

Opinion of BREYER, J.

**SUPREME COURT OF THE UNITED STATES**

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No. 01–963

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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 BREYER, concurring in part and dissenting in part.

I join Parts I, II, and IV of the Court’s opinion. I agree with JUSTICE KENNEDY, however, that the law does not permit recovery for “fear of cancer” in this case. And I join his opinion dissenting from Part III. Because the issue is a close and difficult one, I mention several considerations that, in my mind, tip the balance.

Unlike the majority, I do not believe that the Restatement (Second) of Torts (1963–1964) (hereinafter Second Restatement) comes close to determining the correct answer to the legal question before us. Cf. *ante*, at 10, 15 (majority opinion). The Second Restatement sets forth a general rule of recovery for “fright, shock, or other emotional disturbance” where an “actor’s negligent conduct has so caused any bodily harm to another as to make him liable for” it. §456. But the Second Restatement 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. *Ibid*.

The underlying history underscores the openness of the legal question and the consequent uncertainty as to the answer. When Congress enacted the Federal Employers’ Liability Act (FELA) in 1908, 45 U. S. C. §§51–60, the

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kinds of injury that it primarily had in mind were those resulting directly from physical accidents, such as railway collisions and entanglement with machinery. See *Consolidated Rail Corporation v. Gottshall*, 512 U.S. 532, 542 (1994). And (where negligent conduct was at issue) the Restatement nearest in time to FELA’s enactment (and therefore presumably likely to be more reflective of the background rules that FELA then assumed, cf. *id.*, at 554–555) limited recovery for related emotional distress to concrete harm resulting from that distress. Restatement of Torts §456 (1934) (hereinafter Restatement). In particular, this earlier Restatement restricted recovery to “physical harm resulting . . . from fright or shock or other similar and immediate emotional disturbance” substantially caused by the underlying injury or negligent conduct. *Ibid.*

The later Second Restatement reflects subsequent court decisions that liberalized this rule—in the earlier Restatement’s words) by extending recovery beyond “physical harm” produced by “emotional disturbance,” and by removing the words “similar and immediate.” §456. Linguistically speaking, these changes to the Restatement *might* reflect judicial extension of the scope of “emotional disturbance” far beyond “expectable” or “intended” fears that normally accompany, say, a collision or other machinery-related accident, Second Restatement §905, Comment *e*, p. 458 (1977). They *might* reflect judicial extension of liability to the kind of “brooding, contemplative fear” at issue here, *ante*, at 7 (KENNEDY, J., concurring in part and dissenting in part). But they also *might* reflect more limited judicial holdings—say, holdings that extend liability to fears that arise directly from the compensable injury itself (*e.g.*, the fear of “shortness of breath,” App. 298–299) or which arise directly from the conduct that caused the injury (say, the fear of inhaling asbestos fibers in a visible cloud of dust). The Second Restatement does not say.

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Nor do the Second Restatement's examples resolve the problem. The most expansive example of recovery involves not worry connected with toxic torts or the like, but a considerably more restricted, directly connected worry "about the securing of shelter for [one's self] and family" after "wanto[n]" eviction—the wantonness of the eviction being a *special factor* warranting particularly broad recovery. Second Restatement §905, Illustration 8, at 458; see also *id.*, §905, Comment *e*, at 458.

Most important, different courts have come to different conclusions about recovery for fear of cancer itself (even when triggered by physical injury). The Restatements are not statutes. They simply reflect predominant judicial views. And the variety of answers courts have given to the question at issue here demonstrates that courts have not reached a consensus. See *ante*, at 12–14, and n. 11 (majority opinion); *ante*, at 8–9 (opinion of KENNEDY, J.).

Given the legal uncertainty, this Court, acting like any court interpreting the common law, see *ante*, at 12 (opinion of KENNEDY, J.), should determine the proper rule of law through reference to the underlying factors that have helped to shape related "emotional distress" rules. Those factors argue for the kind of liability limitation that JUSTICE KENNEDY has described, *ante*, at 12.

First, the law in this area has sought to impose limitations that separate valid, important emotional distress claims from less important, trivial, or invalid claims. See *Metro-North Commuter R. Co. v. Buckley*, 521 U. S. 424, 433 (1997). The presence of physical harm often provides a central touchstone in this regard. But that does not work here. That is because, given ordinary background risks, the increment in a person's fear of cancer due to diagnosis of a condition such as asbestosis seems virtually impossible to evaluate. See *ante*, at 13–14 (opinion of KENNEDY, J.). The evidence (viewed in the plaintiffs' favor) indicates that, for a nonsmoker, a diagnosis of asbestosis may in-

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crease the perceived risk of dying of cancer from something like the ordinary background risk of about 22% (about two chances in nine) to about one chance in three. See *ante*, at 16–17 (majority opinion); *ante*, at 13–14 (opinion of KENNEDY, J.). See also L. Ries et al., National Cancer Institute, SEER Cancer Statistics Rev., 1973–1999, Table I–16 (2002), available at [http://seer.cancer.gov/csr/1973\\_1999/overview.pdf](http://seer.cancer.gov/csr/1973_1999/overview.pdf) (as visited Mar. 3, 2003) (available in Clerk of Court’s case file). Would a reasonable person who is not already afraid of cancer when the odds of dying are about two in nine suddenly develop a “genuine and serious” and “reasonable” fear when those odds change to one in three? Would a smoker, a risk-taker whose conduct has already increased the chance of cancer death to, say, about one in four, compare Cagle, *Criteria for Attributing Lung Cancer to Asbestos Exposure*, 117 Am. J. Clin. Path. 9 (2002), with Ries, *supra*, at Table I–16, and whose chance of dying of a smoking-related disease is already about 50–50, Centers for Disease Control and Prevention, *Projected Smoking-Related Deaths Among Youth—United States*, 45 Morbidity and Mortality Weekly Report 971 (1996), suddenly develop a reasonable, genuine, and serious fear of cancer when the chance of cancer or smoking-related death rises even further? There is simply no way to know, and it is close to impossible, in the ordinary case, to evaluate a plaintiff’s affirmative answer.

Second, the law’s recovery-limiting rules have sought to avoid pure jury speculation, speculation that can produce “unlimited and unpredictable liability.” *Metro-North, supra*, at 433 (internal quotation marks omitted). How is the jury, without speculation, to measure compensation for the augmentation of a cancer fear from, say, two in nine to one in three? Given the fact that most of us lead our lives without compensation for fear of a 22% risk of cancer death, Ries, *supra*, at Table I–16, what monetary value can one attach to an incrementally increased fear

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due to a risk, say, of 30%? The problem here is not the unreality or lack of seriousness of the fear. It may be all too real. The problem is the impossibility of knowing an appropriate compensation for asbestosis insofar as its appearance tears away that veil of disregard that ordinarily shelters most of us from fear of cancer, if not fear of death itself. The majority's verdict control measures, *ante*, at 21, n. 19, will not help much in this respect.

Third, it would be perverse to apply tort law's basic compensatory objectives in a way that compensated less serious injuries at the expense of more serious harms. Yet, as JUSTICE KENNEDY points out, the majority's broad interpretation of the scope of compensable fears threatens to do precisely that. The kind of fear at issue here—a "brooding, contemplative fear," *ante*, at 7 (opinion of KENNEDY, J.), brought about by knowledge of exposure to a substance, or of a present condition, correlated with an elevated cancer risk—is associated quite generally with negligent exposure to toxic substances. In addition to generating fear of cancer, such exposure may well produce large numbers of plaintiffs, serious injuries, and large monetary awards—all against limited funds available for compensation. And, as the history of asbestos litigation shows, such a combination of circumstances can occur despite a threshold requirement of physical harm.

In such cases, as JUSTICE KENNEDY points out, a rule that allows everyone who suffers some physical harm to recover damages for fear of correlated cancer threatens, in practice, to exhaust the funds available for those who develop cancer in the future, including funds available to compensate for fear of cancer that has actually developed. *Ante*, at 4. It is estimated, for example, that asbestos litigation has already consumed over \$50 billion and that the eventual cost may substantially exceed \$200 billion. RAND Institute for Civil Justice, S. Carroll et al., *Asbestos Litigation Costs and Compensation: An Interim Report* 81

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(2002), Petitioner's Supplemental Lodging, p. SL82 (hereinafter RAND Institute). The costs have driven dozens of companies into bankruptcy. *Ante*, at 4 (opinion of KENNEDY, J.). They have also largely exhausted certain funds set aside for asbestos claimants—reducing the Johns-Manville Trust for asbestos claimants, for example, from a fund that promised to pay 100% of the value of liquidated claims to a fund that now pays only 5%. RAND Institute 79–80. The concern that tomorrow's actual cancer victims will recover nothing—for medical costs, pain, or fear—is genuine. Cf. *ante*, at 4 (opinion of KENNEDY, J.). And that genuine concern requires this Court to make hard choices. Members of this Court have indicated that Congress should enact legislation to help resolve the asbestos problem. See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U. S. 815, 865 (1999) (REHNQUIST, C. J., concurring). Congress has not responded. But that lack of response does not require the courts to ignore the practical problems that threaten the achievement of tort law's basic compensatory objectives. In this case, those concerns favor a legal rule that will permit future cancer victims to recover for their injuries, including emotional suffering, even if that recovery comes at the expense of limiting the recovery for fear of cancer available to those suffering some present harm.

For these reasons, I would accept the majority's limitations on recovery, *ante*, at 19, while adding further restrictions to rule out recovery for fear of disease when the following conditions are met: (1) actual development of the disease can neither be expected nor ruled out for many years; (2) fear of the disease is separately compensable if the disease occurs; and (3) fear of the disease is based upon risks not significantly different in kind from the background risks that all individuals face. Where these conditions hold, I believe the law generally rules out recovery for fear of cancer. This is not to say that fear of

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cancer is never reimbursable. The conditions above may not hold. Even when they do, I would, consistent with the sense of the common law, permit recovery where the fear of cancer is unusually severe—where it significantly and detrimentally affects the plaintiff’s ability to carry on with everyday life and work. Cf. *Ferrara v. Galluchio*, 5 N. Y. 2d 16, 19, 152 N. E. 2d 249, 251 (1958) (awarding damages for a psychiatrist-confirmed case of “severe cancerophobia” from a radiation burn). However, because I believe that the above limitations create a rule more restrictive than the jury charge here, *ante*, at 4 (majority opinion), and, indeed, would bar recovery as a matter of law in this case, I too respectfully dissent from Part III of the Court’s opinion.