SUPREME COURT OF THE UNITED STATES

No. 92–1956

CONSOLIDATED RAIL CORPORATION, PETITIONER *v.* JAMES E. GOTTSHALL

CONSOLIDATED RAIL CORPORATION, PETITIONER *v.* ALAN CARLISLE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 24, 1994]

JUSTICE GINSBURG, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, dissenting.

The Federal Employers' Liability Act (FELA), 45 U. S. C. §51 *et seq.*, instructs interstate railroads "`to use reasonable care in furnishing [their] employees with a safe place to work.'" *Ante*, at 17, quoting *Atchison T. & S. F. R. Co.* v. *Buell*, 480 U. S. 557, 558 (1987). As the Court today recognizes, the FELA-imposed obligation encompasses "a duty . . . to avoid subjecting [railroad] workers to negligently inflicted emotional injury." *Ante*, at 17.

The Court limits the scope of the railroad's liability, however, by selecting one of the various "tests" state courts have applied to restrict recovery by members of the public for negligently inflicted emotional distress. The Court derives its limitation largely from a concern, often expressed in state court opinions, about the prospect of "infinite liability" to an "infinite number of persons." See *ante*, at 19. This concern should not control in the context of the FELA, as I see it, for the class of potential plaintiffs under the FELA is not the public at large; the Act covers only railroad workers who sustain injuries on the job. In view of the broad language of the Act,[1] and this Court's

[1]Section 1 of the FELA provides, in relevant part, that "[e]very common carrier by railroad . . . shall be liable in

repeated reminders that the FELA is to be liberally construed, I cannot regard as faithful to the legislation and our case law under it the restrictive test announced in the Court's opinion.

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damages to any person suffering injury while he is employed by such carrier . . . [when such injury results] in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U. S. C. §51.

The FELA was designed to provide a federal "statutory negligence action . . . significantly different from the ordinary common-law negligence action." *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 509–510 (1957). An "avowed departure" from prevailing common-law rules, *Sinkler* v. *Missouri Pacific R. Co.*, 356 U. S. 326, 329 (1958), the Act advanced twin purposes: "to eliminate a number of traditional defenses to tort liability and to facilitate recovery in meritorious cases." *Buell*, *supra*, at 561.[2] "Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet changing conditions and changing concepts of industry's duty toward its workers." *Kernan* v. *American Dredging Co.*, 355 U. S. 426, 432 (1958). Relying upon "the breadth of the statutory language, [and] the Act's humanitarian purposes," this Court has accorded the FELA a notably "liberal construction in order to accomplish [Congress'] objects." *Urie* v. *Thompson*, 337 U. S. 163, 180 (1949); see *Buell*, *supra*, at 562.

In particular, the Court has given full scope to the key statutory term "injury." The Act prescribes that "[e]very common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier." 45 U. S. C. §51. That prescription, this Court observed, is "not restrictive as to . . . the particular kind of injury." *Urie*, 337 U. S., at

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[2]The FELA, as enacted in 1908, abolished the employer's "fellow servant" defense and provided that an employee's negligence would not bar, but only reduce recovery; the Act further prohibited employers from exempting themselves contractually from statutory liability. 45 U. S. C. §§51, 53, 55. As amended in 1939, the Act also abolished the employer's assumption of risk defense. §54.

181. "[W]hen the statute was enacted," it is true, "Congress' attention was focused primarily upon . . . accidents on interstate railroads," for "these were the major causes of injury and death resulting from railroad operations." *Ibid.* But "accidental injuries were not the only ones likely to occur," and Congress chose "all-inclusive wording." *Ibid.* "To read into [language as broad as could be framed] a restriction [tied] to . . . the particular sorts of harms inflicted," the Court recognized, "would be contradictory to the wording, the remedial and humanitarian purpose, and the constant and established course of liberal construction of the Act followed by this Court." *Id.*, at 181–182.

Seven years ago, in *Atchison T. & S. F. R. Co.* v. *Buell*, 480 U. S. 557 (1987), the Court left unresolved the question whether emotional injury is compensable under the FELA, because the record in that case did not adequately present the issue. *Id.*, at 560–561, 570–571. In his unanimous opinion for the Court, JUSTICE STEVENS explained why the question could not be resolved on a fact-thin record:

> "[W]hether `emotional injury' is cognizable under the FELA is not necessarily an abstract point of law or a pure question of statutory construction that might be answerable without exacting scrutiny of the facts of the case. Assuming, as we have, that FELA jurisprudence gleans guidance from common-law developments, see *Urie* v. *Thompson*, 337 U. S., at 174, whether one can recover for emotional injury might rest on a variety of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity. . . . [T]he question whether one can recover for emotional injury may not be susceptible to an all-inclusive `yes' or `no' answer. As in other areas of law, broad

> pronouncements in this area may have to bow to the precise application of developing legal principles to the particular facts at hand." 480 U. S., at 568–570.

In deciding the cases now under review, the Court of Appeals endeavored to "field the *Buell* pitch." *Gottshall*, 988 F. 2d 355, 365 (CA3 1993), quoting *Plaisance* v. *Texaco, Inc.*, 937 F. 2d 1004, 1009 (CA5 1991).

In respondent Gottshall's case, the Court of Appeals first described the various rules state courts have applied to common-law actions for negligent infliction of emotional distress. *Id.*, at 361–362. That court emphasized, however, that "[d]etermining FELA liability is distinctly a federal question." *Id.*, at 362. State common-law decisions, the Court of Appeals observed, "do not necessarily etch the contours of the federal right," *ibid.*, for the common law that courts develop to fill the FELA's interstices is "federal" in character. See *id.*, at 367.

In addition to the FELA's express abolition of traditional employer defenses, the Court of Appeals next noted, this Court's decisions interpreting the FELA served as pathmarkers. The Court of Appeals referred to decisions that had relaxed "the strict requirements of causation in common law," *id.*, at 368, citing *Rogers*, 352 U. S., at 506, broadened the conception of negligence *per se*, see 988 F. 2d, at 368, citing *Kernan*, 355 U. S., at 437–439, and generously construed the FELA's injury requirement, 988 F. 2d, at 368, citing *Urie*, 337 U. S., at 181–182. The FELA, the Court of Appeals concluded,

> "imposes upon carriers a higher standard of conduct and has eliminated many of the refined distinctions and restrictions that common law imposed to bar recovery (even on meritorious claims). FELA liability and common law liability

are thus different." 988 F. 2d, at 369.

Accordingly, the Court of Appeals "refused to designate a particular common law test as *the* test" applicable in FELA cases. *Id.*, at 365. Instead, the court looked to the purposes of those tests: to distinguish "the meritorious [claim] from the feigned and frivolous," *id.*, at 369, and to assure that liability for negligently inflicted emotional distress does not expand "into the `fantastic realm of infinite liability.'" *Id.*, at 372, quoting *Amaya* v. *Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, 315, 379 P. 2d 513, 525 (1963); see also 988 F. 2d, at 381–382.

FELA jurisprudence, the Court of Appeals reasoned, has evolved not through a "rules first" approach, but in the traditional, fact-bound, case-by-case common-law way. See *id.*, at 371. The court therefore undertook to determine "whether the factual circumstances [in Gottshall's case] provide a threshold assurance that there is a likelihood of genuine and serious emotional injury." *Ibid.* "[O]ne consideration" in that inquiry, the court said, "is whether plaintiff has a `solid basis in the present state of common law to permit him to recover.'" *Ibid.*, quoting *Outten* v. *National Railroad Passenger Corp.*, 928 F. 2d 74, 79 (CA3 1991).

Gottshall's claim, the Court of Appeals held, presented the requisite "threshold assurance." His emotional distress, diagnosed by three doctors as major depression and posttraumatic stress disorder, 988 F. 2d, at 374, was unquestionably genuine and severe: He was institutionalized for three weeks, followed by continuing outpatient care; he lost 40 pounds; and he suffered from "suicidal preoccupations, anxiety, sleep onset insomnia, cold sweats, . . . nausea, physical weakness, repetitive nightmares and a fear of leaving home." *Ibid.;* see also *id.*, at 373 (noting that Conrail "wisely declined" to attack Gottshall's claim as fraudulent). Gottshall's afflictions, the Court of Appeals observed, satisfied

the "physical manifestation" limitation that some States, and the Second Restatement of Torts, place on emotional distress recovery. See *id.*, at 373–374 (citing cases); Restatement (Second) of Torts §436A (1965) (no liability for emotional distress without "bodily harm or other compensable damage"); *ibid.*, Comment c ("[L]ong continued nausea or headaches may amount to physical illness, which is bodily harm; . . . long continued mental disturbance . . . may be classified by the courts as illness" and thus be compensable). Cf. *Buell*, 480 U. S., at 570, n. 22 (suggesting a distinction between claims for "pure emotional injury" and those involving "physical symptoms in addition to . . . severe psychological illness").

The Court of Appeals also inspected the facts under the "bystander" test, versions of which have been adopted by nearly half the States. See *ante*, at 15. While acknowledging that Gottshall did not satisfy the more restrictive versions of the "bystander" test, the court observed that several States have allowed recovery even where, as here, the plaintiff and the victim of physical injury were unrelated by blood or marriage. See 988 F. 2d, at 371 (citing cases). Further, the court noted, given "the reality of the railway industry," rarely will one "se[e] another family member injured while working in the railroad yard." *Id.*, at 372. A strict version of the bystander rule, therefore, would operate not to limit recovery to the most meritorious cases, but almost to preclude bystander recovery altogether.

To adapt the bystander rule to the FELA context, the court looked to the reasons for limiting bystander recovery: to avoid compensating plaintiffs with fraudulent or trivial claims, and to prevent liability from becoming "an intolerable burden upon society." *Id.*, at 369, 372. The court held that neither concern barred recovery in Gottshall's case. The genuineness of Gottshall's claim appeared not just in the

manifestations of his distress, the court said, but also in the extraordinarily close, 15–year friendship between Gottshall and Johns, the decedent. *Id.*, at 371. Liability to bystanders, the court concluded, would be far less burdensome in the FELA context, where only close co-workers are potential plaintiffs, than in the context of a common-law rule applicable to society as a whole. *Id.*, at 372. In this regard, the Court of Appeals again recalled, this Court has constantly admonished lower courts that "recovery [under the FELA] should be liberally granted," *ibid.*, "so that the remedial and humanitarian goals of the statute can be fully implemented." *Id.*, at 373.

Satisfied that Gottshall had crossed the "genuine and severe" injury threshold, the Court of Appeals inquired whether he had a triable case on breach of duty and causation. *Id.*, at 374. Here, the court emphasized that Gottshall's distress was attributable not to "the ordinary stress of the job." *id.*, at 375, but instead, to Conrail's decision to send a crew of men, most of them 50–60 years old and many of them overweight, out into 97–degree heat at high noon, in a remote, sun-baked location, requiring them to replace heavy steel rails at an extraordinarily fast pace without breaks, and without maintaining radio contact or taking any other precautions to protect the men's safety. *Id.*, at 376–377.

The Court of Appeals stated, further, that even if Conrail could be said to have acted reasonably up to the time of Johns' death, "its conduct after the death raises an issue of whether it breached a legal duty." *Id.*, at 378. The Conrail supervisor required the crew to return to work immediately after Johns' corpse was laid by the side of the road, covered but still in view. *Ibid.* The next day, Gottshall alleged, the supervisor "reprimanded him for administering CPR to Johns," *id.*, at 359, then pushed the crew even harder under the same conditions, requiring a full day, plus three or four hours of overtime. *Id.*, at 378. These

circumstances, the Court of Appeals concluded, "created not only physical hazards, but constituted emotional hazards which can equally debilitate and scar an employee, particularly one who had just witnessed a friend die under the same conditions." *Id.*, at 378.

Upholding a jury verdict for plaintiff in *Carlisle*, the Court of Appeals "reaffirm[ed]" its *Gottshall* holding that "no single common law standard" governs in "weighing the genuineness of emotional injury claims." Instead, the court said:

> "[C]ourts . . . should engage in an initial review of the factual indicia of the genuineness of a claim, taking into account broadly used common law standards, then should apply the traditional negligence elements of duty, foreseeability, breach, and causation in weighing the merits of that claim." 990 F. 2d 90, 98 (CA3 1993).

The Court of Appeals held that the evidence submitted to the jury amply established the claim's genuineness. Carlisle testified that, after Conrail's 1984 reduction-in-force, the pressure on train dispatchers in Philadelphia, already substantial, increased dramatically. As the person chiefly responsible for ensuring the safety of "trains carrying passengers, freight and hazardous materials," Carlisle became "increasingly anxious" over the sharp reduction in staff, together with the outdated equipment and "Conrail's repeated instructions to ignore safety concerns, such as malfunctioning equipment or poor maintenance." *Id.*, at 92. When Carlisle was compelled to work 12 to 15 hour shifts for 15 consecutive days, the resulting additional pressures, and the difficulty of working for "an abusive, alcoholic supervisor," led, according to Carlisle's expert witness, to the nervous breakdown he suffered. *Ibid.*

Other evidence confirmed Carlisle's testimony. Depositions taken from "Carlisle's co-workers and subordinates" averred that "their jobs as dispatchers and supervisors in the Philadelphia Conrail offices had caused them to suffer cardiac arrests, nervous breakdowns, and a variety of emotional problems such as depression, paranoia and insomnia." *Ibid.* An official report prepared by the Federal Railway Administration "criticized the outdated equipment and hazardous working conditions at Conrail's Philadelphia dispatching office." *Id.*, at 93. Furthermore, the Court of Appeals pointed out, Carlisle's emotional injury was "accompanied by obvious physical manifestations": "insomnia, fatigue, headaches, . . . sleepwalking and substantial weight-loss." *Id.*, at 97, n. 11, 92. The court specifically noted: "We do not face and do not decide the issue of whether purely emotional injury, caused by extended exposure to stressful, dangerous working conditions, would be compensable under the FELA." *Id.*, at 97, n. 11.

Satisfied that the jury could indeed find Carlisle's injury genuine, and continuing to follow the path it had marked in *Gottshall*, the court next examined the negligence elements of Carlisle's claim. Emphasizing that "Conrail had ample notice of the stressful and dangerous conditions under which Carlisle was forced to work," including actual notice of physical and emotional injuries sustained by Carlisle's coworkers, 990 F. 2d, at 97, the Court of Appeals affirmed the District Court's denial of Conrail's motions for judgment *n.o.v.* or in the alternative for a new trial. Carlisle's "extended exposure to dangerous and stressful working conditions," the court concluded, constituted a breach of Conrail's duty to provide a safe workplace, and the breach caused Carlisle's injuries. *Id.*, at 97–98.

The Court initially "agree[s] with the Third Circuit that claims for damages for negligent infliction of emotional distress are cognizable under FELA." *Ante*, at 17. This conclusion, "an easy one" for the Court, *ibid.*, is informed by prior decisions giving full scope to the FELA's term "injury." The Court had explained in *Urie* that an occupational disease incurred in the course of employment—silicosis in that particular case—is as much "injury . . . as scalding from a boiler's explosion." 337 U. S., at 187. Rejecting a reading of the statute that would confine coverage to "accidental injury" of the kind that particularly prompted the 1908 Congress to enact the FELA, the Court said of the occupational disease at issue:

> "[W]hen the employer's negligence impairs or destroys an employee's health by requiring him to work under conditions likely to bring about such harmful consequences, the injury to the employee is just as great when it follows, often inevitably, from a carrier's negligent course pursued over an ex- tended period of time as when it comes with the suddenness of lightning." *Id.*, at 186–187.

Similarly, as the Court recognizes today, "`severe emotional injuries can be just as debilitating as physical injuries,'" hence there is "no reason why emotional injury should not be held to be encompassed within th[e] term [`injury']." *Ante*, at 17, quoting *Gottshall*, 988 F. 2d, at 361.

In my view, the Court of Appeals correctly determined that Gottshall's submissions should survive Conrail's motion for summary judgment, and that the jury's verdict in favor of Carlisle should stand. Both workers suffered severe injury on the job, and plausibly tied their afflictions to Conrail's negligence. Both experienced not just emotional, but also physical distress: Gottshall lost 40 pounds and suffered from insomnia, physical weakness and cold sweats, while Carlisle experienced "insomnia, fatigue,

headaches, . . . sleepwalking and substantial weight-loss." *Id.*, at 374; 990 F. 2d, at 92, 97, n. 11. The Court emphasizes the "significant role" that "common-law principles must play." *Ante*, at 10. Notably in that regard, both Gottshall and Carlisle satisfy the "physical manifestation" test endorsed by the Restatement of Torts. See *supra*, at 6, 9; see also W. Keeton, D. Dobbs, R. Keeton, and D. Owen, Prosser and Keeton on the Law of Torts 364 (5th ed. 1984) ("the great majority of courts have now repudiated the requirement of `impact,' regarding as sufficient the requirement that the mental distress be certified by some physical injury, illness or other objective physical manifestation"); *id.*, at 364, n. 55 (citing cases). Thus, without gainsaying that "FELA jurisprudence gleans guidance from common-law developments," *Buell*, 480 U. S., at 568, one can readily conclude that both Gottshall and Carlisle have made sufficient showings of "injuries" compensable under the FELA.[3]

Notwithstanding its recognition that the word "injury," as used in the FELA, "may encompass both physical and emotional injury," the Court elects to render compensable only emotional distress stemming from a worker's placement in the "zone of danger." *Ante*, at 23. In other words, to recover for emotional distress, the railroad employee must show that negligence attributable to his employer threatened him "imminently with physical impact." *Ibid.* Based on the "zone" test, the Court reverses the judgment for Carlisle outright and remands Gottshall's case for reconsideration under that standard. *Ante*, at 25–26.

The Court offers three justifications for its adoption of the "zone of danger" test. First, the Court

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[3]The *Gottshall* and *Carlisle* cases do not call for decision of the question whether physical manifestations would be *necessary* for recovery in every case.

suggests that the "zone" test is most firmly rooted in "the common law." The Court mentions that several jurisdictions had adopted the zone of danger test by 1908, *ante*, at 14, and n. 8 (citing cases from eight States), and that the test "currently is followed in 14 American jurisdictions." *Ante*, at 14. But that very exposition tells us that the "zone" test never held sway in a majority of States.

Moreover, the Court never decides firmly on the point of reference, present or historical, from which to evaluate the relative support the different common-law rules have enjoyed. If the Court regarded as decisive the degree of support a rule currently enjoys among state courts, the Court would allow bystander recovery, permitted in some form in "nearly half the States." *Ante*, at 15. But cf. *ante*, at 24 (bystander rule "was not developed until 60 years after FELA's enactment, and therefore lacks historical support"). If, on the other hand, the Court decided that historical support carried the day, then the impact rule, preferred by most jurisdictions in 1908, would be the Court's choice. But cf. *ibid.* (preferring the zone of danger test to the impact rule, because, *inter alia*, the latter "has considerably less support in the current state of the common law" than the former).

The Court further maintains that the zone of danger test is preferable because it is "consistent with FELA's central focus on physical perils." *Ante*, at 23. But, as already underscored, see *supra*, at 3, the FELA's language "is as broad as could be framed . . . . On its face, every injury suffered [on the job] by any employee . . . by reason of the carrier's negligence was made compensable." *Urie*, 337 U. S., at 181. And the FELA's strikingly broad language, characteristically, "has been construed even more broadly," in line with Congress' dominant remedial objective. *Buell*, 480 U. S., at 562; *Urie*, *supra*, at 181 ("[N]othing in either the language or the legislative history discloses expressly any intent to exclude from

the Act's coverage any injury resulting `in whole or in part from the negligence' of the carrier").

The Court's principal reason for restricting the FELA's coverage of emotional distress claims is its fear of "infinite liability" to an "infinite number of persons." See *ante*, at 19; see also *ante*, at 25 (referring to "the specter of unlimited and unpredictable liability," and stating that "the fear of unlimited liability . . . [is] well-founded"). The universe of potential FELA plaintiffs, however, is hardly "infinite." The statute does not govern the public at large. Only persons "suffering injury . . . while employed" by a railroad may recover under the FELA, and to do so, the complainant must show that the injury resulted from the railroad's negligence. 45 U. S. C. §51. The Court expresses concern that the approach Gottshall and Carlisle advocate would require "[j]udges . . . 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." *Ante*, at 19. One solution to this problem—a solution the Court does not explore—would be to require such "objective medical proof" and to exclude, as too insubstantial to count as "injury," claims lacking this proof.

While recognizing today that emotional distress may qualify as an "injury" compensable under the FELA, the Court rejects the Court of Appeals' thoughtfully developed and comprehensively explained approach as "inconsistent with the principles embodied in the statute and with relevant common-law doctrine." *Ante*, at 1. The Court's formulation, requiring consistency with both the FELA and "common law doctrine," is odd, for there is no unitary common law governing claims for negligent

infliction of emotional distress.[4] The "common law" of emotional distress exists not in the singular, but emphatically in the plural; and while the rule the Court has selected is consistent with one common-law rule that some States have adopted, it is inevitably inconsistent with others.

Most critically, the Court selects a common-law rule perhaps appropriate were the task to choose a law governing the generality of federal tort claims. The "zone" rule the Court selects, however, seems to me inappropriate for a federal statute designed to govern the discrete category of on-the-job injuries sustained by railroad workers. In that domain our charge from Congress is to fashion remedies constantly "liberal," and appropriately "enlarged to meet changing conditions and changing concepts of industry's duty toward its workers." *Kernan* v. *American Dredging Co.*, 355 U. S., at 432. The Court's choice does not fit that bill. Instead of the restrictive "zone" test that leaves severely harmed workers remediless, however negligent their employers, the appropriate FELA claim threshold should be keyed to the genuineness and gravity of the worker's injury.

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[4]Throughout its opinion, the Court invokes "the common law" in the singular. See, *e.g.*, *ante*, at 18 ("[T]he common law must inform the availability of a right to recover under FELA"); *ante*, at 19 ("The common law consistently has sought to place limits on . . . potential liability"); *ante*, at 21–22 ("[T]he common law in 1908 did not allow [prejudgment] interest"); *ante*, at 24 ("[T]he common law restricts recovery"); *ante*, at 26 ("Carlisle's . . . claim plainly does not fall within the common law's conception of the zone of danger"). But see *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 222 (1917) (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified . . . . It always is the law of some State . . . .).

In my view, the Court of Appeals developed the appropriate FELA common-law approach and correctly applied that approach in these cases. I would therefore affirm the Court of Appeals' judgments.