THE ASBESTOS LITIGATION CRISIS

MICHAEL L. MONHOLLON*

I. THE HISTORY OF ASBESTOS AND ASBESTOS-RELATED ILLNESSES

Asbestos is the name used for a number of naturally occurring minerals that are cheap to mine and to process and are strong, fire-retardant, and a good thermal insulator. Though asbestos has been known and used for centuries, maybe even millennia, asbestos use in the western hemisphere did not become common until the industrial revolution in the late nineteenth century. Asbestos was used initially in boilers, steampipes, turbines, ovens, kilns, and other high temperature equipment.[1] By 1973, the height of its use in the United States, it was used in automobile brake drums, potholders, hair dryers, and anything else that required insulation.

Asbestos is a health hazard because it is made up of microscopic bundles of fibers that tend to get into the air when the asbestos is disturbed or damaged and to become inhaled into the lungs. The latency period—the time it takes for disease to develop after first exposure—is long, often 15 to 40 years.

The primary asbestos-related diseases are mesothelioma, asbestosis, and lung and other cancers. Mesothelioma is a cancer of lining of the chest cavity or of the lining of the abdominal wall. It is inevitably fatal, usually within a year or two of diagnosis. Asbestos exposure is the only known cause. Asbestosis is a scarring of the lung tissue that results in decreased pulmonary function. The scarring results from an acid the body produces in a futile effort to dissolve asbestos fibers. It is sometimes, but not usually, fatal. Severe asbestosis requires extensive, high-level exposure to asbestos, which has not been prevelant in the United States for several decades.[2] Lung cancer from asbestos exposure is 50 percent more likely among smokers than nonsmokers. Cancer of the gastrointestinal tract and a host of other cancers have been attributed to asbestos exposure as well.[3]

The health hazards of asbestos exposure have been known for a long time. In the modern era, they were documented as early as 1900.[4] A 1918 report by the Bureau of Labor Statistics, which established that asbestos workers had "unusually early deaths," noted too that many American and Canadian insurance companies no longer issued life insurance policies to asbestos workers because of the "health-injurious conditions" in the industry.[5] The first clear case of death from asbestosis appeared in the medical literature in 1924 (in the *British Medical Journal)*, sparking an intensive seven-year study in Britain that culminated in 1931 with Parliamentary legislation setting safety standards for

---

* Assistant Professor, Hardin-Simmons University

[1] Paul Brodeur, *The Asbestos Industry on Trial ¾ Part I*, NEW YORKER, June 10, 1985, at 58.

[2] RAND INSTITUTE FOR CIVIL JUSTICE, ASBESTOS LITIGATION COSTS AND COMPENSATION, AN INTERIM REPORT 17 (2002).

[3] U.S. Environmental Protection Agency, *Asbestos ¾ What is it?*, available at http://www.epa.gov/asbestos/asbe.pdf.

[4] Paul Brodeur, *supra* note 1, at 58.

[5] *Id*. at 59-60.

asbestos-textile factories and making asbestosis a compensable disease.[6] In the early 1930s, Johns-Manville and Raybestos-Manhattan, the United States' largest processors of asbestos, considered and rejected dust controls in asbestos plants.[7] Johns-Mansville sponsored its first study in 1928 and was settling lawsuits as early as 1933.[8] The results of the first study and of those that followed were not released, and Johns-Manville and Raybestos-Manhattan conspired to keep any mention of asbestosis out of *Asbestos*, the industry trade journal.[9] In the mid-1930s, leading companies in the industry joined a move to have asbestosis covered by "properly drawn occupational disease legislation"—worker's compensation—to eliminate the right of employees and their families to sue at common law for full compensatory damages.[10] "Properly drawn" evidently meant that the legislation included sufficient procedural roadblocks to keep claims to a minimum. For instance, most states required a worker to file his claim within a short time after his last exposure, usually one to three years.[11] Given the long latency period of the diseases, the short statutes of limitations had the effect of barring many claims all together.

The legal landscape changed radically in the 1960s with the coming of strict liability for manufacturers of "any product in a defective condition unreasonably dangerous to the user or consumer."[12] Workers' compensation statutes still served to limit suits against employers, but the manufacturers who sold asbestos to those employers—without warnings of any kind—could be reached. *Borel v. Fibreboard Paper Products Corp.*[13] was the first product liability lawsuit involving asbestos insulation that had resulted in a jury verdict for the plaintiff. The U.S. Court of Appeals for the Fifth Circuit upheld the verdict, triggering "the greatest avalanche of toxic-tort litigation in the history of American jurisprudence. Some twenty-five thousand lawsuits were brought over the next decade…"[14]

II. THE RAND INSTITUTE REPORT

The "avalanche" of 25,000 lawsuits proved to be merely the first wave, and a relatively small one. On September 25, 2002, the Rand Institute for Civil Justice released its interim report on asbestos litigation. It concluded that, through the end of the year 2000, six hundred thousand claimants had filed claims for asbestos-related injuries against 6,000 distinct business entities.[15] Most of the 600,000 claimants based their claims on exposure to asbestos in the workplace. Initially, these workplaces were in the asbestos manufacturing and installation industries. The claimants manipulated asbestos

---

[6] *Id*. at 59.
[7] Paul Brodeur, *The Asbestos Industry on Trial ¾ Part II*, NEW YORKER, June 17, 1985, at 72.
[8] *Id.* at 72-73.
[9] *Id.* at 75.
[10] Paul Brodeur, *supra* note 1, at 63.
[11] *Id*. at 67.
[12] RESTATEMENT (SECOND) OF TORTS § 402A (1965).
[13] 493 F.2d 1076, 1089 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).
[14] Brodeur, *supra* note 7, at 45.
[15] RAND INSTITUTE, *supra* note 2, at 51.

or products containing asbestos as part of their jobs and so were exposed to large amounts of asbestos on a daily basis.[16]

As the number of defendants has grown, from 300 in 1982 to 6,000 today, so has the number of industries to which they belong.[17] For statistical purposes, the U.S. Department of Commerce has divided the entire U.S. economy into 83 broadly defined industries. Companies in 75 of those 83 industries have faced asbestos claims.[18] More recent claimants were often exposed to asbestos in much lower concentrations than their predecessors, sometimes only because the ventilation systems in the workplace included ducts lined with asbestos.[19]

The number of new asbestos claims began to rise sharply in the mid-1990s, almost all of the increase due to claims based on less serious illnesses, illnesses that did not involve cancer. By 2000, the annual number of claims for mesothelioma was about one-and-a-half times the 1990 level, but, since such claims only accounted for about three percent of claims made during the decade, that increase accounted for very little of the growth in the total caseload. Seven percent of the claims were for cancers other than mesothelioma. Over the decade, nonmalignant claims accounted for a whopping 89 percent of the total number of claims and drew 65 percent of the payouts.[20]

The rise in the number of nonmalignant claims—claims by those who are less seriously ill, or even completely asymptomatic—has reduced the amount of money available for cancer claims, even though each nonmalignant claim tends to result in a smaller payout, perhaps a payout only one-tenth the size of a claim for mesothelioma.[21] There is just so much money available. Based on limited data, Rand estimates that asbestos claims have cost business 54 billion dollars to date; it has cost five defendants more than one billion dollars each.[22] As a result of asbestos litigation, more than sixty companies have filed for bankruptcy, more of them since the year 2000—22 through July 2002—than in either of the prior two decades.[23] The companies that have emerged from bankruptcy have done so in the form of a reorganized company and a trust into which all shareholder equity has been put to pay off claims.[24] Shareholders lose everything; claimants benefit from substantially reduced costs of resolving their claims, but they typically receive only a tiny fraction of their claim's litigation value.[25] For example, the Manville Trust, which began paying claimants the full liquidated value of their claims in 1988, had to suspend payments two years later, and, when it began paying claims again in 1995, it could only pay claims at the rate of ten cents on the dollar. In July, 2001, it announced that it was reducing payments to the rate of five cents on the dollar in order to

---

[16] *Id.* at 47.
[17] *Id.* at 49-50.
[18] *Id.* at 50.
[19] *Id.* at 48.
[20] *Id.* at 44-45, 65.
[21] *Id.* at 41, 64.
[22] *Id.* at 54-55.
[23] *Id.* at 71.
[24] *Id.* at 72.
[25] *Id.* at 89-90.

preserve funds to pay future claims.[26] The payout rates of other trusts are similar, ranging from 7.5 percent to 15.5 percent.[27]

The increasing role of bankruptcy in asbestos litigation, and the resulting trusts, has had several effects. First, the reduced costs of pursuing a claim has opened the system to those with even minor injuries and modest losses—and those claimants receive the same fractional compensation as the dying and the seriously ill.[28] The low fractional payouts, combined with the complete inability to pursue companies still in bankruptcy, have forced claimants and their attorneys to seek out more—and more peripheral—defendants.[29] In the early 1980s, claimants typically named about 20 different defendants; by the mid-1990s, they were naming 60 to 70 defendants.[30] Asbestos litigation spread to companies outside the asbestos and building products industries, companies with a relatively small role in exposing workers to asbestos. By the late 1990s, these nontraditional defendants accounted for sixty percent of asbestos expenditures.[31]

The future of asbestos litigation is uncertain. Estimates of the total number of claimants range from one million to three million, suggesting that as few as 20 percent and no more than half of the expected number of claims have been filed to date. Total costs, currently 54 billion dollars, are expected to reach 200 billion to 265 billion dollars.[32]

III. CURRENT LEGAL ISSUES

The Rand Institute's report raises two legal issues that will be important in determining the final dimensions of this litigation explosion. One has to do with the legal system's efforts to accommodate the large number of claims. The other has to do with who is—or should be—entitled to compensation: What about someone who has an injury in the sense of some scarring of the lungs, but no functional impairment?

A. CONSOLIDATING CLAIMS

Asbestos claims filed in federal court are transferred to Judge Charles Weiner of the Eastern District of Pennsylvania under the provision of 28 U.S.C. § 1407 for multi-district litigation.[33] To date, almost 96,000 cases have been transferred, to be dealt with along with the roughly 7400 cases filed in the Eastern District of Pennsylvania to begin with. Though such consolidations of mass tort litigation have often resulted in large-

[26] *Id.* at 67, 79-80.
[27] *Id.* at 80.
[28] *Id.* at 85-86.
[29] *Id.* at 67.
[30] *Id.* at 41.
[31] *Id.* at 50, 87.
[32] *Id.* at 77.
[33] *Id.* at 29. The statute provides, "When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings." 28 U.S.C.S. § 1407 (2003).

scale global settlements, in the case of asbestos litigation, efforts to fashion a broad settlement have ultimately failed.[34] Increasingly, plaintiff attorneys have chosen to avoid the federal courts and multi-district litigation by filing in state courts, which now account for more than 80 percent of all filings.[35] Indeed, between 1998 and 2000, just five states—Mississippi, New York, West Virginia, Ohio, and Texas—accounted for 66 percent of all filings.[36]

The increasing role of state courts has not slowed the consolidation of cases, though when state judges consolidate cases, they often consolidate cases filed by the same law firm rather than cases with similar issues.[37] Mississippi has a liberal joinder rule, which allows out-of-state plaintiffs to join lawsuits by in-state plaintiffs against out-of-state defendants, resulting in something like multi-state class actions.[38] Initially, cases were consolidated for only pre-trial processing, but West Virginia, for example, allows the consolidation of thousands of cases for a single trial, a procedure that has raised due process concerns, even as it lowers litigation costs per claim.[39]

Under West Virginia Trial Court Rule 26.01, all asbestos- based personal injury cases are referred to a mass litigation panel, which produces master plans to deal with the thousands of pending asbestos cases. Early plans called for a series of small group, all issue trials,[40] but these proved impracticable, and the panel set a mass trial date for all asbestos claims pending in West Virginia courts.[41] The defendants appealed the mass trial on due process grounds, claiming that the decision to consolidate thousands of unrelated asbestos claims into a single trial was arbitrary and capricious. ExxonMobil argued, "The mass trial approved will make it impossible for a defendant like Mobil to assert its unique defenses in a meaningful way.[42] "Apart from the fact that their claims involve exposure to asbestos, these approximately 8,000 plaintiffs have nothing in common."[43] The appeal was in vain. Trial began in West Virginia Circuit Court, and the U.S. Supreme Court denied certiorari a week later. Within days, ExxonMobil had settled with all remaining plaintiffs, leaving Union Carbide the sole defendant in what was originally a field of more than 250 companies.[44]

Increasingly, defendants are choosing not to contest liability but instead to negotiate settlements of large numbers of cases with leading plaintiff attorneys' firms.[45] On

---

[34] *Id.* at 27-29.
[35] *Id.* at 29.
[36] *Id.* at 32.
[37] *Id.* at 25, 30. Consolidation by law firm can be a significant amount of consolidation: In 1995, just ten law firms represented 75 percent of all claims filed.
[38] *Id.* at 34.
[39] *Id.* at 25-26, 35.
[40] State ex rel. Allman v. MacQueen, 209 W.Va. 726 (2001).
[41] State ex rel. Mobil Corp. v. Gaughan, 563 S.E.2d 419 (W.Va. 2002), *cert. denied,* Mobil Corp. v. Adkins, 123 S.Ct. 346 (2002).
[42] Greg Stohr, *U.S. Supreme Court Lets Big Asbestos Lawsuits Proceed,* NATIONAL POST, October 8, 2002, at FP12.
[43] *ExxonMobil Corp. Settles Claims With W. Va. Plaintiffs*, ASBESTOS LITIGATION REPORTER, October 24, 2002 at 3.
[44] *Id.* Union Carbide lost on the liability issues, opening the way for the damages phase of the trial. *Verdict in Union Carbide Case*, MSNBC (October 24, 2002), *available at* http://www.msnbc.com/local/wsaz/m239309.asp.
[45] RAND INSTITUTE, *supra* note 2, at 25.

December 18, 2002, Halliburton settled the 300,000 asbestos-related personal injury claims against it for 4 billion dollars in cash and stock, a deal which allowed it to avoid filing for bankruptcy itself and to retain control of two subsidiaries that will seek bankruptcy protection.[46] As of mid-December, Honeywell International was reported to be close to a deal to settle the 200,000 claims against it, the details of which it was at that time unwilling to disclose.[47]

B. WHO IS ENTITLED TO DAMAGES

According to the Rand report, under the law in all 50 states "claimants are entitled to compensation only if they have suffered an injury or disease."[48] A scar on the lungs would be an injury. A pleural plaque (a scarring of the membrane that lines the chest wall and envelops each lung) would be an injury. Such injuries may or may not cause functional impairment. One might argue that a claimant with no functional impairment should be entitled only to nominal damages—except that, with asbestos-related injuries, functional limitations may appear later or may increase. And "in most instances the law deems that the statutory period for filing starts to run when the plaintiff knows or should know that he was 'injured.'"[49]

Different states have taken different approaches to the dilemma imposed on plaintiffs. California has relaxed its statute of limitations so that the statute does not begin to run until the plaintiff's ability to work at his ordinary occupation is impaired.[50] Many states, including Texas, have abandoned the single-action rule in asbestos cases, allowing plaintiffs who initially had nonmalignant diseases to bring a second lawsuit if and when a malignancy is diagnosed.[51] Other states have established "pleural registries" to allow plaintiffs satisfy the statute of limitations but to delay the processing of their lawsuits until it became clearer how far the disease would progress.[52]

Another approach, which has drawn the ire of many commentators, is to include in damages some amount for the possibility of greater functional impairment in the future. *The Wall Street Journal* decried "a West Virginia verdict awarding $5.8 million to six plaintiffs who claimed emotional suffering from the fear they *might* get asbestos-related cancer in the future."[53] George Will observed, "You cannot be too careful in a country in which six Mississippians have been awarded $150 million not because they are sick, but because they fear that they someday may become sick from asbestos-related illnesses."[54] Even plaintiffs' attorneys have complained that all the claims by unimpaired plaintiffs

---

[46] *Halliburton to Settle Asbestos Claims*, WALL STREET JOURNAL, December 19, 2002, at A3.
[47] *Asbestos decision is in the works*, DALLAS MORNING NEWS, December 12, 2002, at 1D
[48] RAND INSTITUTE, *supra* note 2, at 19.
[49] *Id.* at 22.
[50] CA Civ Proc § 34.02.
[51] Pustejovsky v. Rapid-American Corp., 35 S.W.3d 643 (Tex. 2000). "The single action rule, also known as the rule against splitting claims, provides a plaintiff with one indivisible cause of action for all damages arising from a defendant's single breach of a legal duty." *Id.* at 646.
[52] RAND INSTITUTE, *supra* note 2, at 23.
[53] *Review and Outlook*, WALL STREET JOURNAL, September 17, 2002, at A20 (emphasis in the original).
[54] *From playground to "law a la carte,"* ABILENE REPORTER-NEWS, June 4, 2002, at 3AA.

have served to delay and to "severely reduce the compensation awarded to the sick."[55] The critics have a point. In a negligence action, proof of damage has always been an essential part of the plaintiff's case. The mere exposure to risk was not actionable. To quote Prosser, "[t]he threat of future harm, not yet realized, is not enough."[56] The rule of strict liability, while it dispenses with the requirement of fault, still requires a showing of loss or damage.

On March 10, 2003, the U.S. Supreme Court decided *Norfolk & Western Railway Co. v. Ayers*.[57] One of the questions before the court had to do with the requirements of emotional distress damages when the distress stems from the reasonable fear of future disease or injury. The trial judge in the case instructed the jury that it could not award the claimants any damages for their increased risk of cancer, but the trial judge allowed damages for fear based on that risk.[58] So in *Ayers*, the jury had to calculate the increased risk of cancer and had to estimate a rough sense of the increased fear engendered by the noncompensible risk.

What was at stake was whether exposure to risk would become actionable through the vehicle of emotional distress, fundamentally changing the common law's requirement of damage as an essential element of a cause of action. Before *Ayers*, only three cases had held that exposure to risk is actionable when it causes emotional distress. The U.S. Court of Appeals for the Fifth Circuit, applying Texas law, recognized a cause of action for emotional distress based on exposure to asbestos, even in the absence of physical symptoms.[59] The same conclusion was reached by the U.S. District Court for the District of Maine, applying Maine law,[60] and the Supreme Court of New York, Westchester County.[61] None of these cases was decided by the highest court of the relevant state, and the U.S. Supreme Court has found them to espouse an unpersuasive minority view.[62]

Because the defendant in *Norfolk & Western Railway Co. v. Ayers*, was a railroad, the claim was brought under the Federal Employers' Liability Act (FELA), which provides, that "Every common carrier by railroad…shall be liable in damages to any person suffering injury while he is employed by such carrier…resulting in whole or in part from the negligence of…such carrier."[63] Among the injuries FELA recognizes is emotional distress, and, even though the basis for recover is statutory, "[t]he Federal Employers' Liability Act is founded on common-law concepts of negligence and injury."[64]

All states recognize a right to recover for the negligent infliction of emotional distress, except Alabama and possibly Arkansas.[65] The states have used three limiting tests for evaluating such claims. The "physical impact" test requires a "contemporaneously

---

[55] Stuart Taylor, Jr., *Greedy Lawyers Cheat Real Asbestos Victims*, THE ATLANTIC ONLINE (October 1, 2002), *available at* http://www.theatlantic.com/politics/nj/taylor2002-10-01.htm.
[56] WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS, 4TH ED. 143 (1971)
[57] 123 S.Ct. 1210 (2003).
[58] *Id.* at 1216.
[59] Watkins v. Fibreboard Corp., 994 F.2d 253 (5th Cir. 1993).
[60] In re Moorenovich, 634 F.Supp. 634 (D. Me. 1986).
[61] Gerardi v. Nuclear Utility Services, Inc., 566 N.Y.S.2d 1002 (Westchester Cty. 1991).
[62] Metro-North Commuter Railroad Co. v. Buckley, 521 U.S. 424 (1997).
[63] 45 U.S.C. § 51 (1988).
[64] Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 543 (1994) (quoting Urie v. Thompson, 337 U.S. 163, 182 (1949)).
[65] *Gottshall*, 512 U.S. at 544.

sustained…physical impact," no matter how slight.[66] The "zone of danger" test, currently the law in fourteen jurisdictions, limits recovery for emotional distress to those who sustain a physical impact or who are placed in "immediate risk of physical harm" by the defendant's negligent conduct.[67] And the "relative bystander" test, first enunciated by the California Supreme Court in 1968[68] and now adopted in nearly half the states, gives a cause of action to bystanders outside the zone of danger in certain circumstances.

In *Consolidated Rail Corp. v. Gottshall* , the U.S. Supreme Court held that the "zone of danger" test applied to actions under FELA. The "zone of danger" test was consistent with Congressional intent; it remained a well-established common-law concept; and it was consistent with FELA's central focus on physical perils by putting liability on employers whose negligence threatened their employees imminently with physical impact. The court found no basis, however, for extending recovery to bystanders outside the zone of danger.[69]

In *Metro-North Commuter Railroad Co. v. Buckley,*[70] the Supreme Court applied its "zone of danger" test to a case of asbestos exposure. The plaintiff in that case worked as a pipefitter for Metro-North. Part of his job was to remove insulation from pipes, often covering himself with insulation dust that contained asbestos. Over a three-year period, he was exposed to asbestos for about one hour per working day. His emotional distress began after he attended an asbestos-awareness class that made him fearful of developing cancer. According to plaintiff's expert witnesses, the exposure to asbestos increased his risk of death from cancer or other asbestos-related diseases by one to five percent.[71]

The question before the court was whether the physical contact with insulation dust amounted to a "physical impact" under the "zone of danger" test.[72] The court held that it did not. Of the state cases cited in *Gottshall*, recovery was permitted only where the threatened physical harm might have caused immediate, traumatic harm.[73] In cases of emotional distress related to disease, state courts, with only a few exceptions (noted above), have permitted recovery only where the plaintiff suffered from the disease or at least exhibited some physical symptom.[74] The courts have consistently denied recovery to those who feared illness but who were currently disease and symptom free. Under FELA, too, there could be no recovery for emotional distress based on a simple contact, even an extensive contact, with a serious carcinogen absent disease or a physical symptom.

---

[66] *Id.* at 547. As the Restatement (Second) of Torts puts it: "If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional distress." Restatement (Second) of Torts § 436A (1965).

[67] *Id.* at 547-48.

[68] Dillon v. Legg, 68 Cal.2d 728 (1968)(en banc). The Supreme Court of California has restated the *Dillon* bystander test to allow recovery when plaintiff: "(1) is closely related to the injury victim; (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers serious emotional distress." Thing v. La Chusa, 48 Cal.3d 644, 667-68 (1989).

[69] *Gottshall*, 512 U.S. at 556-57.

[70] 521 U.S. 424 (1997).

[71] *Id.* at 427

[72] *Id.* at 428-30.

[73] *Id.* at 430.

[74] *Id.* at 432.

The facts of *Norfolk & Western Railway Co. v. Ayers* required the Supreme Court to further refine its "zone of danger" test. All of the plaintiffs, six former railway workers, suffered from asbestosis, a scarring of the lung tissue that results in decreased pulmonary function. It is a disease with physical symptoms, but it is not the disease of cancer. Does asbestosis satisfy the requirement of physical impact to allow the plaintiffs to recover for their fear of developing cancer? The plaintiffs testified that they feared getting cancer because of their asbestosis, and there was expert testimony that persons suffering from asbestosis were "far more likely" to get both mesothelioma and lung cancer than those without asbestosis.[75] Based on the trial judge's instructions to the jury, it seems clear that some of the 5.8 million dollar verdict was awarded to compensate the plaintiffs for that fear.

The causal link between asbestosis and cancer is tenuous, however. Though individuals with asbestosis have a higher cancer risk than the general population, cancer is not caused by, nor is it medically linked to, asbestosis.[76] Even the plaintiffs conceded that those who have merely been exposed to asbestos—which under *Metro-North* does not satisfy the "zone of danger" test—have the same increased risk for mesothelioma as those with asbestosis.[77]

Whether the existence of asbestosis has the necessary legal relationship to the plaintiffs' fear of cancer turned out to be a close question: the Supreme Court split 5-4 on the issue. The majority held that it did, distinguishing stand-alone distress claims from claims for emotional pain and suffering tied to a physical injury. "Common-law courts…*do* permit a plaintiff *who suffers from a disease* to recover for related negligently caused emotional distress."[78] The relationship between the disease and the fear of cancer was not that the disease of asbestosis itself increased the risk of cancer, but that exposure to asbestos sufficient to cause the disease increased the risk of cancer.[79] For the majority, this was enough: "Asbestosis is a 'chronic, painful and concrete reminder that [a plaintiff] has been injuriously exposed to a substantial amount of asbestos, a reminder which may both qualitatively and quantitatively intensify his fear.'"[80] Justice Kennedy, writing for the four dissenters, disagreed: "Absent causation, it is difficult to conceive why asbestosis is any more than marginally suitable for recovering for fear of cancer than the fact of mere exposure,"[81] which *Metro-North* had found an insufficient basis for recovery. The claimants, noted Kennedy, "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."[82] To award damages based on fear caused by the risk of cancer (while denying damages based on the risk of cancer

---

[75] Brief of Respondents at 3, 2001 U.S. Briefs 963 (2002).
[76] Reply Brief of Petitioner at 1, 2001 U.S. Briefs 963 (2002).
[77] Brief of Respondents, *supra* note 74, at 4. The plaintiffs did contend that the increased risk of lung cancer is present only for those with asbestosis and not for those just exposed to asbestos. Justice Kennedy, though, in his dissenting opinion in *Ayers*, said, "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." *Ayers*, 123 S.Ct. at 1231.
[78] *Ayer*, 123 S.Ct. at 1218 (quoting *Metro North*, 521 U.S. at 432)(.
[79] *Id*. at 1222.
[80] *Id*. (quoting Eagle-Picher Industries, Inc. v. Cox, 481 So.2d 517, 529 (Fla. App. 1985)).
[81] *Id.* at 1231-32.
[82] *Id*. at 1233-34.

itself) invited "speculation compounded."[83] Indeed, the damage awards in the case, ranging from 500,000 dollars to 1.2 million dollars, seem irrational given that the claimants complained only that they suffered shortness of breath and experienced varying degrees of concern about cancer.

Another issue before the Supreme Court in *Ayers* was whether, under FELA, recovery for emotional distress required some objective manifestation of serious emotional injury. The Supreme Court did not decide the question in *Gottshall*, though it did observe, in a footnote, "Many of the jurisdictions that follow the zone of danger…[test] also require that a plaintiff demonstrate a "physical manifestation" of an alleged emotional injury, that is, a physical injury or effect that is the direct result of the emotional injury, in order to recover."[84] Thus, it seemed that the Court's initial impression was that the common law "zone of danger" test required a "physical manifestation" of an emotional injury before there can be any recovery. The "physical manifestation" requirement is clearly distinct from the physical impact requirement, so there is no reason to think that the presence of asbestosis, even if it were sufficient to satisfy the physical impact requirement, would also provide the necessary "physical manifestation" of emotional distress. Emotional distress, after all, does not cause asbestosis.

Because the Court relied so heavily on the common law in *Gottshall* and *Metro-North*, it was surprising that it dispensed with the "physical manifestation" requirement in *Ayers*. At trial there was no evidence of any "physical manifestation" of the fear of cancer, merely expert testimony about increased risks and the plaintiff's testimony about the mental injury caused by knowledge of those risks.[85] The only requirement under *Ayers* is proof that the fear is "genuine and serious."[86] As the dissent pointed out, *Gottshall* had found the "genuine and serious" test an insufficient guard against haphazard damage awards: "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."[87] Yet, under *Ayers*, only the genuineness test remains.

IV. CONCLUSION

As sympathetic as so many of the plaintiffs in asbestos litigation are, and as culpable as the early defendants were, knowing the risks of asbestos exposure and doing their best to hide them, liability now has extended far beyond those early defendants. The burdens imposed on a broad array of businesses and industries—and on their shareholders—have been large and are growing. The money available to compensate the seriously ill is

---

[83] *Id.* at 1235.
[84] *Gottshall*, 512 U.S. at 549.
[85] Brief of Respondents, *supra* note 74, at 7.
[86] *Ayers*, 123 S.Ct. at 1223.
[87] *Id.* at 1235-36 (quoting *Gottshall*, 512 U.S. at 552).

increasingly limited. As West Virginia's consolidation of 8,000 claims against more than 250 defendants suggests, the volume of asbestos claims is so great it may threaten due process. In *Ayers*, the Supreme Court had the opportunity to reign in what the majority itself referred to as "[t]he 'elephantine mass of asbestos cases' lodged in state and federal courts,"[88] either by holding that asbestosis did not satisfy the physical impact test to support a fear of cancer claim or by requiring a physical manifestation of emotional harm. It declined to do so, though neither holding would have been inconsistent with *Metro-North* or *Gottshall*, its most relevant precedent. The majority opinion concluded with a plea for national legislation.[89] On February 11, 2003, the American Bar Association made the same plea, proposing medical standards for people who, like the claimants in *Ayers*, have been exposed to asbestos but do not have cancer.[90] General Electric, Viacom, and General Motors are leading a coalition of Fortune 500 companies in lobbying Congress for legislation built around a multibillion-dollar trust fund to which companies could contribute and from which claimants would receive payments in exchange for forfeiting their rights to sue.[91] As the Rand report makes clear, something must be done, and, after *Ayers*, it is obvious that the courts will not be doing it.

---

[88] *Id.* at 1228 (quoting Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999)).
[89] *Id.*
[90] *Lawyers Group Pushes Limits on Asbestos Suits*, WALL STREET JOURNAL, February 12, 2003.
[91] *Law and Business Groups Face Infighting on Asbestos Litigation*, WALL STREET JOURNAL, February 6, 2003.