

FEAR-OF-CANCER CLAIMS AFTER *NORFOLK & WESTERN RAILWAY v. AYERS*

by

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In *Norfolk & Western Railway Co. v. Ayers*, 123 S. Ct. 1210 (2003), the United States Supreme Court held 5-4 that a railroad worker with asbestosis may recover damages under the Federal Employers' Liability Act ("FELA")¹ for fear of contracting cancer in the future.² The Court held that its prior decision in *Metro-North Commuter Railroad Co. v. Buckley*, 521 U.S. 424 (1997), which denied recovery of fear-of-cancer damages under FELA to those claiming exposure to asbestos, did not apply to a plaintiff with a compensable asbestos-related disease. The Court's decision dashed hopes that some greater measure of rationality would be brought to asbestos litigation, and that limitations established in federal negligence law would be a beacon to show state courts the way to reforming the excesses of state tort law that have led to the nation's asbestos litigation crisis. Now, in the wake of *Ayers*, it is the plaintiffs' bar that trumpets this decision not only as inviting states to allow minimally impaired plaintiffs to recover large "fear-of-cancer" judgments, but also as signaling a possible retrenchment from the second holding in *Buckley*, namely, the Court's ruling under FELA that denied plaintiffs exposed to asbestos a lump-sum damages remedy for "medical monitoring" (*i.e.*, the costs of future medical testing to detect the onset of other asbestos-related disease). *Buckley*, 521 U.S. at 438-44.

That confidence is misplaced. First, it is not clear that there will be any dramatic change in the awarding of fear-of-cancer damages under state law. Second, *Ayers* suggests no retrenchment from *Buckley* on medical monitoring. The Court's rationale for denying lump-sum damages was unquestioned by the *Ayers* court; medical monitoring should never be awarded in the absence of compensable physical injury under general tort principles; and even when such injury occurs, there is

¹45 U.S.C. § 51. FELA creates a remedy against railroad employers for injury suffered by railroad workers that results from the railroad's negligence.

²123 S. Ct. at 1215. Asbestosis is a respiratory disease caused by the scarring of lung tissue by asbestos fibers.

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little scope for the awarding of such damages.

The Ayers Decision. The *Ayers* plaintiffs were emblematic of the national asbestos crisis.³ Most had only very slight occupational exposure to asbestos, heavy smoking histories, minimal claims of physical impairment that could largely be explained by other ailments, and disputed diagnoses of asbestosis. None testified to any severe emotional injury; some testified to apprehension about contracting cancer, and some not even to that. Yet the state trial court permitted much grisly evidence of the deadly cancers related to asbestos, and evidence that asbestotics were at increased risk of contracting those cancers. The plaintiffs put on no evidence of economic or medical damages, but sought only recovery for pain and suffering. A West Virginia jury awarded the six plaintiffs over \$5.8 million in total (later reduced by approximately \$900,000 to reflect plaintiffs' contributory negligence related to smoking).

In the United States Supreme Court, *Norfolk & Western* (supported by the United States as *amicus curiae*) challenged the recoverability of fear-of-cancer damages. It argued that the trial court had misunderstood the traditional common-law limitations on emotional-distress damages reflected in *Buckley* and *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994). This case did not involve traditional "parasitic" damages (*i.e.*, damages recoverable in an action for compensable physical injury). The claimed damages were not pain-and-suffering damages, which *Gottshall* had held are available only when emotional distress *stems directly from* a predicate physical injury. *Id.* at 544. Because there was no evidence that asbestosis causes cancer, the alleged fear of cancer did not stem directly from asbestosis. Nor were plaintiffs' fears the kind of parasitic damages that had been recoverable under the traditional "physical impact" rule, which allows a plaintiff suffering compensable physical injury to recover for emotional damages contemporaneously caused by that trauma. Thus, fear of cancer should not be recoverable, at least not without the strictures of recovery for freestanding emotional torts, which require the emotional distress to be manifest in bodily injury (*e.g.*, shock, illness, etc.). Moreover, the traditional policy reason for permitting a present recovery for fear of future harm is absent in this context, as courts have abandoned the "single-action rule" in asbestos cases, thereby permitting a plaintiff to recover now for his current injury and bring a second action if and when he later contracts cancer. Finally, a contrary rule would permit unfettered recovery for injuries that are difficult to diagnose and susceptible to abuse, arbitrary awards, and the depletion of scarce resources by unimpaired plaintiffs at the expense of later plaintiffs who actually have cancer.

In a 5-4 decision authored by Justice Ginsburg, the Court rejected these arguments, and held that fear-of-cancer damages are available under FELA for a plaintiff with asbestosis. The Court invoked section 456 of the RESTATEMENT (SECOND) OF TORTS (1965), which provides that when negligent conduct causes compensable bodily harm, the defendant is liable for "emotional disturbance resulting from the bodily harm *or from the conduct which causes it*" (emphasis added). *Ayers*, 123 S. Ct. at 1219. The Court relied on old cases allowing recovery for fear of rabies from a dog bite, and noted that various modern courts have permitted claims for fear of cancer. *Id.* Even absent evidence that asbestosis caused cancer, the association with increased risk of cancer justified recovery. *Id.* at 1221-22. The Court distinguished *Buckley* as denying fear-of-cancer damages only to asbestos-exposed plaintiffs without any asbestos-related disease. *Id.*

³The costs of asbestos litigation may reach \$265 billion. Stephen J. Carroll et al., RAND Inst. for Civil Justice, *Asbestos Litigation Costs and Compensation: An Interim Report* at 6, 77 (2002). At least 600,000 claims have been filed against 6,000 defendants, *id.* at 51, and "the flood of claims continues unabated." *In re Joint Dists. Asbestos Litig.*, 237 F. Supp. 2d 297, 302 (E.D.N.Y. 2002).

Justice Kennedy dissented, joined by Chief Justice Rehnquist and Justices O'Connor and Breyer. He did not view section 456 of the Restatement as dispositive, since the law restated there had not involved claims for fear of disease statistically correlated with a physical injury, but neither caused by it nor contemporaneously caused by trauma. *Id.* at 1228, 1233-34 (Kennedy, J., concurring in part and dissenting in part). The dissent concluded that recovery should not be permitted here, noting the limited pool of resources available to compensate future plaintiffs who contract disease and the numerous companies forced into bankruptcy protection by asbestos litigation. *Id.* at 1229-30, 1234-36. The dissent interpreted *Gottshall* as limiting recovery for pain and suffering to emotional distress that is “the direct consequence of an injury or condition.” *Id.* at 1230. And, the dissent concluded, the emotional distress that occurred here was too remote to be called a “direct consequence” because it stemmed from statistical correlations, rather than from the physical injury itself (as in the case of a dog bite). Moreover, there was no proof that asbestosis causes cancer: “correlation is not causation.” *Id.* at 1231. Thus, the dissent concluded, fear-of-cancer damages were outside the common law tradition of recoverable parasitic damages. *Id.* at 1233-34.

Implications. *Ayers* did not deliver the watershed decision that the defense bar had sought, but it leaves changes little in state law cases. Prior to *Ayers*, only one state supreme court had squarely denied recovery of fear-of-cancer damages to plaintiffs with asbestosis. *Id.* at 1220 n.11; *id.* at 1232-33 (Kennedy, J., concurring in part and dissenting in part). Most surprisingly, the issue that so closely divided the Supreme Court had rarely been decided in reported cases, and never with the kind of common-law analysis that the majority and the dissenters brought to bear. *Id.* at 1232. Although the odds are long after *Ayers*, it is still open to state courts of more pragmatic orientation to follow the lead of the four dissenters in using their state common-law powers to restrict recoveries.

Even on the occasion that state courts follow the *Ayers* majority, it will be interesting to see if they adopt, under state law, the limitation that the Court placed on recovery of fear-of-cancer damages under FELA: namely, the “important reservation” that a plaintiff may only recover damages for “genuine and serious” distress. *Id.* at 1223-24. The Court suggested that, under this standard, the *Ayers* plaintiffs’ evidence about a general apprehension of cancer might not have survived a motion for directed verdict. *Id.* Justice Kennedy recognized this to be a novel burden of proof, *id.* at 1235 (Kennedy, J., concurring in part and dissenting in part), and the majority itself even hints that its purpose was to impose some bounds on recoveries. *Id.* at 1224 n.17. The *Ayers* severity requirement, if widely adopted, may have some importance. Notions of increased epidemiological risk of disease are not something that the ordinary person readily understands or fears, especially since, as Justice Breyer pointed out, the persons most at risk for asbestos-related lung cancer are smokers, who by their natures are risktakers. *Id.* at 1238 (Breyer, J., concurring in part and dissenting in part). If a plaintiff can testify to no more than apprehension about a future cancer, and not serious emotional injury, damages should be disallowed.

Some plaintiffs’ counsel have questioned whether *Ayers*, having interpreted *Buckley*’s fear-of-cancer holding restrictively, suggests that *Buckley*’s medical monitoring holding should likewise be limited. At a basic level, that logic is flawed. Nothing in *Ayers* addresses medical monitoring, much less casts any doubt upon *Buckley*’s medical monitoring ruling. More fundamentally, that *Buckley* holding was quite narrow, deciding only that lump-sum damages could not be awarded for medical monitoring on proof of asbestosis, with the Court assuming *arguendo* that the future expenditure might constitute compensable “economic injury.” 521 U.S. at 438-44. In truth, medical monitoring costs are not an independent economic injury. The Restatement defines “injury” as the “invasion of any legally protected interest.” RESTATEMENT (SECOND) OF TORTS § 7(1) (1965). Asbestos exposure does not

invade any economic interest; *i.e.*, it is not an economic tort like unfair competition or tortious interference with contract. Rather, medical monitoring costs are at best consequential pecuniary harms that flow from an invasion of plaintiff's bodily interest in freedom from dangerous agents, and would be compensable as damages only if that interest were legally protected, in other words, if mere exposure were compensable physical "injury" under state tort law. But to consider medical monitoring costs as separate economic injury is to commit category error, and to ignore that the asbestos defendant has not invaded any economic interest of the worker. States allowing medical monitoring damages without a showing that they flow from present physical injury, or allowing recovery of such costs as equitable relief, Pankaj Venugopal, *The Class Certification of Medical Monitoring Claims*, 102 COLUM. L. REV. 1659, 1664-1670 (2002), substantially departs from traditional tort law.

Buckley left open the issue of whether a plaintiff with compensable physical injury can recover medical monitoring costs as damages, 521 U.S. at 444, but the hurdles are high even if such damages are not categorically barred. Where the issue is medical monitoring for cancer, for example, the first question would be whether the plaintiff's asbestos-related injury creates a significantly increased risk of disease relative to those without such injury. *See, e.g., In re Paoli R.R. PCB Litig.*, 35 F.3d 717, 787 (3d Cir. 1994). The epidemiological evidence linking asbestosis and lung cancer, for example, is based on populations dominated by persons with severe asbestosis,⁴ and should not support monitoring in the more common cases of mild asbestosis. Furthermore, the standards for awarding medical monitoring damages are stringent. They require, beyond substantial exposure caused by the defendant that significantly increases the plaintiff's risk of disease, expert testimony that "a reasonable physician would prescribe a monitoring regime different from the one that would have been prescribed in the absence of the exposure" and that "monitoring and testing procedures exist that make the early detection and treatment of the disease possible and beneficial." *Buckley*, 521 U.S. at 450 (Ginsburg, J., concurring in the judgment in part and dissenting in part).

In the end, what *Ayers* demonstrates is once again how ill-suited the common law tort system is to the problem of asbestos, with its long latency periods and complex effects. Not surprisingly, for the third time in five years, the Court called for Congress to enact national legislation to govern asbestos litigation. 123 S. Ct. at 1228; *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 597-599 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 & n.1 (1999). Indeed, no doubt spurred by *Ayers*, a bill to substitute a federal asbestos compensation remedy for the tort system has gained momentum. Jesse J. Holland, *Hatch Panel Adopts Criteria*, WASH. POST (June 25, 2003). Perhaps the madness will stop before long.

⁴*See* D. Henderson et al., ASBESTOS AND LUNG CANCER: IS IT ATTRIBUTABLE TO ASBESTOSIS OR TO ASBESTOS FIBER BURDEN, in *Pathology of Lung Cancer* 83, 83 (B. Corrin ed. 1997) (lung cancer risk "appears to increase with the severity of the pulmonary fibrosis and hence with the inhaled dose of asbestos"); H. Kipen, *Pulmonary Fibrosis in Asbestos Insulation Workers with Lung Cancer: A Radiological and Histopathological Evaluation*, 44 BRIT. J. INDUS. MED. 96, 97-99 (1987); W. Cookson et al., *Compensation, Radiographic Changes, and Survival in Applicants for Asbestosis Compensation*, 42 BRIT. J. INDUS. MED. 461, 464 (1985); F. Liddell & J. McDonald, *Radiological Findings as Predictors of Mortality in Quebec Asbestos Workers*, 37 BRIT. J. INDUS. MED. 257, 264 (1980).