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SUPREME COURT DISPATCHES

Oil and Water

The *Exxon Valdez* case runs aground at the Supreme Court.

By Dahlia Lithwick

Posted Wednesday, Feb. 27, 2008, at 7:07 PM ET

The high court is teeming with Alaskans this morning, and the press office has made a superhuman effort to accommodate them all. The *Exxon Valdez* spill occurred in 1989, and most of these folks are still not recovered. Indeed, of the more than 32,000 fishermen and small-business owners who filed this class action suit against Exxon in 1994, about 20 percent are now dead. Outside the court, Alaskans hold banners demanding justice. And flanking me in the press section today are reporters from at least four different Alaskan newspapers. One is himself a plaintiff in the Exxon suit. A few moments before argument begins, a passel of them are even moved up to the two front rows reserved for the permanent press corps—sacred ground to which your ordinary beat reporter dare not aspire.

The 1994 class action suit against Exxon resulted in a jury verdict of $5 billion in punitive damages, knocked down to $2.5 billion by the federal appeals court. Exxon, having already paid out $3.4 billion in cleanup costs, wants out. The questions on which the court granted certiorari are narrow ones, and underneath the fancy tort analysis they don't amount to much more than, "What do you sue for a drunken sailor?" Unlike other punitive damage cases the court has considered of late, the Exxon case turns only on whether maritime law somehow precludes such an enormous award; either because ship owners may not be held vicariously liable for the conduct of their drunken sailors, or because the Clean Water Act must be read to impose limits on punitive damages. Almost as soon as oral argument begins, one thing is quite clear: We are all still at sea.

Former acting solicitor general and frequent ***Slate*** contributor Walter Dellinger is tasked with defending the oil crowd. In his opening sentence, he concedes the 1989 accident on Prince William Sound was "one of the worst environmental tragedies in U.S. maritime history," but then—sounding a note he will repeat often today—urges that Exxon has already paid. Citing an admiralty case from 1818 called, delightfully, the *Amiable Nancy*
that's been "settled for almost 200 years."

Justice Ruth Bader Ginsburg quickly challenges him on the claim that a 200-year-old case, followed by loads of constitutional radio silence, represents "long-settled law." To which Dellinger replies that the law was "so settled" the issue "didn't come up." The court turns to the issue of whether Capt. Joseph Hazelwood, who by some reports downed five double vodkas on the night of the accident, was in fact a "managerial agent" of Exxon for purposes of holding the company liable. Dellinger says he was not, as he was not responsible for "setting any company policy." He adds that maritime law has a special regard for the "risky and dangerous" nature of maritime commerce. That argument hits an oil slick when Justice David Souter points out that this tradition hearkens back to the days when "a ship put out to sea, the ship was sort of a floating world in itself" because all contact was lost with the owners. There's no longer any such reason to treat maritime commerce as any different from other kinds.

Dellinger notes that Capt. Hazelwood could hardly have been a managerial agent of Exxon since by

drinking on duty, he was violating its clear policies. Ginsburg retorts that the jury could have found that Exxon "knew the captain had severe alcohol problems, but let him stay on voyage after voyage."

The *Amiable Nancy* argument runs aground when Justice Anthony Kennedy starts a question assuming punitive damages are applicable to Exxon and says he's simply looking for a formula to calculate them. Dellinger steps in to remind the justices that since the purpose of punitive damages is deterrence, it's worth recalling that Exxon did nothing malicious, nothing intentional, and that "the company didn't stand to make $1 profit" from the spill. Exxon has already suffered enough. "Punishment can't be a black hole into which all profits disappear."

Professor Jeffrey Fisher of Stanford University represents the class of plaintiffs in this case, and in addition to having the best hair of the Supreme Court appellate bar, he is also one of its coolest new additions. With respect to whether Hazelwood was in fact Exxon's "managerial agent," Fisher contends he was, but argues that the important thing is Exxon's misconduct, not the captain's. It was Exxon that overlooked its own policies and put him in charge of this "business unit." Once they gave him authority over an aspect of the business, he became an agent.

"A janitor has authority over an aspect of the business," snaps Scalia. When Fisher replies that Chief Justice Roberts himself had earlier stated that corporations act through their people, the chief cuts him off to remark curtly, "That was a question. Not a statement."

Justice Kennedy says Hazelwood could not be an agent of Exxon if he was violating express company instructions by drinking on the job. Roberts asks Fisher to cite cases in maritime law that included punitive damagesand Fisher concedes that the applicability of punitive damages awards in admiralty law is "an open question with a smattering of cases pulling in different directions." He says there is a dispute among the appeals courts, "and that's why you agreed to hear this."

"That and $3.5 billion," grins Scalia.

Roberts worries that if Exxon is liable for the acts of Hazelwood, what can a corporation do to protect itself when its agents act against company policy?

"They can hire fit and competent people," replies Fisher.

"But that *is* its policy," says Roberts. "What else can it do?" Fisher says it can implement its policies, which Exxon did not. "There were 33 instances of Exxon employees drinking with Hazelwood over a three-year span."

Fisher finally takes aim at Exxon's claim to have been punished enough. He says it was not until the end of the legal process that Exxon's complicity in the spill really came to light, referring the court to a DVD he's sent them illuminating the misconduct in detail. Fisher reminds them that "in the wake of the spill, Exxon fired one person—Hazelwood—reassigned one, and everyone else received bonuses and raises."

For his part, Dellinger concludes his four-minute rebuttal with a reminder that "Exxon gained nothing here and paid dearly for it." The problem is, that's not quite responsive to Fisher's argument that Exxon may not have profited from the spill, but then it never much cared that it was running a booze cruise in Alaska, either—until it got caught. Life at Exxon will hardly grind to a halt if this judgment must ultimately be paid. The plaintiffs have calculated that the company, which boasted $40.6 billion in profits last year, earns $2.5 billion in net profits about every *three weeks*. Even if Exxon pays out the full amount, the $75,000 or so each class member will collect won't be enough to rebuild the dying town and businesses the Valdez spill has left behind. Which further contributes to the sense that Exxon should pay simply because it can

afford to. Of course, that's not the issue here, but then, when you're surrounded by grizzled men in faded rugby shirts in the gallery of the Supreme Court, the niceties of vicarious liability fall away, which is precisely what Fisher set out to prove. In an unusually visceral way today, you can't quite shake the contrast between the high-flying corporate world of big oil and the rusting old fishing boats in Cordova, Alaska. Oil and water still don't mix. Even 19 years later.

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Article URL: http://www.slate.com/id/2185300/