SUPREME COURT OF THE UNITED STATES

No. 01–963

NORFOLK & WESTERN RAILWAY COMPANY, PETITIONER *v.* FREEMAN AYERS ET AL.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF WEST VIRGINIA, KANAWHA COUNTY

[March 10, 2003]

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE BREYER join, concurring in part and dissenting in part.

The Court is correct, in my view, in rejecting the claim that damages awarded under the Federal Employers' Liability Act (FELA or Act) must be apportioned according to causal contribution among even absent joint tortfeasors. Parts I, II, and IV of its opinion have my full assent.

It is otherwise as to Part III. The Court allows compensation for fear of cancer to those who manifest symptoms of some other disease, not itself causative of cancer, though stemming from asbestos exposure. The Court's precedents interpreting FELA neither compel nor justify this result. The Court's ruling is not based upon a sound application of the common-law principles that should inform our decisions implementing FELA. On the contrary, those principles call for a different rule, one which does not yield such aberrant results in asbestos exposure cases. These reasons require my respectful dissent.

I

It is common ground that the purpose of FELA is to provide compensation for employees protected under the Act. *Ante*, at 6. The Court's decision is a serious threat to that objective. Although a ruling that allows compensa-

tion for fear of a disease might appear on the surface to be solicitous of employees and thus consistent with the goals of FELA, the realities of asbestos litigation should instruct the Court otherwise.

Consider the consequences of allowing compensation for fear of cancer in the cases now before the Court. The respondents are between 60 and 77 years old. All except one have a long history of tobacco use, and three have smoked for more than 50 years. They suffer from shortness of breath, but only one testified that it affects his daily activities. As for emotional injury, one of the respondents complained that his shortness of breath caused him to become depressed; the others stated, in response to questions from their attorneys, that they have some "concern" about their health and about cancer. For this, the jury awarded each respondent between $770,640 and $1,230,806 in damages, reduced by the trial court to between $523,605 and $1,204,093 to account for the comparative negligence of the respondents' cigarette use.

Contrast this recovery with the prospects of an employee who does not yet have asbestosis but who in fact will develop asbestos-related cancer. Cancers caused by asbestos have long periods of latency. Their symptoms do not become manifest for decades after exposure. See Selikoff et al., Latency of Asbestos Disease Among Insulation Workers in the United States and Canada, 46 Cancer 2736, 2740 (1980) (lung cancer becomes manifest 15–24 years after exposure); A. Churg & F. Green, Pathology of Occupational Lung Disease 350 (2d ed. 1998) ("The latency period for asbestos-induced mesothelioma is long, with a mean value of 30 to 40 years"); see generally Mustacchi, Lung Cancer Latency and Asbestos Liability, 17 J. Legal Med. 277 (June 1996) (discussing the pathogenesis of asbestos-related carcinomata). These cancers inflict excruciating pain and distress—pain more severe than that associated with asbestosis, distress more harrowing than

the fear of developing a future illness.

One who has mesothelioma, in particular, faces agonizing, unremitting pain in the lungs, which spreads throughout the thoracic cavity as tumors expand and metastasize. See W. C. Morgan & A. Seaton, Occupational Lung Diseases 353 (3d ed. 1995). The symptoms do not subside. Their severity increases, with death the only prospect for relief. And death is almost certain within a short time from the onset of mesothelioma. See *ibid.* ("Death usually occurs within 18 months to 2 years . . . . A minority of patients, somewhere around 15%, survive 3 to 4 years"). Yet the majority's decision endangers this employee's chances of recovering any damages for the simple reason that, by the time the worker is entitled to sue for the cancer, the funds available for compensation in all likelihood will have disappeared, depleted by verdicts awarding damages for unrealized fear, verdicts the majority is so willing to embrace.

This Court has recognized the danger that no compensation will be available for those with severe injuries caused by asbestos. See *Amchem Products, Inc.* v. *Windsor,* 521 U. S. 591, 598 (1997) ("'[E]xhaustion of assets threatens and distorts the process; and future claimants may lose altogether'") (quoting Report of the Judicial Conference Ad hoc Committee on Asbestos Litigation 2–3 (Mar. 1991)); 521 U. S., at 632 (BREYER, J., concurring in part and dissenting in part). In fact the Court already has framed the question that should guide its resolution of this case:

> "In a world of limited resources, would a rule permitting immediate large-scale recoveries for widespread emotional distress caused by fear of future disease diminish the likelihood of recovery by those who later suffer from the disease?" *Metro-North Commuter R. Co.* v. *Buckley,* 521 U. S. 424, 435–436 (1997).

The Court ignores this question and its warning. It is only

a matter of time before inability to pay for real illness comes to pass. The Court's imprudent ruling will have been a contributing cause to this injustice.

Asbestos litigation has driven 57 companies, which employed hundreds of thousands of people, into bankruptcy, including 26 companies that have become insolvent since January 1, 2000. See RAND Institute for Civil Justice, S. Carroll et al., Asbestos Litigation Costs and Compensation: An Interim Report 71 (2002) Petitioner's Supplemental Lodging, p. SL82. With each bankruptcy the remaining defendants come under greater financial strain, see Edley & Weiler, Asbestos: A Multi-Billion-Dollar Crisis, 30 Harv. J. Legis. 383, 392 (1993); M. Plevin & P. Kalish, What's Behind the Recent Wave of Asbestos Bankruptcies? 16 Mealey's Litigation Report: Asbestos 35 (Apr. 20, 2001), and the funds available for compensation become closer to exhaustion, see Schuck, The Worst Should Go First: Deferral Registries in Asbestos Litigation, 15 Harv. J. L. & Pub. Pol'y 541, 547 (1992).

In this particular universe of asbestos litigation, with its fast diminishing resources, the Court's wooden determination to allow recovery for fear of future illness is antithetical to FELA's goals of ensuring compensation for injuries. Cf. *Consolidated Rail Corporation* v. *Gottshall,* 512 U. S. 532, 555 (1994) (describing FELA's "central focus on physical perils"); *Metro-North, supra*, at 430 (noting that *Gottshall* relied upon cases involving "a threatened physical contact that caused, or might have caused, immediate traumatic harm"). As a consequence of the majority's decision, it is more likely that those with the worst injuries from exposure to asbestos will find they are without remedy because those with lesser, and even problematic, injuries will have exhausted the resources for payment. Today's decision is not employee-protecting; it is employee-threatening.

II

When the Court asks whether the rule it adopts has been settled by the common law, the answer, in my view, must be no. The issue before us is new and unsettled, as is evident from the diverse approaches of state and federal courts to this problem. In its comprehensive discussion, the majority cites some authorities that, it must be acknowledged, could be interpreted to support the Court's position. The result it reaches, however, is far from inevitable, and the rule the majority derives does not comport with our responsibility to develop a federal common law that administers FELA in an effective, principled way.

A

I disagree with the Court's conclusion that damages for fear of cancer may be recovered as part of the pain and suffering caused by asbestosis. *Ante*, at 9. The majority observes that a person who suffers from "a disease" may recover for all "related" emotional distress. *Ante*, at 8 (courts "'*do* permit a plaintiff *who suffers from a disease* to recover for related negligently caused emotional distress'") (quoting *Metro-North, supra*, at 432)). While that may be true as a general matter, it begs the question: What relationship between a disease and associated emotional distress should entitle a person to compensation for the distress as pain and suffering?

The Court's precedent applying FELA provides the answer. To qualify as compensable pain and suffering, a person's emotional distress must be the direct consequence of an injury or condition. See *Gottshall*, 512 U. S., at 544 ("[T]hese terms traditionally have been used to describe sensations stemming directly from a physical injury or condition" (internal quotation marks omitted)). Damages for emotional harms that are less direct may be recovered only pursuant to a stand-alone tort action for negligent infliction of emotional distress. *Ibid.* (defining negligently

inflicted 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").

The common law accords with this rule. The weight of authority defines pain and suffering as emotional distress that is the direct consequence of an injury. See Minneman, Future Disease or Condition, or Anxiety Relating Thereto, as Element of Recovery, 50 A. L. R. 4th 13, 25 (1986) ("[T]he fear that an existing injury will lead to the future onset of an as yet unrealized disease or condition is an element of recovery only where such distress . . . is the natural consequence of, or reasonably expected to flow from, the injury"); see also Restatement (Second) of Torts §456(a) (1963–1964) (hereinafter Restatement) (tortfeasor liable for "fright, shock, or other emotional disturbance resulting from the bodily harm or from the conduct which causes it").

This category of emotional distress includes certain types of fears. The fright that accompanies a dog bite or a radiation burn, for example, may be said to result from an injury because it arises without any intervening cause, such as a medical examination. See *The Lord Derby*, 17 F. 265, 267 (ED La. 1883) ("To many people the shock to the system resulting from the most insignificant bite of a dog drawing blood is such that no money compensation is adequate"). The passage in the Restatement deeming compensable "emotional disturbance resulting from the bodily harm or from the conduct which causes it," §456(a), refers, as the official commentary makes clear, to this sort of instantaneous emotional trauma arising from the tortious act. See *id.*, Comment *e* ("Thus one who is struck by a negligently driven automobile and suffers a broken leg may recover not only for his pain, grief, or worry resulting from the broken leg, but also for his fright at seeing the car about to hit him").

Other, less immediate fears also might qualify as pain and suffering, but only if they are the direct result of an injury. See *id.,* §456, Comment *d* (clarifying that recovery is "not limited to immediate emotional disturbance accompanying the bodily harm, or following at once from it, but includes also subsequent emotional disturbance brought about by the bodily harm itself").

Applying these standards to the instant case, I do not think the brooding, contemplative fear the respondents allege can be called a direct result of their asbestosis. Unlike shortness of breath or other discomfort asbestosis may cause, their fear does not arise from the presence of disease in their lungs. Instead, the respondents' 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.

The majority nevertheless would permit recovery because "[t]here is an undisputed relationship between exposure to asbestos sufficient to cause asbestosis, and asbestos-related cancer." *Ante*, at 16. To state that some relationship exists without examining whether the relationship is enough to support recovery, however, ignores the central issue in this case. There is a fundamental premise in this case—conceded, as I understand it, by all parties—and it is this: There is no demonstrated causal link between asbestosis and cancer. See Churg & Green, Pathology of Occupational Lung Disease, at 313. The incidence of asbestosis correlates with the less-frequent incidence of cancer among exposed workers, *ibid.*, but this does not suffice. Correlation is not causation. Absent causation, it is difficult to conceive why asbestosis is any more than marginally more suitable a predicate for recovering for fear of cancer than the fact of mere exposure. This correlation the Court relies upon does not establish a

direct link between asbestosis and asbestos-related cancer, and it does not suffice under common-law precedents as a predicate condition for recovery of damages based upon fear.

It must be conceded that courts in some common-law jurisdictions have ruled that fear of cancer is compensable as pain and suffering before the cancer is diagnosed, but the majority's extensive citations are not that persuasive. The Court collects cases from 12 jurisdictions that comport with its result, but only 5 of these were decided by the high court of a State. *Ante*, at 12–13, and n. 10. Moreover, three would allow recovery for fear of cancer predicated upon mere exposure to asbestos, see *Denton* v. *Southern R. Co.*, 854 S. W. 2d 885, 889 (Tenn. App. 1993) (citing *Hagerty* v. *L & L Marine Servs., Inc.*, 788 F. 2d 315, 318 (CA5 1986)); *Lavelle* v. *Owens-Corning Fiberglas Corp.*, 30 Ohio Misc. 2d 11, 14, 507 N. E. 2d 476, 480 (Ct. Common Pleas, Cuyahoga Cty. 1987); *Devlin* v. *Johns-Manville Corp.*, 202 N. J. Super. 556, 563, 495 A. 2d 495, 499 (1985), a result contrary to our own holding in *Metro-North*. Five more appear to allow recovery with the onset of pleurisy, see *Capital Holding Corp.* v. *Bailey*, 873 S. W. 2d 187, 194 (Ky. 1994); *Beeman* v. *Manville Corp. Asbestos Disease Compensation Fund*, 496 N. W. 2d 247, 250 (Iowa 1993); *Celotex Corp.* v. Wilson, 607 A. 2d 1223, 1229–1230 (Del. 1992); *Mauro* v. *Raymark Industries, Inc.*, 116 N. J. 126, 129–130, 561 A. 2d 257, 258–259 (1989); *Wolff* v. *A-One Oil, Inc.*, 216 App. Div. 2d 291, 292, 627 N. Y. S. 2d 788, 789–790 (1995), again a result even today's Court would reject, *ante*, at 15–17 and n. 14. In the end, cases from only five of those jurisdictions support the majority's analysis, none of them decided by a state high court.

On the other hand, as the majority acknowledges, some courts have ruled that fear of cancer should not be compensable as pain and suffering. *Ante*, at 12, n. 10. These decisions are based, in part, upon the "separate disease

rule," which allows a person who has recovered for injuries resulting from asbestosis to bring a new lawsuit—notwithstanding the traditional common-law proscription against splitting a cause of action—if cancer develops. See *Wilson* v. *Johns-Manville Sales Corp.*, 684 F. 2d 111, 120–121 (CADC 1982) (Ginsburg, J.). The rule has been adopted by a majority of jurisdictions, see Henderson & Twerski, Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring, 53 S. C. L. Rev. 815, 821, and n. 22 (2002) (collecting cases), and the Court does not suggest that it would not apply in cases brought under FELA.

The separate disease rule is pertinent for at least two reasons. First, it illustrates that courts have found it necessary to construct fair and sensible common-law rules for resolving the problems particular to asbestos litigation. Second, it establishes that a person with asbestosis will not be without a remedy for pain and suffering caused by cancer. That person can and will be compensated if the cancer develops. This eliminates the need courts might otherwise perceive to avert the danger that relief might be foreclosed in the future.

The Supreme Court of Pennsylvania reached this conclusion, and its reasoning deserves attention when the Court suggests the common law is so well settled:

> "[D]amages for fear of cancer are speculative. The awarding of such damages would lead to inequitable results since those who never contract cancer would obtain damages even though the disease never came into fruition.
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> . . . . .
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> "In any case, Appellants are not left without a remedy for their mental anguish. [Pennsylvania case law] permits an action to be commenced if cancer develops. It is in this action that Appellants can assert their

> emotional distress or mental anguish claims. To allow the asbestos plaintiff in a non-cancer claim to recover for any part of the damages relating to cancer, including the fear of contracting cancer, erodes the integrity of and purpose behind the [separate] disease rule." *Simmons* v. *Pacor, Inc.*, 543 Pa. 664, 677–678, 674 A. 2d 232, 238–239 (1996).

This analysis is persuasive because it accounts, in a way that the majority's decision does not, for changes already underway in common-law rules for compensating victims of a disease with a long latency period. This approach surely is more likely to result in an equitable allotment of compensation than the decision of the Court; and this is the rule the Court should adopt to govern the availability of damages for fear of cancer under FELA.

Pennsylvania is not alone in rejecting the majority's view. In a careful opinion applying California law, the United States District Court for the Northern District of California held that parasitic damages for fear of cancer may be recovered only where there is a verifiable causal nexus between the injury suffered and the cancer feared. *Barron* v. *Martin-Marietta Corp.*, 868 F. Supp. 1203, 1211–1212 (1994). The court recognized that California courts had not yet addressed the type of physical injury that would permit compensation for fear of cancer, see *id.*, at 1210, n. 9, but it determined that the requirement of a causal nexus was a clear, implication of recent California Supreme Court precedent, see *id.*, at 1212 (citing *Potter* v. *Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 863 P. 2d 795 (1993)). The justification for this prerequisite is significant in this case as well:

> "If no nexus were required between cancer and an alleged injury, an injury akin to a spinal puncture, serious but unrelated to cancer, would admit recovery of parasitic damages for fear of cancer. Indeed, any seri-

> ous physical injury, however unrelated to cancer, would permit fear-of-cancer damages." 868 F. Supp., at 1211.

The proofs offered by the claimants in *Barron* were insufficient on summary judgment to meet that burden under California law, and the respondents in today's case also would be incapable of recovering under that standard.

Other common-law authorities the majority cites do not compel a contrary result. It is of no help to the respondents that "mental anguish related to a physical injury is recoverable even if 'the underlying future prospect is not itself compensable inasmuch as it is not sufficiently likely to occur.'" *Ante*, at 10 (quoting Minneman, 50 A. L. R. 4th, at 25). This principle cannot sustain an award when, as here, there is a tangential, and no causal, relationship between the present injury suffered and the future disease feared. *Ibid.* ("Thus, damages for mental anguish concerning the chance that a future disease or condition will result from an original injury are generally not recoverable where the connection between the anxiety and the existing injury is too remote or tenuous").

The respondents' characterization, furthermore, finds no support in the part of the Restatement quoted by the majority. *Ante*, at 15 ("[A] negligent actor is answerable in damages for emotional disturbance 'resulting from the bodily harm *or from the conduct which causes it*'" (quoting Restatement §456(a))). As described *supra*, at 6–7, the commentary suggests that this statement would allow recovery for direct or immediate emotional trauma resulting from a tortious act, see Restatement §456(a), Comment *e*. The respondents do not claim to have experienced any shock or trauma arising from their exposure to asbestos or from the onset of their asbestosis. With almost no variation, they complained only of concern, for which the Restatement provides no guidance as to whether

damages should be awarded.

More important, while the disagreement among state courts about how to address this problem is telling, it is important to keep in mind the nature of the Court's responsibility under FELA. The implementation of the Act is a matter of federal common law, see *Urie* v. *Thompson*, 337 U. S. 163, 173 (1949), and it is for the Court to develop and administer a fair and workable rule of decision, see *Brady* v. *Southern R. Co.*, 320 U. S. 476, 479 (1943) ("[T]he question must be determined by this Court finally"); see also *Gottshall*, 512 U. S., at 558 (SOUTER, J., concurring) ("That duty is to develop a federal common law of negligence under FELA, informed by reference to the evolving common law"). State-court precedent is not dispositive. See *Dice* v. *Akron, C. & Y. R. Co.,* 342 U. S. 359, 361 (1952) ("State laws are not controlling in determining what the incidents of this federal right shall be"). Instead, the Court is bound only by the terms of FELA and its own precedent giving meaning to the Act. Within those constraints, the Court must endeavor to arrive at the correct rule—a rule that is just and practical—rather than the majority rule or the rule of the Restatement.

These considerations establish the proper rule for the case. Although the anxiety generated by an increased awareness about a disease may be real and painful, it lacks the direct link to a physical injury that suffices for recovery. Cf. *Metro-North*, 521 U. S., at 432 (denying fear-of-cancer recovery where condition "causes emotional distress only because the worker learns that he may become ill after a substantial period of time"). The respondents' entitlement to compensation for their fear of cancer turns upon their ability to make out a claim for negligent infliction of emotional distress; and they cannot do so.

B

If viewed as alleging negligent infliction of emotional

distress, the respondents' claims fail for the same reasons the Court disallowed recovery in *Metro-North*. There, the employee was exposed to massive amounts of asbestos for one hour of each working day for three years. See *id.,* at 427. He presented testimony about his fear of developing cancer. *Ibid.* Two expert witnesses testified that the employee's fear was at least reasonable because his exposure to asbestos increased the likelihood of contracting cancer, after discounting for a 15-year tobacco habit, by between one and five percent. *Ibid.*

Despite these indications of genuine emotional distress, the Court held the exposure did not satisfy the "zone of danger" test and denied any recovery for fear of cancer. *Id.*, at 430. The Court explained that the claim implicated the traditional concerns underlying common-law restrictions upon recovery for emotional distress. See *id.*, at 433. The distress the employee alleged, including his emotional reaction to an incremental, increased risk of dying from cancer, was beyond the ability of a jury to evaluate with precision, heightening the danger that damages would be based upon speculation or caprice, see *id.*, at 435.

The respondents' claims implicate these considerations to the same or greater degree than in *Metro-North*. Each respondent seeks damages for his emotional response to being told he has an increased likelihood of dying. *Ibid.* The extent of the distress the respondents suffered is not calculable with a precision sufficient to permit juries to award damages, for the distress is simply incremental from the fears already shared by the general population.

The respondents observe, with extensive support in the medical literature, that a person with asbestosis has a 10 percent chance of developing mesothelioma, and that 39 percent of smokers with asbestosis develop fatal lung cancer; that cohort, however, drops to 5 percent, at most, for nonsmokers with asbestosis. While these statistics might at first appear to provide the beginning of an argu-

ment for giving asbestosis sufferers recovery for fear, the average American male has a 44 percent chance of developing cancer during the course of his life, and his chance of dying from some form of cancer is more than 21 percent. See L. Ries et al., National Cancer Institute, SEER Cancer Statistics Rev., 1973–1999, Tables I–15, I–16 (2002), available at http://Seer.Cancer.gov/csr/1973_1949/overview.pdf (as visited Feb. 10, 2003) (available in Clerk of Court's case file). This literature also suggests that a person who smokes has more than a 50 percent chance of dying from a disease caused by tobacco use, see National Cancer Institute, Changes in Cigarette-Related Disease Risks & Their Implication for Prevention and Control, Smoking & Tobacco Control Monograph, No. 8, 1997, at xi, Table1, a risk that all but one of the respondents has incurred that is wholly separate from their exposure to asbestos.

It is beyond the ability of juries to derive from statistics like these a fair estimate of the danger caused by negligent exposure to asbestos. See *Metro-North, supra*, at 435. For this reason, the trial judge was correct to instruct the jury that they could not award the respondents any damages for cancer or for an increased risk of cancer. In disallowing recovery for risk but allowing recovery for fear based on that risk, however, the trial judge attempted to avoid speculation at the outset but succumbed to added speculation in the end. If instructing a jury to calculate an increased risk of cancer invites speculation, then asking the jury to infer from its estimate a rough sense of the fear based on the risk invites speculation compounded.

The damages the jury awarded in this case indicate the legitimacy of these concerns. As described above, *supra*, at 2, the respondents received damages of between $500,000 and $1.2 million despite having complained only that they suffered shortness of breath and experienced varying degrees of concern about cancer. This evidence of

injury and the compensation awarded is recited here not "to reweigh that evidence in light of information not presented at trial," *ante*, at 15, n. 13, or "to judge the sufficiency of the evidence or the reasonableness of the damages awards," *ante*, at 18. Rather, it is instructive as to what results in a single case when a jury is charged with translating into dollar amounts confusing and contested evidence about the nature of a complicated harm. It demonstrates the speculative, unreasoned kind of award generated when a jury is presented vivid testimony about the agony of cancer, provided expert evidence that a person's chances of developing that cancer have increased, but admonished that only the fear of that cancer—and not the cancer itself, or a heightened risk of developing cancer—is compensable.

The majority would allow such awards, but with the "important reservation" that a plaintiff must "prove that his alleged fear is genuine and serious." *Ante*, at 19. There is no basis in our FELA jurisprudence for establishing this burden of proof, and it would be a difficult standard for judges to enforce. The Court has rejected the notion that review for "genuineness" could ameliorate the threat of unlimited and unpredictable liability. See *Gottshall*, 512 U. S., at 552. In explaining its skepticism, the Court observed:

> "Such a fact-specific test . . . would be bound to lead to haphazard results. Judges would be forced to make highly subjective determinations concerning the authenticity of claims for emotional injury, which are far less susceptible to objective medical proof than are their physical counterparts. To the extent the genuineness test could limit potential liability, it could do so only inconsistently. . . . In the context of claims for intangible harms brought under a negligence statute, we find such an arbitrary result unacceptable." *Ibid.*

The Court's response to the possibility of speculative awards is instead to adopt common-law rules restricting the classes of plaintiffs eligible to seek recovery and the types of emotional distress for which recovery is available. See *ibid.;* see also *Metro-North,* 521 U. S., at 436. This is not to say that allegations of emotional distress need not be genuine and serious in order to warrant compensation, but review for genuineness alone does little or nothing to prevent capricious outcomes. Instead, the responsibility of today's Court is not to review whether an individual claim alleging fear of cancer is genuine and severe, but to adopt a rule that reconciles the need to provide compensation for deserving claimants with the concerns that speculative damages awards will exhaust the resources available for recovery.

III

The Court, to be sure, does refer to the admonition in *Metro-North* that common-law rules must be adopted to avoid the risk of "'unlimited and unpredictable liability.'" *Id.,* at 433 (quoting *Gottshall*, 512 U. S. at 557). Yet the rule it adopts is an unreasoned rule of limitation—a rule that does not advance the goal of ensuring that fair and sensible principles will govern recovery for injuries caused by asbestos.

The majority ends its opinion with a plea for legislative intervention, *ante*, at 28, an entreaty made before, see *Ortiz* v. *Fibreboard Corp.,* 527 U. S. 815, 821 (1999); *id.,* at 865 (REHNQUIST, C. J., concurring); *id.*, at 866–867 (BREYER, J., dissenting). This case arises under FELA, however, by which Congress has directed the courts, and ultimately this Court, to use their resources to develop equitable rules of decision. It is regrettable that the Court today does not accept that responsibility.

These reasons explain my dissent from Part III of the Court's opinion.