

Silkwood—The Legal Fallout

An important precedent has been set in what some are calling the Supreme Court's first antinuclear decision

By JANET RALOFF

Until last month, regulation of nuclear safety within the United States was generally believed a responsibility reserved exclusively for the federal government. But a controversial 5-to-4 decision by the Supreme Court appears to have changed that. Contrary to the way the decision *Silkwood vs. Kerr-McGee* has been widely portrayed, the important legal issue was not whether an individual—or in this case, her heirs—could receive compensation for radiation contamination or injury. Rather, it was about whether punitive damages—the tort-law equivalent to a civil fine—could be levied against members of this highly regulated industry. Because punitive damages are regulatory in nature, a case can be made, as four of the nine Supreme Court justices did in this instance, that allowing punitive damages gives states and private citizens sitting on a jury a right to establish *de facto* regulatory policy. This is what makes the Jan. 11 ruling so powerful.

Karen Silkwood was a laboratory analyst at a Kerr-McGee Corp. nuclear-fuel fabrication plant near Crescent, Okla. Shortly before her death in 1974, Silkwood was involved in a sequence of plutonium-contamination episodes (see sidebar). Silkwood died in an auto accident during a time when she was gathering evidence of alleged plant-safety violations; her family decided to sue Kerr-McGee over the contamination incident. In the jury trial in Oklahoma, which lasted three months, lawyers representing Silkwood's father and children elicited testimony from witnesses that suggested the Kerr-McGee plant where Silkwood had worked did not always comply with Nuclear Regulatory Commission (NRC) safety regulations.

The Silkwood attorneys argued that Kerr-McGee was negligent in assuring worker safety. Although NRC did not actually catch the company jeopardizing safety, the attorneys charged that the plant managers nonetheless recklessly endangered not only workers, but also the local community. As such, the jurors were instructed by the court to consider awarding punitive damages if they found Kerr-McGee guilty of contaminating Silkwood and her property. Explained the trial judge to the jurors: "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 so-

ciety, both as a restraint upon the transgressor and as a warning and example to deter the commission of like offenses in the future."

But by attempting to deter future behavior, punitive-damage awards act as a fine imposed upon lawbreakers. Kerr-McGee's lawyers argued that under the Atomic Energy Act of 1954, only the federal government—in this instance, the NRC—had the right to punish those who broke nuclear-safety laws. Punitive damages were therefore illegal, they said, because such damages tread on NRC's exclusive regulatory domain.

In fact, the jury found Kerr-McGee guilty and awarded the Silkwood estate \$10 million in punitive damages, \$500,000 to compensate Silkwood for personal injuries and \$5,000 to cover the cost of contaminated furniture and possessions that had been destroyed.

Kerr-McGee appealed the larger awards to the U.S. Court of Appeals for the 10th Circuit. There the court dismissed the \$500,000 award, ruling Silkwood's contamination was work related and therefore compensable only under the state worker's compensation law. The court also threw out the punitive award, agreeing with Kerr-McGee that such an award put the jury and state in a position of regulating nuclear safety.

That latter ruling, appealed to the Supreme Court, was overturned. Citing the Price-Anderson Act (a 1957 amendment to the Atomic Energy Act, which set a limit of liability for insuring commercial power plants against potentially bankrupting incidents), Justice Byron White says it was obvious "Congress assumed that persons injured by nuclear accidents were free to utilize existing state tort-law remedies." (Tort law is that dealing with civil remedies for wrongful acts other than breach of contract.)

Writing on behalf of the majority, White notes "Kerr-McGee focuses on the differences between compensatory and punitive damages awards and asserts that, at most, Congress intended to allow the former. This argument, however, is misdirected," he says, "because our inquiry is not whether Congress expressly allowed punitive damage awards." He says, "Congress assumed that traditional principles of state tort law would apply with full force

unless they were expressly supplanted."

Observes Bob Alvarez, director of the Environmental Policy Center's nuclear power and weapons project in Washington, D.C., "In a way, the Silkwood case is a bellwether for what I think is the single most important factor shaping nuclear policy in this country—the growing tension between states and the federal government over the siting and regulation of nuclear facilities." He says, "It was no coincidence that 16 states signed on as *amicus curiae* [friends of the court] to the Supreme Court briefs on the side of the Silkwoods."

Rob Hager is a partner in the Christic Institute, a Washington, D.C., public-interest law firm that represented the Silkwoods. He also recruited the states and drafted one of two briefs the states signed onto. Hager now believes the Supreme Court would in fact have ignored the Silkwood case had it not been for the states' involvement. Explains Hager, "Silkwood is generally perceived as an antinuclear case, and the Supreme Court has always been very pronuclear. So to avoid the appearance of this being an antinuclear case, we put the issue before the court as one coming from the states instead of from Bill Silkwood [Karen's father]."

This issue of states' rights was not only a useful ploy but also a valid debating gambit. Alvarez says, "There is a general trend to allow states to assert more control over the nuclear industry." He cites, for example, a decision by Congress to give states veto power (subject to House and Senate override) in the selection of waste-repository sites under the Nuclear Waste Policy Act (SN: 1/1/83, p. 6). Then there is a 1977 amendment to the Clean Air Act that allows states to set stricter ambient-radiation limits than the federal government. In the amendment, Alvarez notes, Congress stated that it saw itself as overturning a Supreme Court ruling in which federal law preempted the states. With the Silkwood case, Alvarez says, the high court finally acknowledges the mood of the Congress: to let states have some say in deterring negligence in radiation safety, even if it means giving states an indirect form of regulation.

"I think that [the regulatory aspect of punitive awards] bothered the majority as

The Silkwood incident

Karen Silkwood joined Kerr-McGee's Cimarron facility outside Oklahoma City on Aug. 5, 1972. She was 26, a divorced mother of three and excited at the prospect of earning \$3.45 an hour as a lab technician grinding and polishing plutonium. Having taken high school and college courses in advanced chemistry, trigonometry, physics, zoology and radiology, she was better educated than most of those with whom she worked. Moreover, she had always dreamed of a career in science. And here it was, making fuel pellets for the power plant of the future — an experimental fast-breeder reactor.

That first flush of enthusiasm began to wear off during a strike in November 1972. But the real turning point came in May 1974 when Silkwood saw a co-worker keel over on the job. Health officers fumbled in attempts to revive the worker with smelling salts, then brought in an oxygen tank, which was broken. Enraged by the episode, Silkwood started complaining. Leaders of her union local heard her and immediately recruited the scrappy Silkwood to represent them in upcoming contract talks.

Two months later, Silkwood became contaminated with plutonium in a pair of accidents—one involving a vacuum that hadn't been properly cleaned, another due to a leaking glove box. Encouraged by leaders of her union local, she began collecting details of other problems about the plant — equipment not up to code, procedural violations and the like. There were 39 specific items on her list



Karen Silkwood and her children

when she and other activists from the local met in Washington, D.C., with representatives of the Oil, Chemical and Atomic Workers Union in late September. Hearing her allegations, the union officials decided to get proof; on the spot they recruited Silkwood as a spy. She was asked to get radiographs of "doctored" fuel pellets and photocopies of incriminating documents. In seven weeks she was to turn these over to one of the union representatives, Steve Wodka, who would in turn make them available to a New York Times reporter.

But a week before the meeting was to occur, Silkwood again became involved in a series of contamination incidents. When the source of the contamination remained elusive, a company decontamination squad accompanied her home. They found high levels of plutonium in Silkwood's bathroom, bed-

room and kitchen—the highest readings came from food in the refrigerator.

After a week of tests to monitor internal-body contamination at Los Alamos Scientific Laboratory, Silkwood returned to work. She was last seen alive at a meeting of her union local, carrying a manila folder. On her way to meet with Wodka and the New York Times reporter, Silkwood's car careened off a road. She died instantly. But the manila folder that she had been carrying only minutes earlier never turned up. A subsequent inquiry by a private auto-accident investigator suggested her car might have been forced off the road by another vehicle.

The official police report ruled Silkwood's death an accident, most likely from sedative-induced drowsiness. Her friends scoffed at that; being a frequent Quaaludes user she wouldn't have been that drowsy from a single pill, they say, especially with her excitement at finally turning over the secret file. To this day, the issue remains unresolved.

Silkwood's family sued Kerr-McGee for the November contamination incident. Though the Supreme Court overturned the appellate court's dismissal of punitive damages, it is unclear what share of the \$10 million award, if any, that Silkwood's estate will collect. The whole issue of whether the jury trial substantiated the wanton recklessness required for justifying a punitive award must be reviewed by an appeals court, together with several other legal disputes.

— J. Raloff

well as the minority in this case," says Gerald Charnoff, a Washington, D.C., attorney experienced in radiation-compensation suits. "That 5-to-4 vote would tell you that some pretty bright judges, regardless of their political views, look at the question in different ways." Moreover, Charnoff says, "It seems to me that the majority's reasoning was not as strong as the minority's."

In part, Charnoff is referring to the way dissenting justices Harry Blackmun and Lewis Powell marshalled logic to demonstrate why punitive damages can be seen as a form of regulation—an issue the majority opinion sidestepped altogether.

In a dissent, Blackmun explains "Congress intended to rely solely on federal expertise in setting safety standards, and to rely on states and juries to remedy whatever injury takes place under the exclusive federal regulatory scheme." Punitive damages, however, "are calculated to compel adherence to a particular standard of safety—and it need not be a federal standard," he says. Because NRC's investigation of the Silkwood incident failed to turn up a punishable violation of federal

law by Kerr-McGee, Blackmun argues that the Silkwood case points out that adherence to federal law is not protection from large punitive actions in state courts. As such, the threat of these suits could encourage if not compel licensed firms to ignore federal laws in deference to state-imposed *de facto* regulations, Blackmun writes.

Powell adds that only last April in the Pacific Gas and Electric (PG&E) case, the Supreme Court addressed directly under what conditions state laws were preempted by federal powers in nuclear regulation (SN: 4/30/83, p. 279). And the high court held that all regulatory powers except those that had been "expressly ceded to the states" were the exclusive responsibility of the federal government—seemingly a direct contradiction to the majority opinion issued in Silkwood.

So what does all this mean in practical terms? Observes Linda Hodge, general counsel for the Atomic Industrial Forum, a trade group representing nuclear utilities, "Plaintiffs are now somewhat more moti-

vated to claim punitive damages in radiation cases. The simple publication and publicity surrounding Silkwood has done that all by itself." Hodge finds even more "disturbing" the Supreme Court's sanctioning of *de facto* regulation through punitive-damage awards. This "allows juries to arrive at a judgment about what the appropriate standard of care is in these situations, and they [the juries] can completely ignore valid federal regulations," she says. Ordinarily, she explains, "In the view of most tort authorities, compliance with a federal regulation is some indication of lack of fault."

To Hager, the Silkwood decision potentially opens the way for states to expand their role in nuclear safety. He said he has already been working with a citizen committee in Dauphin Co., Pa.—where Three Mile Island (TMI) and Harrisburg are located—to draft a local ordinance limiting radioactive emissions from the two TMI reactors. The law would impose fines for noncompliance. Asked whether the proposed limits would be

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lower than existing federal ones, Hager says, "At present the committee hasn't decided, but it may well be. And if they do," he says, "that would likely make the next case [testing the preemption doctrine] to go before the Supreme Court."

But Alvarez believes the Silkwood decision is going to have a far bigger impact on the nuclear-weapons program than the commercial powerplant industry. "Compare the two," he says. "Which is older and committed the most outrages? The Energy Department owns 280 nuclear facilities in some way dedicated to nuclear weapons," he says. "If you look at who has generated the most [radioactive] waste, in terms of volume, and who has exposed the most people for the longest time—it's the Energy Department," he says.

Among pending defense-related suits where the Silkwood precedent could have an immediate impact, are:

- A suit being brought by 28 former servicemen who were exposed to radiation from the March 1, 1954, Bravo nuclear-weapons test on the Marshall Islands in the west Pacific. Because the Supreme Court's *Feres* decision prohibits servicemen from suing the government for military-related injury, they are suing private contractors employed by the government to conduct the tests—and they will be asking for punitive damages.

- Owners of range land near the Rocky Flats nuclear-weapons plant outside Denver. According to their attorney, Howard Holme, the plaintiffs in *McKay vs. the United States* allege that the plant's operations contaminated their land and in so doing reduced its property value. They have made legal claims of negligence, trespass and strict liability. (Strict liability is when proof of damage—regardless of intent or negligence of the accused—is enough to prove guilt. It is particularly applicable when unusual chemicals like plutonium are found, as in the Silkwood case. Karen Silkwood's estate collected \$5,000 in strict-liability awards for damage to her apartment possessions. The mere finding of plutonium there, which could only have come from the Kerr-McGee plant, made the company liable. And in fact, of the three awards made by the jury, only the strict-liability one was never contested by Kerr-McGee.) Plaintiffs in *McKay*, now awaiting trial, are asking for \$26 million in compensatory (actual) damages, and \$160 million in punitive damages.

In addition, Alvarez says, "the last time I looked, the federal government was being sued in excess of \$1 billion for damage related to fallout." Not only have few of these suits been settled, but their number is also growing. Alvarez says that is why "it's the government contractors and the federal weapons program that are really up against the wall on this one." □