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The Scope of Employer Liability for Employee Exposure to a Hazardous Substance: No Harm, No Foul? An Analysis of Metro-North Commuter R.R. Co. v. Buckley

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The Scope of Employer Liability for Employee Exposure to a Hazardous Substance: No Harm, No Foul?

by Barbara J. Fick

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In 1908 Congress enacted the Federal Employers' Liability Act ("FELA" or the "Act") which provides a remedy for railroad employees injured on the job. The principles governing recovery under FELA have been derived primarily from the common law of torts, the body of judge-made law that provides damages for personal and property injury. (Refer to Glossary for the definition of damages.)

Section 1 of the Act provides that "every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury . . . resulting . . . from the negligence . . . of such carrier." 45 U.S.C. § 51 (1994).

FELA differs from workers' compensation statutes because it does not make railroad employers absolutely liable, i.e., liable without fault, for work-related injuries suffered by their employees; rather, the basis for employer liability under the Act is negligence, i.e., an employer's failure to use ordinary care. But like workers' compensation laws, FELA expressly abrogates several defenses normally available in negligence cases, such as the plaintiff's contributory negligence or assumption of risk. Thus, FELA represents an amalgam of the common law tort concepts of negligence and injury and statutory qualifications.
At issue in this case is whether FELA provides a basis of recovery for a railroad employee exposed to asbestos who does not manifest any asbestos-related disease.

ISSUES

1. Does FELA recognize a claim for negligent infliction of emotional distress based solely on exposure to a hazardous substance in the absence of any actual or immediate physical injury?

2. Can an employee recover the costs of future medical monitoring in the absence of physical injury?

FACTS

Michael Buckley began working for the Metro-North Commuter Railroad Company ("Metro-North") in 1985

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METRO-NORTH COMMUTER RAILROAD COMPANY V. MICHAEL BUCKLEY
DOCKET NO. 96-320

ARGUMENT DATE:
FEBRUARY 18, 1997
FROM: THE SECOND CIRCUIT

Case at a Glance

The law, including workers' compensation law, has come to allow plaintiffs to recover for emotional distress. But, as a general rule, recovery requires a physical injury. This case asks the Supreme Court to decide if a railroad worker covered by the Federal Employers' Liability Act who has been exposed to asbestos because of employer negligence but who has not developed an asbestos-related disease can recover damages for emotional distress caused by the exposure.

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as a pipefitter, repairing and maintaining the pipes in the steam tunnels below Grand Central Terminal in New York. The pipes were covered with asbestos insulation which Buckley had to remove before he could perform maintenance or repair work. The insulation would break apart upon removal and cover Buckley's skin and clothes. Buckley and the other pipefitters were nicknamed the "snowmen of Grand Central" because they would emerge from the steam tunnels covered from head to toe with white asbestos powder.

Metro-North put Buckley to work without providing any specialized training in the handling or removal of asbestos and without providing him with a face mask, respirator, or air-quality monitor. Indeed, although Metro-North knew that the insulation was asbestos, it did not give that information to Buckley or the other pipefitters working in the tunnels until 1987, at which time it instructed the employees on asbestos removal and provided respirators. Upon learning that they were working with asbestos, Buckley and the other pipefitters contacted a lawyer. Buckley's case was selected as the test case for the other workers.

Buckley filed a complaint under FELA in federal district court, seeking damages for negligent infliction of emotional distress and payment of medical monitoring costs based on his asbestos exposure. Metro-North conceded its negligence, so the only issues for trial were the nature of Buckley's injury, its cause, and damages.

At trial, Buckley's doctors, who were specialists in asbestos-related occupational disease, testified that Buckley currently showed no signs of disease, but they also noted that the latency period for asbestos-related disease was at least 10 years. The doctors testified that as a result of his exposure, Buckley suffered an increased risk of dying from an asbestos-related cancer.

Buckley himself testified that he is fearful of developing an asbestos-related disease, especially cancer, and worries about his future. He did not, however, undergo any psychiatric treatment or other type of counseling for these fears.

At the close of Buckley's case, Metro-North filed a motion for judgment as a matter of law, which the district court granted and dismissed the case. The district court, in an unreported opinion, held that Buckley did not suffer a sufficient impact with asbestos to support a claim for negligent infliction of emotional distress and had failed to prove that he had suffered a real emotional injury. The court did not address Buckley's claim for medical monitoring costs.

Buckley appealed to the Second Circuit which set aside the district court's judgment and returned the case to that court for trial. 79 F.3d 1337 (2d Cir. 1996).

The appeals court held that based on Buckley's evidence a reasonable jury could find that he had suffered a physical impact with asbestos sufficient to support his claim for emotional distress. The court said that asbestos fibers were embedded in Buckley's lungs as a result of his exposure and that this contact constituted a physical impact; a jury could find that this impact would cause fear in a reasonable person. Pointing to Buckley's testimony that he had complained to his supervisors and state authorities after learning that the insulation was asbestos and noting his testimony about his fear of dying, the court concluded that a reasonable jury could find that Buckley suffered emotional injury. Although the evidence of emotional distress was not overwhelming, the court held that proof of severe distress is not required when physical impact has been proved. Finally, the court held that the costs of future medical monitoring for early detection and treatment of any asbestos-related disease were recoverable expenses incurred as a result of the injury sustained by Buckley.

Metro-North filed a petition for a writ of certiorari with the Supreme Court to review the decision of the Second Circuit, which the Court granted. 117 S. Ct. 379 (1996).

Case Analysis

In *Consolidated Rail Corp. v. Gottshall,* 114 S. Ct. 2396 (1994), 5 ***ABA PREVIEW*** 184 (Feb. 18, 1994), the Supreme Court was presented with the question of whether a claim for emotional distress caused by an employer's negligence constitutes an injury for purposes of Section 1 of FELA. Consistent with FELA jurisprudence, the Court gave great weight to common law tort principles in answering this question.

The Court noted that while nearly all states have recognized a right to recover for negligent infliction of emotional distress, common law tort principles operate to restrict both the class of plaintiffs who may recover for emotional distress and the types of injuries that may be compensated. These limitations are based on several policy grounds such as "the potential for a flood of trivial suits, the possibility of fraudulent claims . . . , and the specter of unlimited and unpredictable liability." 114 S. Ct. at 2411. Thus, while holding that claims for negligent infliction of emotional distress are compensable under FELA, the Court adopted the zone-of-danger test to

limit the class of persons entitled to recover damages for such injury.

The zone-of-danger test, the Court reasoned, "limits recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." 114 S. Ct. at 2406.

The zone-of-danger test adopted by the *Gottshall* Court is an exception to the otherwise generally applicable principle that a viable claim under FELA requires an actual injury. Thus, under the *Gottshall* standard, an employee who is within the zone of danger may recover for emotional distress caused either by an actual physical impact or by being placed at immediate risk of physical harm, even though no such harm is sustained.

This case involves the application of the *Gottshall* zone-of-danger test when an employee is exposed to a hazardous substance but, at the time of suit, has suffered no actual injury or disease. As noted above, the Second Circuit held that physical contact with asbestos fibers constitutes a physical impact for purposes of the zone-of-danger test. And, indeed, the language used by the Court in *Gottshall* focused on physical *impact* and the risk of physical harm, not on physical *injury.*

The view of the Second Circuit, however, conflicts with that of the Third Circuit which concluded in *Schweitzer v. Consolidated Rail Corp.*, a case decided some 10 years before *Gottshall,* that asbestos exposure alone is insufficient to constitute actual injury under FELA. 758 F.2d 936 (3d Cir. 1985).

Metro-North understandably relies on *Schweitzer,* arguing that the overwhelming majority of courts deciding asbestos exposure cases, whether decided under FELA, other federal statutes, or the common law of torts, follow *Schweitzer's* reasoning and require physical injury as a prerequisite to recovery for emotional distress based on exposure. According to Metro-North, proof of physical injury is necessary to prevent clogging the courts with speculative claims, awarding windfalls to those who never fall ill and delaying recovery for those who actually contract disease.

Metro-North argues that by allowing recovery merely because Buckley had physical impact with asbestos, the Second Circuit misread *Gottshall* and ignored the common law tort context in which the Supreme Court developed the zone-of-danger test. Here, Metro-North notes that the *Gottshall* Court linked recovery for emotional distress to actual physical impact or to an immediate risk of physical impact.

Buckley's exposure to asbestos did not place him at risk of imminent harm, as the testimony at trial established. Moreover, argues Metro-North, any possible harm to Buckley will occur, if at all, only in the future. Thus, concludes Metro-North, Buckley was never within any zone of danger; accordingly, he has no basis for recovering under FELA.

Metro-North also contends that the Second Circuit's failure to require medical proof that Buckley's emotional distress was severe and resulted in a physical manifestation is an unwarranted departure from the common law tort principles that govern liability under Section 1 of FELA. Metro-North argues that these principles are necessary both to ensure that a claim for emotional distress is not trivial or fraudulent and to limit the variability and unpredictability of damages awards for emotional distress.

Buckley, on the other hand, contends that the Second Circuit correctly applied prevailing tort law principles which require proof of severity only when the plaintiff has not suffered a physical impact. Since the Second Circuit concluded that he had indeed suffered a physical impact, Buckley maintains that he is entitled to recover for any emotional distress caused by the impact, even if the distress is not severe or did not produce additional bodily harm.

Turning to the issue of who should pay for Buckley's medical monitoring, Metro-North argues that the Second Circuit's holding that it should pay is contrary to the requirements of FELA and established tort law principles. Section 1 of FELA provides that railroad employees may sue to recover damages for *injuries* caused by the employer's negligence. In other words, there can be no recovery under FELA without an injury, and Buckley was not injured. In Metro-North's view, Buckley's claim for medical monitoring is based on exposure to asbestos, but mere exposure is not an injury. Moreover, even if Buckley's emotional distress claim were held to be a compensable injury under FELA, Buckley is not entitled to medical monitoring costs because those costs have no connection to his emotional injury. Buckley is not seeking medical monitoring because of his mental condition; the medical monitoring claim is connected to his asbestos exposure which Buckley himself has not alleged as an injury.

Buckley counters that recovery of reasonable medical expenses flowing from an employer's negligent conduct is a well-accepted element of

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tort law and FELA. Buckley maintains that an employee's exposure to a proven hazardous substance justifies the need for medical monitoring. Accordingly, proof of a present injury is not required.

Significance

This case is being watched closely by railroad employers. Since 1990, over 14,000 new asbestos claims have been brought against American railroads; over 2,000 claims have been filed alleging exposure to various other toxic substances. These numbers can be expected to increase dramatically if the Court adopts the Second Circuit's analysis expanding both the class of plaintiffs entitled to compensation under FELA and the range of injuries that are compensable.

The Supreme Court's decision in this case also could have dramatic ramifications beyond the railroad industry. As explained, FELA generally reflects common law tort principles, and cases decided under FELA frequently shape the development of tort law doctrines applicable to situations involving other types of defendants.

It has been estimated that over 21 million workers have been significantly exposed to asbestos in the 40 years prior to 1980. Moreover, as noted by one federal court, "millions of people have suffered exposure to hazardous substances." *Ball v. Joy Mfg. Co.*, 755 F. Supp. 1344, 1372 (S.D. W.Va. 1990). If a worker who has had nothing more than regular contact with hazardous substances in the workplace or an individual who simply has been exposed to hazardous substances because of someone's negligence can sue for damages, the potential liability would be nearly limitless and unpredictable.

The cost to defendants associated solely with the asbestos lawsuits filed before 1991 is approximately $7 billion. At least 17 companies have gone into bankruptcy because of asbestos-related litigation. The Judicial Conference Ad Hoc Committee on Asbestos Litigation appointed by Chief Justice Rehnquist noted that asbestos litigation has created major problems for the court system, causing long pretrial delays, exhausting the defendants' assets, and raising the prospect that future claimants may not be compensated at all. Certainly, these problems will be exacerbated by an extension of liability in cases of exposure without injury or disease.

Attorneys of the Parties

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Amicus Briefs

In support of Metro-North Commuter Railroad Company

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American Tort Reform Association (Counsel of Record: Victor E. Schwartz; Crowell & Moring; (202) 624-2500);

Joint Brief of the Chemical Manufacturers Association and the Chamber of Commerce of the United States (Counsel of Record: Steven R. Kuney; Williams & Connolly; (202) 434-5000);

Consolidated Rail Corporation (Counsel of Record: Ralph G. Wellington; Consolidated Rail Corporation; (215) 751-2000);

Joint Brief of the Defense Research Institute and the National Association of Manufacturers (Counsel of Record: James M. Doran, Jr.; Manier, Herod, Hollabaugh & Smith; (615) 244-0030);

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Product Liability Advisory Council, Inc. (Counsel of Record: Robert N. Weiner; Arnold & Porter; (202) 942-5000);

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In support of Michael Buckley

Joint brief of the International Association of Machinists and Aerospace Workers and the Brotherhood of Maintenance of Way Employees (Counsel of Record: Michael L. Rustad; Suffolk University Law School; (617) 573-8190);

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