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Fear Factor: Supreme Court Permits Mental Anguish Damages for Fear of Cancer

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The Supreme Court's March 10th ruling in *Norfolk & Western Railway Co. v. Ayers*, No. 01-963, marks the Court's third recent foray into the federal tort law that is the Federal Employers' Liability Act (FELA) and provides ammunition for plaintiffs in product liability cases who are seeking to recover damages for mental anguish. In *Ayers*, the Court, by a 5-4 majority, held that mental anguish damages resulting from fear of cancer may be recovered under FELA by a railroad worker suffering from asbestosis caused by asbestos workplace exposure. The *Ayers* ruling will be read by some as significantly expanding FELA recovery opportunities, and the ruling's reliance on non-FELA authorities (the Restatement of Torts, state court decisions, and so on) may suggest implications beyond FELA. Indeed, it seems likely that attorneys in non-FELA asbestos cases will try to use *Ayers* to expand their recoveries of damages for mental anguish resulting from fear of cancer. Further, nothing in the Court's opinion expressly limits the application of the case to the asbestos world, so its rule could also surface in other products contexts where the potential harm to a plaintiff may not be readily apparent. It is clear, however, that *Ayers* erects boundaries on FELA recovery that merit close attention, as do its two dissenting opinions, perhaps telegraphing where these aspects of the common law might "evolve" next.

Factual and Procedural History

Plaintiffs in *Ayers* were six retired employees of the Norfolk & Western Railway. They alleged that the railroad had negligently exposed them to asbestos in the course of their work. Claiming symptoms of asbestosis, they brought suit under FELA, a statute preempting state law tort claims in the railroad industry, in West Virginia state court.

At the time of suit, asbestosis was the only disease plaintiffs claimed. No plaintiff had been diagnosed with cancer. Among the relief plaintiffs sought was compensation for pain and suffering, brought about by a fear that they might develop cancer in the future. Plaintiffs' experts testified that, due to asbestosis, plaintiffs faced a significantly increased risk of developing lung cancer, and a 10% chance of dying from another form of cancer called "mesothelioma."

The evidence admitted at trial confirmed that asbestos exposure did increase the plaintiffs' likelihood of getting cancer. But other factors — for example, five of the plaintiffs' long histories of smoking — contributed to that risk as well. As a result, the trial judge barred recovery simply for the increased risk itself; in other words, precluding plaintiffs from recovering damages solely in anticipation of cancer that they may or may not develop in the future.

The trial court instructed the jury to consider plaintiffs' evidence only "to judge the genuineness of plaintiffs' claims of fear of developing cancer," or as a component of the pain and suffering damages prompted by their present asbestosis. Notwithstanding that restriction, the jury returned a verdict for plaintiffs, awarding total damages approaching $5 million.

Moving Up

When the West Virginia Supreme Court of Appeals denied review, the Supreme Court granted certiorari, and affirmed. (Unanimously, the *Ayers* Court also held that FELA does not entitle defendants to an apportionment of damages, even when other possible tortfeasors might bear some fault — a point not addressed in this article.)

The *Ayers* majority anchored its analysis by straddling the Court's two prior recent FELA cases, *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), and *Metro-North Commuter R. Co. v. Buckley*, 521 U.S. 424 (1997). *Gottshall*, the Court observed, permits FELA plaintiffs with no signs of physical injury to sue for emotional distress — but only those who satisfy a "zone of danger" test. Simply stated, this means that only those who a defendant places in immediate risk of physical harm may recover damages for emotional distress absent physical harm.

Buckley, on the other hand, comes into play when a FELA plaintiff alleges some present physical injury. That injury, the *Buckley* Court noted, could justify recovery for emotional distress damages directly tied to the injury alleged. Such emotional distress damages, the *Buckley* Court noted, are part and parcel of the related "pain and suffering" for which the defendant must pay. Because plaintiffs in *Buckley* did not allege current injury, their own attempt to recover was denied.

The facts of *Ayers* did not fit squarely within either framework. Unlike in *Gottshall*, the plaintiffs' emotional distress claim in *Ayers* stemmed from physical injury. And under *Buckley*, it was not clear that the *Ayers* plaintiffs had the right

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injury to recover for the emotional distress they claimed. The question for the Court was whether one disease could support recovery for emotional distress of another with the same underlying cause.

The *Ayers* Court permitted recovery. Specifically, the five-justice majority permitted emotional distress recovery for fear of cancer based on the present alleged injury of asbestosis, even when the disease suffered and the disease feared arise from separate disease mechanisms (as do asbestosis and cancer). It is enough, said the Court, that the two diseases share a common cause. On this point, the Court invoked Section 456 of The Restatement (Second) of Torts, which recognizes liability for "any bodily harm" attributable to either "the bodily harm or … the conduct which causes it." Because the railroad, the Court wrote, was found to have caused the plaintiffs' asbestosis, and the same conduct — negligent exposure to asbestos — also caused their fear of developing cancer in the future, the Court affirmed the jury's damages award in full.

Dissent Fears Expansive Reading

Justice Anthony Kennedy wrote for the four dissenting justices. His opinion regards the fear of cancer aspect of the *Ayers* plaintiffs' case as governed by *Gottshall*, not *Buckley*: pain and suffering damages awarded under FELA must compensate "emotional distress [that is] the direct consequence of an injury or condition." To support recovery, emotional distress must spring from the same disease mechanism as a plaintiff's current injury. Justice Kennedy could find no such "direct" link in *Ayers*. Rather, the *Ayers* plaintiffs had claimed at trial merely a "brooding, contemplative fear" that "does not arise from the presence of [asbestosis] in their lungs. Instead, [their] fear is the product of learning from a doctor about their asbestosis, receiving information (perhaps at a much later time) about the conditions that correlate with this disease, and then contemplating how these possible conditions might affect their lives."

One component of a sensible body of tort law — and of FELA law — is to develop workable rules that can enable courts and juries to test claims for recovery. The dissent expressed concern — as had the Court in *Buckley* — that fear claims untethered to actual injury would be too speculative to permit searching court and jury assessment.

Justice Kennedy also criticized the majority's weighting of state court decisions, and of references to statements of the common law, protesting that: "the Court is [actually] bound only by the terms of FELA and its own precedent giving meaning to the Act." A separate dissent of Justice Stephen Breyer focused on this latter point, asserting that the majority misreads the Second Restatement and provides insufficient guidance for meaningfully measuring a claimant's "fear."

Both dissenting opinions in *Ayers* fear an expansive reading of *Ayers* that might flood the courts with tort claims of the uninjured. This concern rings especially loud in the asbestos world, where funds available to pay claims are steadily diminishing. Taken to an extreme, Justice Kennedy noted, the *Ayers* rationale may gut the core purpose of FELA, rendering the statute "not employee-protecting [but] employee-threatening," with payments of fear claims limiting compensation for the physically injured. In other industries, too, such a scenario is not difficult to conceive.

Similarly, the dissent noted with concern the absence of clear decisional lines and boundaries in the *Ayers* majority opinion. *Ayers* permits FELA plaintiffs to attempt to prove their "fear" of a disease by "vivid testimony about the agony of cancer, [and] expert evidence that a person's chances of developing that cancer have increased." Even when, Justice Breyer recognized, the plaintiff is unable to recover for increased risk (as under FELA), the jury will find it "close to impossible" to cabin its damage calculation based on this evidence to the fear of cancer inquiry alone.

Ground Rules for Recovery

Those fearing (as well as celebrating) an expansive view of FELA will thus find reason to cheer the holding of *Ayers*. But *Ayers* is not without its limits, and in fact reaffirms along the way some important limits and ground rules for FELA recovery.

First, *Ayers* makes clear, once and (perhaps) for all, that exposure alone does not give rise to a claim. At least when FELA controls, a tort claim requires injury. Exposure is a cause of injury, *Ayers* holds, not injury in and of itself. *Buckley*, the *Ayers* majority recalled, "sharply distinguished exposure-only plaintiffs from 'plaintiffs who suffer from a disease.'" *Ayers*' threshold requirement — that a FELA plaintiff have injury at the time suit is filed — is no small point. The *Buckley* dissent, and lower courts and commentators, had cast doubt on whether exposure alone can amount to FELA injury. The *Ayers* majority seems to remove that doubt definitively.

Second, *Ayers* recognizes that exposure does not lead inevitably to injury. In other words, the exposure-injury distinction is not just a question of when a FELA claimant may sue. The suit may never accrue. Injuries that are hypothetical, possible, or latent, no matter how conscientiously perceived, are insufficient. Under *Ayers*, a FELA plaintiff must come to court suffering from current injury.

Third, *Ayers* contemplates that cases where the injury asserted is not physical should be rare. Although emotional distress can sometimes be sufficient (*Gottshall*), courts should view those cases guardedly. *Ayers* in particular requires that the physical condition feared be "reasonably certain to develop." Courts applying *Ayers* should be mindful of this caveat, lest *Gottshall's* "zone of danger" restriction lose meaning altogether.

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Fourth, *Ayers* not only qualifies *Gottshall,* but narrows *Buckley*. Under *Ayers*, a FELA claimant claiming a physical, non-emotional injury, who also seeks relief for fear of developing another injury, must demonstrate that his fear is "genuine and serious." At oral argument, Justice Ruth Bader Ginsburg had wondered if fear of injury "might be too easy to make up." In this fashion, this concern is reflected in her opinion for the Court.

Fealty to this reservation will be central when assessing the long-term consequences of *Ayers*. Not every fear is sufficient to sustain a FELA claim, the *Ayers* Court makes clear. Nor should it be. In a world in which most everyone justifiably fears some ill health in the future, and where the very few seek or obtain compensation for that fear, the tort system must set limits. One limit, central to FELA law and to tort law, is actual injury. *Ayers* provides another limit for the FELA context: that one's fear of injury be "genuine and serious" to give rise to recovery. How courts construe and apply "genuine and serious" will largely determine the importance of *Ayers*.

Finally, the *Ayers* Court went out of its way to underscore the narrowness of its ruling. "We affirm only," said the majority, "the qualification of an asbestosis sufferer to seek compensation for fear of cancer as an element of his asbestosis-related pain and suffering damages." And, when reiterating its holding a page later, the *Ayers* Court again made clear that "[w]e rule, specifically and only" on this point. Asbestos is *sui generis* and has for decades made bad law, as watchers of tort law well know. Whether a further ruling in an asbestos case from our highest Court might finally impel a congressional solution remains to be seen.

Unresolved Issues

A thorny question left unresolved by *Ayers* is what remains of the so-called "separate disease rule." Historically, when a tort plaintiff files suit alleging a single disease (including in a FELA case), she need not be compensated at that time for every disease she may someday develop as a result of her employer's alleged negligence. If and when other diseases develop, in other words, the plaintiff should sue again at that time. *Ayers*, however, contemplates that the plaintiff — in a single lawsuit — may recover for both some current injury and any distress that she proves an as-yet-unmanifested injury has caused her.

In practice, as Justice Breyer recognized, the recovery permitted by *Ayers* dilutes the separate disease rule. He would thus qualify the *Ayers* rule with three common-sense propositions that he asserts could flesh out the "genuine and serious" test. To him, courts hearing FELA claims should bar recovery if: actual development of the allegedly feared disease can neither be expected nor ruled out for many years; fear of the disease is separately compensable if the disease occurs; and fear of the disease is based upon risks not significantly different in kind from the background risks that all individuals face. (At oral argument, one member of the Court wondered if minor departures from background risks were even tangible in the first place, and plaintiffs' counsel could not answer whether, for example, an injury that decreased one's life expectancy from 75 to 72 should be compensable.)

The *Ayers* majority did not embrace Justice Breyer's test. The majority did hint, however, that, had a defendant in *Ayers* challenged the factual sufficiency of the plaintiffs' alleged emotional distress, plaintiffs' alleged fear of cancer might not have been sufficiently "genuine and serious" to permit recovery. Calling plaintiffs' proof of fear "notably thin," the Court warns in a footnote that uncorroborated subjective proof of fear probably will not suffice.

Looking to the Future

The requirement that plaintiffs provide objective, corroborated proof of their fear, along with proof that the disease they fear is "reasonably certain to develop," leaves FELA trial lawyers (as well as tort lawyers generally, as the application of the *Ayers* theory expands) facing a delicate two-edged sword. On the one hand, such objective proof should limit cases in which plaintiffs are just "making the fear up." On the other hand, expert testimony regarding a claimant's increased risk of developing the feared disease — often cancer — and the seriousness of that risk may result in a parade of horribles for the jury to comprehend and sort out. In the face of complicated and often contradictory expert testimony, it may prove too much to ask a jury to draw such a fine distinction.

The battleground now returns to the courtroom — and to jury instructions and court control of these cases. Plaintiffs will invoke *Ayers* seeking recovery for fear related to actual injury. Defendants will insist on rigid enforcement of the requirement of injury (especially in FELA cases), and will ask that juries be instructed not to compensate for increased risk of developing the feared disease. Courts will be asked to permit *Ayers*-like recovery when appropriate, while guarding against the risk that a jury will unlawfully award damages for a plaintiff's increased risk of developing a disease, masked as *Ayers*-type emotional distress damages. As the *Ayers* Court points out, jury instructions and special interrogatories on verdict forms should be and will be tools used in this battle. Whether such protections will be enough to make *Ayers* workable remains to be seen.

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