Norfolk & Western Railway Company v. Ayers: Asbestosis-Inflicted Plaintiffs and Fear of Cancer Claims

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NORFOLK & WESTERN RAILWAY COMPANY v. AYERS:
ASBESTOSIS-INFLICTED PLAINTIFFS AND
FEAR OF CANCER CLAIMS

I. INTRODUCTION

In the past asbestos was used in an extensive variety of products, “from
hair dryers to roof tiles, disc brakes to lamps,” and in a wide variety of places
such as hospitals and universities. As a result, “anyone who has ever entered
a building more structurally complex than a dung-smeared hut has probably
been exposed to asbestos.” Because it dissipates in heat and does not burn,
asbestos was originally used as a safety product. The problem is that
exposure to asbestos can lead to diseases from ranging from asbestosis to lung
cancer to mesothelioma. Asbestos litigation began in the 1960s and was
expected to be in decline around 2000. Instead of a decline, the turn of the
century saw close to 200,000 cases in state and federal courts. One of these
cases was Norfolk & Western Railway Co. v. Ayers, a claim brought under the
Federal Employers’ Liability Act (“FELA”) by six retired workers of the
defendant railroad for their current lung problems and their fear of developing
lung cancer sometime in the future.

   WL 7240088.
   at 2001 WL 5100719.
   WL 28473877.
4. Innocent Hurt in Asbestos Suits, supra note 1, at 21.
5. LEE R. RUSS ET AL., ATTORNEY’S MED. ADVISOR § 90:6(b) (last updated Nov. 2002).
6. James A. Henderson, Jr. & Aaron D. Twerski, Asbestos Litigation Gone Mad: Exposure-
   Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring, 53 S.C. L. REV.
   815, 820 (2002).
7. McLeod, supra note 2.
8. Griffin B. Bell, Asbestos Litigation and Judicial Leadership, BRIEFLY . . . PERSPECTIVES
   ON LEGISLATION, REGULATION, AND LITIGATION, Vol. 6, No. 6 at preface (2002).
11. Medill School of Journalism, At the Docket, at http://www.medill.northwestern.edu/
docket (last visited Jan. 8, 2004).
Emotional distress claims date from the 13th century with the tort of assault, a development from trespass.12 Almost one thousand years later, questions remain regarding the tort’s application. In *Consolidated Rail Corp. v. Gottshall*13 the Supreme Court found that claims for damages for negligent infliction of emotional distress were cognizable under FELA, and it adopted the zone of danger test to evaluate such claims.14 In *Metro-North Commuter Railroad Co. v. Buckley*,15 the Court elaborated on the zone of danger test established in *Gottshall* and stated that exposure to asbestos was not sufficient for the “physical contact” requirement of the test.16 *Ayers* then required the Supreme Court to further explain emotional distress claims and to decide whether asbestosis was an injury for which one could recover emotional distress damages for a fear of developing cancer.17

This note looks first at background information of the parties involved, asbestos and its associated diseases, and the Federal Employees Liability Act. Next it traces three important Supreme Court decisions leading up to the case at hand. Then it examines the arguments of both sides, including a look at the briefs filed with the Supreme Court, judicial support for both sides, and the rival public policy arguments. Then the majority and the dissenting opinions in *Ayers* will be analyzed. Finally one possible solution to the problem will be introduced.

II. FACTUAL BACKGROUND

A. Parties

The plaintiffs, six retired employees of Norfolk & Western Railway Company (N&W), were exposed to asbestos while working for N&W, and years later all suffered from asbestosis and claimed that they were living in fear of developing lung cancer as a result of the exposure.18 The plaintiffs claimed that the asbestosis had impaired their daily lives — making it difficult for them

14. See id. at 550, 555.
16. See id. at 432.
18. Id. at 6; see Brief of Respondents at pp. 4-7, Norfolk & W. Ry. Co. v. Ayers, 123 S. Ct. 1210 (2003) (No. 01-963) available at 2002 WL 1964074 [hereinafter Respondents’ Brief].
to walk short distances, talk, sing, and breathe.\textsuperscript{19} Freeman Ayers worked for N&\textsubscript{W} for about eleven years as a yard brakeman, a job that exposed him to asbestos.\textsuperscript{20} He also smoked about a pack of cigarettes per week for most of his life and later worked in automotive maintenance, a job that also subjected him to asbestos exposure.\textsuperscript{21} Doyle Johnson was employed by N&\textsubscript{W} for thirty-five years as a maintenance worker.\textsuperscript{22} He also smoked a pack of cigarettes per week.\textsuperscript{23} Clifford Vance was a “long-time laborer” for N&\textsubscript{W}.\textsuperscript{24} These three men all “worked where the asbestos stripping and reapplication occurred,” which resulted in inhaling asbestos.\textsuperscript{25} Carl Butler was exposed to asbestos for three months during his two or three years working at N\&\textsubscript{W}.\textsuperscript{26} He later worked as a pipe fitter for thirty-three years, a job which also exposed him to asbestos, and smoked cigarettes for fifteen years.\textsuperscript{27} Though he experienced asbestos exposure for a relatively brief period during his time of employment with N\&\textsubscript{W}, this exposure was especially intense — in a repair shop where asbestos was stripped and reapplied, making the air particularly dusty with asbestos.\textsuperscript{28} John Shirley worked for N\&\textsubscript{W} for twenty-nine years, primarily as an office clerk with “minimal or no” exposure to asbestos.\textsuperscript{29} However, at times his job did require him to “handle asbestos sheets and clean up broken bags of asbestos.”\textsuperscript{30} James Spangler worked as a pipe fitter and carman for N\&\textsubscript{W} for thirty-three years.\textsuperscript{31} These jobs entailed stripping asbestos from engines and reapplying it.\textsuperscript{32} In addition to his asbestosis, Spangler had developed emphysema from his cigarette smoking.\textsuperscript{33}

N\&\textsubscript{W} began in 1838 in Virginia.\textsuperscript{34} At the time of its succession by Norfolk Southern it served fourteen states and a province of Canada.\textsuperscript{35} Norfolk

\begin{itemize}
\item\textsuperscript{19} See Respondents’ Brief, \textit{supra} note 18 at 24-25.
\item\textsuperscript{20} See Medill School of Journalism, \textit{supra} note 11.
\item\textsuperscript{21} \textit{Id.}; Petition, \textit{supra} note 17, at 8. At trial a doctor testified that the automotive job exposed Ayers to just as much asbestos as did his job at N\&\textsubscript{W} and that Ayers’ smoking “more likely” led to his lung problems than did his asbestos exposure. Medill School of Journalism, \textit{supra} note 11.
\item\textsuperscript{22} Medill School of Journalism, \textit{supra} note 11.
\item\textsuperscript{23} \textit{Id.}
\item\textsuperscript{24} \textit{Id.}
\item\textsuperscript{25} Respondents’ Brief, \textit{supra} note 18, at 5 n.3.
\item\textsuperscript{26} \textit{Id.}; Petition, \textit{supra} note 17, at 8.
\item\textsuperscript{27} Medill School of Journalism, \textit{supra} note 11; Petition, \textit{supra} note 17, at 8.
\item\textsuperscript{28} Respondents’ Brief, \textit{supra} note 18, at 5.
\item\textsuperscript{29} Petition, \textit{supra} note 17, at 8; Medill School of Journalism, \textit{supra} note 11.
\item\textsuperscript{30} Respondents’ Brief, \textit{supra} note 18, at 5 n. 3.
\item\textsuperscript{31} Medill School of Journalism, \textit{supra} note 11.
\item\textsuperscript{32} Respondents’ Brief, \textit{supra} note 18, at 5 n. 3.
\item\textsuperscript{33} Medill School of Journalism, \textit{supra} note 11.
\item\textsuperscript{34} Norfolk Southern Corporation, \textit{Our History}, at http://www.nscorp.com/nscorp/index.jsp (last visited Jan. 8, 2004).
\end{itemize}
Southern, still based in Virginia, currently operates in twenty-two states, the District of Columbia, and Ontario.\textsuperscript{36} Today it is one of two major eastern railroads.\textsuperscript{37} In the 1930s N&W first became aware of the dangers associated with asbestos exposure but took none of the precautions recommended by the industry for protecting its employees.\textsuperscript{38} Nor did N&W inform any of the plaintiffs of this danger or how to reduce the amount of asbestos dust in the air or otherwise make the workplace less hazardous.\textsuperscript{39}

B. Procedural History

The plaintiffs brought suit under FELA, alleging that N&W was negligent in exposing them to asbestos and in failing to provide them with a safe work environment.\textsuperscript{40} The jury awarded the six men over $5.8 million, with individual awards ranging from $770,640.00 to $1,230,806.00.\textsuperscript{41} Without issuing a written opinion, the trial judge reduced the awards to a total of $4.89 million to “account for settlements that [the plaintiffs] had entered into with other non-FELA entities.”\textsuperscript{42} There are no intermediate appellate state courts in West Virginia and the West Virginia Supreme Court of Appeals denied N&W’s petition for review without comment.\textsuperscript{43} The United States Supreme Court granted N&W’s petition for review of whether emotional distress damages should be awarded under FELA though plaintiffs presented no evidence of physical manifestation or other corroboration of injury related to their alleged fear of cancer.\textsuperscript{44}

\begin{itemize}
  \item \textsuperscript{35} Id.
  \item \textsuperscript{36} Id.
  \item \textsuperscript{37} Petition, supra note 17, at 3.
  \item \textsuperscript{38} Respondents’ Brief, supra note 18, at 5 n.4.
  \item \textsuperscript{39} Id. (referring to some methods of reducing the risk of asbestos exposure that include wetting down the dust and wearing a mask or respirator).
  \item \textsuperscript{40} Petition, supra note 17, at 6; Respondents’ Brief, supra note 18, at 4.
  \item \textsuperscript{41} Verdict Forms, Ayers v. Norfolk & W. Ry. Co., No. 92-C-8888 (W.V. Cir. Ct. 1998). The breakdown is as follows: Ayers-$913,860, Johnson-$1,230,806, Butler-$1,047,000, Shirley-$979,800, Spangler-$868,500, Vance-$770,640. Id.
  \item \textsuperscript{42} Respondents’ Brief, supra note 18, at 9; Petition, supra note 17, at 9.
  \item \textsuperscript{43} Petition, supra note 17, at 10 (The West Virginia Supreme Court of Appeals had denied N&W’s petition for review without comment in a similar case, Norfolk & W. Ry. Co. v. Dye).
  \item \textsuperscript{44} Medill School of Journalism, supra note 11. Like the West Virginia Supreme Court of Appeals, the United States Supreme Court had previously denied N&W’s petition for review in Dye. See Norfolk & W. Ry. Co. v. Dye, 533 U.S. 950 (2001) (mem.). N&W presented another question for Supreme Court review in the case at hand: “Whether it was error for the court below, in conflict with decisions of the federal courts of appeals, state supreme courts and evolving common-law principles, not to apportion damages under FELA among tortfeasors.” Petition, supra note 17, at (i). This note will not address that question.
\end{itemize}
III. ASBESTOS

A. Generally

Asbestos is a strong, flexible, fibrous mineral that is mined.\(^{45}\) Because it is resistant to fire, heat, and corrosion, it is used as an insulator.\(^{46}\) It is also used in asbestos-cement product, brake linings, and roofing and flooring products.\(^{47}\) People have known about the dangers of asbestos for centuries. For example, the ancient Roman historian Pliny referred to the “diseases of slaves” resulting from “the textile processes of preparing and weaving asbestos and flax.”\(^{48}\) The dangers associated with asbestos exposure faded out of the public consciousness until the late 1800s.\(^{49}\) By the end of the 1920s, however, scientists were writing about asbestos and its related diseases in medical journals, which in turn lead to greater awareness by doctors.\(^{50}\)

This knowledge did not stop manufacturers from using asbestos, though. From 1935-1965 industrial use of asbestos worldwide grew “dramatically” and millions of Americans were exposed to asbestos, within and outside of the workplace.\(^{51}\) It was not until 1975 that asbestos use was eliminated in the United States.\(^{52}\) Though asbestos use was eliminated over twenty-five years ago, people are still feeling the effects, for the “latency periods for asbestos-related illnesses rang[e] from 15 to 40 years.”\(^{53}\) Around the time that asbestos use was eliminated the first asbestos-exposed worker was granted relief in court.\(^{54}\) Currently there are over 200,000 asbestos cases pending in United States courts.\(^{55}\)

\(^{45}\) James S. Kakalik et al., The Institute for Civil Justice, Variation in Asbestos Litigation Compensation and Expenses 3 (1984).

\(^{46}\) Id.

\(^{47}\) Id.

\(^{48}\) Barry I. Castleman, Asbestos: Medical and Legal Aspects 1 (4th ed. 1996) (internal quotations omitted). Not only did the ancient Romans realize that asbestos caused disease, they also learned how to control amount of asbestos inhaled, for Pliny refers to “the use of transparent bladder skin as a respirator to avoid inhalation of dusts by the slaves.” Id.

\(^{49}\) Id. at 2. The modern asbestos industry began in the 1870s. Id. By the 1890s the dangers that asbestos posed to health were realized in Austria and Great Britain. See id. at 2-3.

\(^{50}\) See id. at 6-10. Around the same time some asbestos workers began to realize that jobs in asbestos plants were dangerous, probably from viewing the “impaired condition and deaths of those longest employed at the factories.” Id. at 9. However, manufacturers maintain that they had “no actual knowledge of a hazard to the users of their products before 1964.” Id. at 388.


\(^{52}\) Id.

\(^{53}\) Id.

\(^{54}\) See Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076, 1089-92 (5th Cir. 1973).

\(^{55}\) Bell, supra note 8, at 3. More than 50,000 cases are filed each year. Id. at preface.
B. Asbestosis and Cancer

When asbestos fibers are inhaled they “penetrate deeply into the lung . . . [and then] become coated with an iron protein.”56 These fibers can clog and scar the lungs, creating a disabling reduced ability to breathe known as asbestosis.57 The major characteristic of asbestosis is the development of hardened fibrous areas in the lung interstitium, the tissue between the air spaces in the lung.58 Those suffering from asbestosis usually first notice shortness of breath, and these complaints typically cause a medical professional to use X-rays to identify the disease in the patient.59 This shortness of breath takes from ten to more than twenty years to develop, and “from the time that the disease becomes detectable, its course is progressive and irreversible, even if the victim thereafter avoids exposure to asbestos dust.”60 Other effects of asbestosis include pulmonary fibrosis and pleural effusions.61 Once the symptoms of asbestosis occur, they advance quickly.62

Exposure to asbestos can also lead to a number of cancers, including cancer of the bronchials, lung, esophagus, stomach, colon, larynx, pharynx, and kidneys, and a form of cancer called malignant mesothelioma.63 Mesothelioma is a rare tumor of the pleura, the membrane that lines the lungs and the thoracic cavity.64 Often the only signs that someone has mesothelioma are shortness of breath and chest pain, and most people die within a year of diagnoses.65 As with asbestosis, these cancers can take up to twenty years from the time of exposure to develop.66 Though many people have been exposed to asbestos, “only a small percentage suffer from asbestos-related

56. RUSS, supra note 5, § 90:6(b).
57. KAKALIK, supra note 45, at 3. See also INT’L LABOUR OFFICE, SAFETY IN THE USE OF ASBESTOS 1 (1984).
58. RUSS, supra note 5, § 90:6(b).
59. Id. Chest X-rays of those suffering from asbestosis have been described as having a “ground glass appearance.” CASTELMAN, supra note 48, at 13. The diagnoses of asbestosis is “helped by obtaining a history of regular exposure to any form of airborne asbestos.” Ira Maden, Occupational Asthma and Other Respiratory Diseases, BRIT. MED. J., Aug. 3, 1996, at 291, available at 1996 WL 9008068.
60. RUSS, supra note 5, § 90:6(b).
61. Id. § 40:35.
62. Id.
63. Id. § 90:6(b); Maden, supra note 59.
64. RUSS, supra note 5, at § 90:6(b). Mesothelioma is so closely related to asbestos that in Britain it is assumed that those suffering from mesothelioma got the disease because of their occupation. Maden, supra note 59, at 291. Mesothelioma is no longer a rare disease, for as of 1996 there were over 1,000 deaths a year in Britain from mesothelioma. C.A. Veys, Occupational Cancers, BRIT. MED. J., Sept. 7, 1996, at 615, available at 1996 WL 9008227.
65. Maden, supra note 59.
66. RUSS, supra note 55, at § 90:6(b).
physical impairment and . . . of the impairment group fewer still eventually develop lung cancer."\(^{67}\)

Courts have found that asbestosis and cancer are “separate and distinct latent diseases that are not medically linked."\(^{68}\) Asbestosis is not a cancerous process, and there is no relation between the “pathologies of asbestosis and cancer, except that the diseases can be precipitated by the same pathogen or carcinogen."\(^{69}\) Though the diseases are independent of one another, they both result from exposure to asbestos. One author has found that those who have asbestosis have a five times greater risk of developing lung cancer.\(^{70}\) “Over 40% of people with asbestosis die of lung cancer, and 10% die of mesothelioma.”\(^{71}\)

### IV. FELA

The Federal Employers’ Liability Act\(^{72}\) was enacted to facilitate recovery for railworkers who have suffered injuries as a result of their employers’ negligence.\(^{73}\) It was “designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations.”\(^{74}\) Though FELA focuses on injuries and death from accidents, it also includes “any injury resulting in whole or ‘in part from the negligence’ of the carrier.”\(^{75}\) It also eliminated a number of tort defenses traditionally relied on by defendant railroads, including the fellow servant rule and the assumption of risk.

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68. Pierce *v.* Johns-Manville Sales Corp., 464 A.2d 1020, 1025 (Md. 1983); *see also* Jackson *v.* Johns-Manville Sales Corp., 727 F.2d 506, 517 (5th Cir. 1984) (“asbestosis and cancer are distinct diseases”); Wilson *v.* Johns-Manville Sales Corp., 684 F.2d 111, 117 n.33 (D.C. Cir. 1982) (Ginsburg, Circuit Judge) (“asbestosis and mesothelioma are separate and distinct diseases, and . . . mesothelioma is not a complication of the former.”); Eagle-Picher Indus., Inc. *v.* Cox, 481 So. 2d 517, 522 (Fla. Dist. Ct. App. 1985) (“It is widely accepted by the scientific community that asbestosis and cancer are not medically linked, that is, cancer is not an outgrowth or complication of asbestosis.”).
69. Jackson, 727 F.2d at 517.
70. Veys, *supra* note 64. Smokers who are exposed to asbestos also have a greater risk of developing lung cancer. *Id.* Smokers with asbestosis have an even greater risk of developing lung cancer. *Id.*
71. *Id.*
73. *Urie v.* Thompson, 337 U.S. 163, 181 (1949) (“When the statute was enacted, Congress’ attention was focused primarily upon injuries and death resulting from accidents on interstate railroads.”).
75. *Urie*, 337 U.S. at 181.
defense. The wording of FELA is “not restrictive as to the employees covered; the cause of injury, except that it must constitute negligence attributable to the carrier; or the particular kind of injury resulting.” Because of this “all inclusive” wording and its “remedial and humanitarian purpose,” courts have been liberal in their construction of FELA. However, FELA is not a “workers’ compensation statute.” Nor does it “make the employer an insurer.” FELA is a federal statute, but it “generally turns on principles of common law.”

In the fifteen years prior to Ayers the Supreme Court had considered three main cases involving claims for emotional distress under FELA. Each one answered a question left unanswered by the previous case.

V. JUDICIAL BACKGROUND

A. Atchison, Topeka & Santa Fe Railway Co. v. Buell — Raising the Question of Emotional Distress Claims under FELA

Buell filed a FELA complaint against his employer, Atchison, Topeka & Santa Fe Railway Company, alleging that the railway had failed to provide him with a safe workplace. Included in his complaint were allegations that he was harassed, threatened, and intimidated by his fellow employees and his supervisor. After the district judge granted summary judgment for the railway, the Ninth Circuit Court of Appeals proclaimed that a relevant issue, 

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77. Urie, 337 U.S. at 181.
78. Id. at 181-82 (FELA covers occupational diseases such as silicosis and not only injuries and deaths caused by accidents); Kernan v. American Dredging Co., 355 U.S. 426, 432 (1958) (“Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet changing conditions and changing concepts of industry’s duty toward its workers.”); Jamison v. Encarnacion, 281 U.S. 635, 640 (1930) (“[The Act is not to] be narrowed by refined reasoning . . . . It is to be construed liberally to fulfill the purposes for which it was enacted . . . .”); see also Rogers v. Mo. Pac. Ry. Co., 352 U.S. 500, 506 (1957) (applying a relaxed standard of causation under FELA).
80. Inman v. Baltimore & Ohio Ry. Co., 361 U.S. 138, 140 (1959); Ellis v. Union Pac. Ry. Co., 329 U.S. 649, 653 (1947) (FELA “does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur.”).
81. Gottshall, 512 U.S. at 543; Urie, 337 U.S. at 182 (“the Federal Employers’ Liability Act is founded on common-law concepts of negligence and injury, subject to such qualifications as Congress has imported into those terms”).
83. Id.
one raised by neither of the parties nor the district court, was "whether a Railroad employee’s wholly mental injury stemming from his railroad employment is compensable under the [FELA]." Concerning this issue on appeal, the Supreme Court found that the record was "insufficiently developed" at that time to allow either the Supreme Court or the Ninth Circuit "to express an opinion on [Buell’s] ultimate chances of recovery under the FELA." Though the Court did not get a chance to decide the issue or comment on it in detail, the issue of emotional distress damages for a FELA action was raised by the Supreme Court, foreshadowing the question that would be presented seven years later in Gottshall.

B. Consolidated Rail Corp. v. Gottshall — Adopting the Zone of Danger Test

1. Facts

Seven years after dismissing the question of "whether the term ‘injury’ as used in the FELA includes purely emotional injury" in Buell, the Court revisited the issue in Gottshall. Gottshall was working in the hot sun when his friend and co-worker collapsed. Gottshall revived his co-worker for a while, but within five minutes the co-worker collapsed again and died, despite Gottshall’s administration of CPR. Gottshall was then ordered to continue working, within sight of the covered body. Later Gottshall became "preoccupied with the events surrounding (the co-worker’s) death" and was eventually admitted to a psychiatric institution for three weeks.

Carlisle, whose case was consolidated with that of Gottshall, was forced to take on additional duties at his already stressful job when there were cutbacks at work. He received a promotion that led to more responsibilities and made him work irregular hours. He then began to experience “insomnia, headaches, depression, weight loss, and eventually a nervous breakdown.”

2. Court’s Analysis

84. Id. at 560-61, (citing Atchison, Topeka & Santa Fe Ry. Co. v. Buell, 771 F.2d 1320, 1323-24 (9th Cir. 1985)) (punctuation in original) (the Court of Appeals noted that this question was “one of first impression in this circuit.”).
85. Id.
86. Id. at 557.
87. Consol. Rail Corp. v. Gottshall, 512 U.S. 532 (1994) (all facts articulated in this section are taken from the Court’s opinion in Gottshall).
88. Id. at 536.
89. Id. at 539.
The Court recognized that recovery for infliction of emotional distress, though not explicitly addressed in FELA, is available under the statute.90 Though FELA mainly centers on physical injuries, its wording is simply “injury,” which includes emotional as well as physical injuries.91 However, the Court needed a way to evaluate emotional distress claims.92 Looking at three major limiting tests that had developed in common law: the “physical impact” test, the “zone of danger” test, and the “relative bystander” test, the Court came to the conclusion that “an emotional injury constitutes ‘injury’ resulting from the employer’s ‘negligence’ for purposes of FELA only if it would be compensable under the terms of the zone of danger test.”93 According to the zone of danger test, those who sustain a physical impact or are placed in immediate risk of physical harm as a result of a defendant’s negligent conduct may recover for emotional injuries.94

The Court adopted the zone of danger test for a number of reasons. First, it had been adopted by several jurisdictions at the time FELA was enacted.95 Second, at the time Gottshall was decided, the test was used by fourteen jurisdictions so it fulfilled the FELA requirement of turning on common law.96 Third, the zone of danger test is consistent with FELA, which, by imposing liability on employers for injuries and deaths caused by the dangers of working on the railroad, also encourages employers to improve safety measures.97 The Court concluded that allowing railroad employees to recover for both physical and emotional injuries that “threaten them imminently with physical impact” caused by the negligent conduct of their employers would further the goals of FELA.98

90. See id. at 550. The Court easily arrived at this conclusion by looking at the history of emotional distress claims, state common law, and the remedial purpose of FELA. Id. Although pain and suffering technically are mental harms, these terms traditionally “have been used to describe sensations stemming directly from a physical injury or condition.” Id. (citing Richard N. Pearson, Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules, 34 U. FLA. L. REV. 477, 485 n.45 (1982)). The Court therefore defined emotional distress as “mental or emotional harm (such as fright or anxiety) that is caused by the negligence of another and that is not directly brought about by a physical injury, but that may manifest itself in physical symptoms.” Id. at 544.

91. Id. at 556.

92. See Gottshall, 512 U.S. at 556.

93. Id. at 546-49, 555.

94. Id. at 548 (“Those within the zone of danger of physical impact can recover for fright, and those outside of it cannot.”) (internal quotations omitted).

95. Id. at 547.

96. Id. at 555.

97. Gottshall, 512 U.S. at 555; Lancaster v. Norfolk & W. Ry. Co., 773 F.2d 807, 813 (7th Cir. 1985) (FELA is designed to assure “the security of the person from physical invasions or menaces.”).

98. Gottshall, 512 U.S. at 556.
Using the zone of danger test, Gottshall’s case was remanded for reconsideration.99 Carlisle’s claim did not meet the requirements of the zone of danger test, and the Court ruled for Carlisle’s employer.100 Gottshall’s recognition of an emotional injury as an “injury” under FELA and adopting the zone of danger test was important guidance for lower courts. However, it left an unanswered question: what is an “impact” for the zone of danger test?

C. Metro-North Commuter Railroad Company v. Buckley — Defining Physical Impact

Decided three years after Gottshall, Metro-North Commuter Railroad Co. v. Buckley101 faced the Court with the decision “whether the physical contact with insulation dust that accompanied [plaintiff’s] emotional distress amounts to a ‘physical impact’ as th[e] Court used that term in Gottshall,” that is, if physical contact with insulation dust was a physical impact within the zone of danger test.102 In Buckley the plaintiff’s pipefitting job of three years exposed him to asbestos.103 After attending an “asbestos awareness” class, he began to fear that he would develop cancer.104 Focusing on the “physical impact” requirement from Gottshall and precedent from state courts requiring a threatened physical contact that caused, or might have caused, physical harm before recovery for emotional distress was allowed, the Court found that every form of “physical contact” does not constitute a “physical impact.”105 Specifically, “contact that amounts to no more than an exposure . . . to a substance that poses some future risk of disease” is not a “physical impact” under the zone of danger test.106 The Court also noted that “with only a few exceptions, common-law courts have denied recovery to those who, like Buckley, are disease and symptom free.”107 “Therefore the Court suggested that judges should permit recovery only when facing scenarios that present fewer of the problems that led courts to disallow

99. Id. at 558.
100. Id.
102. Id. at 428-29.
103. Id. at 427.
104. Id.
105. Id. at 430-32.
106. Buckley, 521 U.S at 432.
107. Id. at 432. This is important since common law principles help to guide FELA. See id. at 429.
emotional distress actions in the first place.” 108 Simply pointing to physical contact with asbestos dust, however, does not satisfy this criterion. 109

In deciding that Buckley did not state a claim for relief for emotional distress damages, the Court also focused on public policy reasoning. 110 Courts would have difficulty in separating meritorious from trivial emotional distress claims if evidence of the type submitted by Buckley was enough to prevail on such a claim. 111 Courts would also have problems separating meritorious from trivial claims if contact with a carcinogen met the physical impact requirement of the zone of danger test, for “contact, even extensive contacts, with serious carcinogens are common.” 112 The Court was also concerned about a “flood” of litigation that would possibly result if Buckley’s claim were meritorious. 113 The costs associated with such a flood of litigation might “become so great that, given the nature of the harm, it would seem unreasonable to require the public to pay the higher prices that may result.” 114 Another possible result of this potential flood of litigation is that workers who actually develop a disease might not be able to recover from a company with limited resources that has already had to compensate people suffering from emotional distress of future disease. 115

In addition to his claim for negligent infliction of emotional distress, Buckley also sought recovery for the costs of future medical checkups for cancer and other diseases associated with asbestos exposure. 116 Without giving definitive guidance as to possible solutions for the problem of exposure that has not yet (or may never) result in disease, “the Court seemed to suggest that it is unwise for a court to award future medical monitoring costs to a plaintiff

109. Id.
110. See Buckley, 521 U.S. at 433-36.
111. See id. at 433-34. Buckley’s only evidence of emotional distress was his own testimony. Id. at 433. In fact, he returned to working with asbestos though he could have transferred and his medical doctor did not refer him to a psychiatrist. Id.
112. Id. at 434. In support of this proposition, the Court cited a study showing that “43% of American children lived in a home with at least one smoker, and 37% of adult nonsmokers lived in a home with at least one smoker or reported environmental tobacco smoke at work.” Id. at 434-35 (citing Pirkle et al., Exposure of the US Population to Environmental Tobacco Smoke, 275 J. Am. Med. Ass’n 1233, 1237 (1996)).
113. Id. at 435.
114. Id.
115. See Buckley, 521 U.S. at 435-36.
116. Id. at 438.
who has neither severe emotional distress nor a demonstrable increased risk of 
developing a disease . . . .”

Though Buell, Gottshall, and Buckley have helped to define what 
emotional distress injuries are compensable under FELA, none answered a 
question that has arisen in lower courts, namely whether physical manifestation 
is necessary for an emotional distress claim. This is the issue that arose in 
Norfolk & Western Railway Co. v. Freeman Ayers.

VI. PARTIES’ ARGUMENTS

A. Norfolk and Western Railway Company

1. Argument Submitted by N&W to the Supreme Court

In petitioning the Supreme Court for a writ of certiorari, Norfolk & 
Western Railway Company presented two questions: (1) Whether it was an 
error for the trial court to award emotional distress damages under FELA to 
plaintiffs who presented no evidence of physical manifestation or other 
corroborating of injury related to their alleged fear of cancer?118  (2) Whether it 
was an error for the trial court not to apportion damages under FELA among 
tortfeasors?119  This note will focus solely on the first question.

N&W’s claim centered on the assertion that “there is a conflict of authority 
as to whether FELA plaintiffs may recover emotional-distress damages without 
any corroborating manifestation of emotional injury.”120  N&W contended that 
there are two common law limitations on emotional distress claims: the “zone 
of danger test,” embraced by the Court in Gottshall; and “that emotional 
injury, in order to be compensable, must be corroborated by physical 
manifestations (or objective medical symptoms) of injury.”121  This second 
limitation had not been specifically addressed by the Court previously.122

117. Matthew D Hamrick, Comment, Theories of Injury and Recovery for Post-Exposure, 
Pre-Symptom Plaintiffs: The Supreme Court Takes a Critical Look, 29 CUMB. L. REV. 461, 464 
118. Petition, supra note 17, at (i).
119. Id.
120. Id. at 11.
121. Id.
122. In her dissenting opinions in both Gottshall and Buckley, Justice Ginsburg has brought 
(Ginsburg, J., concurring in the judgment in part and dissenting in part) (Buckley’s contact with 
asbestos “constituted ‘physical impact’” but his emotional distress claim failed “because Buckley 
did not present objective evidence of severe emotional distress.”); Consol. Rail Corp. v. Gottshall, 
512 U.S. 532, 571(1994) (Ginsburg, J., dissenting) (“One solution to this problem—a solution the
First, N&W looked to Gottshall’s declaration that pain and suffering “traditionally have been used to describe sensations stemming directly from a physical injury or condition.”123 The physical injury or condition claimed by these plaintiffs was asbestosis.124 However, because cancer is not caused by asbestosis, fear of cancer cannot stem directly from the asbestosis.125 Therefore, the damages awarded to the plaintiffs at trial could only be awarded for negligently inflicted emotional distress and not for pain and suffering.126

However, in order to recover for negligent infliction of emotional distress under FELA, which incorporates the common law, two common law restrictions must be observed.127 The first restriction is that not all conduct is actionable.128 For example, in FELA suits containing a stand-alone emotional distress claim, the zone of danger test must be met in order for conduct to be actionable, as decided in Gottshall.129 The second common law restriction is that plaintiffs must present some objective evidence of a manifestation of their injuries.130 Most jurisdictions comply with this limitation.131

N&W contended that the plaintiffs in this case had not presented objective evidence of their fear of cancer. One plaintiff’s “fear” of developing cancer made him “think, occasionally.”132 Another testified that what worried him the most about cancer was “if there’s nobody to take care of the farm or anything.”133 Yet another offered no testimony at all regarding any concern about contracting cancer.134 None of the plaintiffs testified as to having a “fear” of cancer or the existence of severe emotional injury, and none

123. Petition, supra note 17, at 12 (citing Gottshall, 512 U.S. at 544 (internal quotation marks omitted)).
124. See id. at 12.
125. See id.; see also Potter v. Firestone Tire & Rubber Co., 863 P.2d 795, 805 (Cal. 1993) (Pain and suffering damages are “parasitic damages” which compensate “a reasonable fear of a future harm attributable to the injury.”).
126. See Petition, supra note 17, at 12.
127. See id. at 13.
128. See id.
129. See id.
130. See id.; see also RESTATEMENT (SECOND) OF TORTS § 436A (2003). “If the actor’s conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance.” Id.
131. Petition, supra note 17, at 13-14.
132. Id. at 8.
133. Id. at 8-9.
134. Id. at 9.
presented evidence of any emotional or physical manifestation of their concerns.\footnote{135}{\textit{Id.}}

Though the second restriction on emotional distress claims that are actionable (the physical manifestation requirement) had not been directly addressed by the Supreme Court, the Court had previously recognized the requirement. In \textit{Buell}, the Court recognized that “severe emotional injury . . . has generally been required to establish liability for purely emotional injury.”\footnote{136}{Petition, \textit{supra} note 17, at 15 (citing Atchison, Topeka & Santa Fe Ry. Co. v. Buell, 480 U.S. 557, 567 n.13 (1987)).} In \textit{Gottshall}, the “Court addressed the second limitation only in the context of rejecting the claim that the genuine-injury requirement obviated the need to restrict what conduct is actionable.”\footnote{137}{\textit{Id.} at 17; \textit{see} Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 552 (1994).} In \textit{Buckley}, the Court simply “reiterate[d] \textit{Gottshall}’s admonition that the test for the genuineness of emotional injury ‘alone’ is insufficient to safeguard defendants from meritless claims.”\footnote{138}{Petition, \textit{supra} note 17, at 15; \textit{see} Metro-North Commuter Ry. Co. v. Buckley, 521 U.S. 424, 434 (1997).}

2. Judicial Support for N&W’s Argument

N&W listed a number of cases supporting its view that claims for emotional distress must be accompanied by some form of physical manifestation.\footnote{139}{\textit{See} Petition, \textit{supra} note 17, at 16-17.} In \textit{Moody v. Maine Central Railroad Co.},\footnote{140}{Moody v. Maine Central Ry. Co., 823 F.2d 693 (1st Cir. 1987).} Moody alleged that his railroad employer caused his emotional distress by subjecting him to harassment, denying his admission into an engineer training program, assigning him to an unattractive location, and denying his qualification on certain runs; actions which supposedly led to Moody’s fatigue and depression which in turn led to attacks of angina.\footnote{141}{See \textit{id.} at 693.} Though there was evidence that Moody visited a number of doctors, there was “absolutely no evidence that any one of the doctors indicated that the so-called harassment by defendant’s supervisors was the cause of any symptom exhibited by the plaintiff.”\footnote{142}{\textit{Id.} at 695.} The First Circuit Court of Appeals found that Moody’s condition, “manifested only by subjective pain” and supported by no “medical opinion as to causation,” was not enough to state a claim for emotional distress.\footnote{143}{\textit{Id.} at 696.}
Ten years prior to Moody, the First Circuit decided Bullard v. Central Vermont Railway, Inc.,\(^{144}\) in which Gonyer claimed emotional injuries after a train on which he was working collided with another. Gonyer jumped from the train before the impact, but other workers died in the collision. After the accident, Gonyer remained at the site for hours, setting up flares to warn other trains and directing traffic. The only evidence of Gonyer’s emotional distress was his testimony that his job required him to pass the accident site nearly every day and that he expected to see the deceased members of the crew waiting for him there. In denying recovery, the First Circuit found that “if there is to be compensation for nervousness, depression, or other mental conditions which may sometimes result from harrowing experiences of this sort, there must be evidence from which a jury can make an informed judgment as to the existence, nature, duration and seriousness of the condition.”\(^{145}\)

State supreme courts have also examined emotional distress claims without physical manifestations. In Vance v. Consolidated Rail Corp.,\(^{146}\) the Supreme Court of Ohio found that plaintiff Vance’s claim for negligent infliction of emotional distress could stand because “there was sufficient medical evidence to establish that plaintiff was suffering from chronic and disabling depression.”\(^{147}\) After Vance’s employer, Erie, merged with Penn Central, Penn Central workers began harassing Vance by, among other things, placing a dead bloody rat on his lunch, putting sugar in the gas tank of his wife’s car, and almost running down Vance with a truck. This led to Vance being diagnosed as clinically depressed and being treated with electric shock therapy, tranquilizers, and antidepressants.

The Supreme Court of Alabama also looked at emotional distress claims in connection with physical manifestations. In Alabama Great Southern Railroad Co. v. Jackson,\(^{148}\) supervisory employees of the defendant railroad, after warning Jackson to be on the lookout for vandals on the train, conducted a surprise and secret evaluation of Jackson and his crew. They concealed their presence and, when Jackson heard them moving in the dark, would not respond to his question of “Who is that?” When Jackson approached the place from which he heard their noises the supervisory employees finally revealed themselves. The next morning Jackson began to experience chest pains and a

\(^{144}\) Bullard v. Central Vermont Ry., Inc., 565 F.2d 193 (1st Cir. 1977) (all facts in this section are articulated from the court’s opinion in Bullard).

\(^{145}\) Id. at 197.

\(^{146}\) Vance v. Consol. Ry. Corp., 652 N.E.2d, 776 (Ohio 1995) (all facts in this section are articulated from the court’s opinion in Vance).

\(^{147}\) See id. at 784.

\(^{148}\) Alabama Great Southern Railroad Co. v. Jackson, 587 So. 2d 959 (Ala. 1991) (all facts in this section are articulated from the court’s opinion in Jackson).
severe headache, which continued for several days. Jackson eventually was placed in the hospital for a series of tests and was prescribed medication for his chest pains and headaches. The Alabama Supreme Court upheld a jury verdict in Jackson’s favor because the defendant had caused an injury that resulted in Jackson’s physical problems.149

3. Public Policy Support for N&W’s Argument

Many courts and scholars have spent time analyzing emotional distress claims for a fear of cancer or other disease, in legal terms and also in terms of public policy.150 One such common concern is that asbestos cases are clogging the courts.151 Allowing plaintiffs to bring cases for fear of cancer instead of only allowing cases to be brought for present injuries contributes to this congestion. One author has reported that there are currently more than “200,000 asbestos-related cases pending in state and federal courts, and that number is growing at the rate of more than 50,000 new cases every year.”152 That number is up from 20,000 in 1982.153 Certain jurisdictions with reputations as being plaintiff-friendly, including certain counties in West Virginia, are especially hard hit by the amount of asbestos litigation.154 For example, one county in Mississippi with 9,740 residents had 21,000 plaintiffs file claims from 1995 to 2000.155 The Supreme Court has even commented on the “elephantine mass of asbestos cases.”156 Recognizing the enormity of the

149. See id. at 965.
152. Bell, supra note 8, at preface. In the year 2000 alone, 60,000 claims were filed against the Manville Trust—a trust established to handle asbestos claims against Johns-Manville Corp. Rothstein, supra note 150, at 4. The Manville Trust has now been “so drained by claims that [as of November, 2001] it could . . . pay only five cents on the dollar of claims, down from 10 cents only a few months ago.” The Need for Damage Limitation, supra note 3. In filing for bankruptcy, W.R. Grace & Co. stated that in 2000 asbestos claims had increased 81% over the prior year, reaching a total of 49,000 claims. Rothstein, supra note 150, at 5. “Moreover, in January of 2001, claims against W.R. Grace had increased 374% over those in January of 2000, and February of 2001 claims were 207% higher than February of 2000.” Id.
153. Bell, supra note 8, at preface.
154. Id. at 17 (other states include Texas, Louisiana, New York, and California).
155. Id. (citing Robert Pear, Mississippi Gaining as Lawsuit Mecca, N.Y. TIMES, Aug. 20, 2001, at Section A).
situation, in 1990 Chief Justice Rehnquist convened a Judicial Conference Committee to examine the growing asbestos litigation problem.\(^{157}\) In 1991 the committee reported that the “situation has reached critical dimensions and is getting worse,” and it concluded that the courts were “ill-equipped” to address the mass of claims in an effective manner.\(^{158}\)

Another concern about the number of asbestos cases, including those concerning claims for fear of cancer, is that the lawsuits are bankrupting companies at an alarming pace. As of 2000, twenty-five of the more than 140 businesses that either made asbestos or sold products containing the substance had filed for Chapter 11 bankruptcy.\(^{159}\) For example, power-plant builder Babcock & Wilcox had settled 349,000 claims for $1.6 billion but had to file for bankruptcy protection, estimating its asbestos liability would be an additional $1.3 billion through 2012.\(^{160}\) Analysts have surmised that the total across American industry may reach $50 billion and take fifty years to settle.\(^{161}\) These bankruptcies lead plaintiffs to seek compensation from “peripheral” defendants who only have a remote correlation with asbestos since larger, more culpable companies have already filed for bankruptcy.\(^{162}\) This has a domino effect that results in additional defendants filing for bankruptcy.\(^{163}\)

A third concern about letting plaintiffs recover for a fear of cancer is that those who truly are sick and suffering may face a depleted pool of assets from which to recover.\(^{164}\) It has been estimated that between 50% and 80% of new

\(^{157}\) Rothstein, \textit{supra} note 150, at 7.

\(^{158}\) \textit{Id.}

\(^{159}\) Queena Sook Kim, \textit{Firms Hit by Asbestos Litigation Take Bankruptcy Route}, \textit{WALL ST. J.}, Dec. 21, 2000, at B4, \texttt{available at 2000 WL WSJ 26620724}. In 2000 alone, five manufacturers and users of asbestos products were forced into bankruptcy, which is the largest one-year total of asbestos-related bankruptcies in at least a decade. McLeod, \textit{supra} note 2.

\(^{160}\) Kim, \textit{supra} note 159.


\(^{162}\) See Rothstein, \textit{supra} note 150, at 3. \textit{See also The Need for Damage Limitation, \textit{supra} note 3} (since “virtually all the traditional asbestos companies have already been sued into bankruptcy,” others are now suing “those who installed asbestos products, or used them as building materials (at a time when the stuff was a cliché of contemporary construction), or manufactured masks to keep the dust at bay.”); McLeod, \textit{supra} note 2 (Non-traditional defendants include “giants like IBM, AT&T, Ford Motor Co. and Chrysler Corp.—accused of exposing workers to asbestos-contaminated break parts...as well as institutions like hospitals and universities with small amounts of asbestos in their buildings.”).

\(^{163}\) McLeod, \textit{supra} note 2. For example, despite USG laying off 500 employees to free up $10 million for legal bills, it had to file for bankruptcy because “it was the only way to stop taking hits for companies that had already filed.” \textit{The Asbestos Blob, supra} note 161.

\(^{164}\) \textit{See The Need for Damage Limitation, \textit{supra} note 3} (“But for every healthy claimant who demands compensation now for suffering that may never arise, there is a dying victim whose pain cannot be compensated because the defendants have run out of money settling dubious claims.”).
asbestos cases are brought by plaintiffs who are “not sick in a meaningful sense.”\textsuperscript{165} These claimants who are not sick not only add to the problems associated with clogging the courts and lead to more companies filing for bankruptcy, but more importantly they “reduce the limited pool of resources available for those individuals who are much sicker or dying or will become sick with serious asbestos-related diseases in the future.”\textsuperscript{166} For example, six plaintiffs in Mississippi were awarded $150 million dollars for their asbestos exposure, though none was sick.\textsuperscript{167} Twenty-one plaintiffs in Texas suffering mild to asymptomatic asbestosis were awarded $115.6 million, much of it for future damages.\textsuperscript{168}

Another concern with allowing recovery for fear of cancer is that it will be difficult to distinguish between valid distress and fear that is trivial.\textsuperscript{169} As is stated in the Restatement:

\begin{quote}
(I)n the absence of the guarantee of genuineness provided by resulting bodily harm, . . . emotional disturbances may be too easily feigned, depending, as it must, very largely upon the subjective testimony of the plaintiff; and . . . to allow recovery for it might open too wide a door for false claimants who have suffered no real harm at all.\textsuperscript{170}
\end{quote}

The \textit{Buckley} Court also recognized the problem:

But how can one determine from the external circumstance of exposure whether, or when, a claimed strong emotional reaction to an \textit{increased} mortality risk (say from 23\% to 28\%) is reasonable and genuine, rather than overstated — particularly when the relevant statistics themselves are controversial and uncertain (as is usually the case), and particularly since neither those exposed nor judges or juries are experts in statistics?\textsuperscript{171}

These are four main concerns in regards to allowing claims for a fear of cancer. Not only does allowing these causes of action create problems for courts in terms of overwhelming them and creating a cause of action that is impossible to objectively measure, but they also hurt business by sending them

\textsuperscript{165} Rothstein, \textit{supra} note 150, at 6 (“As many as 80\% of new cases are brought by plaintiffs who suffer from no physical impairment”); Kim, \textit{supra} note 159 (“More than 50\% of the claims are brought by people who were exposed to asbestos but aren’t impaired.”).

\textsuperscript{166} Rothstein, \textit{supra} note 150, at 7.

\textsuperscript{167} \textit{See The Need for Damage Limitation, supra} note 3.

\textsuperscript{168} McLeod, \textit{supra} note 2.

\textsuperscript{169} Klein, \textit{supra} note 12, at 990. \textit{See Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 557 (1994)} (noting that “the common law restricts recovery for negligent infliction of emotional distress on several policy grounds: . . . the possibility of fraudulent claims that are difficult for judges and juries to detect . . .”).

\textsuperscript{170} \textit{RESTATEMENT (SECOND) OF TORTS} § 436A cmt. b (1965).

into bankruptcy and people who truly are suffering from a physical disease and
are forced to get damages from a depleted, if not empty, pool.

However, this is just one view of suits for emotional distress in general and
asbestos suits in particular. The Respondents presented a dramatically
different view.

B. Freeman Ayers, Doyle Johnson, Clifford Vance, Carl Butler, John Shirley,
and James Spangler

1. Argument Submitted by Respondents to the Supreme Court

The plaintiffs in the original suits, the respondents before the Supreme
Court, rejected N&W’s claim that they could not recover for fear of cancer
without physical manifestation.172 They had three main arguments for their
assertion.

First, recognizing that “FELA does not itself answer the question of the
scope of physical and mental injuries for which a negligent defendant is
liable,” the respondents turned to “settled common law principles.”173
According to the respondents, “under settled tort law, a defendant who
negligently causes physical injury to the person of another is liable for the
resulting physical and mental harms, including reasonable apprehension of
future physical consequences.”174 Settled tort law does not, though, require a
physical manifestation of mental harms as long as the mental harms are
“related to a physical injury, reasonable, and like injuries of any kind,
supported by evidence sufficient to sustain a jury verdict.”175 Respondents
agreed with N&W that pain and suffering can stem directly from a physical
injury but asserted that pain and suffering are “not strictly confined to such
immediate, direct pain.”176 According to tort law, when “a cause of action [is]
established by the physical harm, ‘parasitic’ damages are awarded, and it is
considered that there is sufficient assurance that the mental injury is not being
feigned.”177 Therefore, emotional damages that would not be enough to

172. See Respondents’ Brief, supra note 18, at 9-11.
173. Id. at 14.
174. Id. at 13.
175. Id. at 17.
176. Id. at 14. See also Herbert F. Goodrich, Emotional Disturbance as Legal Damage, 20
Mich. L. Rev. 497, 509 (1921) (“In connection with proved physical injury, wrongfully caused
[emotional disturbance] has long been an element in recovery, not merely where
undistinguishable from ‘physical pain,’ but in further removed situations . . . .”).
177. Respondents’ Brief, supra note 18, at 14 (citing WILLIAM L. PROSSER, HANDBOOK OF
THE LAW OF TORTS 213 (1941)).
establish liability on their own can be considered “parasitic” damages if they result from a physical harm.178

Noting that cases involving a fear of cancer from asbestos exposure did not exist at the time FELA was enacted, respondents turned to analogous situations in case law, mainly dog bite cases.179 In these cases, courts allowed recovery “for the physical wounding of the immediate bite and for the fear of future disease [rabies, lockjaw] caused by the possibility that harmful gems were injected into the victim’s bloodstream” and also for “mental injury based on fear of future disease, wholly apart from the physical harm [and immediate mental harm] caused by the initial wounding itself.”180

Respondents next maintained that asbestosis supplied the “requisite physical injury,” and their fear of cancer was “sufficiently related to asbestosis to be a legitimate additional aspect of damages.”181 As previously mentioned, asbestosis is a debilitating lung disease that is caused by exposure to asbestos.182 At trial “there was substantial evidence of respondents’ significant asbestos exposure at [N&W’s] employment” as well as support of the diagnosis of respondents’ asbestosis from a “Board-certified medical expert.”183 Thus, to respondents it appeared that the asbestosis supplied the requisite physical injury.184

Respondents contended that the relationship between their asbestosis and their fear of cancer was legitimate and sufficient in two respects. First, “asbestosis [was] what [made] respondents’ fear of cancer reasonable” because “a present injury of asbestosis makes it more likely than it otherwise would be that a particular plaintiff who has been exposed to asbestos will eventually develop cancer.”185 This relationship between asbestosis and developing cancer is substantial, as “10 percent of individuals with asbestosis contract

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178. \text{See id. at 14-15; see also Restatement (Second) of Torts \S 456 ("If the actor’s negligent conduct has so caused any bodily harm to another as to make him liable for it, the actor is also subject to liability for . . . fright, shock, or other emotional disturbance resulting from the bodily harm or the conduct which causes it . . . ").}\n
179. \text{See Respondents’ Brief, supra note 18, at 15-17.}\n
180. \text{Id. at 16. See Ayers v. Macoughtry, 117 P. 1088, 1090 (Okla. 1911) (upholding jury instructions allowing jury, in determining the amount of damages, to “take into consideration the apprehension of poisoning from the bite of said dog and the fear of evil results therefrom”); Buck v. Brady, 73 A. 277, 279 (Md. 1909) (proper for plaintiff to testify that he worried about rabies); Heintz v. Caldwell, 16 Ohio C.C. 630, 630 (Ohio Cir. 1898) available at 1898 WL 588 ("The court also erred in not permitting the plaintiff to testify to the mental suffering consequent upon her apprehensions of hydrophobia and lockjaw resulting from the dogs biting her.").}\n
181. \text{Respondents’ Brief, supra note 18, at 18.}\n
182. \text{See supra text accompanying notes 56-62.}\n
183. \text{Respondents’ Brief, supra note 18, at 18.}\n
184. \text{See id. at 19.}\n
185. \text{Id. at 19-20.}\n
mesothelioma . . . ; 39 percent of those with asbestosis who also smoke contract fatal lung cancer, while the rate for nonsmokers with asbestosis is 2-5 percent . . . ”186

The second aspect of the relationship between respondents’ asbestosis and their present fear of cancer was that both stemmed from the same thing, asbestos exposure.187 Respondents sought relief “not for a future physical injury [cancer], but for their present mental injury, which exists whether or not that future physical injury occurs.”188 Therefore, the fact that asbestosis and cancer are separate diseases was irrelevant, and N&W was “mistaken that [a] reasonable fear of cancer is not recoverable because ‘asbestosis and cancer are separate diseases.’”189 Allowing plaintiffs to recover for present mental injuries “avoid[s] the unfairness that would otherwise result because many current victims of asbestosis would be unlikely ever to be made whole for their present mental injuries, such as those victims who die of asbestosis or other causes before cancer occurs or a lawsuit can be brought.”190

Respondents’ last argument was that they were seeking recovery for “parasitic damages,” mental injuries that were “simply an additional aspect of damages for a tort cause of action otherwise established,” and there is no precedent in the common law requiring physical manifestation for parasitic damages.191 Had they been seeking recovery for a stand-alone emotional distress claim, one where the emotional distress itself was the injury claimed, respondents agreed with N&W that the mental injury would have to be “severe,” often with accompanying physical manifestations.192 However, such was not the case, as respondents were seeking emotional distress damages in connection with their physical injury.

2. Judicial Support for Respondents’ Argument

Respondents also listed cases in support of their view that recovery for emotional distress damages can be had without accompanying physical manifestation.193 It is interesting to note that none are from circuit courts of
appeals or states’ highest courts. In an unpublished opinion, *Griffin v. Keene Corp.* Griffin filed an asbestosis suit in which he was also seeking damages for his fear of cancer, the district court found that because Griffin was “seeking recovery for a present fear of cancer, which allegedly stem[med] from his exposure to defendants’ products,” Griffin would be able to “point to an actual physical injury causing his emotional distress.” This was assuming Griffin could prove that he had asbestosis and that “his fear of cancer was reasonable.”

In *Eagle-Picher Industries, Inc. v. Cox, Sr.*, the defendant company, a manufacturer of asbestos, sought to have a jury verdict in favor of Cox, who was suffering from asbestosis and a fear of cancer, overturned. The court recognized both that “asbestosis does not cause cancer” and that there was “a physical injury requirement for a mental distress from fear of cancer claim.” However, because a plaintiff with asbestosis may have increased chances of contracting cancer, “plaintiffs with asbestosis may have a well-founded greater reason to fear contracting cancer than those who do not have asbestosis,” and thus the physical injury requirement was met by virtue of Cox’s asbestosis.

3. Public Policy Support for Respondents’ Argument

While some judges and scholars believe that allowing recovery for fear of cancer is bad from a policy perspective, there is a different school of thought that the ensuing evils from allowing such claims have not and will not come to manifest themselves. First, regarding the fear that asbestos cases, including cases for a fear of cancer, are overwhelming the courts, some judges have found that this simply is not the case. As the Supreme Court of Nebraska pointed out, “experience shows that . . . courts have not been overwhelmed with litigation.” In addition, a fear of a flood of litigation is not a valid fear, for the purpose of the courts is to handle litigation.

It is the business of the law to remedy wrongs that deserve it, even at the expense of a “flood of litigation”; and it is a pitiful confession of incompetence

195. *Id.* at *1.
196. *Id.*
198. *See id.* at 519.
199. *Id.* at 528.
200. *Id.*
201. *See supra* notes 150-71 and accompanying text.
on the part of any court of justice to deny relief upon the ground that it will
give the courts too much work to do. 203

One court has commented that “the proper remedy for a potential flood of
litigation in the toxic tort context is ‘an expansion of the judicial machinery,
not a decrease in the availability of justice.’” 204 Justice Ginsburg has also
dismissed this potential flood of litigation, saying that “[i]t is doubtful that
many legions in the universe of individuals ever exposed to toxic material
could demonstrate that their employers negligently exposed them to a known
hazardous substance, and thereby substantially increased the risk that they
would suffer debilitating or deadly disease.” 205

Many of these same commentators maintain that allowing recovery for fear
of cancer will not lead to difficulty in distinguishing between valid distress and
fear that is trivial. Because “mental and emotional distress is just as ‘real’ as
physical pain, . . . its valuation is no more difficult.” 206 “While physical
manifestation of the psychological injury may be highly persuasive, such proof
is not necessary given the current state of medical science and the advances in
psychology.” 207 Requiring physical manifestation before a plaintiff can
recover for fear of cancer is not an effective method of keeping trivial claims
out of the courts, for plaintiffs with a physical manifestation “can fake
emotional distress as well as someone who does not.” 208 This rule also leads to
arbitrary results, as “the plaintiff’s ability to collect for the fear of contracting
cancer at a future date turns on the plaintiff’s physiological idiosyncrasies
rather than on whether his distress is genuine or reasonable.” 209

VII. NORFOLK & WESTERN RAILWAY CO. V. AYERS - THE COURT’S OPINION

A. Majority Opinion

Justice Ginsburg wrote the majority opinion in which Justices Stevens,
Scalia, Souter, and Thomas joined in respect to the “question whether the trial

Prosser, Intentional Infliction of Mental Suffering: A New Tort, 37 Mich. L. Rev. 874, 877
(1939)).

204. Kenneth W. Miller, Toxic Torts and Emotional Distress: The Case for an Independent
State, 176 N.E.2d 729, 731 (N.Y. 1961)).

concurring in the judgment in part and dissenting in part).

206. Miller, supra note 204, at 700 (citing Berman v. Allan, 404 A.2d 8, 15 (N.J. 1979)).

207. James, 375 N.W.2d at 116.

208. Klein, supra note 12, at 974.

209. Id. (citing Glen Donath, Comment, Curing Cancer Phobia: Reasonableness Redefined,
62 U. Chi. L. Rev. 1113, 1124 (1995)).
judge correctly stated the law when he charged the jury that an asbestosis claimant, upon demonstrating a reasonable fear of cancer stemming from his present disease, could recover for that fear as apart of asbestosis-related pain and suffering damages.”

The Court was unanimous in its decision regarding apportionment of damages. In deciding the first question, the majority began with a summary of both Gottshall and Buckley. Recognizing that these two cases distinguished between “stand-alone emotional distress claim not provoked by any physical injury, for which recovery is sharply circumscribed by the zone-of-danger test[,] . . . and emotional distress claims brought on by a physical injury, for which pain and suffering recovery is permitted,” the majority categorized this particular claim in the latter category because “asbestosis is a cognizable injury under the FELA,” it was undisputed “that the [plaintiffs] suffer[ed] from asbestosis,” and “asbestosis can be a clinically serious, often disabling, and progressive disease.”

The majority then traced the origin of the general rule that “claims for pain and suffering associated with . . . a physical injury are traditionally compensable.” In 1908, at the time of the enactment of FELA, “the common law had evolved to encompass apprehension of future harm as a component of pain and suffering,” and that rule has now evolved so that one may recover for “reasonable fears of a future disease.” To illustrate, the majority used the dog-bite analogy, previously mentioned in the discussion of plaintiffs’ argument. For further support for its decision, the majority looked to the common law, stating that, of the courts to consider whether fear of cancer is compensable for an asbestosis plaintiff, “a clear majority” allow for recovery.

The majority then took on some of the arguments offered by N&W and the dissent. First, that “because the asbestosis [plaintiffs] may bring a second action if cancer develops, . . . cancer-related damages are unwarranted in [this] asbestosis suit.” The majority dismissed this argument because the plaintiffs “sought damages for their current injury, which, they allege[d], encompassed [d]

\[\text{raw text continued...}\]
a present fear that the toxic exposure causative of asbestosis may later result in cancer.”219 That is, the plaintiffs were not seeking to recover for cancer, but for their fear that they may someday develop cancer. The majority then took on the argument that “[t]o be compensable as pain and suffering, . . . a mental or emotional harm must have been directly brought about by a physical injury,” and asbestosis does not directly bring about cancer.220 According to the majority, however, this causation requirement is met because “there is an undisputed relationship between exposure to asbestos sufficient to cause asbestosis, and asbestos-related cancer.”221 The majority then addressed the argument that “holding employers liable to workers merely exposed to asbestos would risk unlimited and unpredictable liability.”222 The majority looked to the distinction drawn by the Buckley Court: that emotional distress recovery is available only for “plaintiffs who suffer from a disease” and not those who were merely exposed to asbestos, because “of those exposed to asbestos, only a fraction will develop asbestosis.”223

Therefore, to the question presented: “[w]hether a plaintiff who has asbestosis but not cancer can recover damages for fear of cancer under the [FELA] without proof of physical manifestations of the claimed emotional distress,” the majority answered yes, with one “important reservation.”224 Such a plaintiff can recover for fear of cancer as long as he proves “that his alleged fear is genuine and serious.”225 The majority admitted that “in this case, proof directed to that matter was notably thin.”226 However, the jury forms made it impossible to tell which parts of the awards, if any, were attributed to the plaintiffs’ fear of developing cancer, so it was unknown if the jury thought the plaintiffs’ fears “genuine or serious.”227 Therefore, the judgment of the West Virginia court was affirmed.228

B. Justice Kennedy’s Dissent

Justice Kennedy wrote the main dissent on the issue of whether damages for fear of cancer could be recovered by plaintiffs suffering from asbestosis,

219. Id. (emphasis in original).
220. Id.
221. Id. at 1222.
222. Ayers, 123 S. Ct. at 1223 (internal quotations omitted).
223. Id.
224. Id.
225. Id. at 1224.
226. Id.
227. Ayers, 123 S. Ct. at 1224.
228. Id. at 1228.
joined by Chief Justice Rehnquist and Justices O’Connor and Breyer. The dissent first pointed out that though the decision by the majority “might appear on the surface to be solicitous of employees and thus consistent with the goals of FELA,” this reasoning did not hold up under scrutiny. Because asbestos related cancers take years to develop and companies that are culpable for these cancers are being forced into bankruptcy by asbestos litigation, there is a “danger that no compensation will be available for those with severe injuries caused by asbestos.” Therefore “allow[ing] recovery for fear of future illness is antithetical to FELA’s goals of ensuring compensation for injuries.”

While the dissent did agree with the majority’s conclusion that “a person who suffers from a disease may recover for all related emotional distress,” it contended that related “emotional distress must be the direct consequence of an injury of condition.” Here, the emotional distress, plaintiffs’ fear of cancer, was not caused by asbestosis because “[t]here is no demonstrated causal link between asbestosis and cancer.” Therefore fear of cancer is not a direct consequence of asbestosis.

The dissent also disagreed with the majority’s analysis of other courts decisions in fear of cancer cases and in the majority’s analysis of the separate disease rule. To the dissent, the separate disease rule demonstrated “that courts have found it necessary to construct fair and sensible common-law rules for resolving the problems particular to asbestos litigation . . . [and] that a person with asbestosis will not be without a remedy for pain and suffering caused by cancer.” Allowing plaintiffs to recover for asbestosis when they develop asbestosis and later to recover for cancer when (and if) they develop cancer “accounts . . . for changes already underway in common-law rules for

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229. *Id.* (Kennedy, J., concurring in part and dissenting in part). The dissent would also disallow recovery if recovery had been sought for negligent infliction of emotional distress. *Id.* at 1234 (Kennedy, J., concurring in part and dissenting in part). However, plaintiffs sought recovery for “negligently inflicted physical injury (asbestosis) and attendant pain and suffering.” *Id.* at 1219. This note, therefore, will not delve into this part of the dissent’s analysis.

230. *Id.* at 1228-29 (Kennedy, J., concurring in part and dissenting in part).

231. *Id.* at 1229 (Kennedy, J., concurring in part and dissenting in part); *see supra* note 66 and accompanying text.

232. *Ayers,* 123 S. Ct. at 1229-30 (Kennedy, J., concurring in part and dissenting in part); *see supra* notes 159-63 and accompanying text.

233. *Ayers,* 123 S. Ct. at 1229 (Kennedy, J., concurring in part and dissenting in part).

234. *Id.* at 1230 (Kennedy, J., concurring in part and dissenting in part).

235. *Id.* (Kennedy, J., concurring in part and dissenting in part).

236. *Id.* at 1231 (Kennedy, J., concurring in part and dissenting in part).

237. *See id.* at 1232 (Kennedy, J., concurring in part and dissenting in part).

238. *Ayers,* 123 S. Ct. at 1232 (Kennedy, J., concurring in part and dissenting in part).
compensating victims of a disease with a long latency period . . . [and] is more likely to result in an equitable allotment of compensation.”

C. Justice Breyer’s Dissent

Justice Breyer agreed with the dissent, but wrote separately “[b]ecause the issue [wa]s a close and difficult one.” His main contention with the majority’s decision was its partial reliance on the Restatement (Second) of Torts because it “neither gives a definition of the kind of emotional disturbance for which recovery is available nor otherwise states that recovery is available for any kind of emotional disturbance whatsoever.” The majority, therefore, should have looked “to the underlying factors that have helped to shape related ‘emotional distress’ rules,” which “argue for the kind of liability limitation” as described in Justice Kennedy’s dissent.

VIII. ANALYSIS

Obviously the respondents in this case are sympathetic. Because of their asbestosis, they “just can’t breathe,” feel like they are “gonna fall dead,” and “run plum out of breath” when talking. They certainly should be compensated for their asbestosis, a disease that is physically impairing them. This is especially true since N&W learned of the public health hazards of asbestos exposure in the workplace beginning in the 1930s, and all of the respondents worked for N&W well after the 1930s. Whether or not they should be compensated for the present fear of developing cancer, without any physical manifestation of that fear, is a different question, though. The Supreme Court’s decisions in Gottshall and Buckley can give guidance for one possible solution.

In both Gottshall and Buckley, the Court recognized that FELA was to provide compensation, not only for employees’ physical injuries but also for their emotional injuries. However, the two Courts, along with the dissenters in Ayers, were also careful that their decisions would not create an unlimited

239. Id. at 1233 (Kennedy, J., concurring in part and dissenting in part).
240. Id. at 1236 (Breyer, J., concurring in part and dissenting in part).
241. Id. (Breyer, J., concurring in part and dissenting in part) (emphasis in original) (internal quotations omitted).
242. Id. at 1237 (Breyer, J., concurring in part and dissenting in part).
243. See Respondents’ Brief, supra note 18, at 6-7.
244. Id. at 5 n.4.
245. See Metro-North Commuter Ry. Co. v. Buckley, 521 U.S. 424, 429-30 (1997) (following Gottshall’s precedent and treating an emotional injury as an “injury” under FELA); Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 556 (1994) (recognizing that while FELA “may have been primarily focused on physical injury, it refers simply to ‘injury,’ which may encompass both physical and emotional injury.”).
class of plaintiffs. For example, in *Gottshall*, the Court expressed concern with the “prospect that allowing such suits [for negligently inflicted emotional distress] can lead to unpredictable and nearly infinite liability for defendants.”

Both Courts were also concerned with making rules that would force judges “to make highly subjective determinations concerning the authenticity of claims for emotional injury...”

Keeping these concerns in mind, one possible solution is to keep *Gottshall’s* zone of danger test in place for emotional distress claims by “plaintiffs who sustain a physical impact as a result of a defendant’s negligent conduct or who are placed in immediate risk of physical harm by that conduct.” However, for plaintiffs who suffer a physical injury and bring suit for infliction of emotional distress for fear of a future disease, courts should require physical manifestations of that distress unless plaintiffs can prove that the physical injury from which they currently suffer could actually result in the feared disease. This is in keeping with the rule laid out by the *Ayers* Court that a plaintiff’s fear be “genuine and serious,” for if an injury could not actually result in the feared disease, that fear could be neither genuine nor serious.

For example, in the case at hand, because respondents did not have physical manifestation of their fear of cancer and could not prove that asbestosis could cause cancer, they would be denied recovery.

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246. *Gottshall*, 512 U.S. at 552. The Court also limited the plaintiff class by adopting the zone of danger test. See id. at 555. The Buckley Court reiterated *Gottshall’s* concern of “a threat of ‘unlimited and unpredictable liability.’” *Buckley*, 521 U.S. at 433 (citing *Gottshall*, 512 U.S. at 557).

247. *Gottshall*, 512 U.S. at 552; see also *Buckley*, 521 U.S. at 433.


250. They would not be able to prove that asbestosis could cause cancer since the two are “separate and distinct latent diseases that are not medically linked.” See *supra* note 68 and accompanying text. Respondents seem to forget that since asbestosis does not cause cancer, their asbestosis cannot lead to a reasonable fear of developing cancer. See Respondents’ Brief, *supra* note 18, at 10 (stating the “reasonableness of [respondents’] fear, arising from their asbestosis, that they may suffer in the future from two painful and potentially fatal forms of cancer . . .”). *Id.*

Nor does respondents’ dog bite analogy fit the facts of the case at hand, for a dog bite actually can cause rabies, whereas asbestosis cannot cause cancer. See *supra* notes 179-80 and accompanying text.

251. Consider other examples: Plaintiff gets pricked by a used needle at a hospital and then fears that she may develop HIV. She would have an emotional distress claim against the hospital under the proposed solution even if she had no physical manifestation of emotional distress since the physical injury from which she suffered (being pricked by a used needle) actually could actually result in the feared disease (HIV). Plaintiff gets bit by neighbor’s dog and then fears that he may develop rabies. He would have an emotional distress claim against the neighbor even without physical manifestation of emotional distress since the physical injury (the dog bite) actually could result in the feared disease (rabies).
This solution is sound for a number of reasons. First, it requires that plaintiffs being awarded damages for the emotional distress truly are suffering an injury from that distress. It is safe to say that someone who is diagnosed as severely depressed or requires prescription medication for chest pains and headaches brought about by emotional distress is presently injured from his or her emotional distress. Likewise, someone with the knowledge that his or her current physical injury could actually result in another disease “must necessarily have a most depressing effect upon the injured person. Like the sword of Damocles, he knows not when it will fall.”

Second, this solution is in line with the concerns listed in Gottshall, Buckley, and the in Ayers’s dissent. It keeps in mind FELA’s purpose of providing compensation for employees’ emotional, as well as physical, injuries. It also helps to limit the class of plaintiffs by putting some restrictions on who can bring a claim for a fear of a future disease. Additionally, it provides some guidelines for judges and juries so they will not be forced to make highly subjective decisions.

Third, this solution is in keeping with public policy. By limiting the number of plaintiffs who could bring suit for emotional distress damages, courts would not be faced with such a “flood” of litigation. Not only would courts see their caseloads somewhat reduced, defendant companies would have fewer claims filed against them, leading to fewer bankruptcies being filed. Fewer claims against defendant companies and fewer bankruptcies being filed by these same companies would help to ensure that unimpaired plaintiffs, by not recovering from emotional distress claims, would not cause those who are truly sick and suffering to face a depleted pool of assets. The proposed solution would also help to set a standard for distinguishing valid from invalid claims. A plaintiff would not have a valid claim unless he or she could demonstrate some physical manifestation or that his or her current disease could lead to a future disease. This would preserve the fact-finding role of the jury while keeping them from having to make overly subjective determinations.

Lastly, this solution is consistent with FELA. As mentioned above, FELA’s purpose is to compensate for injuries to employees, whether physical or emotional. This solution achieves the statute’s goal by helping to ensure that emotional distress injuries really are “injuries,” that is, that the employee is objectively suffering a mental harm. FELA then allows compensation for

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255. See supra notes 72-81 and accompanying text.
256. See supra notes 72-81 and accompanying text.
those injuries. Also, because of FELA’s “remedial and humanitarian purpose,” courts have been liberal in their construction of FELA. 257 By allowing for two different manners in which recovery for emotional distress could be recovered, the proposed solution is liberally construing the statute. Furthermore, FELA “generally turns on principles of common law.” 258 Because some states adhere to a rule requiring physical manifestation before recovery can be had for emotional distress, this rule is in keeping with the common law. 259

This proposed solution balances the concerns of both plaintiffs and defendants. It allows claims for emotional distress for fear of a future disease to be brought, but only by those actually suffering from emotional distress. Yet it continues to hold companies liable for the emotional distress they actually have caused. It is mindful of the concerns expressed by the Supreme Court in  

Gottshall, Buckley, and by the dissenters in Ayers, and it is in accordance with FELA.

IX. CONCLUSION

By allowing asbestosis-inflicted plaintiffs to recover emotional distress damages for the fear of developing cancer, a disease that is not caused by asbestosis, the Supreme Court in Ayers did nothing to meaningfully help slow the flood of asbestos litigation, to help defendant companies from declaring bankruptcy, or to help retain a limited pool of resources is for truly ill plaintiffs. Instead, such plaintiffs who are able to show that they manifest a fear of developing cancer, an illogical fear because asbestosis does not lead to cancer, will be able to recover for this fear. The asbestos litigation in this country has gotten out of hand and does not appear to be improving. The Court in Ayers had the opportunity to start steering this in the right direction. Instead, it chose to accelerate many of the problems associated with asbestos litigation.

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259. This requirement does not seem to call for a majority. For example, when adopting the zone of danger test in Gottshall, only fourteen jurisdictions had adopted that test. See Gottshall, 512 U.S. at 555. Yet, the zone of danger test was considered a “well-established common-law concept[t] of negligence.” Id.

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