane Daiquiris, Inc.*, 923 So. 2d 627, 633 (La. 2006).

74. See *Butler*, 16 F.4th at 447–48 (Haynes, dissenting) (citing *Meany v. Meany*, 639 So. 2d 229, 233 (La. 1994)).

75. *Lemann*, 923 So. 2d at 633.

A. *No General Duty of Care under Louisiana Law*

Typically, as stated in articles 2315(A) and 2316 of the Louisiana Civil Code, a general duty of care applies to contractual relations or other legally relevant encounters in Louisiana. Such a duty can expand beyond the parties to the contractual relationship and include third parties that experience the same harm as the primary victim. In *Pete v. Boland Marine & Manufacturing Co.*,⁷⁶ Henry Pete claimed to have developed malignant mesothelioma after being exposed to asbestos as a child from his father's contaminated clothes and then later by working for the same company his father had.⁷⁷ The Louisiana Fourth Circuit Court of Appeal affirmed the district court's judgement for the plaintiff,⁷⁸ holding that an employer also owes a duty of care towards household members if the risk is foreseeable, such as exposure to asbestos fibers carried home.⁷⁹ The court clearly acknowledged that a company must act with foresight if it is reasonable to assume that secondary contact might cause harm.

In *Rando*, the Louisiana Supreme Court expanded the due diligence element even further. The plaintiff was diagnosed with mesothelioma and sued his former employer, alleging that exposure during his employment led to the cancer.⁸⁰ Rando cited various codes and regulations to establish the duty element.⁸¹ However, none of the regulations on asbestos were either in force at the time of his employment or legally binding.⁸² The court, acknowledging the shortcomings, chose another path. It held that an employer's duty towards his employees begins with his knowledge about the dangers of asbestos at the time of the employment.⁸³ The court held that knowledge of the hazardous nature of asbestos can already be assumed if another occupational disease, asbestosis, is proven to be triggered by it.⁸⁴ The court held that an employer did not need to have knowledge of the disease in question. To establish duty, it suffices that the employer has knowledge of another illness triggered by the same cause.⁸⁵

The *Rando* decision shifts the focus from legal obligations to knowledge and dramatically broadened the knowledge element. To establish liability, it is therefore sufficient that the defendant knows in principle that the relevant compounds trigger diseases.

The factual circumstances of the *Rando* case do not altogether overlap with the circumstances of *Butler v. Denka*. The biggest difference is that Rando had a

76. *Pete v. Boland Marine & Mfg. Co., LLC*, 356 So. 3d 1147 (La. Ct. App. 2023).

77. *Id.* at 2.

78. *Id.* at 26.

79. *Id.* at 18.

80. *Rando v. Anco Insulations Inc.*, 16 So. 3d 1065, 1072 (La. 2009).

81. *See id.* at 1087 (citing the Occupational Safety and Health Administration's (OSHA) asbestos regulations, the Walsh-Healy Act, and the recommendations of the American Conference of Governmental Industrial Hygienists).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

contractual relationship with the defendant, whereas Butler did not. Yet, classifying asbestos and chloroprene as cancer-causing pollutants was an important step forward. It also represents a shift for what is required to establish a duty of care. Whether the court will extend this reasoning beyond worker's rights to exposures to other pollutants remains to be seen.

B. Special Standard Available

Another possible route to hold polluters liable in these types of cases is to identify a specific legal standard rather than rely on the EPA's NATA.⁸⁶ More recent decisions since *Butler* suggest a possible solution to overcome that threshold. Among them is *Fortado v. Evonik*, a case similar to *Butler*.⁸⁷ Plaintiff Fortado sued Evonik for damages to himself and his wife, who died of breast cancer.⁸⁸ Following *Butler*, the district court dismissed the EPA NATA standard with leave to amend.⁸⁹ In the plaintiff's amended complaint, he further developed the legal argument by citing to sections of the Louisiana Administrative Code, including sections relating to fugitive emission control, as a basis for the legal duty owed by the defendant.⁹⁰ Environmental regulations state that facilities should be "used and diligently maintained in proper working order," when emissions can be controlled, regardless of whether the air quality standards are exceeded.⁹¹ The rule is supplemented by the fugitive emission control stipulation that all "reasonable precautions" need to be taken to prevent particulate matter from becoming airborne.⁹² The district court accepted this legal standard, calling it "a far-cry from the Butler plaintiff's allegations" and used it as a foundation to establish a duty of care.⁹³

Fortado and *Butler* share many common characteristics, from location to diagnoses of the plaintiffs and history of events. The advancement in legal argument, although only by a district court, could have major implications for *Butler* and other cases reaching the circuit courts. At the district court level, both title 33 of the Louisiana Administrative Code⁹⁴ and its sections relating to fugitive emission control have been used in at least six decisions, mainly

86. See *supra* Part II.B; *Butler v. Denka Performance Elastomer, LLC*, 16 F.4th 427, 444–45 (5th Cir. 2021).

87. *Fortado v. Evonik Corp.*, No. CV 22-1518, 2022 WL 4448230 at *1 (E.D. La. Sept. 23, 2022).

88. *Id.* at *2.

89. *Id.* at *1, 9. Similar strategies of relying on the same "specific standards" were employed in four other district court cases against factories in the same area as *Butler*. See, e.g., *Jones v. Evonik Corp.*, 620 F. Supp. 3d 508 (E.D. La. 2022); *Foster v. Evonik Corp.*, 620 F. Supp. 3d 482 (E.D. La. 2022); *Berthelot v. Union Carbide Corp.*, No. CV 22-793, 2022 WL 3280100 (E.D. La. Aug. 11, 2022); *LeBeouf v. Evonik Corp.*, 620 F. Supp. 3d 463 (E.D. La. 2022).

90. *Fortado*, 2022 WL 4448230 at *9–10.

91. LA. ADMIN. CODE tit. 33, § III-905 (2013).

92. *Id.* § III-2121 (2013).

93. *Fortado*, 2022 WL 4448230 at *9–10 (quotation and citation omitted).

94. LA. ADMIN. CODE tit. 33, § III-905 (2013).

accepting use of the regulations as establishing a duty of care,⁹⁵ as well as at least one Louisiana Fourth Circuit Court of Appeal decision.⁹⁶

CONCLUSION

Butler and similar cases are just some examples of the challenges of trying to hold polluters liable for adverse health outcomes related to pollution exposure. The cases affect the legal options for many individuals in environmental justice communities bordering polluting facilities. These cases might not only provide a blueprint for other proceedings brought forward by others, but also put pressure on facility operators to cut emissions to avoid paying compensation. Such rulings could also signal a shift away from “sacrifice zones,”⁹⁷ where companies disproportionately pollute certain environments with conscious disregard for the affected communities. Community advocacy coupled with legal rights could prove to be an effective tool to influence companies’ investment decisions, hopefully resulting in greater investment in protective measures for “sacrifice zone” residents. The district court’s *Fortado* decision is a ray of hope that at least the first element of toxic tort claims can be established. Whether circuit courts will affirm the reasoning remains to be seen. Another challenge is establishing the other elements for tort claims. Breach and causation particularly will likely be hard to prove. Overall, the advancement of such cases means that important legal gaps are closed. These gaps allow polluting entities to continue to perpetuate environmental racism without fear of legal consequences. *Butler v. Denka* therefore raises important legal questions about the allocation of duties between polluters and injured parties beyond the specific case.

Clara Wimmer

95. See *Terrell v. BWC Harvey, LLC*, No. CV 22-2323, 2022 WL 16834577, at *3 (E.D. La. Nov. 9, 2022); *Joseph v. Evonik Corp.*, No. CV 22-1530, 2022 WL 16712888, at *8 (E.D. La. Nov. 4, 2022); *LeBeouf v. Evonik Corp.*, 620 F. Supp. 3d 463, 466 (E.D. La. 2022); *Jones v. Evonik Corp.*, 620 F. Supp. 3d 508, 521 (E.D. La. 2022); *Fortado*, 2022 WL 4448230 at *9-10; *Berthelot v. Union Carbide Corp.*, No. CV 22-793, 2022 WL 3280100, at *3 (E.D. La. Aug. 11, 2022).

96. *Spencer v. Valero Ref. Meraux, LLC*, 366 So. 3d 182 (La. Cy. App. 2022), *rev'd sub nom.* *Spencer v. Valero Ref. Meraux, LLC*, 356 So. 3d 936 (La. 2023) (finding that the defendant had “a duty to control the overall levels of air contaminants entering the surrounding area by conforming its conduct to a specific standard of care under LAC 33.III.905(A)”).

97. ‘*We’re Dying Here.*’ *The Fight for Life in a Louisiana Fossil Fuel Sacrifice Zone*, HUMAN RIGHTS WATCH (Jan. 25, 2024), <https://www.hrw.org/report/2024/01/25/were-dying-here/fight-life-louisiana-fossil-fuel-sacrifice-zone>.

We welcome responses to this In Brief. If you are interested in submitting a response for our online journal, Ecology Law Currents, please contact cse.elq@law.berkeley.edu. Responses to articles may be viewed at our website, <http://www.ecologylawquarterly.org>.