

Public Health and the Law

The Case of Karen Silkwood

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Last year the United States Supreme Court ruled in *Pacific Gas* that Congress had taken exclusive control over the safety aspects of nuclear power.^{1,2} In a strongly worded opinion, the Court held that the State of California had no authority over the safety of nuclear power, but could exercise regulatory authority in the matter of economics.¹ This year the Court had its first opportunity to apply this holding in the case of Karen Silkwood.³ Were it not for the folklore quality of the Silkwood saga, including Meryl Streep's portrayal of her in Mike Nichols' movie, *Silkwood*, this case might not merit reporting in this column. On the other hand, the case split the Court five to four on non-ideological lines, and thus provides a nice example of how a previous case can be distinguished by judges who decide that drawing distinctions is necessary to do justice.

Karen Silkwood's Story

As presented at the trial in 1979, the basic facts of the lawsuit were not disputed.³⁻⁵ Karen Silkwood was a laboratory analyst for Kerr-McGee at its Cimarron plant, located near Crescent, Oklahoma. The plant fabricated plutonium fuel pins for use as reactor fuel in nuclear power plants. During a three-day period in November 1974, Ms. Silkwood was contaminated with plutonium from the Cimarron plant.

On November 5, after grinding and polishing plutonium samples through a glove box, she monitored herself and found that she had been contaminated with plutonium. She was decontaminated, given urine and fecal kits, and instructed to collect samples to check for plutonium discharge. The following day, after doing an hour of paper work in the laboratory prior to a union meeting, she again monitored herself, and again discovered that she was contaminated. Her hands were decontaminated before the meeting; her entire body later that afternoon.

The next day, November 7, Ms. Silkwood reported directly to the plant's health physics office upon arriving at work. There she was found to be contaminated in her nostrils, and on her hands, arms, chest, back, neck and right ear. Four urine and one fecal sample collected over the past three days were contaminated. Silkwood's apartment was also contaminated, with the highest concentrations of pluto-

nium found in the bathroom and on a package of bologna and cheese in the refrigerator. Many of Ms. Silkwood's possessions were destroyed, and she was sent to Los Alamos Scientific Laboratory in New Mexico to undergo tests to determine the extent of the contamination.

She reported back to work on November 13, at which time she was reassigned. She participated in a union negotiating session that day, and attended a union strategy session. On her way to meet a *New York Times* reporter, David Burnham, that evening, she was killed in an automobile accident. She was 28 years old.

Controversy continues to this day concerning how Karen Silkwood died. Both the movie and a book about the case suggest that she was intentionally forced off the road in the incident that led to her death.⁶ Whatever the truth or falsity of this claim, it was not an issue in this case.

The Lawsuit

Her father, Bill Silkwood, as administrator of her estate, brought suit against Kerr-McGee with any award to go to Ms. Silkwood's three children. The lawsuit was made possible by the work of attorney Daniel Sheehan and contributions from individuals and foundations of approximately \$500,000.⁶ The flamboyant Wyoming trial lawyer, Jerry Spence, was retained to handle the trial itself. The original complaint contained a count alleging a conspiracy between Kerr-McGee and the Federal Bureau of Investigation to violate Karen Silkwood's civil rights. This count was dismissed by the trial judge. The trial itself was confined to physical harm suffered by Karen Silkwood and her property from the plutonium at the Cimarron plant. Specifically, Bill Silkwood sued Kerr-McGee on alternative theories of strict liability and negligence for \$5,000 for Karen's household goods, \$1.5 million in compensatory damages for her personal injuries, and \$10 million in punitive or exemplary damages. A ten-week trial, said to be the longest in Oklahoma history, was held before a jury. At trial, both parties stipulated that the urine samples brought to the plant on November 7 by Silkwood had been spiked with plutonium; they contained insoluble, not naturally excreted, plutonium. The plaintiffs sought to establish that negligent conduct of the defendant Kerr-McGee, including insufficient knowledge of the hazardous nature of plutonium, failure to properly inform and train workers about plutonium, and failure to take reasonably necessary steps to prevent the escape of plutonium and avoid contamination, permitted plutonium to escape from its Cimarron facility, and that the plutonium caused Karen Silkwood injury. In his closing argument, attorney Spence changed his request for punitive damages from \$10 million to

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\$70 million.⁴ On the issues of punitive or exemplary damages, the Court instructed the jury:

The basis for allowance of *punitive damages* rests upon the principle that they are *allowed as a punishment* to the offender for the general benefit of society, both as a restraint upon the transgressor and as a warning and example to deter the commission of like offenses in the future.

Exemplary damages are not limited to cases where there is direct evidence of fraud, malice or gross negligence. They may be allowed when there is evidence of such *recklessness and wanton disregard of another's rights* that malice and evil intent will be inferred. If a defendant is grossly and wantonly reckless in exposing others to dangers, the law holds him to have intended the natural consequences of his acts, and treats him as guilty of a willful wrong.⁴ (emphasis added).

The jury was further instructed that they could consider the "wealth" of Kerr-McGee in determining the amount of the award and its ability to act as "punishment."⁴

The jury awarded Karen Silkwood's estate \$5,000 for household goods, \$500,000 for her injuries, and \$10 million in punitive damages. Kerr-McGee appealed.

The Circuit Court of Appeals

On appeal, Kerr-McGee argued that workers' compensation should be Karen's exclusive remedy for job-related injuries, and that the federal government had preempted the area of nuclear safety so that the punitive damages award should be set aside. The Court of Appeals agreed. That Court held that in the absence of any credible evidence that a Kerr-McGee agent intentionally planted plutonium in Ms. Silkwood's apartment, the evidence at trial led to the circumstantial conclusion that all of her exposures were "job related" and thus that personal injury compensation could only be had under the Oklahoma Workers' Compensation Act. The Court thus reversed the \$500,000 personal injury award. The Court, however, affirmed the \$5,000 award for property damage on the theory that as an ultra-hazardous product, Kerr-McGee should be held strictly liable for plutonium damage occurring outside the plant (since the jury found that Karen had not intentionally removed plutonium from the plant). As for punitive damages, the Court held that since such damages were primarily designed to have a deterrent or regulatory effect, and since this related exclusively to regulating the safety of nuclear power, this issue was exclusively in the hands of federal government: "A judicial award of exemplary damages under state law as punishment for bad practices involving exposure to radiation is no less intrusive than direct legislative acts of the state. Thus we hold punitive damages may not be awarded in this case." (at 923)⁵

US Supreme Court

Silkwood did not appeal the reversal of the personal injury award but did seek review of the Court of Appeals' reversal of the punitive damages. More specifically, the Supreme Court was asked to determine whether a state-authorized award of punitive damages arising out of the escape of plutonium from a federally licensed nuclear facility is preempted by the federal nuclear power regulatory scheme. The US Government submitted an *amicus curiae* brief on behalf of Kerr-McGee, arguing that punitive damages were preempted because they conflicted with the

federal remedial scheme: the Nuclear Regulatory Commission levying fines and other civil penalties on licensees who violate federal standards.

The author of *Pacific Gas*, Justice Byron White, again wrote for the majority. He began the Court's analysis by noting that Congress' decision to exclude the state from safety regulation of nuclear development "was premised on its belief that the Commission was more qualified to determine what type of safety standards should be enacted in this complex area." (at 4046)³ The Court, however, found no specific evidence that Congress intended to forbid the states from providing remedies for those suffering from radiation in a nuclear plant. The notion that Congress meant to retain state tort actions for personal injuries under these conditions was bolstered by the legislative history of the Atomic Energy and Price-Anderson Acts, since neither provided any federal remedy for personal injury. "It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." As to punitive damages in particular, the Court argued that such damages "have long been a part of traditional state tort law" and should be assumed to continue in full force "unless . . . expressly supplanted." (at 4048)³

Admitting that there was "tension" between this conclusion and *Pacific Gas*, the Court concluded that Congress intended to tolerate such tension:

[P]reemption should not be judged on the basis that the federal government has so completely occupied the field of safety that state remedies are foreclosed but on whether there is an *irreconcilable conflict* between the federal and state standards or whether the imposition of a state standard in a damages action would *frustrate the objectives* of the federal law. We perceive no such conflict. (at 4048)³ (emphasis added).

The Court accordingly reversed the judgment of the Court of Appeals, and remanded the case back to it to permit Kerr-McGee to argue any other claims related to the punitive damages award, "including its contention that the jury's findings with respect to punitive damages were not supported by sufficient evidence" and were "excessive." (at 4049)³

The Dissenters

Four Justices dissented. All argued that the case was governed by *Pacific Gas*, and their primary reason was the nature of punitive damages. As Justice Blackmun noted, such damages are essentially "private fines levied by civil juries," and are calculated to "compel adherence to a particular standard of safety." (at 4049)³ In *Silkwood*, for example, the plaintiffs sought punitive damages on the basis that the day-to-day safety procedures employed at the Kerr-McGee facility were recklessly substandard. Specifically, the judge instructed the jury regarding the applicability of federal safety standards to a jury award of punitive or exemplary damages:

You may consider compliance with these standards as evidence of the exercise of reasonable care by Kerr-McGee Nuclear Corporation and to negate a finding of the conduct necessary to establish a basis for exemplary damages . . . You are instructed, however, that *you are not bound by these standards. Your duty is to determine what constitutes the exercise of reasonable care in handling plutonium*, or the existence of reckless and wanton conduct, in light of the physical characteristics of that material and the risks associated with it. (at 598)⁴ (emphasis added).

The dissenters spun two arguments: 1) that the jury is permitted to second-guess and even totally supplant federal safety standards by their own determination of "reasonable care"; and 2) that it is at least anomalous to have a randomly selected lay jury "imposing a fine to regulate activity considered too complicated for state regulatory experts." (at 4050-51)³

Discussion

It is probably as difficult to develop sympathy for Kerr-McGee, as it is to determine what to make of this decision. It certainly means that the Supreme Court is continuing to narrow the scope of federal preemption: *Pacific Gas* permitted state economic regulations, and *Silkwood* now permits some traditional state tort law remedies for personal injuries arising from radiation risks. This "trend" indicates that the Supreme Court is not as enchanted with the nuclear power industry and the need for federal preemption as it was previously; and that the "new federalism" of a diminished federal role and an enhanced state role in dealing with regulated industries is taking hold in the federal Judiciary, as it has in the Executive.

Another way to read the case is to conclude that the Court decided to let traditional notions of justice run their course in the *Silkwood* case, even at the price of resulting "tension" between state tort law and federal regulation in the field of nuclear power. Since the Court of Appeals had reversed the \$500,000 award of compensatory damages to Karen's estate as barred by the State Workers' Compensation statute, state workers' compensation law also remains viable. A reversal of the punitive damages award would have left the total jury award to the *Silkwood* estate at \$5,000 along with a potential workers' compensation claims to be

filed, and this would have been inadequate to most observers. By ruling as it did, the Court could rightly feel that it was doing justice to *Silkwood*, and if Congress did not agree with the Court's characterization of its intention regarding preemption of state punitive damages actions in nuclear safety cases, it could *specifically* say so by statute, making similar actions impossible in the future.

No matter how one interprets the case, however, it presents a recurrent problem, the role of the jury in complex toxic tort litigation involving inconclusive medical and scientific data, and personal injuries to plaintiffs despite regulatory compliance by defendants. In such cases, can we rely on a jury of lay persons to intelligently determine proper safety precautions at government-licensed facilities, to apply common law principles of rights and duties to parties in various risk contexts, and to set compensation for personal injuries arising from permitted activities? At least in an era of public health concerns and mistrust of federal agencies and industrial activities, it is some comfort to know that merely following the letter of minimal federal safety standards is not a bar to a citizen jury determining that personal injuries caused by the regulated industry should be compensated; and failure to take more than the required steps may be so "unreasonable" as to warrant punitive damages.

REFERENCES

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3. *Silkwood v. Kerr-McGee*, 104 S.Ct. 615 (1984).
4. *Silkwood v. Kerr-McGee*, 485 F. Supp. 566 (W.D. Olka. 1979).
5. *Silkwood v. Kerr-McGee*, 667 F.2d 908 (10 Cir. 1981).
6. Rashke R: *The Killing of Karen Silkwood*. NY: Penguin Books, 1982.

Summer Workshop at Gallaudet on Health Education for Deaf People

Gallaudet College, the nation's only liberal arts college for deaf people, will sponsor a special workshop focusing on ways health education programs and materials can be made accessible to deaf children and adults. The workshop, "Strategies in Health Education for Deaf Consumers," will be held June 24-27, 1984 at Gallaudet in Washington, DC.

Gallaudet will bring together health education professionals who will provide information on deafness and present sessions that show how to teach such subjects as CPR, sex, prepared childbirth, wellness, and drug abuse to deaf consumers. Participants in the workshop will have opportunities to learn how to develop or adapt materials and programs for deaf consumers. The workshop will also highlight model programs already in existence in the rapidly expanding area of health education for deaf people.

Gallaudet is an international resource which serves deaf people through programs in education, public service, and research.

Application has been submitted to the District of Columbia Nurses' Association for continuing education credit. Tuition fee: \$75; room, board, recreation fee: \$80. For registration contact: Terri Baker, The National Academy of Gallaudet College, 800 Florida Ave. NE, Washington, DC 20002, (202) 651-5480 (voice or TDD).