U.S.: Asbestosis And "Fear Of" Cancer Damages

In Norfolk & Western Railway Co. v. Freeman A.S., et al., the Supreme Court made two rulings on issues under the Federal Employers Liability Act ("FELA"). Both have important implications for claims under the Jones Act in the United States (seamen’s personal injury).

The first issue was whether railroad workers suffering from asbestosis could recover for asbestosis-related "pain and suffering" including damages for fear of developing cancer. The Court, by a 5-4 majority held that "mental anguish damages resulting from the fear of developing cancer may be recovered under FELA by a railroad worker suffering from the actual injury of asbestosis caused by work-related exposure to asbestosis." The second issue was whether the defendant railroad could apportion plaintiffs' damages among other alleged tortfeasors and therefore limit its liability to the injured railroad workers to a proportionate share. The Court ruled, unanimously, "we similarly decline to write new law by requiring initial apportionment of damages among potential tortfeasors." It stated that "the burden of seeking contribution from other tortfeasors" lay with the defendants originally found liable.

The Background Facts

Six asbestosis claimants, five of whom had cigarette-smoking histories, brought an action against their former employer, the Norfolk & Western Railway Co., under FELA asserting that they had been negligently exposed to asbestos which caused them to contract asbestosis. The majority noted the symptoms of asbestosis, which include "shortness of breath, coughing and fatigue." However, as one of the dissenting justices wryly noted, "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."

Nevertheless, as part of their claim for damages arising from that alleged disease, the asbestosis claimants sought recovery for "mental anguish based on their fear of developing cancer." At trial, plaintiffs’ evidence included statistics showing that the risk of dying of the fatal cancer, mesothelioma, rose to 1 in 10 for asbestosis sufferers. The trial court concluded that none of the plaintiffs had shown that he was reasonably certain to develop cancer and therefore the jury could not award damages for "cancer or any increased risk of cancer." The trial court stated, however, that testimony as to the risk of contracting mesothelioma could be considered in the context of a claim for damages for "fear of" developing cancer, rejecting the railroad’s assertion that such damages could only be considered if the claimant proved both the actual likelihood of developing cancer and the physical manifestations of the alleged fear. The jury then issued a plaintiffs’ verdict. The damage awards ranged from $770,000 to $1.2 million for each claimant. They did not separate out any particular elements of the damages, including the "fear of" damages.

Unfortunately, the railroad did not attempt to clarify those determinations or, indeed, seek to establish what element of those awards represented the "fear of" damages.

The Supreme Court of Appeals of West Virginia denied discretionary review. The U.S. Supreme Court agreed to hear the railroad's appeal.

The Majority Decision

The majority reviewed two prior Supreme Court decisions in respect of the entitlement to "fear of cancer" damages. In the first, "Gottshall," the plaintiff had alleged that he should be awarded damages for his severe emotional distress arising from witnessing the death of a co-worker while on the job. The Supreme Court had reversed judgment in favor of the plaintiff by the Court of Appeals because unrestricted awards of damages for negligently inflicted emotional distress would "hold out the very real possibility of nearly infinite and unpredictable liability for defendants." In that case the Court stated that a "zone of danger" test should determine the scope of a FELA employer’s duty to its employees to avoid negligently inflicted emotional injury. Thus a plaintiff could only recover for simple emotional distress if he "sustained a physical impact as a result of a defendant's negligent conduct" or was "placed in immediate risk of physical harm by that conduct."

In the second case, "Metro North," the plaintiff claimed damages for fear of contracting cancer arising from his exposure to asbestos while working as a pipe fitter for the defendant railroad in New York City’s Grand Central Terminal. At the time of his action, however, he had a "clean bill of health." In that case, the Supreme Court had rejected the entire claim because, it said, exposure alone was insufficient to show "physical impact" under the previously stated "zone of danger" test. It distinguished "stand-alone distress claims" from claims for damages for emotional pain and suffering tied to a physical injury.

Following these two decisions, the Supreme Court, by the narrowest 5-4 majority, reached a "mend" to the two decisions. The majority first held that, as the parties had agreed, "asbestosis is a cognizable injury under the FELA." Accordingly, based on "Metro North," pain and suffering damages, which would include compensation for fear of cancer, could be awarded when the fear accompanies a physical injury. Here, the railroad could not assert that the claimants were "disease and symptom free." The majority further stated that the "claimants before us, in contrast, complained of negligently inflicted physical injury (asbestosis) and attendant pain and suffering." Pain and suffering associated with a physical injury is compensable under U.S. law. The majority stated "future harm, genuinely feared, need not be more likely than not to materialize." The majority then reviewed cases in which damage awards had been given to physically injured plaintiffs for their "reasonable fears" of a future disease arising from such varied negligence as dog bites, etc. giving rise to the "ghost of hydrophobia and rabies, lockjaw, blood poisoning, etc." The majority also considered cases where an asbestosis claimant had recovered damages for "fear of cancer." It drew a distinction between the "discrete damages for their increased risk of future damages," which plaintiffs had not sought, and their "fear of" damages. Thus brushed aside the railroad’s assertion that the asbestosis claimants could bring a second action if a cancer developed. Thus, the majority held, damages for "fear of" cancer, without proof of the physical manifestations of the claimed emotional distress, may be awarded but "with an important reservation." That reservation is that the plaintiff must "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-evidence objection," had Norfolk so targeted its attack. Indeed, the majority noted that one of the claimants had failed even to testify as to having any concern about cancer and the other testified that he was more afraid of shortness of breath than cancer. Nevertheless, it was too late for the railroad to challenge the awards on that score; the judgment of the lower court was affirmed.

The Dissent

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The chief dissent was written by Justice Kennedy. He noted at the outset that “[a]sbestos 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.” He further stated that the majority’s “wooden determination to allow recovery for fear of future illness is antithetical to FELA’s goals of ensuring compensation for injuries” and stated that “[a]s 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 resources for payment.”

The rationale of the dissent was that there is “no demonstrated causal link between asbestos and cancer;” “Correlation is not causation.” Accordingly, without any proof of causation there is no basis upon which asbestos is “any more than marginally more suitable as a predicate for recovering for fear of cancer than the fact of mere exposure.” The common law precedents upon which the majority had relied, Justice Kennedy wrote, cannot permit recovery for “fear of” damages without a “direct” causal link. The “anxiety generated by the increased awareness about a disease may be real and painful [but] it lacks the direct link to a physical injury that suffices for recovery.” Similarly, there is no basis for recovery under the theory of “negligent infliction of emotional distress” under the “zone of danger” test stated in "Metro North", especially where the “distress is simply incremental from the fears [of cancer] already shared by the general population.” This reasoning was expanded in Justice Kennedy’s critical examination of the majority’s “important reservation” to the green light to a new wave of mass tort filings. The standard upon which to apply fear of damages based on the “genuineness” of the alleged fear “does little or nothing to prevent capricious outcomes.” To the contrary, he concluded, “speculative damage awards will exhaust the resources available for recovery” and the majority’s “pia for legislative intervention” does not advance the goal of ensuring that fair and sensible principles will govern recovery for injuries caused by asbestos.

Justice Breyer’s dissent likewise agreed that the law does not permit recovery for “fear of cancer” and mentioned the “several considerations” that led to his dissent on this issue. Unlike other such “fear of cases” the “presence of physical harm often provides a central touchstone . . . [but] that does not work here.” That was because, “given ordinary background risks, the increment in a person’s fear of cancer due to a diagnosis of a condition such as asbestos seems virtually impossible to evaluate.” For example, questioned Justice Breyer.

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 and whose chance of dying of a smoking-related diseases is already about 50-50 suddenly develop 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. [citations omitted].

Likewise, “a jury’s speculation” which can lead to unlimited and unpredictable liability should not be permitted or encouraged and the “serious reservation” test by the majority would be of no help. Further restrictions should be made, Justice Breyer stated, to rule out recovery for fear of disease when the following conditions are met:

1. “Actual development of 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.”

The stated dissents was to “Part III” of the majority’s decision and therefore did not dissent with the ruling in respect of the apportionment of damages decision made by the majority in Part IV of that decision, which is now clearly the law. No doubt this decision will force more actual and potential defendants to resort to the Bankruptcy Court for protection until the Congress acts and sets up a compensation scheme to handle the asbestos nightmare.

With thanks to Jeremy Harwood of Healy & Baillie for preparing this article.

1. United States Supreme Court, decision issued: March 10, 2003
2. In 1920, the U.S. Jones Act provided seamen the same rights to sue their employers for personal injury or death as railroad workers under FELA.