

## Drunk Driving, Pollution, and Insurance

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**David Lebedoff, *Cleaning Up: The Story Behind the Biggest Legal Bonanza of Our Time* (New York Free Press), 321 pages \$25.00**

This book tells the story of the law suit that a large number of fishermen brought after the *Exxon Valdez* plowed into Bligh Reef in Prince William Sound shortly after midnight on March 24, 1989. David Lebedoff, the lawyer-author of this brisk book, describes the case as the biggest drunk driving case in history. That image captures the substance and tone of the book.

The story of the litigation contains a number of intriguing elements. Most significant, a number of lawyers descended upon Alaska in the hopes of getting a piece of this case (like flies to—well—“whatever,” as they say). Curiously, the law firm that emerged as the leader of the plaintiffs’ lawyers was Faegre & Benson (F&B), a large and prestigious corporate firm in Minneapolis, Minnesota. Needless to say, F&B was not known as a plaintiffs’ firm, nor did it think of itself that way. However, one of its midlevel partners, Brian O’Neill, wanted to undertake the case, secured permission to do so, and has probably made a fortune for everybody there.

The fundamental theory of the case was quite simple. The captain of the ship had been drinking on the night of the accident. He had a history of irresponsible (alcoholic) drinking, and the company knew it. Exxon kept an insufficient watch on the captain of the *Valdez*, and its policies regarding alcohol abuse were defective. In addition, the crew members on the bridge of the *Valdez* were tired

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and incapable of dealing with any serious difficulty. Hence, when the besotted captain went to his quarters—ostensibly to do paperwork—disastrous negligence occurred, caused an accident, and in turn generated billions of dollars in damages.

Pretrial activities were immense and intense. Exxon pursued a “scorched-earth policy,” and deposed thousands of fishermen, at astonishing cost. Forty lawyers from F&B, among many others, were utilized to meet Exxon’s full press. Eventually, the presentation of the case had to be organized. Facts had to be marshaled, and damage theories had to be formulated, documented, and honed. A trial team had to be selected from the many, many plaintiffs’ lawyers. And the case had to be presented to test juries.

It was tried for real in three phases. Exxon admitted its negligence right from the start. Hence, Phase One was to determine whether the spill had occurred because the captain, Exxon, or both, recklessly operated the tanker. Recklessness, of course, is the predicate for gross negligence and, therefore, punitive damages. Phase Two would determine how much money would be paid as actual damages. Phase Three would decide whether punitive damages would have to be paid and, if so, how much.

Since Exxon’s negligence was never at issue, the plaintiffs did not have to prove it, but they did have to prove Exxon’s recklessness, which is much harder to demonstrate. Basically, from a legal point of view, to prove recklessness, the plaintiff has to show that a defendant knew that it was being negligent and didn’t care. However, from a rhetorical point of view, to prove gross negligence, a plaintiff must prove *outrageous negligence* as well, so that the jury is in a deeply angry mood that lasts over some time.

This case was also about damages. As to actual damages, Exxon wanted to hold the number down, of course, while the plaintiffs wanted to pump it up. As to punitive damages, the plaintiffs wanted irate, outraged, scandalized, thoroughly disgusted jurors. From Exxon’s side, the punitive damage case was—in part—about obtaining a hung jury. Thus, it asked every prospective juror, “If you had a belief that the facts were such that your belief differed from the rest of the jurors, do you feel as though you have the strength of character to hold out and tell people what your beliefs are, independent of what they may say to you?” No one but Exxon could afford to try this case very many times. (Interestingly, although Exxon admitted that it was negligent and that its captain was negligent, the captain did not admit that he was negligent.)

In Phase One, the plaintiffs contended that the captain was drunk, but he and Exxon both denied it. The plaintiffs contended that blood samples established that he was drunk, but the defense contended that the blood samples had been badly mishandled and were, therefore, unreliable. A number of people testified that they had seen the captain drinking on the day the *Valdez* sailed, but no one could testify that the captain was drunk.

The plaintiffs produced many witnesses to the captain's long and dedicated drinking history. They also demonstrated that Exxon was well aware of this history. Perhaps the most important testimony was that of Dr. David Smith, a physician-expert on addiction and alcohol. He testified that a blood test was the best indicator of alcohol consumption and, therefore, of drunkenness. The captain of the *Valdez* took a blood test 11 hours after the grounding. His blood-alcohol level was found to be .061. In the shipping industry, there is no acceptable level higher than .04. In many places, .08 or .10 is considered drunk driving. Dr. Smith retroactively extrapolated from this number across the 11 hours. He then gave a professional opinion that the captain had a blood-alcohol level at the time of the grounding of .226. "A person with a blood-alcohol reading of .226 is what non-experts call pie-high drunk," says author Lebedoff. "One steps over the people in the gutter who have lower readings. This is 2½ times the drunk-driving level. No one would argue that someone with a reading of .226 should have been commanding a tanker, or, for that matter, standing upright."

Of course, the defense suggested that "retrograde extrapolation" was a defective methodology. It was absurd, they said, to say that the captain had a level of .226. The captain would have been slurring or reeling, and would have appeared obviously drunk to all the crew members who had seen him and thought he seemed sober. Even the Coast Guard officials detected no signs of insobriety other than the smell of alcohol. Dr. Smith had a response. "Some people who are dead drunk are not visibly affected by strong drink, but their judgment is invariably lousy." Dr. Smith's testimony was 150-proof stuff, although many criminal-defense lawyers doubted that it could be right.

At the end of Phase One, the jury found recklessness. According to Lebedoff, the jury aggregated the captain's mistakes to get to gross negligence. First, the captain should never have sailed only three hours after his last drink. Second, he should not have left the bridge. Third, he shouldn't have left the controls of the *Valdez* in the hands

of an unqualified seaman. Fourth, and this mistake the jury found itself, the captain had set the ship's computer program in such a way that it was accelerating as it approached Bligh Reef. (This last matter had been briefly mentioned by the plaintiffs in passing, but the jury extracted the meat of the point from computerized logs and relied extensively upon it.) Rhetorically, one way to get to gross negligence is to add up a series of smaller negligences. Legally, of course, this idea is complete nonsense.

Phase Two, on actual damages, was dull and yet remarkable. Exxon believed that compensatory damages should be about \$100 million. The plaintiffs thought it should be \$890 million. Each side conducted and presented expensive and exhaustive damage studies. Hence, Phase Two was also tedious. Nevertheless, three things stand out. First, the defense lawyers appeared to chastise the jurors for finding Exxon reckless. A bad taste stayed in the jury's mouth, as a result, but it still kept damages down. Second, the jury deliberations were lengthier than the trial—somewhere around a month. The third noteworthy feature of Phase Two was the verdict itself. The jury awarded compensatory damages of \$286,700,000—less than one-third what the plaintiffs sought, but almost three times what the defendants suggested. The actual damage award was unquestionably a defeat for the plaintiffs, even though it was still quite large. Exxon must have regarded it as a defeat, too.

There were two crucial aspects to the jury verdict. Usually, without bodily injury or property damage, there can be no award for economic losses based upon negligence or even gross negligence. There are several exceptions to this general rule, and marine-pollution disasters are one of them. Thus, the fishermen were seeking compensation for a lost harvest of fish. State records, however, only ran through 1992. The jury, therefore, refused to find damages after that date, although the plaintiffs asked for damages through the end of 1995. Right there, the jurors threw out 40 percent of the money the plaintiffs had been seeking for fish that were never caught—more than \$115 million. There was an even larger loss for the plaintiffs.

The biggest component of the plaintiff's damages was the drop in salmon prices. The plaintiffs contended that the spill at the *Valdez* was responsible for this drop. There was a battle of the experts on this point. Professor James Anderson of the University of Rhode Island claimed that salmon prices fell all over the world during the relevant period, and not just in the spill areas of Alaska, and he contended that the reason prices fell was "because the market was being flooded with farm-raised salmon. Supply and demand." Thus, the

wreck of the *Valdez* was not responsible. The jury accepted this argument and refused to award the damages the plaintiffs sought. (For an extended discussion of this matter, see Bruce M. Owen et al., *The Economics of a Disaster: The Exxon Valdez Oil Spill* (1995), a boring, mercifully short, but highly instructive, academic treatise that takes up the price-of-salmon issue.)

According to Lebedoff, Phase Three, concerning punitive damages, was the most agonizing component of the trial for the jury. After the presentation of additional evidence, the lengthy jury deliberations were sharply conflicted—indeed, agonizing. The jury nearly hung up. Eventually, it awarded \$5 billion against Exxon but only \$5,000 against the captain.

The trial did not end the conflict, of course. Post-trial motions can be enormously important to a losing defendant. The most important clash that arose after the trial concerned the so-called “Seattle Seven.” Exxon settled with a group of seafood processors for \$70 million. The theory of the settlement was that since Exxon had caused there to be fewer fish, there was less canning to be done. The settlement agreement itself was extremely confidential. However, the Seattle Seven filed an application for a fraction of the punitive damage award in the fishermen’s tort case. In order to proceed, the terms of the settlement had to be disclosed. According to the settlement, the canners were to refund to Exxon any punitive damages they recovered. They asked for \$7.45 million.

The judge was irate. He described the settlement as a “startling affront to the jury system” and involving “pernicious and flagrant violations of public policy.” As far as the judge was concerned, this was nothing more than a kickback scheme. Moreover, since Exxon officials had testified about the settlement and had not fully characterized the settlement agreement, the judge suggested that one or more Exxon lawyers had violated Rule 3.3 of the Alaska Rules of Professional Conduct, which require candor towards tribunals. (At the same time, the judge suggested that trial counsel was unaware of all the terms of the settlement agreement.)

As of May 1998, the Ninth Circuit had not ruled on the appeal of this case, although it was argued in early 1998. The book ends with everyone waiting to see what will happen next. It is a great virtue of this book that, after one has read it, one is actually curious about how the appeal will come out.

*Cleaning Up* is a deliberately ambiguous title. On the one hand, it refers to what Exxon did at Prince William Sound; on the other, it refers to the amounts of money the plaintiffs may recover and their

lawyers may make. Indeed, some of the most interesting portions of the book are spent discussing the fees these lawyers may receive. More broadly, a fair fraction of the book is a relatively elementary sociology of the legal profession and of life in a large law firm. (There are even a few instructive passages on Exxon's corporate culture and how it focuses on the long run.)

As good an evening's read as it is, the book suffers from a number of deficiencies. Its rather breathless prose focuses mainly on the lead counsel for the plaintiffs, yet one doesn't feel that one has really gotten to know this fellow at all. Other lawyers, who receive briefer treatments, come off as nothing but cardboard characters. One has no sense at all of defense lawyers who tried the case—perhaps they wouldn't be interviewed. If so, that fact should have been made clear. Also, the major decisionmakers for Exxon are total ciphers. Perhaps that is as it should be, since the case is still on appeal, or perhaps Exxon's corporate culture dictates anonymity. At the same time, it constitutes a defect in a book like this one. One puts down the book entirely uncertain who presented themselves to the author, who refused to present themselves, and who is simply too dull to discuss.

There is another aspect of this entire conflict about which nothing is said. Exxon became embroiled in insurance litigation with Lloyds of London as a result of the *Valdez*. Some parts of the case were settled; other coverage aspects of the case were tried; and the bad-faith component of the case was ultimately settled. Hundreds of millions of dollars were at stake, so one would have thought something might be said about the insurance case. Alas, *Cleaning Up* was not written that way. It is true that overwrought writing is more at home describing parts of a torts case involving astronomical punitive damages than it is in an insurance case. Then again, when Texas-style insurer bad faith is combined with drunk driving and massive pollution cleanup, who knows what kind of prose might be produced.

