Employer's Tort Liability When a Female Employee Is Exposed to Harmful Substances

ALLAN SLOAN*

The responsibility of an employer to provide a safe environment for employees is mandated under OSHA regulations. The question now arises as to the employer's responsibility to provide the same protection to the yet unborn (or not yet conceived) offspring of employees. The tort liability—in this case, stemming from exposing female employees and their future fetuses to harmful substances in the work place—is the subject of this article. The author examines not only the potential extent of the liability, but also the steps an employer can take to minimize his chances of being found liable.

A topic of increasing importance to employers is that of exposure of women of child-bearing age to substances with harmful effects. The employer's tort liability may extend not only to the woman, but also to her offspring. There is evidence that certain substances may cause fetal damages not just through the mother by transplacental transmission, but even by the mother's or father's exposure prior to conception.

The evidence to date is based upon studies of reproductive functions of women who have been exposed. (These studies generally have not examined the effect upon reproductive functions of similarly exposed men.) While the standards adopted pursuant to section 6(b) of the Occupational Safety and Health Act[1] (OSHA) are not sex-specific as to exposure levels but rather are neutral, some employers have completely excluded women of child-bearing age from all jobs in which the exposure to substances known to cause fetal damage is possible.

The main thrust of this article concerns the extent of employers' tort liability to offspring. It is better understood after a brief review of the employer's obligation to its female employees and other background material.

* *LL.B., Brooklyn Law School. Mr. Sloan is with Vedder, Price, Kaufman, Kammholz & Day, New York.*

Danger to Female Employees

The prohibitions against discrimination in Title VII of the Civil Rights Act of 1964[2] (and, by implication, Executive Order 11246[3]) have generally been interpreted to bar any policy excluding women from any job where that policy is designed to "protect" women workers from danger. *Weeks v. Southern Bell Telephone Co.*, 408 F.2d 228 (5th Cir. 1969); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969).

> "Moreover, Title VII rejects just this type of romantic paternalism as unduly victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing."[4]

Indeed, even where a state "protective" law prohibits the employment of women in certain dangerous jobs, an employer violates Title VII if he excludes women from those jobs on the basis of the state "protective" law. *Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971).

These cases, however, arguably involved situations where the dangers were not sex-specific, i.e., both men and women were exposed to similar hazards, albeit in different degrees.[5] A different result might obtain if, for example, exposure to a particular substance created a significant risk of cancer in female workers but little or no carcinogenic risk to male workers. An employer who wished to exclude women from jobs where the hazards were sex-specific might argue that although it may be unlawful to treat women differently where the hazards exist for both men and women, it would not be unlawful to treat women differently where they faced hazards demonstrably unique to them.

In such a case, before adopting a policy of excluding women, the employer should first carefully review the relevant medical and scientific literature to determine if there is any substantial risk, albeit noncarcinogenic, in exposure of males.

The more troublesome situation is one in which the only recognized dangers to the workers are sex-specific (e.g., only women workers run a substantial risk if exposed). This might be the case with lead, where there is some evidence that the toxic exposure level for women may be significantly lower than for men. Thus, male workers could be safely employed at exposure levels unsafe for women.

In such circumstances, an employer would have three options. First, he could reduce the exposure to a level low enough to eliminate the hazard to women. This is the general recommendation of unions and civil rights groups. Second, he could continue to employ women at hazardous exposure levels after carefully and fully warning them of the risks. (The problem with this second option is that although the female employee voluntarily assumes the risk, thereby freeing the employer of liability, the female employee may not bind her unborn child to a release from liability. This is discussed in the section on "Danger to Offspring.") Third, he could refuse to employ women in the jobs in question.

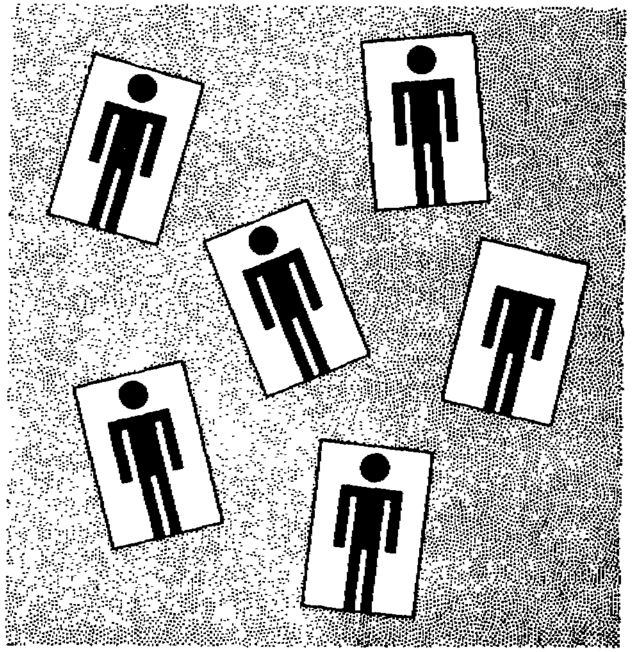
Option number one would satisfy any question of compliance with OSHA and Title VII and therefore ought to be given prime consideration. It will not be a realistic alternative, however, if a reduction of exposure to a level safe for women is not technically feasible or if the cost is prohibitive.

Option number two raises serious questions because of employer accountability to OSHA as to the reasons for the hazardous exposure levels. Tort liability questions also are raised by this option. However, the risk of tort liability for injury to female workers (but not their offspring) can be reduced, if not entirely eliminated, by a full and adequate warning. But another problem with option number two arises under Title VII if a reduction in exposure levels is technically feasible. Female workers then may be able to argue successfully that it is unlawful sex discrimination for the employer to provide safer working conditions for men than for women. Therefore, if it is technically and economically feasible to reduce the level of exposure to one safe for women workers, option number one appears to be preferable.

Similarly, option number three—barring females from certain employment—presents grave Title VII problems if the employer can reduce exposure levels to provide a safe work place for women. Where it is not technically feasible or the cost is clearly prohibitive, Title VII may nevertheless require that individual female workers,

rather than the employer, be given the choice of employment in a hazardous job.

In conclusion, if it is technically and economically feasible, an employer should reduce all recognized hazards to a level safe for



both female and male workers. If such a reduction is not feasible, the employer should fully inform all workers of the risks involved and allow them to accept or decline employment in the hazardous jobs.

Danger to Offspring

Offspring can be damaged by exposure of a woman to a hazardous substance prior to conception, by exposure of the mother after conception, and by direct exposure of the fetus after conception.

Where sufficient medical evidence exists with respect to exposure of female workers to a particular substance, company policy with respect to those workers must be uniform. For example, an employer could not exclude women workers from benzene production positions in a petrochemical plant while employing women in clerical positions in offices adjacent thereto if the exposure levels of both were similar.

Companies at which there may be a substantial risk of exposure of all fertile females to situations dangerous to the fetus (or future fetuses) should examine the relevant medical evidence carefully before deciding on a company policy.

Assuming that the employer concludes that there is a risk to the current fetus (or future fetuses) by exposure of the mother, the employer has three options. The first is for the employer to consider lowering exposure levels to protect all fertile workers (particularly pregnant workers) from exposure levels dangerous to the fetus, if this is technically feasible and not cost prohibitive.

The employer's second option is to continue to employ the fertile female employees at the potentially dangerous exposure levels after providing them with ample notice of the risks to the fetus. As mentioned earlier, this notice may limit the liability toward the mother but not toward the fetus (see discussion, *infra*).

Employer's third option is to exclude all fertile women (particularly pregnant women) from jobs where exposure levels may threaten the fetus.[6]

A recent decision in an Illinois State Court[7] raises the question of the extent of the employer's tort liability to a child born in the future to a female employee exposed to substances having harmful effects. This case also raises the question of whether a female employee may bind her unborn child with a release from tort liability to the employer. Also, if this case decision is followed by other courts, will it—since it extends employers' tort liability far beyond current limits—become commonplace for labor arbitrators (and possibly the EEOC) to permit an employer to control the work areas in which females of childbearing capability may work?

The *Renslow* case involved an action in an Illinois State Court for negligence and willful and wanton misconduct. The plaintiff alleged, successfully, that when her mother was thirteen years of age, the defendants, on two occasions, negligently transfused her mother with the wrong blood (Rh-positive and not Rh-negative), discovered their error, but never notified her mother or her mother's family. As a result, there was prenatal damage many years later to plaintiff's hemolytic process and her life was put in jeopardy, necessitating her induced, premature birth. When she was born, she required two immediate complete exchange transfusions of blood, resulting in permanent damage to, inter alia, her brain and her nervous system. Transfusing the wrong blood was clearly a negligent act, and the defendants were responsible for knowing that transfusing the wrong blood can cause such fetal injury. The negligent act was committed pre-conception, but the injury attached only at the conception of the fetus.

(This was a tort action and not a workmen's compensation action, since it was not an employer-employee relationship but one of hospital-patient. However, even if exposure or injury to a mother is work related, workmen's compensation statutes are not relevant since the plaintiff was not an employee.)

The issue facing the court in *Renslow* was whether a child, born alive, may have a cause of action for prenatal injuries resulting from another's pre-conception negligent conduct. According to the *Renslow* court, the substance of the defendant's contention was that they owed *no* duty of care to the minor plaintiff prior to her conception. However, the court held that the fact that the negligence occurred prior to conception was no bar to plaintiff's cause of action. The court held that although there are complex burden-of-proof questions in prenatal injury cases, the causal connection is traceable and the injury reasonably foreseeable. Plaintiff had alleged sufficient facts to enable the court to find a duty owed by the defendant to the plaintiff and a breach of that duty.

Following are three possible post-*Renslow* impact effects on an employer's tort liability to the offspring of its female employees:

A. If the decision is reversed by a higher court or rejected by other courts, no liability, and the employer's obligations and tort liability to these offspring will not be extended appreciably;

B. Or, other courts may limit *Renslow* to the doctor-hospital-patient context, and not extend it to the employer-employee context (a stricter standard of duty may be imposed on doctors and hospitals than on employers);

C. Courts may extend *Renslow* to the industrial context.

If "C" occurs and *Renslow* is held applicable to the industrial context, certain questions of legal significance arise and must be answered:

- *Proximate-Cause Criteria*

  Did exposure in fact cause or bring about the fetal injury? "But for" the mother's exposure, would the fetus have been injured?

- *Foreseeability-of-Harm Criteria*

  Would the "reasonable man" foresee that employer's exposing its employees to a particular substance would cause injury and harm to a fetus conceived at a later time?

  Did employer know or have reason to know that the substance to which it was exposing its employees was harmful to a later-conceived fetus?

  Did employer know or have reason to know that the employee's later-conceived fetus was not sufficiently protected even if the adult employee was?

  Do animal studies indicate danger to a fetus sufficient to establish foreseeability in humans?

- *Standard-of-Care Criteria*

  Is compliance with an OSHA regulation sufficient to establish a standard of care (duty)?

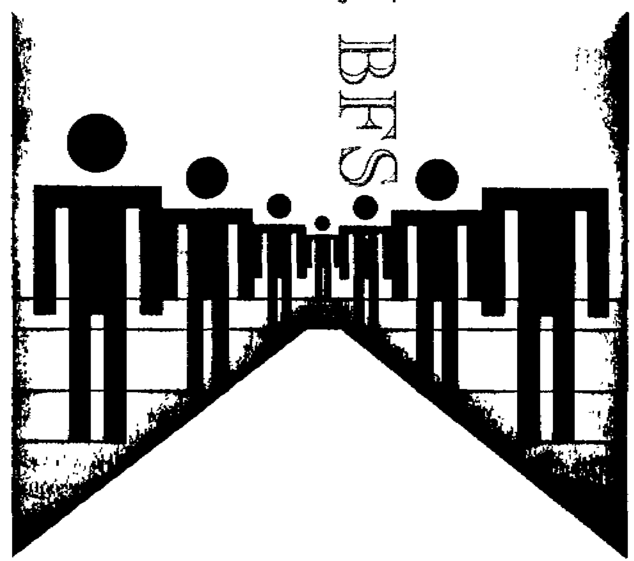
  Is the standard of care met if an employer is in compliance with an OSHA regulation, or is the standard of care greater than the regulation?

  What if there is no OSHA regulation—how is standard of care measured?

  At what point in time is the employer bound to a standard of care (duty) to the employee and the employee's offspring: pre-OSHA regulation; concurrent with OSHA regulation?

The effect of this case on the employer's obligation to the current and future offspring of its female employees may be wide-reaching. If upheld by other courts and applied to the industrial context, it

may result in arbitrators and the EEOC permitting a company more easily to adopt a policy barring female employees of child-bearing capability from jobs involving exposure that may negatively affect a fetus. Further, even if OSHA has not issued a directive embodying such a recommendation, arbitrators and the EEOC may permit a company—assuming that reasonable medical authorities have recom-



mended such a policy—to deny jobs in certain areas of the plant to female employees of child-bearing capability. However, in order to avoid an EEOC confrontation and avoid a charge of sex discrimination, the company's safety rule will have to bar only females of child-bearing capability, but not all females, from those jobs.

Lastly, I call your attention to a series of publications discussing the general subject of prenatal injury and the law of torts, the relationship between OSHA and the law of torts, and the *Renslow* decision and its possible long-range effect on the extent of the employer's tort responsibility to female employees:

1. *Renslow v. Mennonite Hospital: Prenatal Injuries and a Pre-Existence Duty*, 10 John Marshall Journal of Practice and Procedure 417 (1977).
2. *Relationship Between OSHA and the Law of Torts*, Proceedings of the ABA National Institute on Occupational Safety and Health Law, ABA's Section of Labor Relations Law, 1976 meeting.
3. *Ways the Developing Fetus or Child Can Be Harmed*, Working for Your Life—A Woman's Guide to Job Health Hazards, Joint Publication of Labor Occupational Health Programs and Public Citizens Health Research Group (chapter 8).
4. *The Right of Recovery for Prenatal Injuries*, XII Louisiana L. Rev. 383 (1952).
5. *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 University of Pennsylvania L. Rev. 554 (1962).
6. *Radiation and Preconception Injuries: Some Interesting Problems in Tort Law*, 28 Southwestern L.J. 414 (1974).
7. *Wrongful Birth: The Emerging Status of a New Tort*, 8 St. Mary's L.J. 140 (1976).

Conclusion

The entire area of tort liability between and among employer, female employee, and fetus is one of great import to many companies. However, of the many questions raised in this area of tort liability, pre-conception injuries are probably the most difficult to deal with in the legal context; and they, more than other types of injuries, strain traditional tort law to its limits. However, if the *Renslow* decision receives widespread acceptance by other courts and is applied in the industrial context, the employer's tort liability will be extended immeasurably, with a probable result that the employer may be able better to control the work areas of its fertile female employees.

NOTES

1. 29 U.S.C. § 656(b).
2. 42 U.S.C. and Supp. v. 2000e *et seq.*, 78 Stat. 253.
3. 3 C.F.R. § 339 (1965), as amended by Executive Order 11375 (1967).
4. *Weeks* at 236.
5. Both *Weeks* and *Bowe* involved lifting weights of over thirty pounds, and *Rosenfeld* involved heavy physical effort.
6. It should be noted that an employer's exclusion of fertile female employees from jobs hazardous to a fetus can be defended on at least two different theories:

   A. The exclusion is based on a "business necessity." But this must be an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. However, case law indicates that availability of the defense is far from clear. The EEOC has repeatedly stated that a business-necessity defense cannot be used to justify any practice that overtly distinguishes between male/female or black/white workers. The EEOC General Counsel wrote to the Atomic Energy Commission [letter from EEOC General Counsel William Carey to Counsel for Environment and Safety Stephen Greenleigh August 29, 1974] indicating that the defense would not insulate a policy setting lower radiation exposure levels for pregnant females.

   B. *Bona Fide Occupational Qualification*. Section 703(e) of Title VII provides that employers may differentiate on the basis of sex where sex is a bona fide occupational qualification. However, this defense is likely to be reserved for jobs—such as wet nurse—where the sex of the employee is a biological prerequisite for successful performance.
7. Renslow v. Mennonite Hospital, ____ Ill. 2d ____, ____ N.E.2d ____ (1977), aff'g 40 Ill. App. 3d 234, 351 N.E.2d 870 (4th Dist. 1976).