Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

NORFOLK & WESTERN RAILWAY CO. *v.* AYERS ET AL.

CERTIORARI TO THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

No. 01–963. Argued November 6, 2002—Decided March 10, 2003

Alleging that petitioner Norfolk & Western Railway Company (Norfolk) had negligently exposed them to asbestos and thereby caused them to contract the occupational disease asbestosis, respondents, six former Norfolk employees (asbestosis claimants), brought this suit in a West Virginia state court under the Federal Employers' Liability Act (FELA). Section 1 of the FELA provides: "Every common carrier by railroad while engaging in [interstate commerce], shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the [carrier's] negligence." As an element of their damages, the asbestosis claimants sought recovery for mental anguish based on their fear of developing cancer. The trial court instructed the jury that a plaintiff who demonstrated a reasonable fear of cancer related to proven physical injury from asbestos was entitled to compensation for that fear as a part of the damages awardable for pain and suffering. The court also instructed the jury not to reduce recoveries because of nonrailroad exposures to asbestos, so long as the jury found that Norfolk was negligent and that dust exposures at Norfolk contributed, however slightly, to each plaintiff's injuries. The court rejected Norfolk's proposed instructions, which would have (1) ruled out damages for fear of cancer unless the claimant proved both an actual likelihood of developing cancer and physical manifestations of the alleged fear, and (2) required the jury to apportion damages between Norfolk and other employers alleged to have contributed to an asbestosis claimant's disease. The jury returned damages awards for each claimant. The Supreme Court of Appeals of West Virginia denied discretionary review.

Syllabus

Held:

1. Mental anguish damages resulting from the fear of developing cancer may be recovered under the FELA by a railroad worker suffering from the actionable injury asbestosis caused by work-related exposure to asbestos. Pp. 7–21.

(a) The trial 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 part of asbestosis-related pain and suffering damages. In so ruling, this Court follows the path marked by its decisions in *Consolidated Rail Corporation* v. *Gottshall,* 512 U. S. 532, and *Metro-North Commuter R. Co.* v. *Buckley,* 521 U. S. 424. *Gottshall* and *Metro-North* describe two categories of claims for emotional distress damages: Stand-alone emotional distress claims not provoked by any physical injury, for which recovery is sharply circumscribed by the common law zone-of-danger test; and emotional distress claims brought on by a physical injury, for which pain and suffering recovery is permitted. This case is properly placed in the emotional distress stemming from a physical injury category. The parties agree that the claimants suffer from asbestosis, a cognizable injury under the FELA. As *Metro-North* plainly indicates, when fear of cancer "accompanies a physical injury," pain and suffering damages may include compensation for that fear. *E.g.,* 521 U. S., at 430. The Court adheres to the clear line its recent decisions delineate. Pp. 7–10.

(b) Unlike stand-alone claims for negligently inflicted emotional distress, claims for pain and suffering associated with a physical injury are traditionally compensable. By 1908, when the FELA was enacted, the common law had evolved to encompass apprehension of future harm as a component of pain and suffering. In recent years, of the many courts that have ruled on the question presented here, a clear majority sustain recovery. Arguing against this trend, Norfolk and its *amici* assert that the asbestosis claimants' alleged cancer fears are too remote from asbestosis to warrant inclusion in their pain and suffering awards. *Amicus* United States refers to the "separate disease rule," under which most courts have held that the statute of limitations runs separately for each asbestos-related disease. Because the asbestosis claimants may bring a second action if cancer develops, the Government argues, cancer-related damages are unwarranted here. The question, as the Government frames it, is not *whether* the asbestosis claimants can recover for fear of cancer, but *when.* But those claimants did not seek, and the trial court did not allow, discrete damages for their *increased risk* of future cancer. Instead, they sought damages for their *current* injury, which, they allege, encompasses a *present fear* that the toxic exposure causative of asbestosis may later result in cancer. The Government's *"when,* not *whether"*

argument has a large gap; it excludes recovery for any fear experienced by an asbestosis sufferer who never gets cancer. To be compensable as pain and suffering, Norfolk further urges, a mental or emotional harm must have been "directly brought about by a physical injury." This argument elides over a key connection between Norfolk's conduct and the damages the asbestosis claimants allege as part of their pain and suffering: Once found liable for any bodily harm, a negligent actor is answerable in damages under the common law for emotional disturbance resulting from that harm or from the conduct which causes it. Given the acknowledgment by Norfolk's expert that asbestosis puts a worker in a heightened risk category for asbestos-related lung cancer, as well as the undisputed testimony of the asbestosis claimants' expert that some ten percent of asbestosis sufferers have died of mesothelioma, the claimants would have good cause for increased apprehension about their vulnerability to cancer. Although *Metro-North* stressed that holding employers liable to workers merely exposed to asbestos would risk "unlimited and unpredictable liability," 521 U. S., at 435, that decision sharply distinguished exposure-only plaintiffs from those who suffer from a disease, and stated, unambiguously, that the common law permits emotional distress recovery for the latter category, *e.g., id.,* at 436. The categorical exclusion of exposure-only claimants reduces the universe of potential claimants to numbers neither "unlimited" nor "unpredictable," for, of those exposed to asbestos, only a small fraction will develop asbestosis. Pp. 10–19.

(c) The Court affirms the qualification of an asbestosis sufferer to seek compensation for fear of cancer as an element of his asbestosis-related pain and suffering damages, but with an important reservation. It is incumbent upon the complainant to prove that his alleged fear is genuine and serious. In this case, proof directed to that matter was notably thin, and might well have succumbed to a straightforward sufficiency-of-the-evidence objection, had Norfolk so targeted its attack. But Norfolk, instead, sought categorical exclusion of cancer-fear damages for asbestosis claimants. This Court, moreover, did not grant review to judge the sufficiency of the evidence or the reasonableness of the damages awards. Pp. 19–21.

2. The FELA's express terms, reinforced by consistent judicial applications of the Act, allow a worker to recover his entire damages from a railroad whose negligence jointly caused an injury, thus placing on the railroad the burden of seeking contribution from other potential tortfeasors. Pp. 21–28.

(a) The statutory language supports the trial court's understanding that the FELA does not provide for apportionment of damages between railroad and nonrailroad causes. Section 1 of the Act

makes common carrier railroads "liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of such carrier." 45 U. S. C. §51. The claimants here suffer from asbestosis (an "injury"), which is linked to their employment with Norfolk and "result[ed] in whole or in part from . . . negligence" by Norfolk. Norfolk is therefore "liable in damages . . . *for such injury*." Nothing in the statutory text instructs that the amount of damages payable by a liable employer bears reduction when the negligence of a third party also contributed in part to the injury-in-suit. Norfolk maintains that the statutory language conveying that a railroad is liable only for injuries an employee sustains "while he is employed by such carrier" makes it clear that railroads are not liable for employee injuries resulting from outside causes. Placed in context, however, the clause on which Norfolk relies clarifies that the FELA's reach is limited to injuries sustained by railroad employees while the employees are themselves engaged in interstate commerce; the provision does not speak to cases in which an injury has multiple causes, some related to railroad employment and others unrelated to that employment. Moreover, interpreting §1 to require apportionment would put that provision in tension with the rest of the statute. Several of the FELA's provisions expand a railroad's liability by abolishing common-law defenses that limited employees' ability to recover against their employers. And although the Act expressly directs apportionment of responsibility between employer and employee based on comparative fault, it expressly prescribes no other apportionment. Pp. 21–23.

(b) Norfolk's view also runs counter to a century of FELA jurisprudence. No FELA decision made by this Court so much as hints that the statute mandates apportionment of damages among potentially liable tortfeasors. Also significant, there is scant lower court authority for the proposition that the FELA contemplates apportionment, and this Court has repeatedly stated that joint and several liability is the traditional rule, see, *e.g., The "Atlas,"* 93 U. S. 302, 315. Norfolk contends that the modern trend is to apportion damages between multiple tortfeasors. The state of affairs when the FELA was enacted, however, is the more important guide. See, *e.g., Monessen Southwestern R. Co.* v. *Morgan,* 486 U. S. 330, 336–339. At any rate, many States retain full joint and several liability, even more retain it in certain circumstances, and most of the recent changes away from the traditional rule have come through legislative enactments rather than judicial development of common-law principles. Congress, however, has not amended the FELA. Finally, reading the FELA to require apportionment would handicap plaintiffs and could vastly com-

plicate adjudications. Once an employer has been adjudged negligent with respect to a given injury, it accords with the FELA's overarching purpose to require the employer to bear the burden of identifying other responsible parties and demonstrating that some of the costs of the injury should be spread to them. Pp. 23–28.

Affirmed.

GINSBURG, J., delivered the opinion for a unanimous Court with respect to Parts I, II, and IV, and the opinion of the Court with respect to Part III, in which STEVENS, SCALIA, SOUTER, and THOMAS, JJ., joined. KENNEDY, J., filed an opinion concurring in part and dissenting in part, in which REHNQUIST, C. J., and O'CONNOR and BREYER, JJ., joined. BREYER, J., filed an opinion concurring in part and dissenting in part.