Consolidated Rail Corp. v. Gottshall: Does the "Zone of Danger" Test Put FELA on a New Track?

Steven L. Vollins*

TABLE OF CONTENTS

I. The *Gottshall* Opinion 184
II. The Law Prior to *Gottshall* 187
III. What Types of Emotional Injuries are Within the "Zone of Danger"? 190
IV. *Gottshall's* Ramifications for Physical Injury FELA Cases . 191
V. *Gottshall's* Ramifications for Asbestos Cases 195
VI. Conclusion 197

In *Consolidated Rail Corp. v. Gottshall*,[1] the U.S. Supreme Court (Thomas, J.) resolved that a claim for negligent infliction of emotional distress may be brought against railroads under the Federal Employers'

* Steven L. Vollins is an associate with New York's Chadbourne & Parke. He is a graduate of Brown University (B.A., magna cum laude, 1986) and Harvard Law School (J.D., cum laude, 1989).

1. Consolidated Rail Corp. v. Gottshall, 114 S.Ct. 2396 (1994).

Published by Digital Commons @ DU, 1994

Liability Act ("FELA").[2] This aspect of the Court's decision is not remarkable. Prior to *Gottshall*, courts around the country allowed FELA plaintiffs to recover for emotional distress in a variety of circumstances.[3]

What is noteworthy about the Court's decision, however, is the requirement that FELA plaintiffs must fall within the "zone of danger" before they can recover for emotional distress. Before *Gottshall*, federal circuit courts were split as to when plaintiffs could recover for emotional damages under FELA. Some circuits required plaintiffs to show they had sustained physical as well as emotional injuries,[4] while other courts permitted recovery for emotional injury only.[5]

By requiring that a plaintiff be in the zone of danger in order to recover for emotional injury, the Court's ruling in *Gottshall* may lead to markedly different results as to who can recover under FELA. Judges will often face complex issues about whether a plaintiff sustained an emotional injury due to being in the zone of danger. The *Gottshall* decision is also important because it may significantly restrict the extent of recovery by railroad employees for physical as well as emotional injuries.

This article examines the potential effect of the *Gottshall* opinion on a variety of FELA claims, including claims based on workplace exposure to asbestos. It suggests the approach courts may take given *Gottshall's* rationale that the zone of danger test best achieves FELA's goal of "alleviating the physical dangers of railroading."[6]

I. THE *GOTTSHALL* OPINION

Two separate cases were at issue in *Gottshall*.[7] The first involved James Gottshall, a Conrail crew member assigned to replace defective track on an extremely hot and humid day. The crew had been under time pressure to complete the job, and was discouraged from taking scheduled breaks. Two and one-half hours into the job, a worker named Richard Johns (a longtime friend of Gottshall) collapsed. Several coworkers rushed to help Johns. They revived him, but five minutes later he col-

2. 45 U.S.C. § 51-60 (1986).

3. *See, e.g.*, Taylor v. Burlington N. R.R., 787 F.2d 1309 (9th Cir. 1986); Lancaster v. Norfolk & W. Ry., 773 F.2d 807 (7th Cir. 1985).

4. *See, e.g.*, Adkins v. Seaboard Sys. R.R., 821 F.2d 340 (6th Cir.), *cert. denied*, 484 U.S. 963 (1987).

5. *See, e.g.*, Taylor v. Burlington N. R.R., 787 F.2d 1309 (9th Cir. 1986).

6. Consolidated Rail Corp. v. Gottshall, 114 S. Ct 2396 (1994).

7. The Supreme Court granted certiorari on two Third Circuit opinions: Consolidated Rail v. Gottshall, 988 F.2d 355 (3rd Cir. 1993) and Consolidated Rail v. Carlisle, 990 F.2d 90 (3rd Cir. 1993).

lapsed again. By the time the paramedics arrived, Johns was dead. The coroner's report indicated that Johns had died from a heart attack brought on by the heat, humidity, and heavy exertion.[8]

Gottshall became extremely agitated and upset as a result of this experience. Over the next several days, Gottshall felt sick while he continued working under the hot and humid weather conditions. He became preoccupied with Johns's death and feared he would die under similar circumstances. Shortly after Johns's funeral, Gottshall entered a psychiatric institution and was diagnosed with depression and post-traumatic stress disorder.[9]

The second case before the Supreme Court in *Gottshall* involved a claim by Alan Carlisle for negligent infliction of emotional distress. Carlisle's responsibility as a Conrail train dispatcher was to ensure the safe and timely movement of passengers and cargo. Due to a reduction in personnel, Carlisle was required to assume additional duties and work long hours. He began to experience headaches, insomnia, depression and weight loss. After an extended period of working mandatory twelve to fifteen-hour shifts, Carlisle suffered a nervous breakdown.[10]

There were anomalous results in these two cases at the district court level. Carlisle was awarded $386,500 in damages. He had maintained that his injuries were the result of Conrail's failure to ensure workplace safety. Carlisle's medical experts testified that his nervous breakdown was due, at least in part, to job strain.[11] Conversely, the district court dismissed Gottshall's action and held that FELA did not provide a remedy for Gottshall's emotional injuries.[12]

The Third Circuit affirmed the jury award for Carlisle,[13] and reversed the dismissal of Gottshall's claim.[14] It recognized that claims for negligent infliction of emotional distress were cognizable under FELA, even if there was no proof of physical impact or physical harm.[15] To safeguard against frivolous claims for emotional harm, the Third Circuit advised that courts should "engage in an initial review of the factual indicia of the genuineness of a claim."[16] This would require courts to consider

8. Consolidated Rail Corp. v. Gottshall, 114 S.Ct. at 2401.
9. *Id.*
10. *Id.* at 2402.
11. *Id.*
12. *Id.* at 2401.
13. *Id.* at 2402.
14. *Id.* at 2401.
15. *Id.* at 2402.
16. *Id.* (quoting Carlisle, 990 F.2d at 97-98).

"broadly used common law standards" and then "apply the traditional negligence elements of duty, foreseeability, breach, and causation in weighing the merits of that claim."[17]

The Supreme Court (Thomas, J.) agreed with the Third Circuit that a claim for negligent infliction of emotional distress is cognizable under FELA. The Court rejected as too broad, however, the Third Circuit's approach for detecting which claims were viable under the statute. Specifically, the Court ruled that the Third Circuit's approach would "dramatically expand employers' FELA liability to cover the stresses and strains of everyday employment", and would "tend to make railroads the insurers of the emotional well-being and mental health of their employees."[18] The Court therefore analyzed three approaches that would best limit an employer's liability under FELA: the physical impact test; zone of danger test; and relative bystander test.[19]

The Court rejected the physical impact test as too restrictive. It reasoned that an employer should not escape liability where it put an employee in danger, but did not hurt the employee physically. "We see no reason . . . to allow an employer to escape liability for emotional injury caused by the apprehension of physical impact simply because of the fortuity that the impact did not occur."[20]

The Court also rejected the relative bystander test as too limiting, since at common law the test only permitted recovery for persons who witnessed the severe injury or death of a close family member. The Court explained that "[o]nly railroad employees (and their estates) may bring FELA claims . . . and presumably it would be a rare occurrence for a worker to witness during the course of his employment the injury or death of a close family member."[21]

In contrast, the Court ruled that the zone of danger test was consistent with FELA's "central focus", i.e., the protection of railroad workers from physical perils.[22] It explained that FELA was designed to provide compensation for the "dangers of railroad work", and that these dangers could lead to both physical and emotional injuries.[23] Under the Court's

17. *Id.* (quoting Carlisle, 990 F.2d at 98).

18. *Id.* at 2409.

19. *Id.* at 2406-07. In several instances, Justice Thomas expressed concern that permitting claims for emotional distress under FELA would impose "infinite" liability on railroads. *Id.* at 2405-09. In her dissent, Justice Ginsberg took issue with this concern. She pointed out that the "universe of potential FELA plaintiffs . . . is hardly 'infinite,'" and that FELA only permits plaintiffs to recover where they are able to show that their injury was caused by the negligence of a railroad. *Id.* at 2418.

20. *Id.* at 2411.

21. *Id.*

22. *Id.* at 2410.

23. *Id.* (citing Urie v. Thompson, 337 U.S.163, 181 (1949)).

logic, a railroad should be held liable if it exposes an employee to an unreasonable hazard, which in turn causes the employee to have some sort of injury, whether it be partly physical or entirely emotional in nature.

Unfortunately, the Court spent little time actually articulating the boundaries of the zone of danger. It merely stated that "a worker within the zone of danger of physical impact will be able to recover for emotional injury caused by fear of physical injury to himself, whereas a worker outside this zone will not."[24] As a result, railroad employees who are "threaten[ed] . . . imminently with physical impact" will be able to recover for any emotional damages they may have sustained.[25]

Applying the zone of danger standard, the Court remanded Carlisle's case with instructions to enter judgment for Conrail. It explained that Carlisle's "work-stress-related claim" plainly did not fall within the common law's conception of the zone of danger because it merely arose from "stress arising in the ordinary course of employment."[26] Conversely, the Court directed the Third Circuit to reconsider Gottshall's claim under the zone of danger test. That issue had not been adequately briefed before the Supreme Court. Gottshall's only assertion was that he met the requirements of the zone of danger test, a conclusion with which Conrail disagreed.[27]

II. The Law Prior to *Gottshall*

Seven years ago, in *Atchison, Topeka & Santa Fe Railroad Co. v. Buell*,[28] the Supreme Court left unresolved the issue as to what extent plaintiffs could recover under FELA for emotional injuries. The Court merely stated in obiter dicta that whether emotional injuries were cognizable under FELA was "not necessarily an abstract point of law or a pure question of statutory construction that might be answered without exacting scrutiny of the facts of the case."[29] It further explained that whether FELA permits recovery for purely emotional damages rested on a "vari-

---

24. *Id.* at 2410-11.
25. *Id.* at 2411.
26. *Id.* at 2411.
27. *Id.*
28. Atchison, T. & S. Fe R.R. v. Buell, 480 U.S. 557 (1987).
29. *Id.* at 568. With respect to the facts of the Buell case, the Court had found that the record was "insufficiently developed to express an opinion on [plaintiff's] ultimate chances of recovery." *Id.* at 564. Instead, it held that the only issue before it was whether the plaintiff's sole remedy was pursuant to the Railway Labor Act ("RLA"). On this issue, the Court determined that the plaintiff could maintain his FELA action, even though he could have arbitrated his claim subject to the RLA. The Court stated: "The fact that an injury otherwise compensable under the FELA was caused by conduct that may have been subject to arbitration under the RLA does not deprive an employee of his opportunity to bring an FELA action for damages." *Id.*

ety of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity."[30] Thus, the Court clearly indicated that purely emotional injuries were cognizable to some extent under FELA. It deferred to the circuit courts, however, to define when such recovery would be allowed.[31]

Prior to and following the Supreme Court's dicta in *Buell*, circuit courts had articulated several different standards for determining when a FELA plaintiff could recover for purely emotional injuries. The Ninth Circuit crafted the most liberal standard. In *Buell*, it held that an employee who suffers any injury attributable to a railroad's negligence is eligible for recovery under FELA "regardless of its characterization as mental or physical."[32]

The First Circuit was more circumspect. Before the Supreme Court's dicta in *Buell*, it had not allowed plaintiffs to recover for emotional distress unless associated with a physical injury.[33] After *Buell*, the First Circuit admitted that "the door to recovery for wholly emotional injury" under FELA was "somewhat ajar," but it cautioned that it was "by no means wide open."[34]

Like the First Circuit, other federal courts also required that some physical injury accompany a claim for emotional damages. For example, in *Hammond v. Terminal Railroad Ass'n. of St. Louis*,[35] a post-*Buell* opinion, the Seventh Circuit affirmed the dismissal of a FELA complaint that merely alleged that the defendant-railroad unfairly criticized the plain-

30. *Id.* at 568.

31. Although silent on the issue of negligent infliction of emotional distress, the language of the FELA statute does not appear to place any limit on the type of recovery railroad employees may seek. FELA states 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 or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." Gottshall, 114 S.Ct. 2396, ? (quoting 45 U.S.C. § 51) (emphasis added).

32. Atchison, T. & S. F. R.R. v. Buell, 771 F.2d 1320, 1324 (9th Cir. 1985), *aff'd in part and vacated in part*, 480 U.S. 557 (1986). Buell involved a carman's claim that his emotional breakdown was caused by the "harassment, threats, and intimidation" he suffered while employed by a railroad. He had maintained that the railroad "negligently failed to stop this harassment and abuse even after [he] and other workers complained" about these actions to the appropriate railroad officials. *Id.* at 1321. *See also* Taylor v. Burlington N. R.R., 787 F.2d 1309, 1313 (9th Cir. 1986) ("The law of this circuit is that railroad employees may assert claims under [FELA] wholly for mental injury."); Toscano v. Burlington N. R.R., 678 F. Supp. 1477, 1478 (D. Montana 1987) (the Supreme Court's opinion in Buell left "unassailed" Ninth Circuit precedent recognizing the right of railroad employees to assert claims for wholly mental injuries).

33. *See, e.g.*, Bullard v. Central Valley Ry., 565 F.2d 193 (1st Cir. 1977) (refusing to permit recovery for emotional injury as a result of other railroad employees' deaths); Finn v. Consolidated Rail, 622 F. Supp. 41 (D. Mass. 1985), *aff'd*, 782 F.2d 13 (1st Cir. 1986) (rejecting damage claim for emotional injury brought about by employer's record-keeping error).

34. Moody v. Maine Cent. R.R., 823 F.2d 693, 694 (1st Cir. 1987).

35. Hammond v. Terminal R.R. Ass'n of St. L., 848 F.2d 95 (7th Cir. 1988), *cert. denied*, 489 U.S. 1032 (1989).

tiff's work and unfairly conducted disciplinary proceedings against him. The court stated that it knew of no case where such allegations were "thought even remotely sufficient to state a claim under the FELA."[36] Likewise, in *Adkins v. Seaboard System Railroad Co.*,[37] the Sixth Circuit ruled that an alleged intentional tort resulting in purely emotional injury was not cognizable under FELA.

In *Amendola v. Kansas City Southern Railway Co.*,[38] the court dismissed a complaint alleging "mental anguish resulting from fear of contracting asbestos-related diseases in the future." It held that a plaintiff suing under FELA for negligent infliction of emotional distress must introduce either: (1) evidence that he or she has suffered harm as a result of the conduct that caused the distress, or (2) physical harm caused by the alleged distress. The plaintiffs in *Amendola* failed to plead either type of physical harm; therefore, their complaint was dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

In contrast, federal courts had largely permitted emotional injury claims under FELA where there was some physical injury. One example is *Giammona v. Metro-North Commuter Railroad Co.*,[39] another asbestos lawsuit. In *Giammona*, the plaintiff satisfied the standard set forth in *Amendola* by pleading emotional harm as a result of asbestos fibers causing the initiation of a "scarring process in his lung."[40] The court explained that although the asserted harm to plaintiff's lungs may not rise to the level of a clinically diagnosed disease, it did "suffice to differentiate this case from *Amendola* where the court held only that the mere inhalation of asbestos fibers, alone, does not represent an actionable physical injury."[41] In other words, the court found that "a detrimental physical change" in body tissue "would, if substantiated, be sufficient to support recovery for emotional harm under FELA."[42] Likewise, in *Lancaster v. Norfolk & Western Railway Co.*,[43] the Seventh Circuit affirmed a judgment in favor of the plaintiff where the alleged emotional injury was

36. *Id.* at 98. *See also* Ray v. Consolidated Rail, 721 F. Supp. 1017 (N.D. Ill. 1989), *aff'd*, 938 F.2d 704 (7th Cir. 1991) (dismissed complaint where plaintiff made no allegation that the conduct which harmed him was physical in nature).

37. Adkins v. Seaboard Sys. R.R., 821 F.2d 340 (6th Cir.), *cert. denied*, 484 U.S. 963 (1987).

38. Amendola v. Kansas City S. Ry., 699 F. Supp. 1401, 1402-03 (W.D. Mo. 1988).

39. Giammona v. Metro-North Commuter R.R., 750 F. Supp. 662 (S.D.N.Y. 1990).

40. *Id.* at 663.

41. *Id.* at 664.

42. *Id.*

43. Lancaster v. Norfolk & W. Ry., 773 F.2d 807 (7th Cir. 1985), *cert. denied*, 480 U.S. 945 (1987).

caused by a series of relatively minor physical violations.[44] Specifically, the plaintiff alleged that on separate occasions he was "goosed," had a sledgehammer thrown at him, and was threatened with a pickax handle.[45]

Thus, prior to *Gottshall*, the circuit courts had attempted to find some ground on which to limit recovery for purely emotional damages under FELA. These varying standards will now be replaced by the zone of danger test articulated by Justice Thomas in *Gottshall*.

III. What Types of Emotional Injuries are Within the "Zone Of Danger?"

As explained above, in *Gottshall* the Court ruled that the issue of whether Gottshall was in the "zone of danger" at the time of the events that caused his emotional injury had not been sufficiently briefed. For this reason, it remanded the case to the Third Circuit for further analysis pursuant to relevant common-law precedent.[46] One can only wonder, however, what factors would be significant in the railroad setting to determine whether Gottshall was in the "zone of danger." The Supreme Court's opinion in *Gottshall* provides only a few hints as to what criteria will be useful in making this determination.

Justice Thomas's use of the word "imminently" is perhaps the best indication of what the "zone of danger" standard may entail. As explained above, the *Gottshall* Court held that the "zone of danger" would include those railroad employees who are threatened "imminently with physical impact."[47] Webster's New Collegiate Dictionary defines "imminent" as "ready to take place," especially with reference to "hanging threateningly over someone's head."[48] Clearly, Carlisle was not in "imminent" danger of any "physical impact" because he merely alleged that Conrail had required him to work long, difficult hours. There was no allegation that he was about to be struck physically.

For the same reason, it could be argued that Gottshall was also not in "imminent" danger of "physical impact." Like Carlisle, he was merely required to work long, arduous hours. The only differences are perhaps that Gottshall was required to do heavy physical labor in difficult weather conditions, and actually claimed that he feared that, like his friend Johns, he too would suffer a heart attack while working under these conditions. One might ask whether Carlisle would also be in "imminent" danger of

---

44. *Id.* at 813.
45. *Id.* at 811.
46. Gottshall, 114 S.Ct. 2396, 2411.
47. *Id.*
48. Webster's New Collegiate Dictionary 568 (1981).

"physical impact" if a fellow dispatcher had died of a heart attack while on the job, and he feared, like Gottshall, that he too would have a heart attack while working long, stressful hours.

The spirit of Justice Thomas's opinion would suggest that even under these circumstances, Carlisle would not be able to recover for purely emotional injuries pursuant to FELA. Justice Thomas placed great weight on the historic underpinnings of FELA. Indeed, he explained that the "zone of danger" test was consistent with FELA's "central focus" of compensating railroad employees for "physical perils," and that when FELA was enacted in 1908, Congress's "attention was focused primarily upon injuries and death resulting from accidents on interstate railroads."[49] He further explained that a desired effect of FELA was to have railroads "improve safety measures in order to avoid those claims."[50] Perhaps most telling, however, is his statement that the "zone of danger" standard was the most appropriate way to limit FELA claims for emotional injuries because it will further Congress's "goal" of "alleviating the physical dangers of railroading."[51]

In other words, pursuant to the logic of the *Gottshall* opinion, only individuals who are actually injured as a result of a hazard that is unique to railroading could raise a claim for emotional distress under FELA. Gottshall's fear of danger satisfies this test because working long, physically-arduous hours laying tracks is a hazard that is unique to railroading. Carlisle would not be covered by this standard since he was merely a dispatcher who worked in an office. He could have just as easily been a bus dispatcher or a taxi dispatcher. Indeed, the Court even stated that Carlisle's complaint was "not our idea of a FELA claim" insofar as he merely alleged that he suffered his injury as a result of "too much — not too dangerous — work."[52] Thus, the success of future FELA claims for emotional distress will likely hinge on whether the plaintiff was injured while performing a dangerous task, unique to railroading.

IV. *Gottshall's* Ramifications for Physical Injury FELA Cases

The Court's attempt to differentiate between perilous "railroad-type" injuries and non-perilous "non-railroad-type" injuries is curious in light of the previous FELA case law, which had permitted even the most

49. Gottshall, 114 S.Ct. 2396, 2404 (quoting Urie, 337 U.S. at 181). *See also* Wilkerson v. McCarthy, 336 U.S. 53, 68 (1949) (Douglas, J., concurring) (FELA "was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations").

50. Gottshall, 114 S.Ct. 2396, 2411.

51. *Id.*

52. *Id.* at 2412 (quoting Lancaster, 773 F.2d at 813).

minor of on-the-job physical injuries to fall within the statute. These cases, including opinions by the Supreme Court, held that FELA covered any injury incurred by a railroad employee as long as that injury was caused by the railroad in the scope of employment.[53] This line of FELA decisions was premised on the notion that, under FELA all railroad employees are entitled to a "safe place to work."[54]

Indeed, this "safe place to work" standard has been applied quite liberally. In *Moore v. Chesapeake & Ohio Railroad Co.*,[55] for example, the Fourth Circuit permitted the plaintiff, a mail clerk, to maintain her FELA claim based on the injuries she sustained in the railroad's cafeteria when she slipped on a pat of butter while carrying a tray from the serving line to the condiment table. The railroad had argued that FELA recovery was inappropriate because its employees were not required to eat lunch in the cafeteria, and were free to eat their lunch at the place of their choice. The railroad had also argued that although the injury occurred on its premises it could not be held liable because the cafeteria was operated by a separate company that was in the catering business. The Fourth Circuit rejected these arguments. It ruled that FELA recovery was appropriate because representatives of the railroad had acknowledged in their testimony that there was some benefit to having employees eat their lunch in the cafeteria, specifically because it "improved employee morale and enabled employees with short lunch periods to return to work on time."[56] As a result, it ruled that the plaintiff's injury occurred within the "scope of employment," and FELA was therefore applicable.[57]

Likewise, in *Gallose v. Long Island Railroad Co.*,[58] the Second Circuit broadly defined what constitutes the "scope of employment" under FELA. The trial court held that the plaintiff could not maintain his FELA claim because his injury was caused by another railroad employee acting outside the scope of her employment. Specifically, the plaintiff was injured by a dog brought to work by the other railroad employee. This other employee claimed that she needed to bring the dog to work with her because she feared for her safety while on the job. The Second Circuit found that there was sufficient evidence in the record to create a jury question as to whether this employee was acting within the scope of her employment by bringing the dog to work. It explained:

53. *See, e.g.*, Urie, 337 U.S. at 181; Gallose v. Long Island Railroad Co., 878 F.2d 80, 83 (2d Cir. 1989); Moore v. Chesapeake & Ohio Railway Co., 649 F.2d 1004, 1008 (4th Cir. 1981).

54. Buell, 480 U.S. at 558.

55. Moore v. Chesapeake & O. Ry., 649 F.2d 1004 (4th Cir. 1981).

56. Moore, 649 F.2d at 1010.

57. *See* Moore, 649 F.2d at 1011.

58. Gallose v. Long Island R.R., 878 F.2d 80 (2d Cir. 1989).

> Arguably, at least as far as [the dog owner] was concerned, the bringing of the dog to work served a legitimate employment purpose: It afforded her physical protection from what she believed to be a real hazard in the workplace and allowed her to concentrate fully on her duties, thus making her more efficient and better able to perform high quality work.[59]

Moore, *Gallose* and the other cases like them have permitted railroad employees to raise FELA claims for numerous types of injuries that are not necessarily unique to railroading.[60] These cases represent quite a departure from the original intent of FELA, which — as Justice Thomas reiterated in *Gottshall* — was enacted in the early part of this century in response to "the special needs of railroad workers who are daily exposed to risks inherent in railroad work and are helpless to provide adequately for their own safety."[61] As such, the Act was designed to provide railroad workers with a federal remedy that would eliminate several of the traditional tort defenses that the railroad could raise if sued at common law.[62] For example, under FELA railroads cannot assert the defense of assumption of risk.[63] FELA is also more liberal with respect to a plaintiff's burden of proving causation. A FELA plaintiff can get to a jury if he or she can show that "the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."[64]

In the past, courts have, for the most part, rejected defense arguments that plaintiffs should not be afforded these special FELA advantages where they have not sustained an injury that is attendant to the dangers of working for railroads. In *Moore* and *Gallose*, the railroads' arguments that FELA was inapplicable were rejected because the plaintiffs were injured at their place of work, albeit while they were in the process of doing something that was not dangerous and not specific to railroading. The plaintiff in *Moore* could have injured herself by slipping on a pat of butter in any cafeteria. There are no unique facts which tie

59. Gallose, 878 F.2d at 84.

60. For other cases in which non-railroad-type physical injuries were recoverable under FELA, *see* Harrison v. Missouri Pac. R.R., 372 U.S. 248 (1963) (intentional assault of railroad employee by another employee); Lillie v. Thompson, 332 U.S. 459 (1947) (intentional assault of railroad employee by a non-employee); Schneider v. National R.R. Passenger Corp., 854 F.2d 14 (2d Cir. 1988) (employee attacked and robbed by unknown assailant); Burns v. Penn Cent. R.R., 519 F.2d 512 (2d Cir. 1975) (brakeman shot and killed by sniper); Hartel v. Long Island R.R. Co., 476 F.2d 462 (2d Cir.) (ticket agent shot and killed during holdup), *cert. denied*, 414 U.S. 980 (1973).

61. Sinkler v. Missouri Pac. R.R., 356 U.S. 326 (1958) (citing Tiller v. Atlantic Coast Line R.R., 318 U.S. 54 (1943)).

62. *Eg.* Buell, 480 U.S. at 561.

63. *See* 45 U.S.C. § 54 (1986).

64. Rogers v. Missouri Pac. R.R., 352 U.S. 500, 506. For a fuller discussion of the advantages afforded by FELA, *see* Gottshall, 114 S.Ct. 2396, 2404.

her injury to railroading, or even railroad cafeterias. Likewise, the *Gallose* plaintiff's injury could have occurred in any workplace setting where someone brought a dog to work. Again, there is nothing that links this injury to the dangers attendant to railroading.

Thus, the *Gottshall* Court's emphatic rejection of claims for negligent infliction of emotional distress that are not based on the dangerous nature of railroad work may be seen as a divergence from prior precedent which broadly defined the type of workplace injuries that FELA covered. Of course, it will likely be argued that the Court's holding in *Gottshall* should only apply in cases where the plaintiff alleges a purely emotional injury. But this distinction would leave one to wonder why the Court chose the "zone of danger" standard over the "physical impact test." If it truly wanted to draw a clear line between FELA claims for emotional injury and FELA claims for physical injury, no matter how small the physical injury, it could have required plaintiffs to have been physically hurt or physically touched in some way before being able to recover for emotional harm. Instead, the Court focused on the hazardous nature of railroad work, and opted to have FELA govern the claims of employees who had the "apprehension of physical impact" because they were doing dangerous work.[65]

One might also wonder why physical injuries should be treated any differently from emotional injuries under FELA. After all, the *Gottshall* Court recognized that on its face FELA makes no distinction between physical and emotional injury.[66] As such, why should purely emotional injuries be subject to greater scrutiny with regard to whether they were caused by a hazard specific to railroading?

A plausible answer may be the Court's desire to place some limitation on claims for emotional injury under FELA. Justice Thomas was concerned that permitting FELA claims for negligent infliction of emotional distress would lead to "infinite" liability for the railroads. As Justice Ginsburg noted, however, there are other ways of verifying the validity of claims for emotional distress. For example, the "physical manifestation" test endorsed by the Restatement of Torts would limit recovery for emotional injuries to claimants who have sustained some physical distress as a result of their emotional harm. On this ground, Justice Ginsberg would have affirmed the Third Circuit's ruling which permitted Carlisle to recover under FELA because there was a mechanism by which

---

65. Gottshall, 114 S.Ct. 2396, 2410.

66. *Id.*

the "genuineness" of his claim could be verified.[67] The Court's rejection of this alternative, as well as its repeated concern that FELA was intended to compensate railroad employees for the dangers attendant to railroading, lead one to believe that it was interested in not just limiting liability for emotional injuries under FELA, but also in limiting the type of FELA claims that can be raised for physical injuries.

V. *Gottshall's* Ramifications for Asbestos Cases

Many of the issues *Gottshall* raises about the parameters of the "zone of danger" test in the railroad setting may be answered if courts have to resolve to what extent railroad workers exposed to asbestos can recover under FELA. Since diseases caused by asbestos take years to manifest themselves, courts may likely rule that railroad employees who were exposed to asbestos decades ago cannot recover today for claims of emotional distress because they have not been in "imminent danger." As discussed above, the word "imminent" connotes a threat of immediate danger, one that is simply not present in the asbestos context. Therefore, plaintiffs raising claims for infliction of emotional distress because of their exposure to asbestos would at first blush flunk the "zone of danger" test.

But it should be remembered that the *Giammona* court had based its decision on the fact that the plaintiff there alleged that although he had no clinically diagnosed disease, the asbestos fibers he was exposed to initiated a "scarring process," which had already done damage to his lung tissue.[68] Would this physical harm, albeit without a clinically diagnosed illness, take an asbestos plaintiff outside the reach of *Gottshall*, and relieve him from having to show that he was in the "zone of danger?" If so, the scope of the Court's opinion in *Gottshall* would indeed be limited to situations where there is not even the least serious physical harm. If not, then a court would likely rule that the reasoning of *Gottshall* applies to FELA claims for at least some physical injuries, as well as to FELA claims for emotional harm.

A court could easily dodge this complex issue requiring an interpretation of *Gottshall* by rejecting the reasoning of *Giammona*, and ruling that an asbestos plaintiff who has simply sustained scarring to the lungs — with no clinically diagnosed disease — is merely suing for an emotional

67. Specifically, she pointed out that the "genuineness" of Carlisle's emotional injuries could be established because he experienced such verifiable physical symptoms as "insomnia, fatigue, headaches, . . . sleepwalking and substantial weight loss." Gottshall, 114 S.Ct. 2396, 2416 (quoting *Carlisle*, 990 F.2d at 92, 97 n.11).

68. Giammona v. Metro-North Commuter R.R., 750 F. Supp. at 663.

injury, i.e., the fear of coming down with a disease.[69] Such an approach would require a court to look beyond the pleadings to discover whether the true nature of a plaintiff's injury was physical or emotional.

This was what the Eastern District of Louisiana did in *Gaston v. Flowers Transportation Co.*,[70] a case filed pursuant to the Jones Act.[71] In *Gaston*, the plaintiff and his half-brother were both working as deckhands on a barge at the time of a collision. Because of the accident, plaintiff fell to the deck and injured his elbow. His half-brother slipped off the barge, and was crushed to death. The court rejected the plaintiff's Jones Act claim, ruling that his injury was essentially emotional in nature, even though he had also suffered a trivial injury, a bruised elbow.[72]

Could an analogous argument be made for someone who was exposed to asbestos while working for a railroad and many years later has sustained scarring to the lungs as a result, but has come down with no clinically diagnosed illness? The Fifth Circuit's *Gaston* opinion, affirming the district court's ruling, may shed some light on this issue. In that opinion, the Fifth Circuit distinguished the *Gaston* plaintiff's injury from the injury sustained by the plaintiff in another case, *Hagerty v. L & L Marine Services*.[73] The plaintiff *Hagerty* was accidentally drenched in cancer-causing chemicals and feared contracting cancer based on this exposure. The Fifth Circuit explained that unlike the plaintiff in *Gaston*, "Mr. Hagerty's recovery was one for his own expenses and for his own fear of contracting cancer — one based upon an event directly affecting him."[74]

Based on the same reasoning, the Fifth Circuit also ruled that the *Gaston* plaintiff failed to meet the "zone of danger" test. It pointed out that at neither his deposition nor in his answers to interrogatories did the plaintiff indicate that he was concerned that he himself would be harmed at the time of the barge accident.[75] In this sense, *Gaston* was unlike *Gottshall*, where the plaintiff was able to allege that he continually feared that he, like his friend Johns, would have a heart attack while working long,

69. Of course, a railroad employee who allegedly sustained a clinically-diagnosed condition because of his asbestos exposure while working for a railroad would still be able to maintain a FELA claim. *Cf.* Urie, 337 U.S. at 175.

70. Gaston v. Flowers Transp., 675 F. Supp. 1036 (E.D. La. 1988), *aff'd*, 866 F.2d 816 (5th Cir. 1989).

71. The Jones Act, which applies to seamen, was modeled after FELA. "The standard of liability is the same under both acts, and the case law of the FELA therefore sheds light on the Jones Act." Gaston, 866 F.2d at 817.

72. *See* Gaston, 675 F. Supp. at 1037.

73. Hagerty v. L & L Marine Services, 788 F.2d 315, 318 (5th Cir. 1986).

74. Gaston, 866 F.2d at 819.

75. Gaston, 866 F.2d at 820.

arduous hours in the sun. Gaston was also unlike Hagerty, who feared for his own health from the moment he was accidentally drenched in the cancer-causing chemicals.

As such, it appears that a key inquiry under the "zone of danger" test is whether the employee actually feared danger at the time of the exposure, and not at some later time when he learned that an exposure may have caused him harm. In this sense, asbestos plaintiffs would not be able to recover for what are essentially emotional injuries under the "zone of danger" test, unless they knew at the time of their exposure that they were inhaling asbestos fibers and feared the risks attendant to this exposure at the time. Since asbestos fibers are too small to be seen and since it takes prolonged exposure to asbestos to impose any risk of physical harm, such a factual scenario appears highly unlikely. Moreover, any asbestos plaintiff making such allegations about his fears at the time of exposure would likely have significant problems under the statute of limitations, which starts to run at the time that the plaintiff discovered or reasonably should have discovered the cause of his alleged injury.[76]

VI. Conclusion

The Supreme Court's holding in *Gottshall* may not just limit the extent to which railroad employees can recover for purely emotional injuries under FELA, but may limit the extent to which they can recover for physical injuries as well. Justice Thomas's adoption of the "zone of danger" standard appears to signal a significant departure from the holdings of lower federal courts, which had broadly interpreted the statute to permit FELA recovery for any physical injuries sustained by railroad employees while they were on duty. Following *Gottshall*, courts may require that plaintiffs seeking recovery under FELA be engaged in the type of work that the statute was originally aimed to protect, i.e., work that is dangerous but essential to railroading.

76. *Cf.* Urie, 337 U.S. at 170.