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William H. Rodgers

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ARTICLE

PUNITIVE DECISIONMAKING

WILLIAM H. RODGERS*

The Supreme Court's decision in *Exxon Shipping v. Baker*[1] will haunt environmental law for years to come.

In a 5:3 decision[2] authored by David Souter, the opinion of the court begins:[3]

> There are three questions of maritime law before us: whether a shipowner may be liable for punitive damages without acquiescence in the actions causing harm, whether punitive damages have been barred implicitly by federal statutory law making no provision for them, and whether the award of $2.5 billion in this case is greater than maritime law should allow in the circumstances. We are equally divided on the owner's derivative liability, and hold that the federal statutory law does not bar a punitive award on top of damages for economic loss, but that the award here should be limited to an amount equal to compensatory damages.

All three of these outcomes give reason for regret.

The 4:4 split on derivative liability will become 5:4 against if Justice Alito votes as expected at first opportunity. Requiring "acquiescence" by giant corporations in the drunken driving (and any number of other foibles and missteps) by the captains of giant vessels[4] gives "deniability" to the

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* Reprinted from WILLIAM RODGERS, ENVIRONMENTAL LAW IN INDIAN COUNTRY, Winter 2009 Pocket Parts, Preface (Thomson / West, 2005). Appreciation is expressed to my secretary, Cynthia Fester; and to my second-to-none librarians (among them Peggy Jarrett, Cheryl Nyberg, Mary Whisner, Ann E. Hemmens and Nancy McMurrer) who work with Professor Penny Hazelton at the University of Washington School of Law's Marian Gould Gallagher Law Library.

1. ____ U.S. ____, 128 S.Ct. 2605, 171 L.Ed.2d 570 (June 25, 2008).

2. Justice Alito took no part in the consideration of the decision. There is a strong dissent on the punitive damages issue by Mr. Justice Stevens and cryptic dissents by Justice Ginsburg and by Justice Breyer.

3. 128 S.Ct. at 2611.

4. See Paul Edelman, *Amici Curiae* Brief of Ship Masters and Expert Mariners Captains Mitchell Stoller, Joseph Ahlstrom, Roger Johnson, John Scott Merrill, and Tom Trosvig In Support of Respondents 26 (Jan. 29, 2008) ("In addition to piloting these enormous ships, captains may manage as many as several hundred crew members. In order to run all of the operations on these ships, captains must maintain contact with the shore. As a result, captains of today are much

corporation and will fuel strategies to let the buck stop far downstream. The Exxon disaster itself shows exactly what you get when there is expected to be no "derivative" liability for an oil spill. Paper rules from above. Poor oversight. Little change in behavior. Deny later that the captain was drunk,[5] even while the company fires him for being drunk.[6] Make a scapegoat of the captain. He will suffer all sanctions while those whose liability could only be "derivative" are praised, honored, and promoted.[7]

The wonder in the question of whether the Clean Water Act bars punitives is not in the result (it clearly does not)[8] but in how appellate courts allowed this matter to be raised and presented. The claim was not even made in the district court until thirteen months after the jury verdict in the punitive damages case.[9] Most lawyers who would dare to raise it would face Rule 11 sanctions. But not, it seems, law firms that are highly honored and strategically placed. A forgettable lesson in Supreme Court practice.

As for the punitives (set by the jury at $5 billion in 1994), Mr. Justice Souter dug deeply for a vision of justice (presumed to be buried within each and every one of us) and discovered sentiments against "unpredictability" and "this feature of happenstance" that "is in tension with the function of the awards as punitive, just because of the implication of unfairness that an eccentrically high punitive verdict carries in a system whose commonly held notion of law rests on a sense of fairness in dealing with one another."[10] Empirical support for this vision of "unpredictability" and "outlier" and "eccentric" jury behavior on punitives appears in empirical research. Some of this is blessed and cited by the court, with the curious disclaimer: "Because this research was funded in part by Exxon, we decline to rely on it."[11] There are many other published works not paid for by Exxon and not relied on by the court either.[12]

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like plant managers of a land-based operation"; see id. at 8: "more than half of all cargo transported by sea today is harmful to the environment").

5. See Walter Dellinger, Brief for Petitioners 9 n.3 (Dec. 17, 2007) (the question of whether Hazelwood was "impaired by alcohol" is "hotly disputed").

6. See David W. Oesting, Brief for Respondents 9 n.8 (Jan. 22, 2008) ("Even Exxon's Chairman conceded shortly after the spill that Hazelwood was 'drunk' . . . and Exxon fired him for that reason").

7. Exxon Shipping Co. v. Baker, Transcript of Oral Argument, Feb. 27, 2008, p. 76 (Jeffrey L. Fisher, Esq., for Respondents) [hereinafter Feb. 27, 2008 Oral Argument]: ("In the wake of the spill, . . . , Exxon fired one person – Captain Hazelwood. They reassigned the third mate. Everybody else up – further up the chain of command that allowed this to happen received bonuses and raises.")

8. *See Exxon Shipping Co. v. Baker*, 128 S.Ct. at 2618-19.

9. *See id.* at 2617.

10. *Exxon Shipping Co. v. Baker*, 128 S.Ct. at 2627. As of mid-October 2008, not a penny of the punitive damages awarded to class members has been paid.

11. *Exxon Shipping Co. v. Baker*, 128 S.Ct. at 2126, citing, among other authorities, Schlade, Sunstein & Kahneman, Deliberating About Dollars: The Severity Shift, 100 Colum. L. Rev. 1139 (2000). Obviously, the court relies upon this research while "declining" to rely upon it.

12. Riki Ott, Sound Truth and Corporate Myths: The Legacy of the Exxon Valdez Oil Spill (2005, Dragonfly Sisters Press, Cordova, Ala.) (by a member of the plaintiff class); Kellie Kvas-

To correct this wildly unpredictable behavior by juries, Justice Souter took the court on a "quantitative" path, declaring:[13]

> given the need to protect against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary, either for deterrence or for measured retribution, we consider that a 1:1 ratio [of punitives to compensatory damages], which is above the median award, is a fair upper limit in such maritime cases.

Consider whether the unpredictability and caprice declared to exist in the jury system can be surpassed by the imagination (and ample self-deceptions) of a sample of Supreme Court justices. For example —

Noncompensatory Purpose

The Supreme Court informs us that "the consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct."[14] The historical record is quite mixed on this point, as the court concedes.[15] No better case for reconsidering this question will ever be found than the fishermen plaintiffs in the Exxon matter, numbering 32,000 (with perhaps 26,000 still alive). For these plaintiffs, the punitive award was meticulously allocated and heavily relied upon for compensation if the funds never were to be collected. Windfalls came to nobody. Shortfalls came to all. This *Exxon Shipping* decision works a cruel dashing of economic expectations along with the presumed quenching of the desire for retribution said to be satisfied by the decision.

Inadequacy of Compensation

The Supreme Court announced that this Exxon case "does not support an argument that maritime compensatory awards need supplementing."[16] But of course the attractiveness (and simplemindedness) of insisting upon a "quantitative" ratio between punitive and compensatory damages is that the "punishment" should not greatly exceed the damage inflicted. "Compensatory" in this equation must stand for "damages done" not "the small fraction of damage for which we were made to pay." Perhaps Justice Souter's "unpredictability" beacon could be recalibrated if the compensatory function represented more than a tiny fraction of costs imposed.

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nikoff, Exxon Valdez: 18 Years and Counting (2007, Lulu.com) (another member of the plaintiff class) [hereinafter cited as 2007 Kvasnikoff]; Rodgers, et al., *The* Exxon Valdez *Reopener: Natural Resource Damage Settlements and Roads Not Taken*, 22 Alask. L. Rev. 135 (2005) [hereinafter cited as 2005 *Exxon Valdez* Reopener].

13. *Exxon Shipping Co. v. Baker*, 128 S.Ct. at 2633.
14. *Exxon Shipping Co. v. Baker*, 128 S.Ct. at 2621.
15. *Exxon Shipping Co. v. Baker*, 128 S.Ct. at 2620.
16. *Exxon Shipping Co. v. Baker*, 128 S.Ct. at 2633 n.27.

How much has Exxon "underpaid" for the economic and environmental damage done in Prince William Sound? I would start with a figure of about $10 billion, more or less.[17] Massive environmental damage was not compensated for in the Exxon case. The court heard something about this in the briefs[18] but not a single advocate before the Supreme Court thought it useful to inform the court that the authorities are in the process of trying to collect from Exxon an additional $92 million in reopener monies for ongoing environmental damage.[19] This important environmental case is missing its environmental part.

"Unnecessary for Deterrence or for Measured Retribution"[20]

Justice Souter and the court no doubt chose its fatuous 1:1 ratio because it is not easy for a jury or a court to determine whether a corporate entity has been adequately deterred and appropriately sanctioned. Litigation over "bad acts" is strongly directional towards minutiae.[21] It may well

17. Compare 2005 *Exxon Valdez* Reopener at 148-49 (original contingent valuation studies put damage done to the Sound at $3-14 billion dollars) with Feb. 27, 2008 Oral Argument at 33 (Walter Dellinger, on behalf of Petitioners) ("when you start with payments that have reached $3.4 billion in terms of compensation, fines, remediation, restitution, that clearly obviates the need for deterrence"). There could be another trial on the additional damage inflicted by the "payments" for which Exxon gets full credit. See Riki Ott, Not One Drop: Betrayal and Courage in the Wake of the *Exxon Valdez* Oil Spill (2008, Chelsea Green Pub., White River Junction, Vt.) [hereinafter cited as 2008 Ott]; David S. Case, Brief of *Amici Curiae* National Congress of American Indians and many other native groups, Jan. 29, 2008 (assertion that class members were "fully compensated" is remarkably "shallow" and "callous").

18. *See* Amy J. Wildermuth, Brief for the Pacific Coast Federation of Fishermen's Associations and the Institute for Fisheries Resources As *Amici Curiae* In Support of Respondents, Jan. 29, 2008, pp. 5-10 (on the persistence of oil and collapse of the herring); *Exxon Val*dez Oil Spill Trustee Council, Lingering Oil, http://www.evostc.state.ak.us/Habitat/lingering.cfm (visited October 20, 2008).

19. The U.S. and Alaska have made demands for $92 million of the $100 million under the Reopener clause. These funds have not been paid and will necessitate further litigation.

20. *Exxon Shipping Co. v. Baker*, 128 S.Ct. at 2633.

21. *See* Thomas O. McGarity, *On the Prospect of* "Daubertizing" *Judicial Review of Risk Assessment*, 66 Law & Contemp. Prob. 161 (2003). What is the scope of the offender's behavior put in issue by a punitive damages claim and award? *Exxon Shipping* and the U.S. Supreme Court say it is limited to the precise behavior (i.e., drunken driving) that yielded the spill. What are the fishing peoples' views on this corporate character inquiry? 2007 Kvasnikoff, passim (eradication of food supply, crushing of elders' spirits, dysfunctional cleanup program, flawed contingency plans, copious motion and litigation extravagance designed to discourage adversaries, misuse of "limited fund" theory to prevent "opt-outs" from the class, extravagant claims of privilege for 12,000 documents, a secret deal between Exxon and the Seattle Seven fishing companies to undercut the punitives award, numerous fines and penalties on environmental matters, destruction of indigenous peoples' rainforest with the Chad-Camerron pipeline project, participation in climate-change coverup, recognition as the "sixth-worst" polluter in the U.S., cozy relationships with the brutal Indonesian military, a "History of Pollution and Theft," numerous hazardous waste violations, withdrawal of oil and gas from Texas lands without permission, defrauding Alabama on royalties due from natural gas wells in state waters); 2008 Ott, passim (false promises of double-bottom tankers and state-of-the-art vessel traffic control, reduced minimum crew sizes, nonexistence contingency plans, dysfunctional ballast water treatment plant, failure to build the promised sludge incinerator, coverup of sickness among oil cleanup workers, more "charade" than

be that Exxon has learned its "drunken captain" lesson. There is little evidence that the corporation will be capsized by a wave of remorse over its broader oil-spill avoidance duties on topics such as vessels with double-bottoms and clean-up plans.[22] Lessons are yet to be learned on other topics such as participation in the corruption of government or the payment of royalties the company honorably owes.[23]

Exxon Shipping Co. v. Baker declares the company "adequately deterred" though there can be no character test on the matter.

Exxon Shipping Co. v. Baker also declares the company "adequately punished." There is little evidence of that. In the early 1990s criminal proceedings were staged. Exxon pled guilty to three misdemeanors and agreed to pay a $150 million fine. But $125 million of this fine vanished and was "remitted" ("to forgive or pardon") and returned to the corporation.

Another $100 million was declared "restitution" and went to the federal and state governments — but free of the legal restraints of the natural resource damage process.[24]

"cleanup," politicization of science, incessant public relations, tanker operators laundering hazardous wastes at Valdez — a "Ballast Watergate," Wackenhut spies, distortion of truth, the pledge of the Exxon chairman to "use every legal means available to overturn this unjust verdict," the Seattle Seven and the "fraud on the Court," Exxon's legal efforts to bring the *Exxon Valdez* back to Prince William Sound, arrested at the Exxon shareholder meeting, seventeen years after the spill nine of twenty-four species originally injured are listed as "recovered," profit by stalling, "Some Corporate Defense Strategies in Adversarial Legislation," Native creation of a "Shame Pole" dedicated to Exxon Mobil).

22. *Compare* 2008 Ott at 23-25 with William M. Walker, Brief of *Amicus Curiae* Prince William Sound Regional Citizens' Advisory Council and Cook Inlet Regional Citizens' Advisory Council in Support of Respondents, Jan. 28, 2008, p. 28 (after twenty years' experience, the RCACs assert that "despite the many safeguards in place today against another oil spill, the elements of human error — indeed recklessness — and the corporate profit-seeking imperative remain substantially the same"; urges continuation of the "threat of punitive damages").

23. *See, e.g.*, Escaping the Resource Curse, 24-25 (2007, Mascartan Humphreys, Jeffrey D. Sachs & Joseph E. Stiglitz, eds., Columbia Un. Press, N.Y., N.Y.) (ch. 2, Joseph E. Stiglitz, What is the Role of the State? (footnotes omitted) ("In the 1980s I worked on a case involving cheating by the major oil companies in Alaska. This oil-rich state had a mineral lease requiring the oil companies to pay 12.5 percent of the gross receipts, less the cost of transporting the oil out from the far-flung site at Prudhoe Bay on the Arctic Circle. By overestimating their costs by just a few pennies per gallon (and multiplying those pennies by hundreds of millions of gallons) the oil companies would increase their profits enormously. They could not resist the temptation"; "In the end, there was no doubt that the cheating had occurred — and on a massive scale. There followed a series of settlements involving a who's who of global oil companies — including what are now BP, ExxonMobil, and ConocoPhillips — for an amount in excess of 6 billion dollars"; Robert McClure, "Federal Agency bungles oil-gas contracts", Seattle Post-Intelligencer, Sept. 19, 2008, p. 1, col. 2 ("Uncollected royalties by minerals service could hit $14 billion, GAO says"); U.S. Dep't of Interior, Office of Inspector General, "OIG Investigations of MMS Employees," Sept. 9, 2008 (sex, drugs, and "Royalties in Kind"); H. Josef Hebert, "Oil Brokers sex scandal may affect drilling debate", Associated Press, Sept. 11, 2008, available at http://ap.google.com/article/ALeqM5jzUY8O1E6qfQWasH6Fewcq6YfYmwD934FHVG0 (visited 10/20/2008).

24. 2005 *Exxon Valdez* Reopener at 149-52.

"No Earmarks of Exceptional Blame"[25]

Justice Souter repeatedly downplays Exxon's role in the oil spill disaster with terminology that minimizes culpability. Thousands of fishing people who came to know this corporation far better than they had wanted to get no chance to talk back. One of them, Kellie Kvasnikoff,[26] is given a chance in these pages. He says: "The gloating predictions of Exxon's chief strategist have turned out to be true, and the case has stretched into the 21st century. After 18 years justice has turned out to be misspelled, it is JUST-US. Those with the deep pockets that can manufacture legal arguments, use the law, buy science, keep Supreme Court Justices and Presidents in their hip pockets and play them like puppets when it is to their benefit. This to me is horrific."

25. *Exxon Shipping Co. v. Baker*, 128 S.Ct. at 2633; see id. at 2631 ("worse than negligent but less than malicious"); 2631 n. 22 (no "specific purpose to cause harm at the expense of an established duty"; 2631 (not a case of "malicious behavior and dangerous activity carried on for the purpose of increasing a tortfeasor's gain")); 2637: "[only a case of] reckless action, profitless to the tortfeasor, resulting in substantial recovery for substantial injury"; *id*. at 2633: "without behavior driven primarily by desire for gain"; "without the modest economic harm or odds of detection that have opened the door to higher awards").

26. 2007 Kvasnikoff at 30; *id*. at 165: "If there are grounds for the death penalty to be inflicted upon an individual, then there should be grounds for a corporate death penalty."